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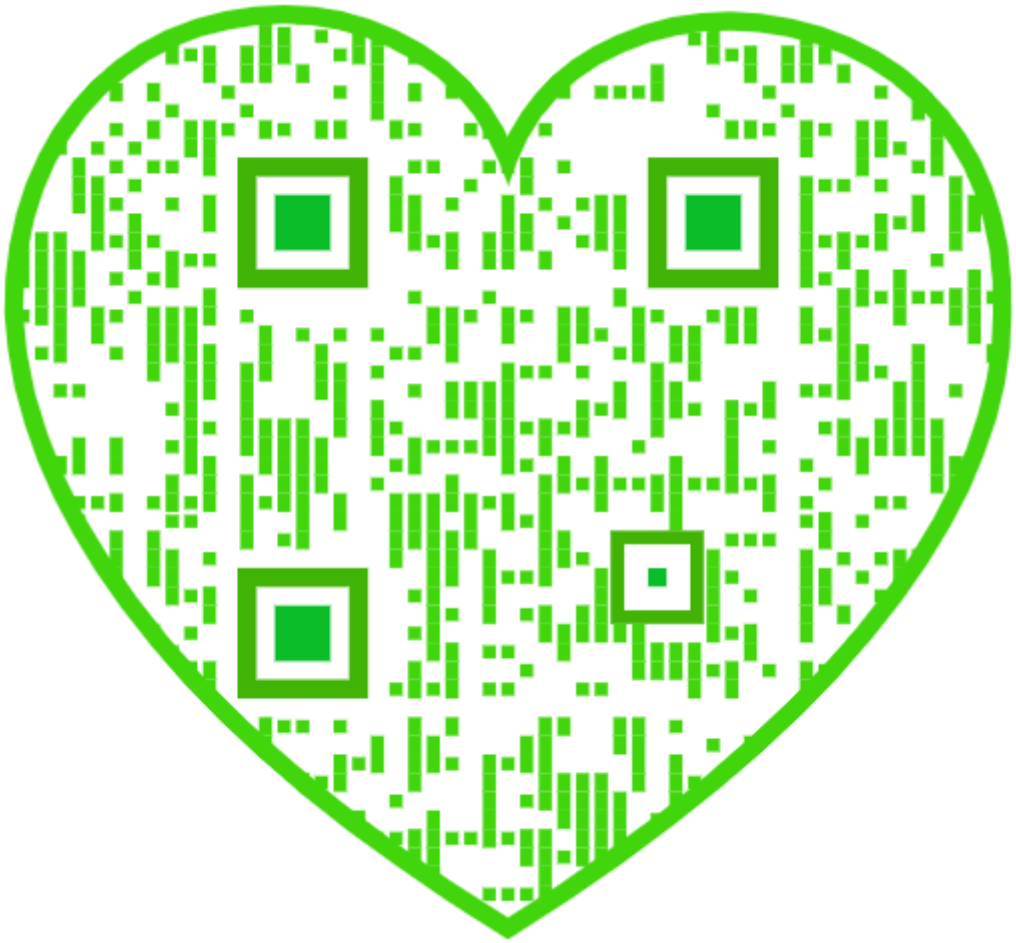

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TABLE OF TITLES, EDITORS, AND CONTRIBUTORS

CHATTEL MORTGAGES, 1 - - - - - - - - - LEONARD A. JONES

CITIZENS, 132 - - - - - - - H. GERALD CHAPIN

CIVIL RIGHTS, 158 - - - - - - - JAMES BECK CLARK

CLERKS OF COURTS, 193 - - EDWARD A. CRAIGHILL, JR.

CLUBS, 258 - - GEORGE W. BARTCH

COLLEGES AND UNIVERSITIES, 283 FRANK E. JENNINGS

COLLISION, 299 - - - JULIAN BEDFORD SHOPE

COMMERCE, 407 - - JOHN M. GOULD

COMMERCIAL PAPER, 495 - JOSEPH F. RANDOLPH

WORDS, PHRASES, AND MAXIMS, - - - - GEORGE A. BENHAM

CITE THIS VOLUME

7 Cyc.

FOLLOWED BY PAGE.

CHATTEL MORTGAGES

EDITED BY LEONARD A. JONES*
Judge of the Court of Land Registration of Massachusetts

I. DEFINITION. [6 Cyc. 980]

II. MORTGAGE DISTINGUISHED FROM PLEDGE. [6 Cyc. 980]

III. FORM AND REQUISITES. [6 Cyc. 980]

IV. FORMALITIES ESSENTIAL TO CREATION OF VALID INSTRUMENT [6 Cyc. 980]

V. CONSIDERATION FOR MORTGAGE AND THE DEBT SECURED. [6 Cyc. 981]

VI. DESCRIPTION OF THE PARTIES AND PROPERTY. [6 Cyc. 981]

VII. SUBJECT-MATTER OF A CHATTEL MORTGAGE. [6 Cyc. 982]

VIII. DELIVERY OF MORTGAGED CHATTELS AND POSSESSION BY THE MORTGAGEE. [6 Cyc. 982]

IX. WHAT LAW GOVERNS. [6 Cyc. 982]

X. FILING, RECORDING, AND REGISTRATION. [6 Cyc. 982]

XI. FRAUD AT COMMON LAW AND UNDER THE RECORDING ACTS. [6 Cyc. 984]

XII. RIGHT TO POSSESSION OF MORTGAGED PROPERTY AND ACTIONS IN REGARD THERETO, 6

A. *In General*, 6
B. *Receivers*, 8
C. *Stipulations in Regard to Possession*, 9
1. *Generally*, 9
2. *Against Depreciation of Property*, 10
3. *Conditions Against Removal or Sale*, 10
a. *In General*, 10
b. *What Constitutes a Breach*, 10
4. *Conditions That Property Shall Not Be Levied on*, 11
5. *Insecurity Clause in Mortgage*, 12
a. *In General*, 12
b. *When Right May Be Exercised*, 12
6. *Income From Mortgaged Property*, 14
D. *Actions by Mortgagor*, 14
1. *Against Mortgagee*, 14
a. *In General*, 14
b. *Conversion by Mortgagee*, 16
c. *Evidence*, 16
d. *Issues*, 16
e. *Measure of Damages*, 17
2. *Against Third Persons*, 18
a. *In General*, 18
b. *Measure of Damages*, 19
E. *Actions by Mortgagee*, 19
1. *Right of Action*, 19

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a. *In General*, 19
b. *Against Levying Officer*, 20
(I) *In General*, 20
(II) *Demand*, 21
(A) *In General*, 21
(B) *Statutory Requirement*, 22
(1) *Necessity*, 22
(2) *Sufficiency*, 22
(a) *In General*, 22
(b) *Statement of Amount*, 23
(3) *Time of Making*, 23
(III) *Validity of Attachment Claim*, 24
c. *Against Mortgagor*, 24
(I) *In General*, 24
(II) *Demand*, 25
d. *Against Purchaser at Execution Sale*, 25
(I) *In General*, 25
(II) *Demand*, 25
e. *Effect of Mortgagor's Right to Possession*, 25
2. *Defenses*, 26
3. *Form of Action*, 28
4. *Parties*, 29
5. *Pleading*, 30
a. *Complaint*, 30
b. *Answer*, 30
6. *Evidence*, 31
a. *Burden of Proof*, 31
b. *Admissibility*, 31
(I) *In General*, 31
(II) *Admissions*, 32
(III) *The Mortgage Document*, 32
c. *Proof of Mortgagee's Title*, 32
7. *Instructions*, 33
8. *Verdict*, 33
9. *Damages*, 33
a. *In General*, 33
b. *Against Mortgagor*, 35

XIII. CONFUSION OF MORTGAGED GOODS, 35

XIV. RIGHT OF MORTGAGOR TO TRANSFER AND ENCUMBER MORTGAGED PROPERTY, 37

A. *Creation of Liens*, 37
1. *Agister's Lien*, 37
2. *Contractual Lien*, 38
3. *Laborer's Lien*, 38
4. *Landlord's Lien*, 38
a. *Contractual*, 38
b. *Statutory*, 39
5. *Lien For Storage, Manufacture, or Repairs*, 39
6. *Lien on Crops*, 40
a. *Contractual*, 40
b. *Statutory*, 40
(I) *For Advances on Crops*, 40
(II) *For Rent*, 41
7. *Vendor's Rights*, 41
B. *Execution of Second Mortgage*, 43
1. *In General*, 43

2. *Rights of First Mortgagee Against Second Mortgagee*, 43
3. *Rights of Second Mortgagee Against First Mortgagee*, 44
4. *Rights of Second Mortgagee Against Third Person*, 45
5. *Priority Between Successive Mortgages*, 46

C. *Transfers by Way of Sale*, 47
1. *In General*, 47
2. *Consent of Mortgagee to Sale*, 47
a. *Generally*, 47
b. *Conditional Consent*, 48
c. *Manner of Sale*, 49
d. *Necessity For Written Consent*, 44
e. *What Constitutes Consent*, 49
3. *Conversion by Purchaser*, 50
4. *Conversion by Agent*, 51
5. *Right to Proceeds of Sales*, 51

XV. ATTACHMENT AND LEVY ON MORTGAGED PROPERTY, 52

A. *In General*, 52
B. *Disposition of Mortgaged Property by Attaching Officer*, 53
C. *Mortgagee's Duty to Prevent Attachment*, 54
D. *Statutory Requirements For Tender of Mortgage Debt*, 54
E. *Waiver of Lien by Mortgagee's Attachment of Property*, 55

XVI. ASSIGNMENT OF MORTGAGE AND OF SECURED CLAIM, 55

A. *In General*, 55
B. *Sufficiency*, 56
1. *Assignment of Secured Claim Alone*, 56
2. *Assignment of Mortgage Alone*, 57
3. *Formal Requirements*, 57
a. *Generally*, 57
b. *Recording*, 57
4. *Necessity For Consideration*, 58
C. *Rights of Assignees*, 58
1. *In General*, 58
2. *As Bona Fide Purchaser*, 58
3. *Actions by Assignee*, 60
a. *Generally*, 60
b. *In His Own Name*, 60
c. *Trial*, 61

XVII. CRIMINAL LIABILITY FOR SALE OR REMOVAL OF MORTGAGED PROPERTY, 61

A. *Elements of Offense*, 61
1. *Intent*, 61
2. *Sale and Removal*, 62
B. *What Mortgages Are Protected*, 62
C. *What Persons Are Protected*, 63
D. *Defenses*, 63
E. *Sufficiency of Indictment or Information*, 63
1. *In General*, 63
2. *Description of Property*, 64
3. *Description of Mortgage*, 64
4. *Variance*, 65
F. *Procedure and Trial*, 65
1. *Venue*, 65
2. *Burden of Proof*, 65
3. *Instructions*, 65

XVIII. PAYMENT AND TENDER OF MORTGAGE DEBT AND DISCHARGE OF MORTGAGE, 66

A. *In General,* 66
B. *Change in Form of Debt,* 67
C. *Merger,* 67
D. *Obtaining Additional Security,* 68
E. *Renewal of Mortgage,* 68
F. *Tender,* 69
1. *In General,* 69
2. *After Default,* 70
3. *Keeping Tender Good,* 71
G. *What Constitutes Payment,* 71
1. *Counter-Claims Against Mortgagee,* 71
2. *Payment by Third Persons,* 72
a. *In General,* 72
b. *Indemnity Mortgagees,* 73
3. *Payment to Mortgagee in Ignorance of Assignment,* 73
4. *Satisfaction of Debt Out of Mortgaged Property,* 73
H. *Release,* 74
1. *In General,* 74
2. *Proof of Discharge,* 74
I. *Entry of Satisfaction,* 75
1. *Generally,* 75
2. *Fraud and Mistake,* 75
3. *Actions to Enforce Penalty,* 76
a. *In General,* 76
b. *Damages Recoverable Against Mortgagee,* 76

XIX. RIGHTS AND INTERESTS OF PARTIES AFTER DEFAULT, 76

A. *Title to the Property,* 76
B. *Right to Possession,* 78
1. *In General,* 78
2. *Effect of Stipulations in the Mortgage,* 79
3. *Manner of Taking Possession,* 80
a. *Generally,* 80
b. *After Foreclosure,* 80
c. *Recovering Possession by Suit,* 80
4. *Necessity For Proceeding to Foreclose,* 81
C. *What Constitutes a Default,* 81
1. *In General,* 81
2. *Instalment Mortgages,* 82
D. *Waiver of Forfeiture,* 83

XX. REDEMPTION, 83

A. *In General,* 83
B. *Extinguishment,* 84
1. *Foreclosure as a Bar,* 84
2. *Lapse of Time,* 85
a. *Generally,* 85
b. *Statutory Period,* 86
c. *Voluntary Surrender,* 86
C. *Parties,* 87
D. *Practice and Procedure,* 87
1. *In General,* 87
2. *Complaint,* 88
3. *Judgment and Decree,* 88
4. *Liability For Costs,* 88

E. *Tender of Mortgage Debt*, 88
1. *Effect*, 88
2. *Sufficiency*, 89
a. *In General*, 89
b. *Amount*, 89
F. *Accountability of Mortgagee*, 90
1. *In General*, 90
2. *Duty to Preserve Property*, 91
3. *Expenses Incurred in Regard to Mortgaged Property*, 91

XXI. FORECLOSURE, 92
A. *In General*, 92
1. *Right*, 92
2. *Manner or Mode*, 93
3. *Modifying Circumstances*, 94
4. *Time of Accrual*, 94
5. *When Barred*, 95
B. *By Suit in Equity*, 95
1. *In General*, 95
2. *Conditions Precedent*, 96
a. *Demand*, 96
b. *Recording Notice*, 96
3. *Venue*, 96
4. *Parties*, 97
a. *In General*, 97
b. *Mortgagees*, 97
c. *Mortgagors*, 98
d. *Persons Entitled to Intervene*, 98
5. *Pleadings*, 98
a. *Petition or Complaint*, 98
b. *Plea, Answer, or Cross Complaint*, 99
6. *Hearing and Determination*, 100
7. *Judgment and Decree*, 101
a. *In General*, 101
b. *Requisites and Validity*, 101
(I) *In General*, 101
(II) *Amount*, 102
(III) *Personal Judgment on Mortgage Debt*, 102
c. *Sequestration and Receivership*, 102
d. *Enforcement of Order or Decree*, 103
(I) *In General*, 103
(II) *Advertisement*, 104
(III) *Effect*, 104
(IV) *Right of Mortgagee to Purchase*, 104
8. *Appeal*, 104
C. *By Sale Under a Power*, 105
1. *Authority to Sell*, 105
2. *Demand*, 106
3. *Conduct of Sale*, 106
a. *In General*, 106
b. *Necessity For Public Sale*, 107
c. *Notice*, 107
(I) *Generally*, 107
(II) *Sufficiency*, 108
(A) *In General*, 108
(B) *Personal Service*, 108
(C) *Place of Notice*, 109

d. *Obligation to Secure Fair Price*, 109
e. *Person Conducting Sale*, 109
f. *Time and Place of Sale*, 110
4. *Effect of Sale*, 110
a. *On Equity of Redemption*, 110
b. *On Mortgage Debt*, 111
c. *Warranty of Title*, 112
5. *Irregular and Void Sales*, 112
a. *In General*, 112
b. *Liability of Mortgagee*, 112
c. *Waiver of Irregularities*, 112
6. *Limitations as to Amount*, 113
7. *Right of Mortgagee to Buy in*, 113
a. *Generally*, 113
b. *Burden of Proving Fairness*, 115
8. *Right to Proceeds*, 115
a. *In General*, 115
b. *Where Mortgagee Has Other Security*, 116
c. *Surplus*, 116
(I) *In General*, 116
(II) *Rights of Third Parties*, 117
D. *Statutory Modes of Foreclosure*, 118
1. *In General*, 118
2. *Amendment of Affidavit*, 119
3. *Issue and Levy of Execution*, 119
E. *Right to Restrain Foreclosure*, 119
1. *Rule Stated*, 119
2. *Grounds For Equitable Action*, 120
3. *Terms on Which Relief Is Given*, 120
4. *Parties Entitled to Equitable Relief*, 121
a. *Creditors of Mortgagor*, 121
b. *Junior Mortgagee*, 121
c. *Mortgagor*, 121
d. *Purchaser*, 121
F. *Payment of Expenses*, 121

CROSS-REFERENCES

[See 6 Cyc. 984, 985]

XII. RIGHT TO POSSESSION OF MORTGAGED PROPERTY AND ACTIONS IN REGARD THERETO.

A. In General. Where there is no language in the mortgage and no other agreement to restrain or control, mortgagees have the right of immediate possession in all cases;[1] and it has been held that the right of the mortgagee to posses-

1. *Alabama.*— Dunlap *v.* Steele, 80 Ala. 424; Scott *v.* Hodges, 62 Ala. 337; Ross *v.* Ross, 21 Ala. 322.

Arkansas.— Kannady *v.* McCarron, 18 Ark. 166.

California.— Wilson *v.* Brannan, 27 Cal. 258; Wildman *v.* Radenaker, 20 Cal. 615.

Colorado.— Horn *v.* Reitler, 12 Colo. 310, 318, 21 Pac. 186.

Connecticut.— Pease *v.* Odenkirchen, 42 Conn. 415; Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337.

Hawaii.— Phillips *v.* McChesney, 8 Hawaii 289; Nott *v.* Burgess, 5 Hawaii 420.

Illinois.— Chipron *v.* Feikert, 68 Ill. 284; Frank *v.* Miner, 50 Ill. 444; Constant *v.* Matteson, 22 Ill. 546; Whisler *v.* Roberts, 19 Ill. 274.

Indiana.—Johnson *v.* Simpson, 77 Ind. 412; Broadhead *v.* McKay, 46 Ind. 595; Case *v.* Winship, 4 Blackf. (Ind.) 425, 30 Am. Dec. 664; Whitehead *v.* Coyle, 1 Ind. App. 450, 27 N. E. 716.

Iowa.— Goldsmith *v.* Willson, 67 Iowa 662,

sion is not impaired by the circumstance that no part of the debt secured or interest is due[2] or that a large part of it has been paid.[3] There is authority,

25 N. W. 870. *Compare* Barnhart *v.* Hanford, 105 Iowa 116, 74 N. W. 742, where a mortgage of a piano to the lessee thereof, given during the year for which rent had been paid, and, in addition to the usual provisions for taking possession and selling in case of default, reciting, "Said piano being now in the possession of the said Geo. S. Hanford in the Union Hotel, in Charles City, and is to remain in the possession of the said Hanford during . . . continuance of this mortgage," was held to give H, the mortgagee, the right to possess and use the piano, and to supersede the lease.

Kansas.—Brown *v.* James H. Campbell Co., 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274; Hamlyn *v.* Boulter, 15 Kan. 376; Wolfley *v.* Rising, 12 Kan. 535.

Maine.— Foster *v.* Perkins, 42 Me. 168; Woodman *v.* Chesley, 39 Me. 45; Stewart *v.* Hanson, 35 Me. 506; Libby *v.* Cushman, 29 Me. 429; Ferguson *v.* Thomas, 26 Me. 499.

Maryland.—McGuire *v.* Benoit, 33 Md. 181; Jamieson *v.* Bruce, 6 Gill & J. (Md.) 72, 26 Am. Dec. 557, holding that a mortgagee who had permitted the mortgaged property to remain in the possession of the mortgagor for a time did not become a trespasser by subsequently taking it from him.

Massachusetts.— Coles *v.* Clark, 3 Cush. (Mass.) 399; Brackett *v.* Bullard, 12 Metc. (Mass.) 308; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

Minnesota.— Fletcher *v.* Neudeck, 30 Minn. 125, 14 N. W. 513.

Mississippi.— Harmon *v.* Short, 8 Sm. & M. (Miss.) 433.

Missouri.— Robinson *v.* Campbell, 8 Mo. 365; Williams *v.* Rorer, 7 Mo. 556.

Nebraska.—Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370.

New Hampshire.— Leach *v.* Kimball, 34 N. H. 568.

New Jersey.— Shreve *v.* Miller, 29 N. J. L. 250; Sanderson *v.* Price, 21 N. J. L. 637.

New York.— Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Mattison *v.* Baucus, 1 N. Y. 295; Chadwick *v.* Lamb, 29 Barb. (N. Y.) 518; Burdick *v.* McVanner, 2 Den. (N. Y.) 170; Fuller *v.* Acker, 1 Hill (N. Y.) 473; Smith *v.* Acker, 23 Wend. (N. Y.) 653; Langdon *v.* Buel, 9 Wend. (N. Y.) 80.

Ohio.— Robinson *v.* Fitch, 26 Ohio St. 659; Bates *v.* Wiles, 1 Handy (Ohio) 532, 12 Ohio Dec. (Reprint) 274. But see Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306, where it was held that, subject to the rights of the mortgagee, the possession of mortgaged chattels remained with the mortgagor liable to execution, sale, and delivery to the purchaser.

Rhode Island.— Good *v.* Rogers, 19 R. I. 1, 31 Atl. 264.

Tennessee.— Hickman *v.* Perrin, 6 Coldw. (Tenn.) 135.

Texas.— Bergen *v.* Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027.

Vermont.— Longey *v.* Leach, 57 Vt. 377.

Wisconsin.—Hill *v.* Merriman, 72 Wis. 483, 40 N. W. 399; Manson *v.* Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573; McCutchin *v.* Platt, 22 Wis. 561; Tenney *v.* State Bank, 20 Wis. 152.

United States.— Brown *v.* Van Meter, 62 Fed. 557, 27 U. S. App. 153, 10 C. C. A. 544; Lippincott *v.* Shaw Carriage Co., 34 Fed. 570.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 273.

The bona fide mortgagee of chattels who is in possession thereof has a property in them which he may defend in the same manner as if he owned them absolutely. Wentworth *v.* People, 5 Ill. 550; Marsh *v.* Wade, 1 Wash. 538, 20 Pac. 578.

A junior mortgagee is entitled to possession of the chattels as against everyone but the first mortgagee. Sperry *v.* Ethridge, 70 Iowa 27, 30 N. W. 4; Newman *v.* Tymeson, 13 Wis. 172, 80 Am. Dec. 735.

A trustee under a mortgage deed of trust has a right to possession of the property against all third persons. Jacoby *v.* Brigman, (Tex. 1887) 7 S. W. 366; Linz *v.* Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542.

An agreement for sale by the mortgagor and part payment of the purchase-price does not affect the right of a subsequent mortgagee of the chattels to claim possession of them, provided no title passed by the agreement for sale. Hughes *v.* Daniells, 87 Mich. 190, 49 N. W. 542.

When an attachment is dissolved by the mortgagor's insolvency, the attaching officer should deliver the property to the mortgagee and not to the assignee of the mortgagor. Howe *v.* Bartlett, 8 Allen (Mass.) 20.

2. McLoud *v.* Wakefield, 70 Vt. 558, 43 Atl. 179.

3. Webb *v.* McCain, 2 Indian Terr. 305, 51 S. W. 957; Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97. See also Gilbert *v.* Vail, 60 Vt. 261, 14 Atl. 542, where the right of a mortgagee of chattels to their possession, under a mortgage to protect him against liability on indorsements, was held not to be affected by the fact that the holders of the indorsed notes had proved them against the mortgagor's insolvent estate before the mortgagee took them up.

An invalid mortgage cannot be made the basis of a claim of possession of the mortgaged property by the mortgagee, although it in terms gives him such possession (Ruiter *v.* Plate, 77 Iowa 17, 41 N. W. 474), and possession under a void mortgage gives the party in possession no more rights in the property, as against the creditors of the mortgagor, than if he had come into possession by a trespass (Delaware *v.* Ensign, 21 Barb. (N. Y.) 85).

Possession of the entire mortgaged property is the mortgagee's right and so he is entitled to the possession of the balance of the prop-

however, for the doctrine that the mortgagor is entitled to possession till default,[4] and in some states he is entitled to such possession by virtue of statutory provisions.[5]

B. Receivers. Under ordinary circumstances a mortgagee in possession will not be disturbed by an appointment of a receiver[6] as long as any balance is due on the mortgage.[7] Where the mortgagee apprehends the loss of the property by reason of the misconduct of the mortgagor he may have a receiver appointed, even though his right to foreclose has not accrued,[8] but it should appear that the mortgagor is insolvent.[9] Attempts by the mortgagor to remove the mortgaged goods from the state,[10] or otherwise to dispose of it to the injury of the mort-

erty covered by a mortgage, although he already has enough to equal in value the mortgage indebtedness. Woodman *v.* Chesley, 39 Me. 45.

4. Barnett *v.* Timberlake, 57 Mo. 499; McMillan *v.* Grayston, 83 Mo. App. 425; Finkel *v.* Lepkin, 62 N. J. L. 580, 41 Atl. 718; Calkins *v.* Clement, 54 Vt. 635. See also Stonebraker *v.* Ford, 81 Mo. 532, where it was held that under a mortgage of personalty to indemnify the mortgagees as sureties of the mortgagor, the mortgagees were not entitled to possession, in the absence of a provision in the mortgage, until they had paid the mortgage debt or part of it. *Compare* Doughten *v.* Gray, 10 N. J. Eq. 323, where it was held that the interest of a chattel mortgagee in the *res* was similar to the interest of a mortgagee under a mortgage of real estate.

No presumption in favor of the mortgagee's right to possession before condition broken as against the mortgagor arises in a possessory action against a stranger. Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231.

5. Sanford *v.* Duluth, etc., Elevator Co., 2 N. D. 6, 48 N. W. 434.

6. Rapier *v.* Gulf City Paper Co., 64 Ala. 330 (refusing to dispossess the mortgagee of a newspaper plant, and appoint a receiver merely because the property might be sold to better advantage under a receiver); Bayaud *v.* Fellows, 28 Barb. (N. Y.) 451; Patten *v.* Accessory Transit Co., 4 Abb. Pr. (N. Y.) 235. See also Shultz *v.* Jarrard, 9 N. J. L. J. 123, holding that a receiver would not be appointed against a mortgagee in possession when there is no charge of waste, insolvency, or mismanagement, and no dispute as to the amount due on the mortgage debt or as to the property included in the mortgage.

7. Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781; Bayaud *v.* Fellows, 28 Barb. (N. Y.) 451; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314.

A receiver appointed in a suit between partners does not by selling the property affect the paramount lien of a mortgagor who is a stranger to the record. Lorch *v.* Aultman, 75 Ind. 162.

8. *Colorado.*— Bennett *v.* Reef, 16 Colo. 431, 27 Pac. 252.

Iowa.— Maish *v.* Bird, 59 Iowa 307, 13 N. W. 298.

Maryland.— Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170; Clagett *v.* Salmon, 5 Gill & J. (Md.) 314.

New Jersey.— Long Dock Co. *v.* Mallery, 12 N. J. Eq. 93, 431.

Wyoming.— O'Donnell *v.* Rock Springs First Nat. Bank, 9 Wyo. 408, 64 Pac. 337, where the mortgagor of a butcher shop broke the condition of his mortgage, was intoxicated for two weeks, and was squandering the proceeds of the business and a receiver was appointed without notice to the interested parties.

By giving bond with sufficient sureties to produce the mortgaged property, a mortgagor can prevent the appointment of a receiver. Williams *v.* Noland, 2 Tenn. Ch. 151.

Dissipation of property as ground for receivership.— Where the mortgagor turned over part of the mortgaged goods to other creditors as payment of their debts, a receiver was appointed to take possession of the goods and dispose of them under the court's direction (Logan *v.* Slade, 28 Fla. 699, 10 So. 25), and where the mortgagor, being insolvent, refused to deliver the property to the mortgagee, as provided in the mortgage, and the property was depreciating in value, a receiver was appointed (Alexander *v.* Houston, (Miss. 1902) 31 So. 211). *Compare* New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 93 Fed. 712, 35 C. C. A. 547, holding that the appointment of a receiver in a foreclosure suit does not constitute a taking of possession of the property by the mortgagee as against other creditors, so as to perfect his rights before the intervention of other claims then made.

The appointment of a receiver will not be set aside on the ground of duress, where it does not appear that the mortgagor was influenced by the threats alleged to have constituted the duress. Mains *v.* Des Moines Nat. Bank, 113 Iowa 395, 85 N. W. 758.

9. Reynolds *v.* Quick, 128 Ind. 316, 27 N. E. 621; Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68.

10. Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Berry *v.* Burckhartt, 1 Mo. 418. But in such cases the mortgagee must swear to the facts which induce his apprehension that the goods are about to be removed; it is not sufficient to swear that he apprehends the removal. Bres *v.* Booth, 1 La. Ann. 307.

A mere temporary removal, with intent to return the property before maturity, will not be enjoined. Walker *v.* Radford, 67 Ala. 446, where the mortgaged property was a horse and wagon.

gagee, will be restrained by injunction,[11] even before breach of the condition of the mortgage.[12]

C. Stipulations in Regard to Possession[13]**— 1. GENERALLY.** A stipulation that the mortgagor may remain in control of the property till default will entitle him to possession,[14] even though it is added "but always at the will of the mortgagee";[15] and such an agreement may be inferred from a condition that the mortgagee may take possession when he deems himself insecure,[16] or that the mortgage debt shall draw interest.[17] Upon a proper showing the mortgagor may have the mortgagee enjoined from taking possession before a breach of condition.[18]

11. Bennett *v.* Reef, 16 Colo. 431, 27 Pac. 252; Logan *v.* Slade, 28 Fla. 699, 10 So. 25 (holding that an injunction will lie to prevent one who has mortgaged his stock of goods from selling otherwise than for cash).

12. Parsons *v.* Hughes, 12 Md. 1; Clagett *v.* Salmon, 5 Gill & J. (Md.) 314 (where the bill alleged concealment and removal of the property); Freeman *v.* Freeman, 17 N. J. Eq. 44. To same effect see Ukiah Bank *v.* Moore, 106 Cal. 673, 39 Pac. 1071, where, however, a *bona fide* purchaser prevailed over the rights of the mortgagee.

13. **A parol agreement** modifying a stipulation in a mortgage that the mortgagor shall be entitled to possession till thirty days after default in payment of the debt is valid and it is error to overlook it in a charge to the jury. Hyde *v.* Shank, 77 Mich. 517, 43 N. W. 890.

14. Niven *v.* Burke, 82 Ind. 455; McGuire *v.* Benoit, 33 Md. 181 (where default was held not to occur till the maturity of a second note secured by a mortgage); Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32. *Compare* Van Hassell *v.* Borden, 1 Hilt. (N. Y.) 128, holding that the mortgagee cannot take possession before such default, where it does not appear that any actual conversion of the property has taken place.

15. Anderson *v.* Holmes, 14 S. C. 162.

16. *Illinois.*—Babcock *v.* McFarland, 43 Ill. 381.

Kansas.—Russell First Nat. Bank *v.* Knoll, 7 Kan. App. 352, 52 Pac. 619.

Minnesota.— Sherman *v.* Clark, 24 Minn. 37.

Missouri.—Lafayette County Bank *v.* Metcalf, 29 Mo. App. 384.

New York.— Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56 [*overruling* Chadwick *v.* Lamb, 29 Barb. (N. Y.) 518; Rich *v.* Milk, 20 Barb. (N. Y.) 616].

See 9 Cent. Dig. tit. "Chattel Mortgages," § 285.

Giving the mortgagee a right to take possession on default has been held to entitle the mortgagor to retain possession till that time, when there is a clerical error in the clause conferring such a right upon the mortgagor in terms. Letcher *v.* Norton, 5 Ill. 575. But see Ferguson *v.* Thomas, 26 Me. 499, where a mortgage contained an authority for the mortgagee to enter and take possession of the mortgaged chattels upon the maturity of the mortgage and it was held that this express authority did not deprive him of his ordinary right of possession before maturity of the mortgage note.

Mere delivery of the property to the mortgagor does not amount to a stipulation that he might retain possession, even when the mortgage was to secure boot money on a swapped horse. Hinson *v.* Smith, 118 N. C. 503, 24 S. E. 541.

Requiring a mortgagor to feed a horse covered by a mortgage was held not to give the mortgagor an implied right to retain the possession of the horse after he had abandoned lands which he had agreed to cultivate for the mortgagee with the mortgaged horse. Ellington *v.* Charleston, 51 Ala. 166.

Where the mortgagee took possession of and managed the mortgaged property, an agreement giving the mortgagor the right to retain possession and enjoy the property was still effective and the mortgagee was held to act as an agent for the mortgagor. Bee *v.* Stanard, 15 Colo. App. 101, 61 Pac. 234.

17. Newlean *v.* Olson, 22 Nebr. 717, 36 N. W. 155, 3 Am. St. Rep. 286.

18. Ford *v.* Ransom, 8 Abb. Pr. N. S. (N. Y.) 416, 39 How. Pr. (N. Y.) 429. *Compare* State Bank *v.* Gourdin, Speers Eq. (S. C.) 439, where the court enjoined a double recovery of the mortgage debt. But see Cline *v.* Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700, where it was held that a mortgagee who was entitled to possession could not be forced to accept additional security and allow the mortgagor to continue in control.

Attachment.— Under Ky. Civ. Code, § 249, providing a special remedy for a mortgagee of personal property by its attachment and sale when there is danger of loss, the mortgagee cannot seize the property under a general attachment where no danger is shown and thus deprive the mortgagor of possession to which he is entitled by the terms of the mortgage. Gaar *v.* Lyons, 99 Ky. 672, 18 Ky. L. Rep. 500, 37 S. W. 73, 148.

Effect of bankruptcy.— Although there is a stipulation that the mortgagor remain in possession of the property till default, the mortgagee is entitled to possession on the mortgagor's becoming bankrupt. Fallon *v.* Robinson, 2 Hawaii 227.

The mortgagor's right to remain in possession may be lost and such a result was held to follow an unconditional sale of the mortgaged property by the mortgagor (Whitney *v.* Lowell, 33 Me. 318), or such misuse of

2. AGAINST DEPRECIATION OF PROPERTY. Where there is a stipulation in a mortgage that the mortgagee may take possession in case of a depreciation in the value of the property, this means a substantial, not a nominal, diminution.[19] The standard is the value of the property at the time the mortgage was executed,[20] and the jury determines whether the depreciation is sufficient to justify the mortgagee in taking possession.[21]

3. CONDITIONS AGAINST REMOVAL OR SALE — a. In General. A stipulation that the mortgagee may take possession of the property if it is sold, assigned, or removed by the mortgagor is valid,[22] and under a clause authorizing the mortgagee to sell the property upon any attempted disposition thereof by the mortgagor, such a disposition gives him an immediate right to possession,[23] and he can sue a third person who converts the property before the maturity of the mortgage debt.[24]

b. What Constitutes a Breach. It has been held sufficient to constitute a breach of a stipulation not to sell, remove, or dispose of the mortgaged property that the mortgagor sold a part thereof,[25] that a portion of the property was con-

the chattel as would necessarily injure its value (Ripley *v.* Dolbier, 18 Me. 382). *Compare* Hall *v.* Harris, 11 Tex. 300, where the grantor in a mortgage deed of trust claimed the property adversely to the trustee and it was held that the trustee was entitled to possession, although the deed provided that possession should remain in the grantor until a sale by the trustee.

19. Solomon *v.* Friend, 42 Ill. App. 407.

Depreciation of part of the mortgaged property has been held sufficient to justify a mortgagee in taking possession under a clause in the mortgage, even though the remainder of the property covered increases in value so that the value of the entire mass was not reduced. Kerbs *v.* Zumwalt, 86 Mo. App. 128.

20. Kerbs *v.* Zumwalt, 86 Mo. App. 128.

21. Hinton *v.* Spearman, 1 Mo. App. Rep. 501.

Failure to account as required by a mortgage justifies a mortgagee in bringing an action to recover possession, but where this was not stated as the ground for the action, it was evidence showing that he had waived the accounting. Kerbs *v.* Zumwalt, 86 Mo. App. 128.

A stipulation for keeping stock up to a certain value differs from an ordinary insecurity clause in a mortgage, and when the property falls below the required value the mortgagee is entitled to possession without regard to his belief that he was insecure. Crowley *v.* Langdon, 127 Mich. 51, 86 N. W. 391.

22. Plano Mfg. Co. *v.* Hallberg, 61 Minn. 528, 63 N. W. 1114; Eddy *v.* Kenney, 5 Mont. 502, 6 Pac. 342; Rindskopf *v.* Vaughan, 40 Fed. 394. *Compare* Bauman *v.* Cornez, 15 Daly (N. Y.) 450, 8 N. Y. Suppl. 480, 29 N. Y. St. 320, where such a stipulation was held not to be unconscionable but valid and enforceable.

A provision in a chattel mortgage that if the mortgagor sell, assign, or remove the property the mortgagee may take possession thereof is not equivalent to a stipulation that the mortgagor may retain the possession thereof for a definite period. Eggleston *v.* Mundy, 4 Mich. 295.

Taking is not arbitrary.—A mortgagee taking possession on breach of a condition against removal does not violate a statute which provides that no mortgagee shall have any right, arbitrarily or without just cause, to declare any condition broken prior to default in payment of the mortgage. Plano Mfg. Co. *v.* Hallberg, 61 Minn. 528, 63 N. W. 1114.

23. National Bank of Commerce *v.* Morris, 125 Mo. 343, 28 S. W. 602; Sandager *v.* Northern Pac. Elevator Co., 2 N. D. 3, 48 N. W. 438; Hargadine-McKittrick Dry Goods Co. *v.* Jacksboro First Nat. Bank, 14 Tex. Civ. App. 416, 37 S. W. 622.

The mortgagor may retain the property by paying the debt when the mortgagee avails himself of a stipulation in the mortgage to take possession of the property covered thereby. Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465.

A right given by statute to the mortgagee to take possession of the mortgaged property and sell it may be exercised by the legal representative of the mortgagee after his death. Kelly *v.* Wimbish, (Tex. Civ. App. 1901) 65 S. W. 386.

24. Balz *v.* Shaw, 13 Misc. (N. Y.) 181, 34 N. Y. Suppl. 5, 67 N. Y. St. 861; Ellestad *v.* Northwestern Elevator Co., 6 N. D. 88, 69 N. W. 44.

25. Dixon *v.* Atkinson, 86 Mo. App. 24. *Compare* Holloway *v.* Arnold, 92 Mo. 293, 5 S. W. 277, where an action was brought by the mortgagor against the mortgagee, to recover property seized by the latter under his mortgage, and plaintiff claimed that, although he had sold part of the mortgaged property contrary to the condition in the mortgage, defendant had orally agreed to allow him to make sales and apply the proceeds to the mortgage debt, and it was held that instructions proceeding on the theory that if plaintiff sold pursuant to this agreement defendant had no right to take possession, otherwise he had such right, are correct.

Sales of stock in trade.—Although there is an implied authority for a mortgagor remaining in possession of a mortgaged stock in trade to make sales at retail, a sale of

sumed,[26] that the property was converted by a third person,[27] or that the mortgagor removed it out of the state without regard to the purpose for which the removal was made;[28] but a temporary loan of the mortgaged chattel[29] or the execution of a second mortgage thereon[30] seems not to be objectionable on this score.[31] Whether a seizure of property upon judicial process is a breach of a stipulation not to dispose of it has received both an affirmative and negative answer. A seizure on distress warrant[32] and by levy of attachment[33] or by virtue of a writ of execution[34] have been regarded as a breach and sufficient to justify the mortgagee in taking possession; but it has also been decided that an attachment in due course of law is not a selling.[35]

4. CONDITIONS THAT PROPERTY SHALL NOT BE LEVIED ON. A condition in a mortgage that the mortgagor shall not permit a levy to be made on the property and that the mortgagee may take possession in case a levy is made is a valid stipulation,[36] and immediately upon a levy being made the right of

a material part of the stock to pay an existing debt is a breach of an agreement not to dispose of it (Laing *v.* Perrott, 48 Mich. 298, 12 N. W. 192), and where there is no implied authority to sell at retail, sales in the usual course of trade constitute a breach of such an agreement, although stock was replenished from time to time (Fleming *v.* Graham, 34 Mo. App. 160). See also Dedrick *v.* Ashdown, 15 Can. Supreme Ct. 227, where there was a provision in a chattel mortgage of a stock of goods that if the mortgagor attempted to sell or dispose of the goods the mortgagee might seize them, and it was held that this only gave the mortgagee the right of seizure in case of an attempted disposal in some manner other than in the regular course of business.

26. Mathews *v.* Granger, 66 Ill. 121, where the mortgage covered crops raised by the mortgagor and he fed a portion of them to his stock.

27. Ellestad *v.* Northwestern Elevator Co., 6 N. D. 88, 69 N. W. 44; Sandager *v.* Northern Pac. Elevator Co., 2 N. D. 3, 48 N. W. 438.

28. King *v.* Wright, 36 Minn. 128, 30 N. W. 448.

29. Jones *v.* Smith, 123 Ind. 585, 24 N. E. 368.

30. Donovan *v.* Sell, 64 Minn. 212, 66 N. W. 722. But see Chrisman-Sawyer Banking Co. *v.* Strahorn-Hutton-Evans Commission Co., 80 Mo. App. 438, where the second mortgagee took possession under his mortgage and this was held to be a breach of a stipulation not to sell contained in the first mortgage on the property. *Compare* Howard *v.* Chase, 104 Mass. 249, where the mortgagor executed simultaneous mortgages with the one containing the stipulation against removal or disposition which were recorded with it and contained clauses to the effect that they were equal in order of priority, and this was held to be a breach of the stipulation entitling the mortgagee to take possession.

31. No breach of stipulation is made out when the mortgagee consents to the sale of the mortgaged property, and such a consent was held to be sufficiently established by the evidence in Nash *v.* Larson, 80 Minn. 458, 83 N. W. 451, 81 Am. St. Rep. 272.

32. Conkey *v.* Hart, 14 N. Y. 22.

33. Kennedy *v.* Dodson, 44 Mo. App. 550, where the property was removed from the premises by the levying officer.

34. Straub *v.* Simpson, 74 Mo. App. 230; State *v.* Murphy, 64 Mo. App. 63; Brown *v.* Hawkins, 54 Mo. App. 75; Ashley *v.* Wright, 19 Ohio St. 291 (where the property was removed out of the township by the levying officer).

A sale under execution against the mortgagor is a breach of a condition in a chattel mortgage which authorizes possession to be taken in case of a sale of the property. State *v.* Althaus, 60 Mo. App. 122.

35. Carpenter *v.* Town, Lalor (N. Y.) 72.

Filing a voluntary petition in bankruptcy has been held to be a breach of an agreement that the mortgagor shall not attempt to sell without the consent of the mortgagee. Moore *v.* Young, 4 Biss. (U. S.) 128, 17 Fed. Cas. No. 9,782.

Mortgagor's interest not subject to levy.—Although the interest of a mortgagor who is entitled to possession for a definite time is subject to levy, such is not the case when the mortgagor remains in possession under a mortgage which contains an insecurity clause. Farrell *v.* Hildreth, 38 Barb. (N. Y.) 178.

A stipulation allowing the mortgagee to take possession whenever he should think proper has been held to give him a right to take possession at any time without further permission from the mortgagor. Braley *v.* Byrnes, 21 Minn. 482.

36. Donahoe *v.* Gillon, 167 Mass. 24, 44 N. E. 1070; Eddy *v.* Kenney, 5 Mont. 502, 6 Pac. 342.

A stipulation for the accelerated maturity of the mortgage debt in case the property mortgaged is levied on by a third person is valid. Gaar *v.* Centralia First Nat. Bank, 20 Ill. App. 611; Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488.

Only as to levy on the property included in the mortgage has been the judicial interpretation of a clause in a mortgage allowing the mortgagee to take possession if the mortgagor permits or suffers any process to issue against the property. Robertson *v.* Ongley Electric Co., 146 N. Y. 20, 40 N. E. 390, 65 N. Y. St.

possession vests in the mortgagee,[37] even though the mortgage debt is not yet due.[38]

5. INSECURITY CLAUSE IN MORTGAGE — a. In General. A stipulation in a mortgage giving the mortgagee a right to take possession of the mortgaged chattels in case he feels insecure is valid[39] and enforceable,[40] although the mortgage debt is not mature[41] or the time for payment thereof has been extended;[42] and also, it has been held, in spite of an agreement, that the mortgagor may retain possession till default.[43] Under an insecurity clause a mortgagee has been allowed to maintain an action against a third person for the possession of the property before the maturity of the mortgage debt,[44] or trover for its value;[45] but he must not resort to force or stealth to secure possession from the mortgagor and is obliged to seek his remedy by action in the absence of consent.[46]

b. When Right May Be Exercised. Although the ordinary wording of the insecurity clause is that the mortgagor may take possession whenever he "deems" himself insecure, the prevailing doctrine is that he must act reasonably and have

757 [*affirming* 82 Hun (N. Y.) 585, 31 N. Y. Suppl. 605, 64 N. Y. St. 342].

37. Dunlap *v.* Steele, 80 Ala. 424; Kent *v.* Reed, 16 Gray (Mass.) 282; Eddy *v.* Kenney, 5 Mont. 502, 6 Pac. 342. *Contra,* Sparks *v.* Compton, 70 Ind. 393, where the code provided that the attaching officer was entitled to possession. And see Robertson *v.* Ongley Electric Co., 82 Hun (N. Y.) 585, 31 N. Y. Suppl. 605, 64 N. Y. St. 342, where an attachment against a foreign corporation was held not to be a breach of a stipulation that the mortgagor should not permit a levy on the property sufficient to justify the mortgagee in taking possession, because a foreign corporation was liable to attachment without regard to its solvency or to the validity of the claim against it.

The sheriff who attached the property must surrender possession to the mortgagee when the attachment constituted a breach of the condition of the mortgage. Bryan *v.* Smith, 13 Daly (N. Y.) 331.

What constitutes a breach.— An attachment in a collusive suit against both mortgagor and mortgagee was held to be a breach of a stipulation that the mortgagor would not permit an attachment of the property (Crocker *v.* Atwood, 144 Mass. 588, 12 N. E. 421); but there was no breach of the stipulation when the mortgagors successfully defended the attachment branch of the suit on the ground that the property belonged to one of the mortgagors and was not liable to be seized in an action against the other (Watson *v.* Buckler, 29 Oreg. 235, 45 Pac. 765).

38. Wells *v.* Chapman, 59 Iowa 658, 13 N. W. 841.

39. Landenberger *v.* Rector, 59 Ill. App. 550.

40. Cline *v.* Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700, holding that the rule that equity will not enforce a hard and unconscionable contract does not authorize an injunction against the seizure of mortgaged chattels by the mortgagee, under a provision authorizing him to take possession whenever he deemed himself insecure, since the mortgagee is not seeking affirmative relief. Nor can the provision of the mortgage be termed hard and unconscionable, as the execution of a chattel mortgage transfers the legal title, which carries with it the right of possession, in the absence of an agreement, express or implied, to the contrary.

After-acquired property which has been added to a mortgaged stock of goods may be seized by the mortgagee under an insecurity clause in a mortgage. Francisco *v.* Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711.

41. *Illinois.*— Aultman *v.* Silvis, 39 Ill. App. 164.

Kansas.— Jones *v.* Annis, 47 Kan. 478, 28 Pac. 156.

Michigan.— Cole *v.* Shaw, 103 Mich. 505, 61 N. W. 869.

New York.— Huggans *v.* Fryer, 1 Lans. (N. Y.) 276.

Wisconsin.— Evans *v.* Graham, 50 Wis. 450, 7 N. W. 380.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 285.

Where mortgaged property was sold for taxes, the mortgagees, under a clause in the mortgage that they might take possession whenever they deemed it necessary, were entitled to the surplus on demand, although the mortgage debt was not due. McDuffee *v.* Collins, 117 Ala. 487, 23 So. 45.

42. Landenberger *v.* Rector, 59 Ill. App. 550; Beckman *v.* Noble, 115 Mich. 523, 73 N. W. 803.

43. Hanahran *v.* Roche, 22 Alb. L. J. 134.

44. Chadwick *v.* Lamb, 29 Barb. (N. Y.) 518; Welch *v.* Sackett, 12 Wis. 243; Frisbee *v.* Langworthy, 11 Wis. 375. But see Skiff *v.* Solace, 23 Vt. 279, where it was held that an insecurity clause in a mortgage would not give the mortgagee constructive possession of the property so as to enable him to maintain trespass, unless the contingency had happened upon which his right to take possession depended and had been followed by some act on his part.

45. McGraw *v.* Bishop, 85 Mich. 72, 48 N. W. 167; Wright *v.* Starks, 77 Mich. 221, 43 N. W. 868; Grove *v.* Wise, 39 Mich. 161.

46. Okarche First Nat. Bank *v.* Teat, 4 Okla. 454, 46 Pac. 474.

probable cause to apprehend the loss of his claim to justify a taking;[47] for an arbitrary power is not conferred.[48] That the mortgage be actually insecure is not necessary, however,[49] and some courts have gone farther in this direction and adopted an essentially different doctrine, to the effect that a mortgagee has an absolute discretion in declaring a forfeiture.[50] A third test has been suggested which would make it necessary that the mortgagee act in good faith and on facts arising subsequently to the execution of the mortgage.[51]

47. *Colorado.*— Sills *v.* Hawes, 14 Colo. App. 157, 59 Pac. 422.

Illinois.— Hogan *v.* Akin, 181 Ill. 448, 55 N. E. 137 [*reversing* 81 Ill. App. 62]; Roy *v.* Goings, 96 Ill. 361, 36 Am. Rep. 151; Slingo *v.* Steele-Wedeles Co., 82 Ill. App. 139; Ley *v.* Reitz, 25 Ill. App. 615.

Michigan.— Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14.

Minnesota.— Nash *v.* Larson, 80 Minn. 458, 83 N. W. 451, 81 Am. St. Rep. 372; Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835.

New York.— Hawver *v.* Bell, 141 N. Y. 140, 36 N. E. 6, 56 N. Y. St. 674 [*affirming* 19 N. Y. Suppl. 612, 46 N. Y. St. 447]; Hyer *v.* Sutton, 59 Hun (N. Y.) 40, 12 N. Y. Suppl. 378, 35 N. Y. St. 174.

Oklahoma.— Brook *v.* Bayless, 6 Okla. 568, 52 Pac. 738; Okarche First Nat. Bank *v.* Teat, 4 Okla. 454, 46 Pac. 474.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 285.

Seizure under judicial process such as levy under an execution (Lewis *v.* D'Arcy, 71 Ill. 648; Beach *v.* Derby, 19 Ill. 617; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211; Welch *v.* Sackett, 12 Wis. 243; Frisbee *v.* Langworthy, 11 Wis. 375), under an attachment writ (Wells *v.* Chapman, 59 Iowa 658, 13 N. W. 841), or seizure by virtue of a distress warrant (McCarthy *v.* Hetzner, 70 Ill. App. 480) has been held sufficient to justify a mortgagee in taking possession of the property under an insecurity clause in a mortgage. But see Galde *v.* Forsyth, 72 Minn. 248, 75 N. W. 219, where an officer levied on the mortgagor's interest in mortgaged property and removed it to another township and it was held that the mortgagee was not entitled to possession under the insecurity clause in his mortgage.

The determination of the reasonableness of the grounds upon which the mortgagee acted in taking possession under an insecurity clause is for the jury. Nash *v.* Larson, 80 Minn. 458, 83 N. W. 451, 81 Am. St. Rep. 372.

48. Brown *v.* Hogan, 49 Nebr. 746, 69 N. W. 100; Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88.

Trespass will lie against the mortgagee when he takes possession without reasonable grounds for believing himself insecure, and when he takes possession at an unusual hour, without giving notice, such action being evidence of malice which furnishes a basis for exemplary damages. Davenport *v.* Ledger, 80 Ill. 574.

A mortgagee was held to be justified in taking possession under an insecurity clause in his mortgage when the mortgagor absconded and left the property unprotected (O'Neil *v.* Patterson, 52 Ill. App. 26), when a mortgaged threshing-machine was left exposed to the weather for months and one of the mortgagors absconded and the other authorized possession to be taken (J. I. Case Plow Works *v.* Marr, 33 Nebr. 215, 49 N. W. 1119), where the mortgaged property was a number of wool sheep and the wool thereon and the mortgagor sold some wool in another county (Bailey *v.* Godfrey, 54 Ill. 507, 5 Am. Rep. 157), and where the mortgaged property consisted of a horse and a growing crop, and the crop failed (Allen *v.* Vose, 34 Hun (N. Y.) 57).

49. Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14.

Necessity for actual damage.—A mortgagee is not justified in taking possession under an insecurity clause in his mortgage unless the mortgagors are in default or have done or are about to do some act which tends to impair the security. Rector-Wilhelmy Co. *v.* Nissen, 35 Nebr. 716, 53 N. W. 670; J. I. Case Plow Works *v.* Marr, 33 Nebr. 215, 49 N. W. 1119; Lichtenberger *v.* Johnson, 32 Nebr. 185, 49 N. W. 336; Newlean *v.* Olson, 22 Nebr. 717, 36 N. W. 155, 3 Am. St. Rep. 286.

Under a statutory insecurity clause providing for the appointment of a receiver in case the property be "in danger of being lost or materially injured," such action is not authorized because of the seizure of the property by one of several joint mortgagees as agent for the rest, unless it be shown that he is not a proper person to have charge of it. Silverman *v.* Kuhn, 53 Iowa 436, 5 N. W. 523.

50. Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356; Wells *v.* Chapman, 59 Iowa 658, 13 N. W. 841; Werner *v.* Bergman, 28 Kan. 60, 42 Am. Rep. 152; Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Farrell *v.* Hildreth, 38 Barb. (N. Y.) 178; Gage *v.* Wayland, 67 Wis. 566, 31 N. W. 108; Cline *v.* Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700; Huehner *v.* Koehke, 42 Wis. 319; Frisbee *v.* Langworthy, 11 Wis. 375.

51. Barrett *v.* Hart, 42 Ohio St. 41, 51 Am. Rep. 801. *Compare* Campbell *v.* Doggett, (Miss. 1898) 23 So. 371, where property was covered by a deed of trust which contained an insecurity clause, and the grantor died and a new deed of trust with a similar provision was executed on the same property by his personal representative, and it was held that the trustee could not take possession for a breach of the stipulation occurring before the grantor's death. But see Botsford *v.* Murphy, 47 Mich. 536, 11 N. W. 375, 376, where it

6. Income From Mortgaged Property. As long as a mortgagor rightfully retains possession of the mortgaged property, he is entitled to the use of the property free of charge,[52] and cannot be made to account either at law or in equity for profits arising out of his use of it.[53]

D. Actions by Mortgagor — 1. Against Mortgagee — a. In General. Until a mortgagor loses his right to possession under the terms of the mortgage, he has a right of action for damages against the mortgagee for disturbing his possession[54]

was held that a mortgagee was justified in taking possession under an insecurity clause when he had been overreached in regard to the value of the property covered by the mortgage.

Failure to insure according to an agreement in a mortgage will not justify a mortgagee in replevying the property in the absence of an express provision that failure to insure would entitle them to possession. Kerhs *v.* Zumwalt, 86 Mo. App. 128. *Compare* Crowley *v.* Langdon, 127 Mich. 51, 86 N. W. 391, where a failure to insure was excused because it was caused by the action of the mortgagee's agent.

In determining whether a mortgagee had reasonable ground to believe that he was in danger of losing his security, it is competent to show where the property was found and whether the mortgagor had parted with possession. Hogan *v.* Akin, 181 Ill. 448, 55 N. E. 137 [*reversing* 81 Ill. App. 62]. *Compare* Rector-Wilhelmy Co. *v.* Nissen, 35 Nebr. 716, 53 N. W. 670, where a mortgagee was allowed to prove any facts tending to show the conduct of the mortgagors in regard to the mortgaged property but was not allowed to prove mere rumors or reports.

Issues raised and submitted.— Where the mortgagee pleads in a replevin suit by the mortgagor that he seized the property because the mortgagor sold without permission and the mortgagor alleges permission to sell, the question whether written permission to sell was necessary is not raised (Matthew *v.* Granger, 96 Ill. App. 536); and on an issue of fact as to whether the mortgagee had reasonable ground to feel insecure, a request that the jury find specially whether the value of the property sold in bulk at public auction would exceed the amount of the mortgage debt was properly refused (Crowley *v.* Langdon, 127 Mich. 51, 86 N. W. 391).

52. *Kentucky.*— Graves *v.* Sayre, 5 B. Mon. (Ky.) 390.

Mississippi.— Turnbull *v.* Middleton, Walk. (Miss.) 413.

South Carolina.— Page *v.* Street, Speers Eq. (S. C.) 159.

Tennessee.—Whitmore *v.* Parks, 3 Humphr. (Tenn.) 95.

Vermont.— Holt *v.* Ladd, 71 Vt. 204, 44 Atl. 69.

Wisconsin.— See Tenney *v.* State Bank, 20 Wis. 152, where a vessel mortgaged to secure a debt remained in the mortgagor's possession, and it was held that the mortgagee had no lien on the earnings of the vessel and could not compel a specific appropriation of them to the payment of the debt.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 295.

After the mortgagee is entitled to possession and a demand has been made on a third person to whom the mortgagor has transferred the property, such third person will be liable to the mortgagee for the rental of the property. Chambers *v.* Mauldin, 4 Ala. 477.

53. Stewart *v.* Fry, 3 Ala. 573, where there was a special agreement by a deceased mortgagor that the profits earned by the mortgaged property would be applied toward payment of the debt secured and it was held that the mortgagee could not have an account against the personal representatives of the mortgagor for the amounts received by him during his lifetime.

A personal representative of the mortgagor is accountable to the mortgagee for profits accruing after the death of the mortgagor when there is a special agreement to that effect, and such receipts do not become assets of the estate (Stewart *v.* Fry, 3 Ala. 573); and where the personal representative held the property for his own benefit, he was held chargeable to the mortgagee for the income of the property (North *v.* Drayton, Harp. Eq. (S. C.) 34).

54. *Alabama.*— Fields *v.* Copeland, 121 Ala. 644, 26 So. 491.

Illinois.— Pierce *v.* Hasbrouck, 49 Ill. 23. But see Fuller *v.* Feinberg, 86 Ill. App. 585, where the mortgagee took possession of a mortgaged store to compel the mortgagor to deliver to its true owner an article contained therein and the mortgagee was held not to be liable for such act.

Indiana.— Niven *v.* Burke, 82 Ind. 455.

Iowa.— Johnston *v.* Robuck, 104 Iowa 523, 73 N. W. 1062.

Kentucky.— Brown *v.* Phillips, 3 Bush (Ky.) 656.

Nebraska.— Brashier *v.* Tolleth, 31 Nebr. 622, 48 N. W. 398.

New York.— Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Ford *v.* Ransom, 8 Abb. Pr. N. S. (N. Y.) 416, 39 How. Pr. (N. Y.) 429.

Oklahoma.— Brook *v.* Bayless, 6 Okla. 568, 52 Pac. 738.

Texas.— Niagara Stamping, etc., Co. *v.* Oliver, (Tex. Civ. App. 1895) 33 S. W. 689, holding that a mortgagor could recover from the mortgagee insurance money paid on mortgaged chattels which had been destroyed after being sequestered by the mortgagee, because the mortgagee could not sue as owner to recover the property mortgaged but must resort to foreclosure proceedings.

and can maintain replevin to recover possession of the property.[55] Where the mortgagor has forfeited his right to possession he cannot maintain trespass,[56] trover,[57] detinue,[58] or replevin[59] against the mortgagee, even though he has a defense which would defeat any attempt to enforce the mortgage;[60] but his

See 9 Cent. Dig. tit. "Chattel Mortgages," § 330.

The common form of insecurity clause allowing a mortgagee to take possession of the property when he deems himself insecure does not preclude a mortgagor from bringing trover where possession is taken by the mortgagee before condition broken. Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14.

The existence of an unsatisfied second mortgage on the same property is a defense *pro tanto* to an action brought by a mortgagor against a first mortgagee for conversion of the mortgaged property. Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253.

A mortgagee acting in concert with an assignee of the mortgage in wrongfully seizing the property covered thereby has been held to be liable to the mortgagor in conversion. Burghen *v.* Purdy, 27 N. Y. App. Div. 460, 50 N. Y. Suppl. 546.

Default between the time of commencing the suit and the time of trial will not defeat an action by the mortgagor, and he will nevertheless be entitled to a verdict for the value of his interest in the property and for damages and costs. Brook *v.* Bayless, 6 Okla. 568, 52 Pac. 738.

55. Jones *v.* Smith, 123 Ind. 585, 24 N. E. 368; Niven *v.* Burke, 82 Ind. 455; Brashier *v.* Tolleth, 31 Nebr. 622, 48 N. W. 398; Newsam *v.* Finch, 25 Barb. (N. Y.) 175. See, generally, REPLEVIN.

56. Burns *v.* Campbell, 71 Ala. 271; Street *v.* Sinclair, 71 Ala. 110; McNeal *v.* Emerson, 15 Gray (Mass.) 384; Van Werden *v.* Winslow, 117 Mich. 564, 76 N. W. 87; Nichols *v.* Webster, 2 Pinn. (Wis.) 234, 1 Chandl. (Wis.) 203. See, generally, TRESPASS.

No doctrine of trespass ab initio can be applied, when the mortgage contains no clause entitling the mortgagor to possession, because the mortgagee sold the property in a manner other than that required by statute. Leach *v.* Kimball, 34 N. H. 568.

57. Wells *v.* Connable, 138 Mass. 513; Landon *v.* Emmons, 97 Mass. 37; Cody *v.* Springfield First Nat. Bank, 63 N. Y. App. Div. 199, 71 N. Y. Suppl. 277. *Compare* Holmes *v.* Bell, 3 Cush. (Mass.) 322, where a mortgagee having a right to possession sold the property before default in the condition of the mortgage, and the mortgagor was not allowed to maintain trover, although he proved that it was an indemnity mortgage and that the liability incurred by the mortgage had terminated without loss to him. But see Burton *v.* Randall, 4 Kan. App. 593, 46 Pac. 326, holding that where a mortgagee of chattels disposed of them in denial of the interest of the mortgagor, the latter could treat such disposition as a conversion. See, generally, TROVER AND CONVERSION.

Common-law rule not changed by statute. — The code in abolishing the forms of action did not change the rule that a mortgagor cannot maintain an action against the mortgagee for seizing the property after breach of condition, so the mortgagor cannot recover in an action at law the difference between the amount due on the mortgage debt and the value of the property at the time of seizure. Colorado Springs First Nat. Bank *v.* Wilbur, 16 Colo. 316, 26 Pac. 777.

58. Denning *v.* Davis, 57 Ala. 590, where the mortgagee was sued for taking the chattels from an officer after the law day of the mortgage. See, generally, DETINUE.

59. *Colorado.*— Horn *v.* Reitler, 12 Colo. 310, 21 Pac. 186.

Illinois.— Hutt *v.* Bruckman, 55 Ill. 441, where it was held that a mortgagor might replevy mortgaged property after breach of condition and set off damages accruing by reason of a breach of warranty accompanying a sale of the chattels against the unpaid purchase-price.

Massachusetts.— Dougherty *v.* Bonavia, 124 Mass. 210.

Minnesota.— Nichols *v.* Knutson, 62 Minn. 237, 64 N. W. 391, holding that a forcible taking pending foreclosure proceedings which would furnish a basis for an action of trespass would not entitle the mortgagor to bring replevin against the mortgagee.

Mississippi.— Dreyfus *v.* Cage, 62 Miss. 733, holding that the mortgagor could not replevy the excess of property over that necessary to pay the debt secured and costs, so long as any part of the debt remained unpaid.

Wisconsin.— Holzhausen *v.* Parkhill, 85 Wis. 446, 55 N. W. 892.

See, generally, REPLEVIN; and 9 Cent. Dig. tit. "Chattel Mortgages," § 306.

60. **Illegality of consideration** is not a ground on which a mortgagor may replevin the property from a mortgagee who has obtained possession thereof for a breach of the conditions of the mortgage. Dougherty *v.* Bonavia, 124 Mass. 210.

The reason for this rule is found in the maxim, *Potior est conditio possidentis.* Horn *v.* Reitler, 12 Colo. 310, 21 Pac. 186; King *v.* Green, 6 Allen (Mass.) 139.

Where the mortgage is void the mortgagor may replevy the property from the mortgagee after he has taken possession (McCartney *v.* Wilson, 17 Kan. 294) or sue him for conversion (Wetherell *v.* Stewart, 35 Minn. 496, 29 N. W. 196); and where the taking was against the known wishes of the defrauded mortgagor a demand on the mortgagee is not necessary prior to an action for their recovery (Ruiter *v.* Plate, 77 Iowa 17, 41 N. W. 474).

proper remedy is an action on the case[61] or a bill in equity to redeem the mortgaged property.[62]

b. Conversion by Mortgagee. It has been held that the mortgagee's sale of the property before foreclosure is a conversion for which he is liable to the mortgagor,[63] unless the latter consented to the sale,[64] or it was authorized by the terms of the mortgage instrument.[65]

c. Evidence. When a mortgagee of chattels is sued for the conversion thereof by the mortgagor, evidence is admissible which goes to show the conduct of the parties in regard to the property and in regard to the mortgage since the original execution thereof;[66] and an agreement not to exercise the privilege conferred by an insecurity clause in a mortgage may properly be shown.[67]

d. Issues. A mortgagor who seeks to recover chattels seized by a mortgagee on the ground that the mortgage was invalid need not tender in his complaint an issue in regard to the precise kind of invalidity he intends to set up.[68] Where

61. Adams *v.* Rice, 65 N. H. 186, 18 Atl. 652; Leach *v.* Kimball, 34 N. H. 568.

A mortgagee entitled to possession does not hold unlawfully because he took possession unlawfully, as where he acted under an order from a justice who had no jurisdiction. Atkinson *v.* Burt, (Ark. 1898) 53 S. W. 404.

After the mortgagee had replevied property from a constable who had levied on it under a writ against the mortgagor, the latter could not maintain any action against the mortgagee because the entire equity of redemption had passed to the constable. Michelson *v.* Fowler, 27 Hun (N. Y.) 159.

62. Heyland *v.* Badger, 35 Cal. 404; Rose *v.* Page, 82 Mich. 105, 46 N. W. 227; Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54; Holzhausen *v.* Parkhill, 85 Wis. 446, 55 N. W. 892. *Compare* Darrow *v.* Wendelstadt, 43 N. Y. App. Div. 426, 60 N. Y. Suppl. 174, holding that after default a mortgagor could not sue at law for damages caused by the mortgagee to the property but that his relief was in equity.

Parties.— A mortgagee of personal property sued by the mortgagor for its conversion has a right to have subsequent mortgagees brought in under Iowa Code (1897), § 3466. Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253.

63. Mathews *v.* Fisk, 64 Me. 101; Spaulding *v.* Barnes, 4 Gray (Mass.) 330. *Compare* Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707, where the mortgagee sold other property not included in the mortgage and was liable for a conversion, although he had a right to sell the mortgaged goods. *Contra*, Hale *v.* Omaha Nat. Bank, 39 N. Y. Super. Ct. 207, where the sale was by a second mortgagee and was made without any recognition of the rights of the first mortgagee.

The mortgagee's act of taking possession on default does not entitle the mortgagor to recover from him as for conversion the difference between the market value of the property and the mortgage debt. Bragelman *v.* Daue, 69 N. Y. 69.

64. Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337, where the condition on which the consent had been given was complied with by the mortgagee.

65. Hamlyn *v.* Boulter, 15 Kan. 376; Murray *v.* Erskine, 109 Mass. 597.

66. Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98; Cadwell *v.* Pray, 86 Mich. 266, 49 N. W. 150 (holding all matters leading to the controversy could be shown). *Compare* Bennett *v.* Bailey, 150 Mass. 257, 22 N. E. 916, holding that evidence as to the disposition of the property seized by the mortgagee is competent as tending to show whether he acted in good faith in conducting the foreclosure.

The amount paid on the mortgage debt may be shown by a mortgagor who is bringing replevin against the mortgagee. Gardner *v.* Matteson, 38 Mich. 200.

A sheriff's return may be amended so as to show correctly what property was sold under a mortgage and what under an execution in order to make out a defense for the mortgagee in an action brought by the mortgagor for the conversion of the mortgaged chattels. Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309.

67. Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14, holding that the testimony of the mortgagee's agent that he took possession of the goods and resold them for a certain sum was admissible as bearing on the question of value. *Compare* Grady *v.* Smith, 14 Ill. App. 305, holding that when the mortgagee justified his taking under an insecurity clause, it was error to exclude evidence tending to show insecurity and to admit evidence bearing only upon plaintiff's property and the condition of his family, and only calculated to excite the sympathies of the jury.

A prima facie defense is established by the mortgagee in a suit against him by the mortgagor by producing the mortgage and mortgage note uncanceled which showed that the debt had matured, and the burden is on plaintiff to show a failure of consideration. Fikes *v.* Manchester, 43 Ill. 379.

68. Johnson *v.* Simmons, 61 Mo. App. 395, where the mortgagor was allowed to prove the exaction of usurious interest. But see Holland *v.* Griffith, 13 Nebr. 472, 14 N. W. 387, where the mortgagor alleged that the mortgage had been procured by false representations, and on the state of the pleadings it was held error to admit in evidence a writ-

the mortgagor sues for a detention of the property, the fact that the mortgagee seized the property before the maturity of the mortgage debt is immaterial if it has since become due.[69]

e. **Measure of Damages.** Where a mortgagee of chattels takes possession and sells before condition broken, the mortgagor's measure of damages is the value of the property at the time of the conversion,[70] plus such special damages as are actually caused by the taking;[71] but it has been held that the amount of the mortgage debt remaining unpaid must be deducted from this sum[72] in order

ten agreement that the mortgage should be released in case of the mortgagor's failure to make certain sales of a patent right.

A general denial in an answer by a mortgagee does not raise an issue of ownership, when the answer alleges ownership in the mortgagor at the time of the execution of the mortgage and contains no averment of a transfer, and hence a special verdict is not defective because it fails to find as to such ownership. Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88.

69. Bodley *v.* Anderson, 2 Ill. App. 450.

Admission by mortgagee.— Where earlier mortgages had been replaced by later ones and the mortgagee sued in trover by the mortgagor relied entirely upon the earlier ones as a justification for seizing the mortgaged property, a finding by the jury that the earlier mortgages had been superseded was conclusive against the mortgagee by reason of his admission that the later one had been satisfied. Kramer *v.* Gustin, 53 Mich. 291, 19 N. W. 1.

70. Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14; Cutler *v.* James Goold Co., 43 Hun (N. Y.) 516; Finley *v.* Cudd, 42 S. C. 121, 20 S. E. 32 (holding that damages were not limited to the value of the use of the property until such time as the mortgagee became entitled to possession of it).

In determining the value of mortgaged chattels which have been wrongfully taken and sold by a mortgagee, the amount they brought at a forced sale should not be considered (Rector-Wilhelmy Co. *v.* Nissen, 35 Nebr. 716, 53 N. W. 670); but the measure of damages is the difference between the price obtained and the market price at the time of sale (Gravel *v.* Clough, 81 Iowa 272, 46 N. W. 1092); and the mortgagor was not obliged to accept a tender of the amount which a mortgaged horse brought after being used two years by the mortgagee but could claim the value of the horse at the time of the conversion (Quick *v.* Van Auken, 3 Pennyp. (Pa.) 469). *Compare* Howery *v.* Hoover, 97 Iowa 581, 66 N. W. 772, holding that where a mortgagee took possession of mortgaged chattels and treated them as his own instead of selling as he was authorized to do, the value of the property as of the time he took possession may be considered in estimating damages. See also Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253, stating what rules may be adopted as a basis for the assessment of damages.

In trespass against a second mortgagee for a wrongful taking of the property from the mortgagor, where a first mortgagee had replevied the property, the measure of damages is the difference between the market value of the property at the time of the wrongful taking and the time of its recovery in the replevin suit, plus actual loss to business which is the direct result of such taking. Davenport *v.* Ledger, 80 Ill. 574.

71. Special damages which flow directly from the taking of the mortgaged property by the mortgagee may be recovered (Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14; Brink *v.* Freoff, 40 Mich. 610, 44 Mich. 70, 6 N. W. 94); but such damages must be actually suffered by reason of the taking (McClure *v.* Hill, 36 Ark. 268), and where a mortgagee prematurely took possession of a mortgaged mule which was needed for the cultivation of a crop, injuries resulting to the crop from neglect were too remote to be recovered as consequential damages (Jackson *v.* Hall, 84 N. C. 489). *Compare* Cutler *v.* James Goold Co., 43 Hun (N. Y.) 516, where it was held that a mortgagor could not recover a dollar a day from the mortgagee for the wrongful taking of a carriage.

An allegation in the declaration of special damages and a claim therefor is essential in order that they may be recovered. Street *v.* Sinclair, 71 Ala. 110; Brink *v.* Freoff, 44 Mich. 69, 6 N. W. 94.

Exemplary damages may be allowed where a mortgage was void for usury and fraud and the mortgagee entered the house of the mortgagor in his absence and took the chattels. Kemmitt *v.* Adamson, 44 Minn. 121, 46 N. W. 327.

Costs for such sales as were properly made may be allowed to a mortgagee, notwithstanding an unauthorized sale of the remainder for which the mortgagor recovers in conversion. Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253.

72. *Arkansas.*— McClure *v.* Hill, 36 Ark. 268.

Kansas.— Burton *v.* Randall, 4 Kan. App. 593, 46 Pac. 326. *Compare* Jones *v.* Annis, 47 Kan. 478, 28 Pac. 156, where a mortgagor brought replevin against a mortgagee for the mortgaged property and it appeared that two cattle not included in the mortgage had been seized and slaughtered by the mortgagee. It was held that the mortgagor could not recover absolutely for the value of these two cattle, but was only entitled to have their value deducted from the amount of the mortgage debt remaining unpaid.

Kentucky.— Brown *v.* Phillips, 3 Bush (Ky.) 656, holding that under the code the

to avoid circuity of action two suits to adjust equities in a single transaction not being tolerated when adjustment can be made in one suit.[73]

2. AGAINST THIRD PERSONS — a. In General. A mortgagor who is allowed to retain possession[74] of mortgaged property may maintain an action against one who interferes with his possession,[75] as where an officer makes a wrongful levy[76] or seizes exempt property upon an execution[77] or to recover for damage to the property caused by the negligence of a third person;[78] and in one instance a mortgagor was allowed to recover in a suit brought in his own name on an account owing him which had been included in a mortgage.[79] After the mortgagor has parted with the possession of the property he can maintain an action on the case against one who takes it from the hands of the mortgagee,[80] but

mortgagee could plead his claim as a counterclaim.

Michigan.— Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394; Brink *v.* Freoff, 44 Mich. 69, 6 N. W. 94.

Minnesota.— Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835; Torp *v.* Gulseth, 37 Minn. 135, 33 N. W. 550; Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249 (holding that proof of an unpaid balance could be given under a general denial).

New York.— Russell *v.* Butterfield, 21 Wend. (N. Y.) 300.

Washington.— Jacobson *v.* Aberdeen Packing Co., 26 Wash. 175, 66 Pac. 419.

Wisconsin.— Tenney *v.* State Bank, 20 Wis. 152. *Compare* Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999, holding that, where the mortgagee had refused a tender of the mortgage debt, interest should be allowed the mortgagor from the time of such refusal to the day of trial.

United States.— Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 308.

Mortgagee cannot dispute the maturity of the mortgage debt after he has exercised an option to treat the whole debt as due, so as to prevent an application of the damages recovered by the mortgagor from going in reduction of the mortgage debt. Harder *v.* Hosp, 69 Wis. 288, 34 N. W. 145.

Where the mortgagee has become entitled to possession of the property before the trial, the measure of plaintiff's damages for its detention is the value of its use to the time when by proper legal proceedings defendant became entitled to its possession. Gaar *v.* Lyons, 99 Ky. 672, 18 Ky. L. Rep. 500, 37 S. W. 73, 148.

73. Brink *v.* Frehoff, 44 Mich. 69, 6 N. W. 94, 40 Mich. 610.

Set-off and counter-claim.— Where a mortgagee of personal property took possession before forfeiture, and the mortgagor brought an action for damages, the mortgage debt may be pleaded by the mortgagee in counterclaim, but he could not plead a claim for money paid by him to third persons as plaintiff's surety. Brown *v.* Phillips, 3 Bush (Ky.) 656. *Compare* Finley *v.* Cudd, 42 S. C. 121, 20 S. E. 32, where it was held on the peculiar facts of the case that evidence of what plaintiff owed defendant was prejudicial, where it exceeded the largest amount he could recover as damages, since the jury might infer he had sustained no damages at all.

74. **Where the mortgagor has possession and control,** this is *prima facie* evidence of a right to such possession against a third person. Rogers *v.* King, 66 Barb. (N. Y.) 495.

75. *Kansas.*— Tallman *v.* Jones, 13 Kan. 438.

Michigan.— Ganong *v.* Green, 64 Mich. 488, 31 N. W. 461; Parkhurst *v.* Jacobs, 17 Mich. 302.

Missouri.— Buddington *v.* Mastbrook, 17 Mo. App. 577, even after condition broken.

New Jersey.— Luse *v.* Jones, 39 N. J. L. 707.

Ohio.— Middlesworth *v.* Robinson, Wright (Ohio) 552.

Oregon.— Gregory *v.* North Pac. Lumbering Co., 15 Oreg. 447, 17 Pac. 143.

Texas.— Weir Plow Co. *v.* Armentrout, 9 Tex. Civ. App. 117, 28 S. W. 1045, 29 S. W. 405.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 336.

76. Vaughan *v.* Thompson, 17 Ill. 78; Carey *v.* Gunnison, (Iowa 1883) 17 N. W. 881. But see Brown *v.* Carroll, 16 R. I. 604, 18 Atl. 283, holding that the officer was protected when the process was fair on its face.

Although the attachment constituted a breach of the condition of the mortgage, a mortgagor may maintain an action against an officer who wrongfully made the attachment. Copp *v.* Williams, 135 Mass. 401.

Where the sheriff levied, at the direction of the mortgagee, an execution which ran against both mortgagee and mortgagor, it was held that replevin against him would not lie at the instance of the mortgagor. Talbot *v.* De Forest, 3 Greene (Iowa) 586.

77. Adams *v.* Hessian, 11 Ind. App. 598, 39 N. E. 530; Evans *v.* St. Paul Harvester Works, 63 Iowa 204, 18 N. W. 881; Collett *v.* Jones, 2 B. Mon. (Ky.) 19, 36 Am. Dec. 586; Livor *v.* Orser, 5 Duer (N. Y.) 501.

78. Gallatin, etc., Turnpike Co. *v.* Fry, 88 Tenn. 296, 12 S. W. 720, where the injury was caused by a defective road.

79. Swan *v.* Thurman, 112 Mich. 416, 70 N. W. 1023, where the mortgage gave the mortgagor the right to retain possession of the property covered thereby.

80. Frankenthal *v.* Mayer, 54 Ill. App. 160.

such a mortgagor is no longer entitled to maintain a possessory action, especially after default and possession taken by the mortgagee.[81]

b. Measure of Damages. More than a nominal recovery may be obtained by the mortgagor,[82] for the measure of damages is the full face value of the goods which are taken from his possession.[83] The damages are the same whether the mortgagor or a stranger becomes the purchaser of the property at the sale under the wrongful levy.[84]

E. Actions by Mortgagee — 1. Right of Action — a. In General. A mortgagee of personal property may maintain a possessory action against one who wrongfully takes the property from his possession,[85] and where the mortgagee is entitled to possession he may maintain an action for its conversion,[86] even before condition broken.[87] A mortgagee may also enforce an immediate right of posses-

81. Frankenthal *v.* Meyer, 55 Ill. App. 405; Axford *v.* Mathews, 43 Mich. 327, 5 N. W. 377, 38 Am. Rep. 185, where the action was brought by an assignee in bankruptcy. But see Vandiver *v.* O'Gorman, 57 Minn. 64, 58 N. W. 831, where it was held to be no defense to an action of trover brought by a mortgagor that plaintiff had made default in a mortgage which was held by a third party.

82. Tallman *v.* Jones, 13 Kan. 438; Ganong *v.* Green, 64 Mich. 488, 31 N. W. 461; Gregory *v.* North Pac. Lumbering Co., 15 Oreg. 447, 17 Pac. 143.

83. Luse *v.* Jones, 39 N. J. L. 707; Brown *v.* Carroll, 16 R. I. 604, 18 Atl. 283.

Even after condition broken the mortgagor is entitled to recover the full value of the property against one who is a stranger to the mortgage. Vandiver *v.* O'Gorman, 57 Minn. 64, 58 N. W. 831.

84. Leonard *v.* Hair, 133 Mass. 455.

85. O'Neill *v.* Whitcomb, (Ida. 1893) 32 Pac. 1133; Reynolds *v.* Shuler, 5 Cow. (N. Y.) 323; Wolf *v.* O'Farrel, 1 Treadw. (S. C.) 151. *Compare* Hackett *v.* Manlove, 14 Cal. 85, holding that where a mortgagee had the mortgaged property attached and arranged to have the constable hold the property by virtue of the mortgage as well as under the attachment, the mortgagee was in possession after the dissolution of the attachment and could maintain an action against a trespasser.

Although a mortgage is satisfied by a foreclosure sale at which the mortgagee is the purchaser, he may recover for a previous removal of the property from his possession by a third person. Laflin *v.* Griffiths, 35 Barb. (N. Y.) 58.

86. *Alabama.*— Holst *v.* Harmon, 122 Ala. 453, 26 So. 157, holding that a mortgagee could maintain trover for the mortgaged chattels by proof that different portions of the chattels are embraced in separate mortgages executed by different persons.

Arkansas.— Ohio *v.* Byrne, 59 Ark. 280, 27 N. W. 243, construing Texas law and reaching this conclusion, although it was admitted that a mortgagee in that state could not maintain a statutory proceeding for trial of right of property.

Indiana.—Hunter *v.* Cronkhite, 9 Ind. App. 470, 36 N. E. 924, action being against the mortgagor.

Maine.— Hotchkiss *v.* Hunt, 49 Me. 213.

Michigan.— Canfield *v.* Gould, 115 Mich. 461, 73 N. W. 550; Grove *v.* Wise, 39 Mich. 161, even though a mortgagee gets a mere lien on the property for security.

Minnesota.— Strickland *v.* Minnesota Type-Foundry Co., 77 Minn. 210, 79 N. W. 674.

Montana.— Reynolds *v.* Fitzpatrick, 23 Mont. 52, 57 Pac. 452.

North Dakota.— Donovan *v.* St. Anthony, etc., Elevator Co., 7 N. D. 513, 75 N. W. 809.

South Carolina.— Montgomery *v.* Kerr, 1 Hill (S. C.) 291; Wolff *v.* Farrell, 3 Brev. (S. C.) 68.

Texas.— Williams *v.* Beasley, 5 Tex. Civ. App. 408, 25 S. W. 321, holding that where a mortgagor of chattels is insolvent and not a resident of the state, the mortgagee can sue one who has taken and converted them, with notice of the mortgage, for their value, not exceeding the mortgage debt.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 340.

No judgment against a mortgagor need be obtained prior to the mortgagee's bringing an action of trover against a third person who has converted the property. Howard *v.* Hutchinson First Nat. Bank, 44 Kan. 549, 24 Pac. 983; Howard *v.* Burns, 44 Kan. 543, 24 Pac. 981.

The mortgagee need not reduce the property to actual possession in order to maintain an action against one taking the property, after forfeiture in the condition of the mortgage. Champlin *v.* Johnson, 39 Barb. (N. Y.) 606. *Compare* Snyder *v.* Hitt, 2 Dana (Ky.) 204, holding that a mortgagee could maintain trover for the conversion of mortgaged property by a stranger while the property was in the possession of the mortgagor.

A cotenant of the mortgagor who takes exclusive possession of the property and refuses to recognize the mortgagee's rights is liable to him for a conversion. Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54.

87. Wright *v.* Starks, 77 Mich. 221, 43 N. W. 868; Chadwick *v.* Lamb, 29 Barb. (N. Y.) 518 (where the mortgagee's right of possession accrued through a breach of an insecurity clause); Sandager *v.* Northern Pac. Elevator Co., 2 N. D. 3, 48 N. W. 438.

Accrual of right of action.— Where a mortgagee's action is for a fraudulent removal of the property, the statute of limitations be-

sion in an action of replevin,[88] even though he is not the absolute owner of the property;[89] but he is not required to enforce his rights against the specific property under the mortgage.[90]

b. Against Levying Officer — (i) *In General.* Where property covered by a chattel mortgage is seized by a sheriff on process against the mortgagor, the mortgagee may maintain a possessory action against the officer provided the mortgagee was in possession of the property[91] or was entitled to an immediate right of possession at the time of the seizure,[92] and the danger of loss which is

gins to run in defendant's favor from the time of removal unless the fraudulent intent was not apparent then, in which case the statute will run from the time when plaintiff with due diligence discovered the fraud. Reed *v.* Matthews, 102 Ga. 189, 29 S. E. 173, 66 Am. St. Rep. 164.

88. *Indiana.*— Recker *v.* Kilgore, 62 Ind. 10, against the widow of the mortgagor.

Kansas.— Brookover *v.* Esterly, 12 Kan. 149.

Maine.— Pickard *v.* Low, 15 Me. 48.

Michigan.— Campbell *v.* Quackenbush, 33 Mich. 287, where the action was against a bailee of the mortgagor and demand was held to be necessary to make the detention wrongful.

New York.—Fuller *v.* Acker, 1 Hill (N. Y.) 473.

Wisconsin.—Welch *v.* Sackett, 12 Wis. 243.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 316.

A portion only of the indebtedness secured by a mortgage need be held by the mortgagee in order to entitle him to maintain replevin against a third person for the chattels. Machette *v.* Wanless, 1 Colo. 225.

Replevin will not lie against a receiver, in charge of partnership property under appointment by a court of competent jurisdiction, by a mortgagee who has a mortgage valid against the interest of one partner. Frankhouser *v.* Worrall, 51 Kan. 404, 32 Pac. 1097.

89. Woodland Bank *v.* Duncan, 117 Cal. 412, 49 Pac. 414.

After a sale of mortgaged property by a trustee under a mortgage deed of trust, the trustee can bring an action to recover possession of it from a third person in order to deliver it to the vendee. Lacey *v.* Giboney, 36 Mo. 320, 88 Am. Dec. 145.

Suit on an account included in a mortgage may be maintained in the name of the mortgagee after the account has been assigned to him. Grumme *v.* Firminich Mfg. Co., 110 Iowa 505, 81 N. W. 791.

90. Parlin, etc., Co. *v.* Moore, (Tex. Civ. App. 1902) 66 S. W. 798.

91. *Colorado.*— Burchinell *v.* Koon, 25 Colo. 59, 52 Pac. 1100; Poundstone *v.* Holt, 5 Colo. App. 66, 37 Pac. 35 (where the mortgagee maintained his possession through the medium of an agent).

Illinois.— Cummins *v.* Holmes, 109 Ill. 15, where the officer seized the goods on a void execution.

Massachusetts.—Allen *v.* Wright, 134 Mass. 347.

Missouri.— Hausmann *v.* Hope, 20 Mo. App. 193, even though the mortgage debt was not due. *Compare* Howell *v.* Caryl, 50 Mo. App. 440, holding that in such a case it was immaterial that the mortgage was not duly executed, since the mortgagee could maintain his action as a pledgee.

Nebraska.— Hakanson *v.* Brodke, 36 Nebr. 42, 53 N. W. 1033.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 318.

92. *Alabama.*— Jordan *v.* Wells, 104 Ala. 383, 16 So. 23, after the law day had passed.

California.— Stringer *v.* Davis, 35 Cal. 25.

Illinois.— Quinn *v.* Schmidt, 91 Ill. 84; Udell *v.* Slocum, 56 Ill. App. 216, in which cases plaintiff's right of possession grew out of the breach of an insecurity clause caused by defendant's levy.

Indiana.— Syfers *v.* Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619, after the mortgagee had sold the goods under a power of sale contained in the mortgage.

Iowa.— Tieman *v.* Haw, 49 Iowa 312, where the mortgaged property was seized by a sheriff on a criminal complaint against the mortgagor, and destroyed after coming into his possession.

Kansas.— Johnson *v.* Anderson, 60 Kan. 578, 57 Pac. 513.

Maine.— Ferguson *v.* Thomas, 26 Me. 499; Welch *v.* Whittemore, 25 Me. 86 (where there was a stipulation that the property should not be levied on).

Massachusetts.— Fuller *v.* Day, 103 Mass. 481, against a tax-collector who sought to enforce a tax against the mortgagor.

Michigan.— Worthington *v.* Hanna, 23 Mich. 530. But see Macomber *v.* Saxton, 28 Mich. 516, where an officer was protected so long as he was proceeding in due course under the statute to a sale of the mortgagor's interest, notwithstanding the mortgage was past due and unpaid.

Mississippi.— Stamps *v.* Gilman, 43 Miss. 456, after condition broken.

Nebraska.— Stuart *v.* Alexander, 14 Nebr. 37, 14 N. W. 655.

New Jersey.— Smith *v.* Koenig, 57 N. J. L. 486, 31 Atl. 979; Miller *v.* Shreve, 29 N. J. L. 250 (before default); Freeman *v.* Freeman, 17 N. J. Eq. 44.

New York.— Swift *v.* Hart, 12 Barb. (N. Y.) 530; Gelhaar *v.* Ross, 1 Hilt. (N. Y.) 117 (after foreclosure proceedings had been begun); Russell *v.* Butterfield, 21 Wend. (N. Y.) 300 (although the mortgage is not yet due).

Ohio.— Ashley *v.* Wright, 19 Ohio St. 291

thereby caused is not a material question,[93] for the levy of itself constitutes a conversion.[94]

(II) *DEMAND* — (A) *In General.* In the absence of statute it is not necessary for a mortgagee with an immediate right to possession to make a demand on an officer levying an execution or attachment writ on the mortgaged property, before commencing an action of replevin to recover it[95] or trover for the value thereof.[96] Where the mortgagee did not have an immediate right of possession so that the taking was not wrongful as to him, a demand is necessary,[97] but after demand replevin can be brought.[1]

(on breach of stipulation in insecurity clause); Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306 (although the mortgage debt was not due).

South Carolina.—Wylie *v.* Ohio River, etc., R. Co., 48 S. C. 405, 26 S. E. 676; Williams *v.* Dobson, 26 S. C. 110, 1 S. E. 421 (after breach of condition); Spriggs *v.* Camp, 2 Speers (S. C.) 181 (before the maturity of the mortgage debt).

South Dakota.— Coughran *v.* Sundback, 9 S. D. 483, 70 N. W. 644, on breach of a stipulation in an insecurity clause.

Wisconsin.— Frisbee *v.* Langworthy, 11 Wis. 375.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 318.

Effect of insecurity clause.— Where a chattel mortgage authorizes the mortgagees to take possession whenever they deem themselves insecure, they may maintain an action of replevin against a sheriff who has levied an attachment on the property, although the mortgage be not due. Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630.

93. Huellmantel *v.* Vinton, 112 Mich. 47, 70 N. W. 412; Kelly *v.* Purcell, 6 Ohio Dec. (Reprint) 920, 8 Am. L. Rec. 705 (where plaintiff held other security but was nevertheless allowed to replevy the mortgaged goods from the sheriff). But see Canfield *v.* Moore, 16 Tex. Civ. App. 472, 41 S. W. 718, where a mortgage was given as security for a debt which was already amply secured and it was held that the mortgagee had no cause of action against a judgment creditor who levied on the property.

Actual payment on the debt will be considered in reduction of damages. Huellmantel *v.* Vinton, 112 Mich. 47, 70 N. W. 412.

After foreclosure of a mortgage and before the property had been sold it was levied on under a distress warrant, and it was held that the mortgagee could maintain trover against the officer levying the writ. Dean *v.* Davis, 12 Mo. 112.

The insolvency of the mortgagor need not be shown, because that would enable any wrong-doer to compel the holder of a security against a solvent party to look to the personal remedy and give up the security. Conwell *v.* Jeger, 21 Ind. App. 110, 51 N. E. 733; Worthington *v.* Hanna, 23 Mich. 530; J. I. Case Threshing Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324.

When the mortgage is in the form of a deed of trust the trustee is the person to maintain an action against an attaching officer to recover the property, even though part of the property has been delivered to the beneficiary. Spears *v.* Robinson, 71 Miss. 774, 15 So. 111; Myers *v.* Hale, 17 Mo. App. 204.

94. Stuart *v.* Phelps, 39 Iowa 14; Shapard *v.* Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675 (where the property was taken from the possession of the mortgagee). See also Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530, reaching the same conclusion because the levying creditor denied the mortgagee's right to the property at every stage in the proceedings.

95. Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823; Jackson *v.* Dean, 1 Dougl. (Mich.) 519; Whitney *v.* Levon, 34 Nebr. 443, 51 N. W. 972; Keefer *v.* Greene, 16 N. Y. Suppl. 498, 41 N. Y. St. 452.

96. Malachiski *v.* Stellwagen, 85 Mich. 41, 48 N. W. 152 (where the levying officer claimed that the mortgage was fraudulent); Manning *v.* Monaghan, 10 Bosw. (N. Y.) 231.

Demand and refusal is evidence of a conversion whether the officer levying the attachment still has possession of the property or not. Ferguson *v.* Clifford, 37 N. H. 86.

Mortgagee need not pursue the property attached by the officer and attempt to reclaim it from him (Gaar *v.* Hurd, 92 Ill. 315) and does not waive his rights by allowing it to be sold under attachment (Butler *v.* Case, 53 Kan. 262, 36 Pac. 330).

A sale on execution of mortgaged property was held to entitle the mortgagee to bring an action of conversion against the officer making the sale without a demand and refusal. Leonard *v.* Hair, 133 Mass. 455.

97. Holladay *v.* Bartholomae, 11 Ill. App. 206.

1. Wood *v.* Weimar, 104 U. S. 786, 26 L. ed. 779. *Compare* McGraw *v.* Bishop, 85 Mich. 72, 48 N. W. 167, where a mortgage was due on demand, and it was held that the mortgagee was entitled to bring trover against an attaching creditor of the mortgagor who refused to deliver the property upon a demand therefor, and that it was not necessary for the mortgagee to formally declare the mortgage due before they demanded the property from the creditor. See also Brown *v.* Cook, 3 E. D. Smith (N. Y.) 123, where a mortgage was payable on demand, and it was held that no demand for payment was necessary in order to maintain an action against a third person who unlawfully removed the property.

(B) *Statutory Requirement* — (1) NECESSITY. In some jurisdictions it is required by statute that a mortgagee make a demand for payment on an officer who has levied on the mortgaged property before bringing an action against him.[2] Such a demand need not be made unless there is a valid subsisting attachment,[3] but the circumstance that the mortgage is not given to secure a definite sum does not render it unnecessary,[4] neither does a stipulation in a mortgage giving the mortgagee an immediate right to possession in case the property is attached.[5] The levying officer's failure to comply with the demand within the statutory period gives the mortgagee an immediate right to possession.[6] In some states the burden of taking the initiative is upon the officer, and he must demand of the mortgagee the amount due on the mortgage.[7]

(2) SUFFICIENCY — (a) IN GENERAL. The statement of demand which must be made to an attaching officer must describe the property[8] and allege that it is in the possession of the officer and demand payment of the amount due on the mortgage,[9] but where the mortgage was not given to secure the payment of money,

2. Potter *v.* McKenney, 78 Me. 80, 2 Atl. 844; Johnson *v.* Sumner, 1 Metc. (Mass.) 172.

Demand necessary in case of conditional sale.— The holder of a "Holmes note," which contains a stipulation that the property for which it is given shall remain the property of the payee until the note is paid, cannot maintain replevin against the officer who has attached such property, until he has given him forty-eight hours' notice in writing of his claim and its amount. Monaghan *v.* Longfellow, 82 Me. 419, 19 Atl. 857.

3. Jordan *v.* Farnsworth, 15 Gray (Mass.) 517.

When the attachment suit is against a person other than the mortgagor, no demand on the attaching officer by the mortgagee is necessary. Ashcroft *v.* Simmons, 159 Mass. 203, 34 N. E. 188.

4. Haskell *v.* Gordon, 3 Metc. (Mass.) 268, as where the mortgage was given to secure the mortgagee from future liability or to secure the performance of some collateral act.

5. Hunt *v.* Williams, 106 Mass. 114.

Exempt property must be designated and the failure of a mortgagee to give an attaching officer an account of the amount due on the mortgage will cause him to lose his lien on the property, although part of the property would have been exempt had the mortgagor made an election in due time. Colson *v.* Wilson, 58 Me. 416.

6. Alden *v.* Lincoln, 13 Metc. (Mass.) 204, decided before the time had been changed from twenty-four hours to ten days.

7. Gilmore *v.* Gale, 33 N. H. 410, holding that a demand by the officer upon the assignee of the mortgage was a sufficient compliance with the statute.

Demand a sufficient notice of intention to foreclose.— A written demand by one claiming goods under chattel mortgage, duly served upon the officer seizing the goods on execution, that the goods be returned to the place from whence they were taken, is a sufficient indication that the party claiming the goods intended to proceed to a foreclosure of his mortgage thereon, as he has the right to do under its terms, and if the other fails to comply with such demand an action for conversion will lie. Wells *v.* Chapman, 59 Iowa 658, 13 N. W. 841.

Necessity of demand on officer not changed by requirement of deposit by him before levy. — The written notice, required by Iowa Code (1873), § 3055, to be given to the officer holding the goods before replevin of property seized under execution, is not dispensed with in replevin by a mortgagee, by Iowa Acts (1886), c. 117, which authorizes the levy of execution on mortgaged property on a tender or deposit of the amount due on the mortgage before the levy, and it is immaterial that no tender or deposit was made. Danforth *v.* Harlow, 76 Iowa 236, 40 N. W. 822.

8. Moriarty *v.* Lovejoy, 23 Pick. (Mass.) 321, holding a description of the property by reference to the town records was insufficient. See also Woodward *v.* Ham, 140 Mass. 154, 2 N. E. 702, where the demand mentioned only a partial list of the articles mortgaged and did not refer to the mortgage itself for an enumeration of the articles claimed, and it was held to be insufficient and that replevin would not lie against the officer.

Necessity for identifying property.— It is sufficient for a mortgagee to describe the mortgaged goods by a reference to the schedule, and as a whole or a part of the goods attached by an officer in a particular house, unless the officer call upon the mortgagee to select and identify the articles more particularly. Codman *v.* Freeman, 3 Cush. (Mass.) 306. *Compare* Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680, holding that the rule which requires the owner of chattels mixed with other property to point out his own and demand them of the officer does not apply to the holder of a mortgage covering all future-acquired property which he honestly believed to be legally operative.

9. Moriarty *v.* Lovejoy, 23 Pick. (Mass.) 321. But see Brewster *v.* Bailey, 10 Gray (Mass.) 37, holding that an express demand for payment was not essential to the validity of the notice.

Where the property has been attached on two writs, and the demand made by the mortgagee was expressly limited to one, the mort-

the statement may intimate that the mortgagee claims to hold the property pursuant to a mortgage, in place of demanding payment.[10] The demand may be signed by an attorney and may state an alternative claim of title under a pledge.[11]

(b) Statement of Amount. A mortgagee in making demand upon an officer who has attached the mortgaged property may describe the sum due on the note secured as due upon the mortgage,[12] and it has been held that a demand was not invalidated by failing to specify the rate of interest which the mortgage bore;[13] but there was not a sufficient compliance with the statute where the amount stated included a sum not secured by the mortgage,[14] or where a gross amount was stated composed of the aggregate of several distinct demands which were secured by the mortgage.[15]

(3) Time of Making. Demand upon the officer levying an execution or attachment writ on the mortgaged property must be made by the mortgagee within a reasonable time,[16] and while the property is still in possession of the mortgagee,[17]

gagee cannot maintain replevin against the officer for refusing to comply with the demand (Macomber *v.* Baker, 3 Allen (Mass.) 241), even though there was no formal taking except in the first suit and the mortgagee had not been informed of the subsequent suits (Howe *v.* Bartlett, 1 Allen (Mass.) 29), but if the mortgagee makes a second demand within a reasonable time he can commence another action to recover the property (Crosby *v.* Baker, 6 Allen (Mass.) 295).

Where there are two mortgages made by the same debtor covering different portions of the property attached, a sufficient statement and demand as to one mortgage will prevail *pro tanto*, although it be insufficient as to the other. Simonds *v.* Parker, 3 Metc. (Mass.) 144.

10. Codman *v.* Freeman, 3 Cush. (Mass.) 306.

11. Pettis *v.* Kellogg, 7 Cush. (Mass.) 456.

Demand for payment of a mortgage due on demand is not necessary to entitle a mortgagee to bring trover for mortgaged property against a sheriff who has had a proper notice of the mortgagee's rights. Alden *v.* Lincoln, 13 Metc. (Mass.) 204.

12. Degnan *v.* Farr, 126 Mass. 297. *Compare* Bicknell *v.* Cleverly, 125 Mass. 164, holding that an assignee of a mortgage could describe the debt as an amount due him on the mortgage when he made a demand upon an officer who had attached the property.

13. Robinson *v.* Sprague, 125 Mass. 582, where the actual rate of interest was seven per cent and a demand for the legal rate of six per cent was presumed in the absence of any demand for interest. See also Gassett *v.* Sanborn, 8 Gray (Mass.) 218, where a demand was made on an officer for a certain sum which included both principal and interest on the mortgage, and it was held to be sufficient.

14. Hills *v.* Farrington, 3 Allen (Mass.) 427. But see Melvin *v.* Fellows, 33 N. H. 401, holding that a mortgagee who rendered a true account would not be subject to loss because some portion of the whole of his debts or the evidence of their existence was incorrectly described in the condition of the mortgage.

Effect of mistake.—An account rendered by a mortgagee to an attaching officer is not a false account entitling the officer to hold the property discharged from the mortgage because it inadvertently included more than was due. Putnam *v.* Osgood, 51 N. H. 192. *Compare* Johnson *v.* Sumner, 1 Metc. (Mass.) 172, holding that a misstatement in the amount of interest was not a defect where the securities were not within reach.

15. Johnson *v.* Sumner, 1 Metc. (Mass.) 172. But see Rhode Island Cent. Bank *v.* Danforth, 14 Gray (Mass.) 123, where the demand stated that B has a large claim against A, as security for which the said mortgage was given; B holds claims and demands of his own against A, amounting to $10,000, on which A has paid part leaving a specified balance due. The payments were the result of sales of the mortgaged property, the proceeds of which had been applied in payment of the mortgage debt, and it was held on these facts that there had been a sufficient demand on the officer. *Compare* Ashcroft *v.* Simmons, 151 Mass. 497, 24 N. E. 398, where the mortgagee had an election as to which of two things the mortgage should secure, and his demand for payment of a gross sum due on the mortgage represented by cash and notes not yet due was held to be a sufficient election that the mortgage should secure the payment of money.

Parol evidence may be introduced to establish the truth of the account of the amount due the mortgagee and of the consideration of the mortgage. Hanson *v.* Herrick, 100 Mass. 323.

16. Brackett *v.* Bullard, 12 Metc. (Mass.) 308 (holding that ten months was not a reasonable time when no explanation for the delay was given); Tapley *v.* Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374 (holding that thirteen days was a reasonable time). *Compare* Crosby *v.* Baker, 6 Allen (Mass.) 295, where a second demand correcting a mistake in an earlier one was twenty days after the rendition of judgment in the suit and it was held to be made within a reasonable time, as the officer's position had not changed in the meantime.

17. Granger *v.* Kellogg, 3 Gray (Mass.) 490, holding that the mortgagee could not sell

although demand may be made after the officer has parted with his interest in the property.[18]

(III) *Validity of Attachment Claim.* Where property which has been levied on in an action against a mortgagor is replevied from the officer by the mortgagee, it cannot be shown in defense to the replevin suit that the mortgage is in fraud of creditors without proof that the attachment debt in fact existed;[19] and although the officer must act in reliance on valid process[20] it is not sufficient merely to prove the existence of the writ of attachment.[21]

c. Against Mortgagor — (I) *In General.* When there is no agreement entitling the mortgagor to possession, the mortgagee may bring replevin for the mortgaged property before the maturity of the mortgage debt,[22] but a stipulation giving the mortgagor a right to possession bars any action before default in the condition of the mortgage.[23] There is authority, however, for the doctrine that an absolute disposition of the property in denial of the mortgagee's interest is a conversion for which trover will lie.[24] The mortgagor's denial of the mort-

a portion of the property and then demand the balance from the officer.

18. Tapley *v.* Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374.

19. Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Braley *v.* Byrnes, 20 Minn. 435 (holding that the papers in the attachment suit were not sufficient to prove the validity of the debt on which the attachment was founded). *Compare* Davis *v.* Ransom, 26 Ill. 100, where a mortgage was allowed to be received in evidence against one who had not shown himself to be a creditor, although it had been declared void by a previous decision of the court.

20. Halsey *v.* Christie, 21 Wend. (N. Y.) 9, where the affidavit in attachment was insufficient to confer jurisdiction and the attaching party was not allowed to show that possession did not accompany the mortgage.

A mere naked trespasser, sued by the mortgagee in trover for the conversion of mortgaged property, cannot question the validity of the sale by plaintiff of a portion of the mortgaged property, or complain of the application of the proceeds as between different debts of the mortgagor, or ask an allowance or deduction of profits on resale of property purchased by mortgagee at his own sale. Broughton *v.* Atchison, 52 Ala. 62.

A wrongful sale by a mortgagee before the maturity of the mortgage indebtedness will not prevent him from defending his possession against an attaching creditor whose attachment is invalid. Cary *v.* Everett, 107 Mich. 654, 65 N. W. 566.

21. James *v.* Van Duyn, 45 Wis. 512.

22. Ferguson *v.* Thomas, 26 Me. 499; Pickard *v.* Low, 15 Me. 48; Eldridge *v.* Sherman, 70 Mich. 266, 38 N. W. 255; Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Fletcher *v.* Neudeck, 30 Minn. 125, 14 N. W. 513; Mertens *v.* Kielmann, 79 Mo. 412.

Where the mortgaged property was not in esse at the time of the execution of the mortgage, the mortgagee cannot maintain trover against the mortgagor for a sale thereof until after the mortgagee has reduced the property to possession. Fleetham *v.* Reddick, 82 Hun (N. Y.) 390, 31 N. Y. Suppl. 342, 63 N. Y. St. 791.

23. *Dakota.*— Madison Nat. Bank *v.* Farmer, 5 Dak. 282, 40 N. W. 345.

Illinois.— Simmons *v.* Jenkins, 76 Ill. 479.

Maine.— Ingraham *v.* Martin, 15 Me. 373.

New York.— Hathaway *v.* Brayman, 42 N. Y. 322, 1 Am. Rep. 524; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32.

Ohio.— Curd *v.* Wunder, 5 Ohio. St. 92.

Vermont.— Calkins *v.* Clement, 54 Vt. 635.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 310.

Payment of mortgage debt pending an action of replevin by the mortgagee against the mortgagor entitled defendant to judgment. O'Connor *v.* Van Hoy, 29 Oreg. 505, 45 Pac. 762.

Where the mortgaged chattel was hired to the mortgagee in order to pay interest on the bond representing the mortgage debt and the mortgagor retook the property before the period for hiring had elapsed, it was held that the mortgagee might maintain trover for the property. Bowen *v.* Coker, 2 Rich. (S. C.) 13.

24. Matter of Hicks, 20 Mich. 280; White *v.* Phelps, 12 N. H. 382; Millar *v.* Allen, 10 R. I. 49.

For a mortgagor to take the property from an attaching officer by the appointment of a receiptor was held not to constitute a wrongful taking or detention by him, although the property remained in his house and was used by him. Simpson *v.* McFarland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602.

When removal constitutes conversion.— A removal of mortgaged chattels without the consent of the mortgagee, as required by the mortgage, is no conversion thereof, if there be no intent or act of placing them beyond his reach (Metcalf *v.* McLaughlin, 122 Mass. 84), as where lumber was removed to save it from injury by water and was subsequently burned (Smith *v.* Anderson, 70 Vt. 424, 41 Atl. 441), and *a fortiori* mere contemplated sales do not amount to a conversion (Jones *v.* Smith, 123 Ind. 585, 24 N. E. 368); but delivery of the property to a purchaser renders the mortgagor guilty of conversion (Dean *v.* Cushman, 95 Me. 454, 50 Atl. 85, 85 Am. St. Rep. 425).

gagee's interest after default in the condition of the mortgage will constitute a conversion.[25]

(II) *DEMAND.*[26] Although a mortgage stipulates that a mortgagee is entitled to possession after default, a demand for possession must be made on the mortgagor before replevin can be maintained against him.[27]

d. Against Purchaser at Execution Sale — (I) *IN GENERAL.* Replevin will lie by the mortgagee of chattels who is entitled to their immediate possession against a purchaser of the property at a sale on execution against the mortgagor,[28] or trover against a purchaser at an attachment sale.[29]

(II) *DEMAND.* It is not necessary to make a demand for the property before a mortgagee commences an action against one who purchases from the mortgagor,[30] except in those jurisdictions where a mortgage is regarded as merely giving a lien on the property.[31]

e. Effect of Mortgagor's Right to Possession. Although a mortgagee may sue a third person, such as an attaching officer, for injury to his reversionary interest while the mortgagor has a right to the possession of the mortgaged chattels for a definite term,[32] he cannot maintain a possessory action against a third person

25. Roach *v.* St. Louis Type Foundry, 21 Mo. App. 118. *Compare* Mattingly *v.* Paul, 88 Ind. 95, holding a mortgagor guilty of conversion when he agreed to pay the debt or deliver the chattel on a certain day and failed to do either.

26. **Demand for payment of a note** secured by chattel mortgage is not necessary before an action by the payee to secure possession of the chattels. Acme Harvester Co. *v.* Butterfield, 12 S. D. 91, 80 N. W. 170.

27. Mertens *v.* Kielmann, 79 Mo. 412; Monnot *v.* Ibert, 33 Barb. (N. Y.) 24; Roberts *v.* Norris, 67 Ind. 386. *Compare* Henby *v.* Forgy, 7 Ind. 284, where the mortgage provided that the mortgagor was to be entitled to possession till it was demanded by the mortgagee. *Contra,* Morris *v.* Rucks, 62 Miss. 76.

It is not necessary to demand possession of the property before bringing suit when the mortgagor has signified his intention of not complying with the demand (Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156), as where he sets up a verbal agreement that he was to be allowed to retain possession (Moore *v.* Hurtt, 124 N. C. 27, 32 S. E. 317). *Compare* Nordman *v.* Wilkins, 28 Ark. 191, holding that the continued use and possession by the mortgagor of chattels, after breach of condition or non-payment of the mortgage, was such adverse possession as would entitle the mortgagee to bring an action for the possession of the property without first having demanded the same.

28. Kannady *v.* McCarron, 18 Ark. 166; Mercer *v.* Tinsley, 14 B. Mon. (Ky.) 220; Lamb *v.* Johnson, 10 Cush. (Mass.) 126.

Foreclosure on part of the mortgaged property is no bar to an action by the mortgagee against a purchaser for the conversion of the balance. De Smet First Nat. Bank *v.* Northwestern Elevator Co., 4 S. D. 409, 57 N. W. 77.

29. Crocker *v.* Atwood, 144 Mass. 588, 12 N. E. 421, where the right to possession was obtained by the breach of a condition against levy caused by the attachment.

30. *Connecticut.*— Pease *v.* Odenkirchen, 42 Conn. 415.

Kansas.—Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751.

Maine.— Partridge *v.* Swazey, 46 Me. 414.

Minnesota.— Braley *v.* Barnes, 20 Minn. 435.

New York.— Keefer *v.* Greene, 16 N. Y. Suppl. 498, 41 N. Y. St. 452. But see Hathaway *v.* Brayman, 42 N. Y. 322, 1 Am. Rep. 524, holding that a mortgagee must exercise some of the rights conferred by the mortgage to entitle him to possession before suing a purchaser for conversion of the property.

Where the property was fraudulently secreted by a purchaser, no demand was held to be necessary before the mortgagee could bring an action to recover it. Boise *v.* Knox, 10 Metc. (Mass.) 40.

31. Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52; Sanford *v.* Duluth, etc., Elevator Co., 2 N. D. 6, 48 N. W. 434.

32. Benton *v.* McCord, 96 Ga. 393, 23 S. E. 392 (although the mortgagee had a mere lien); Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472; Forbes *v.* Parker, 16 Pick. (Mass.) 462 (where the officer did not pursue the proper statutory mode of attaching the property); Manning *v.* Monaghan, 23 N. Y. 539. *Compare* Hall *v.* Snowhill, 14 N. J. L. 8, holding that the mortgagee could bring an action on the case against a trespasser who seized the property while it was in the possession of the mortgagor.

A sale by a sheriff of the mortgaged property in parcels is a breach of his duty, because he is only entitled to sell the equity of redemption, and the mortgagee can sue the sheriff directly for such a sale and is not obliged to search out the purchasers of the various parcels and proceed against them. Harvey *v.* McAdams, 32 Mich. 472; Worthington *v.* Hanna, 23 Mich. 530; Manning *v.* Monaghan, 28 N. Y. 585 [*affirming* 10 Bosw. (N. Y.) 231]. But see Hull *v.* Carnley, 17 N. Y. 202, where the sheriff sold in parcels but no injury to the reversionary

before the end of the term during which the mortgagor is entitled to possession.[32] Where property seized by a sheriff while the mortgagor has a right to its possession is detained after that right ceases, the mortgagee can maintain replevin against the officer.[34]

2. DEFENSES.[35] The fact that the goods were taken by virtue of an execution against the mortgagor affords no justification,[36] and if defendant relies on the consent of the mortgagee to his dealing with the property,[37] he must show that

estate was caused thereby, and therefore no right of action accrued.

33. *Alabama.*—Heflin *v.* Slay, 78 Ala. 180; Elmore *v.* Simon, 67 Ala. 526.

Florida.— Barney Cavanaugh Hardware Co. *v.* Lewis, (Fla. 1901) 31 So. 270.

Illinois.— Dawes *v.* Rosenbaum, 179 Ill. 112, 53 N. E. 585 [*affirming* 77 Ill. App. 295].

Indiana.— Olds *v.* Andrews, 66 Ind. 147. But see Kackley *v.* State, 91 Ind. 437.

Kentucky.— McIsaacs *v.* Hobbs, 8 Dana (Ky.) 268, holding that instructions which did not submit to the jury the question of the right to possession were erroneous. But see Squires *v.* Smith, 10 B. Mon. (Ky.) 33; Fugate *v.* Clarkson, 2 B. Mon. (Ky.) 41, 36 Am. Dec. 589.

Maine.— Jones *v.* Cobb, 84 Me. 153, 24 Atl. 798; Pierce *v.* Stevens, 30 Me. 184. But see Foster *v.* Perkins, 42 Me. 168, holding that the right of possession of the mortgagor did not deprive the mortgagee of the right to take actual possession as against a wrongdoer.

Massachusetts.— Field *v.* Early, 167 Mass. 449, 45 N. E. 917.

Michigan.— Wilson *v.* Montague, 57 Mich. 638, 24 N. W. 851.

Minnesota.— Kellogg *v.* Anderson, 40 Minn. 207, 41 N. W. 1045, where the form of the action was claim and delivery.

Mississippi.— Buck *v.* Payne, 52 Miss. 271.

Montana.— Laubenheimer *v.* McDermott, 5 Mont. 512, 6 Pac. 344.

Nebraska.— Hill *v.* Campbell Commission Co., 54 Nebr. 59, 74 N. W. 388; Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231.

New York.— Goulet *v.* Asseler, 22 N. Y. 225; Hull *v.* Carnley, 17 N. Y. 202, 11 N. Y. 501 [*reversing* 2 Duer (N. Y.) 99]; Martin *v.* Lewinski, 54 N. Y. App. Div. 573, 66 N. Y. Suppl. 995; Randall *v.* Cook, 17 Wend. (N. Y.) 53. *Compare* Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32, where plaintiff failed because his title was founded on a mortgage not yet mature, by the terms of which the mortgagor was entitled to possession till default. But see Livor *v.* Orser, 5 Duer (N. Y.) 501; Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434.

Ohio.— Curd *v.* Wunder, 5 Ohio St. 92. *Compare* Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306, holding that in the absence of contract the mortgagee would not be entitled to possession.

Wisconsin.— Shinners *v.* Brill, 38 Wis. 648.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 316.

Contra.— *Arkansas.*— McLeod *v.* Bernhold, 32 Ark. 671.

Connecticut.— Ashmead *v.* Kellogg, 23 Conn. 70.

Missouri.— National Bank of Commerce *v.* Morris, 114 Mo. 255, 21 S. W. 511, 35 Am. St. Rep. 754, 19 L. R. A. 463.

Oklahoma.— Hixon *v.* Hubbell, 4 Okla. 224, 44 Pac. 222.

South Carolina.— Levi *v.* Legg, 23 S. C. 282; Bellune *v.* Wallace, 2 Rich. (S. C.) 80.

South Dakota.— First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

Texas.— Fouts *v.* Ayres, 11 Tex. Civ. App. 338, 32 S. W. 435.

A remedy in equity would be open to the mortgagee when mortgaged chattels were seized under a writ against the mortgagor before his right of possession terminated. Curd *v.* Wunder, 5 Ohio St. 92.

34. Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751. *Compare* Ament *v.* Greer, 37 Kan. 648, 16 Pac. 102, where the same conclusion was reached, although the mortgagee never demanded of the mortgagor that he fulfil his contract and replevin had been brought against the sheriff by a junior mortgagee.

The detention by the attaching creditor after default and demand is, as against the mortgagee, a conversion of the property. Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434.

35. **The invalidity of the mortgage against an assignee** in bankruptcy is no defense for a third person who has been sued by the mortgagee for a conversion of the mortgaged property. Young *v.* Kimball, 59 N. H. 446.

36. Stringer *v.* Davis, 35 Cal. 25; Cotton *v.* Marsh, 3 Wis. 221.

An absence of proper record may be shown by the officer who is sued in conversion for attaching the mortgaged property, as where the instrument was withdrawn from the files before it was recorded. Jones *v.* Parker, 73 Me. 248.

The diligence of the sheriff in procuring purchasers for the mortgaged property will not prevent his previous seizure thereof from giving the mortgagee a right to bring replevin against him. Kay *v.* Noll, 20 Nebr. 380, 30 N. W. 269.

37. **The mortgagee's parol license** to sell personalty mortgaged by instrument under seal is a good defense in conversion by the mortgagor against the buyer. Hunt *v.* Allen, 73 Vt. 322, 50 Atl. 1103. *Contra*, Clark *v.* Houghton, 12 Gray (Mass.) 38. See also Harvey *v.* McAdams, 32 Mich. 472, holding that no parol understanding between mortgagor and mortgagee regarding the possession of mortgaged chattels can afford protection to third persons who have unlawfully converted

the condition on which such consent was given has been complied with.[38] The defense of payment[39] may be shown by proving an application of property in satisfaction of the debt;[40] but in order that payment of the mortgage debt shall constitute a defense to an action brought by a mortgagee against a third person for the mortgaged chattels, it must be shown that payment was made before the suit was instituted,[41] and for the same reason it is inadmissible to show irregularities in the foreclosure of the mortgage which occurred after the commencement of the suit.[42] An officer who has levied on the mortgaged property under a writ against the mortgagor cannot defend by showing property in a third person,[43] and

them. *Compare* Partridge *v.* Minnesota, etc., Elevator Co., 75 Minn. 496, 78 N. W. 85, where it was held to be error to direct a verdict for plaintiff, when there was evidence that he as mortgagee had expressly or impliedly authorized the sale of the mortgaged chattels.

38. Norris *v.* McCanna, 29 Fed. 757, where the mortgagee consented to a levy on the property provided his rights were recognized, and the mortgagee was held entitled to bring trover where defendant levied without indicating that there was a mortgage lien on the property.

39. **Full payment of the mortgage note** is a defense in an action for conversion by the mortgagee against a purchaser of the property. Stein *v.* Hastings, 45 Minn. 196, 47 N. W. 968.

A mere voluntary donee of the mortgagor who is sued in conversion by the mortgagee is restricted to the defenses which were open to the mortgagor, among which is proof of payment of the mortgage debt. Sanders *v.* Knox, 57 Ala. 80.

Recovery by the mortgagor on a bond given by a defendant who has converted mortgaged chattels and conditioned for their return will not prevent the mortgagee from maintaining an action of conversion against the obligor in the bond. Graingers *v.* Lindsay, 123 N. C. 216, 31 S. E. 473.

40. Place *v.* Grant, 9 Mich. 42, where five of nine notes secured by a mortgage had been assigned and the assignee brought trover against an officer who levied on the property. Defendant was permitted to show that, prior to the institution of the suit, plaintiff had applied sufficient of the property in payment to satisfy his share in the mortgage notes. *Compare* Ward *v.* Henry, 19 Wis. 76, 88 Am. Dec. 672, where defendant claimed that sufficient of the mortgaged goods had been left in plaintiff's possession to satisfy the mortgage debt, and plaintiff was allowed to show that part of the goods thus left with him were the property of a third person.

An application is essential, and it is no defense for defendant to show that there is sufficient property other than that converted to which plaintiff could resort under his mortgage. Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879; Kilpatrick-Koch Dry-Goods Co. *v.* Strauss, 45 Nebr. 793, 64 N. W. 223; Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83; Coughran *v.* Sandback, 9 S. D. 483, 70 N. W. 644. *Compare* Close *v.* Hodges, 44 Minn. 204, 46 N. W. 335, holding that in an action of trover against a purchaser it is immaterial that the mortgage covers other property not shown to have come to the possession of the mortgagee or to be within his reach.

That an agent has turned over the proceeds of a sale of mortgaged property to his principal is no defense to an action for conversion by the mortgagee. Hughes *v.* Abston, 105 Tenn. 70, 58 S. W. 296.

41. Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751; Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630. *Compare* Hyde *v.* Shank, 93 Mich. 535, 53 N. W. 787, where a land contract was transferred to the mortgagee in payment of the mortgage debt, but the mortgagee was allowed to sue a third person for the property covered because the land contract was not fully paid for.

Part payment of the mortgage debt will not defeat an action of replevin by the mortgagee to recover possession of the property from a third person. Machette *v.* Wanless, 1 Colo. 225; Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97.

42. Smith *v.* Phelan, 40 Nebr. 765, 59 N. W. 562. But see Hibbard *v.* Zenor, 82 Iowa 505, 49 N. W. 63, where a mortgagee suing attaching creditors of the mortgagor was allowed to show payment of certain lien creditors after the institution of his suit.

A subsequent sale of the chattel by the mortgagor to defendant is not a defense to an action of trover by the mortgagee who has established title in himself. Clark *v.* Houghton, 12 Gray (Mass.) 38.

43. **Defendant may set up his own title** in an action against him by a mortgagee for an alleged conversion of the mortgaged chattels, as by showing that he delivered the property to the mortgagor under an agreement that title should not pass till it was paid for. Holman *v.* Lock, 51 Ala. 287. *Compare* Chafey *v.* Mathews, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558, where the property had been delivered to the mortgagor on condition that title should not pass till certain payments were made.

A discharge in bankruptcy may be shown to be invalid, so that an execution issued prior thereto would be a lien on the property and would take precedence over a subsequent mortgage, thus entitling the sheriff to defend an action brought by the mortgagee for the mortgaged property. Hale *v.* Sweet, 40 N. Y. 97.

Possession given without authority.— Where a sheriff is sued in conversion by a

this rule seems to be equally true of a third person other than an officer who has so levied on the property.[44]

3. Form of Action.[45] In passing upon the right of a mortgagee to bring a possessory action it has been held that he could bring trover as well as trespass[46] — for trespass cannot be maintained for a taking of the property from the possession of the mortgagor[47] — and that he could elect whether to replevy the property or sue for conversion.[48] But the mortgagee cannot maintain assumpsit against the levying officer for the value of the mortgaged chattels,[49] although such a remedy has been held proper against an execution creditor to whom the proceeds from the execution sale have been turned over.[50]

mortgagee whose mortgage is unrecorded, he cannot defend by setting up that the assignee of the mortgagor who gave the mortgagee possession of the property had no authority so to do. Adlard *v.* Rodgers, 105 Cal. 327, 38 Pac. 889.

The source from which the mortgagor procured the mortgaged property is immaterial in an action of replevin by a mortgagee against a levying creditor. Darnall *v.* Bennett, 98 Iowa 410, 67 N. W. 273.

Where the claim of the third person has been assigned to defendant, it seems that he may properly set it up as a defense to an action by the mortgagee to recover the property. Bradley *v.* Hargadine-McKittrick Dry-Goods Co., 96 Fed. 914, 37 C. C. A. 623. But see Moore *v.* Prentiss Tool, etc., Co., 133 N. Y. 144, 30 N. E. 736, 44 N. Y. St. 68 [*affirming* 59 N. Y. Super. Ct. 516, 15 N. Y. Suppl. 150, 39 N. Y. St. 361], holding that defendant could not set up as a defense a title acquired by foreclosure of a first mortgage after the institution of suit by the second mortgagee.

44. Marks *v.* Robinson, 82 Ala. 69, 2 So. 292. *Compare* Barry *v.* Bennett, 7 Metc. (Mass.) 354, where title to the property had become absolute in the first mortgagee by default, but the evidence warranted the jury in finding that he had waived his right to hold the property, and the second mortgagee was not estopped by recitals of postponement in his mortgage.

45. **Relief in equity.**— After a court of equity has given judgment for a mortgagee in his suit to establish a mortgage lien on chattels, it is proper for the court to compensate the mortgagee for deterioration in the property by reason of its being removed and converted by defendant. Dunn *v.* Hastings, 54 N. J. Eq. 503, 34 Atl. 256.

It was properly held a proceeding in equity where a prior mortgagee sought to have an accounting, to ascertain the priority of liens, and to charge a junior encumbrancer as trustee. Stockham Bank *v.* Alter, 61 Nebr. 359, 85 N. W. 300.

46. Sanders *v.* Vance, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167.

47. Skiff *v.* Solace, 23 Vt. 279; Strect *v.* Hamilton, 5 U. C. Q. B. O. S. 658. *Contra*, Holmes *v.* Sprowl, 31 Me. 73. And *compare* Halsey *v.* Woodruff, 9 Pick. (Mass.) 555, where the mortgaged chattel was an unoccupied building and it was held that the mortgagee was in constructive possession so that he could maintain trespass. See also Brackett *v.* Bullard, 12 Metc. (Mass.) 308, holding that a mortgagee with an immediate right of possession could maintain trespass against one taking the goods from the possession of the mortgagor, although he had not given the notice of his intention to foreclose which was required by statute.

48. Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104; Williams *v.* Dobson, 26 S. C. 110, 1 S. E. 421.

49. Carpenter *v.* Graham, 42 Mich. 191, 3 N. W. 974, 46 Mich. 531, 9 N. W. 841; Randall *v.* Highbee, 37 Mich. 40. But see Stevens *v.* Whittier, 43 Mich. 376, where a mortgagee agreed that a creditor might attach and sell mortgaged goods provided he would pay off the mortgage with the proceeds, and it was held that the mortgagee could maintain assumpsit against the levying officer to the extent of the mortgage debt. And *compare* Appleton *v.* Bancroft, 10 Metc. (Mass.) 231, where goods under attachment had been mortgaged, and after the attachment suit had been discontinued, the mortgagee was allowed to bring assumpsit against an officer who held in his hands the proceeds of a sale of the attached property.

50. Glasgow *v.* Ridgeley, 11 Mo. 34, holding that a first mortgagee could not recover the amount due on a second mortgage in such an action.

No right against proceeds.— Where property subject to a prior chattel mortgage is seized and sold under a distress warrant for rent, the mortgagee has no cause of action for the proceeds of such sale; his remedy being against the property in the hands of the purchasers, who take subject to the mortgage. Jackson *v.* Merchants' Hotel Assoc., 37 S. C. 562, 16 S. E. 713 [*following* Paysinger *v.* Shumpard, 1 Bailey (S. C.) 237].

Against the mortgagor, it has been held that a demand for possession of the property and for judgment for the debt secured could be joined in an action of claim and delivery under a chattel mortgage. Kiger *v.* Harmon, 113 N. C. 406, 18 S. E. 515.

An action on a bond given by a levying officer as a substitute for mortgaged property can be maintained when the officer has denied the mortgagee's title, and it cannot be urged in defense that the mortgagees have a remedy by foreclosure. Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530.

4. PARTIES.[51] A mortgagee entitled to possession may maintain trover against a third person without making the mortgagor a party,[52] although he may do so if he wishes,[53] and it has been held not to be essential to join all of various purchasers of the property at an execution sale in a suit against them for conversion.[54] The owners of separate mortgages on the same chattel cannot join as plaintiffs in an action against an attaching creditor of the mortgagor,[55] unless they are of equal priority and the mortgagees take as tenants in common.[56] One of several joint mortgagees may bring replevin against the mortgagor without joining the others as plaintiffs,[57] or all may join, even though the debts secured are owing to them separately.[58] The interests of a mortgagor and mortgagee in the mortgaged property are several and therefore they cannot ordinarily join as plaintiffs in an action for the conversion of the mortgaged property.[59]

51. Right of intervention.— An execution creditor may cause himself to be made a party to a suit against a sheriff levying his writ even after appeal, and by counter-claim therein may set up and enforce his right to proper equitable relief. Morgan *v.* Spangler, 20 Ohio St. 38. A mortgagee entitled to possession may intervene in an action brought by a third person against the mortgagor, although plaintiff obtained possession by giving bond. Martin *v.* Thompson, 63 Cal. 3. The beneficiary in a trust mortgage has also been allowed to intervene, although his interests would be fully protected by the trustee. Boltz *v.* Engelke, (Tex. Civ. App. 1897) 43 S. W. 47. But where a mortgagee is bringing replevin against a mortgagor, a subsequent mortgagee cannot intervene because he would not be entitled to a judgment against the mortgagor or to an adjudication regarding possession against plaintiff. Cassidy *v.* Harrelson, 1 Colo. App. 458, 29 Pac. 525. *Compare* Smith *v.* Moore, 49 Ark. 100, 4 S. W. 282, holding that a prior mortgagee who had become surety on a forthcoming bond for the mortgagor, when the latter was sued by a second mortgagee, was entitled to be admitted as a party to the suit.

No duty to intervene rests on a prior mortgagee when a subsequent one brings replevin for the mortgaged property, but he may institute a separate action under his own mortgage. Smith *v.* Simper, 15 Ohio Cir. Ct. 375.

Capacity of plaintiff mortgagee to bring action in the state courts to recover mortgaged property cannot be questioned by interveners, as they are in effect plaintiffs themselves. Pitts Agricultural Works *v.* Baker, 11 S. D. 342, 77 N. W. 586.

52. Howard *v.* Hutchinson First Nat. Bank, 44 Kan. 549, 24 Pac. 983; Howard *v.* Burns, 44 Kan. 543, 24 Pac. 981; Boydston *v.* Morris, 71 Tex. 697, 10 S. W. 331. *Compare* Williams *v.* Beasley, 5 Tex. Civ. App. 408, 25 S. W. 321, where the mortgagor was insolvent and not a resident of the state and it was held unnecessary to join him in an action against a third person for conversion of the property. *Contra*, Anderson *v.* Aiken, 11 Rich. Eq. (S. C.) 232. See also Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130, where defendant, sued for conversion of the mortgaged property, set up a lien thereon for its keep, and demanded that it be sold to satisfy such lien, and it was held that the mortgagor was a necessary party in order to grant defendant such relief.

53. Cobb *v.* Barber, (Tex. 1898) 47 S. W. 963.

54. Manning *v.* Monaghan, 10 Bosw. (N. Y.) 231, where the mortgagee had made diligent search and was unable to find the other purchaser.

55. Wehlen *v.* Macke, 9 Ohio Dec. (Reprint) 565, 15 Cinc. L. Bul. 125. But see Densmore *v.* Mathews, 58 Mich. 616, 26 N. W. 146, where mortgaged chattels were held by a first mortgagee to be disposed of for the benefit of himself and a second mortgagee and the two were allowed to join in an action of trespass against an officer who had wrongfully levied on part of the property.

56. Howard *v.* Chase, 104 Mass. 249, where three mortgages were described as being alike in time and it was added that "neither is to have precedence of the other, but to be alike security to each" mortgagee.

57. Watson *v.* Mead, 98 Mich. 330, 57 N. W. 181. *Compare* Sloan *v.* Thomas Mfg. Co., 58 Nebr. 713, 79 N. W. 728, holding that persons secured by the same mortgage could maintain separate actions to recover possession of the property from a wrongful taker thereof.

58. Wheeler *v.* Nichols, 32 Me. 233.

The assignee of one partner's interests in a mortgage belonging to a firm may properly join with the remaining partner in an action for the conversion of the property covered by the mortgage. Keith *v.* Ham, 89 Ala. 590, 7 So. 234.

59. Lyons *v.* Geddes, 8 Ohio Dec. (Reprint) 197, 6 Cinc. L. Bul. 247. But see Evans *v.* St. Paul Harvester Works, 63 Iowa 204, 18 N. W. 881, holding that where a mortgagee had been deprived of his security by levy he should be joined with the mortgagor as co-plaintiff in an action for damages.

Mortgage deed of trust.— Where the trustee in a trust mortgage is invested with full power to administer the trust property, neither the heirs nor the assignees of the beneficiaries are necessary parties in an action by the trustee in regard to the property (Sullivan *v.* Thurmond, (Tex. Civ. App. 1898) 45 S. W. 393), for the trustee under a trust deed and not the beneficiary is the proper person to bring a suit against a sub-

5. PLEADING — a. Complaint. In an action by a mortgagee of chattels against a third person for their wrongful seizure, it has been held that plaintiff could recover upon general allegations of title and right to immediate possession.[60] An allegation in the complaint of the non-payment of the mortgage is not necessary,[61] neither is an allegation that the mortgage was executed in good faith,[62] and a default in the condition of the mortgage need not be alleged specifically when a default is clearly implied from the facts stated.[63]

b. Answer. While it has been held that a mortgage is open to all attacks by defendant who is sued for converting the mortgaged chattels without the necessity of a plea disclosing the ground for attack,[64] there is also authority to the effect that a sheriff must plead as well as prove that the claimant's mortgage was fraudulent.[65]

sequent mortgagee who has sold the property (Pollard *v.* Thomas, 61 Miss. 150).

60. Hixon *v.* Hubbell, 4 Okla. 224, 44 Pac. 222; Pyeatt *v.* Powell, 51 Fed. 551, 10 U. S. App. 200, 2 C. C. A. 367. See also Darnall *v.* Bennett, 98 Iowa 410, 67 N. W. 273, where there was an allegation of general ownership but the mortgages were set out in the complaint and it was held proper to admit the mortgages in evidence to prove the alleged ownership.

Averments as to record.— Where an unrecorded mortgage was void even against those who had actual notice of it, an allegation in an action of replevin against a third person that defendant had notice of the mortgage will not take the place of an averment of record (Diggs *v.* Way, 22 Ind. App. 612, 51 N. E. 429, 54 N. E. 412), and when the time has come for refiling plaintiff's mortgage, a complaint is insufficient unless it avers that the mortgage was refiled (Cope *v.* Minnesota Type Foundry Co., 20 Mont. 67, 49 Pac. 387). *Compare* Morris *v.* Ellis, 16 Ind. App. 679, 46 N. E. 41, holding that an averment that a mortgage was recorded in the district where the firm executing it did business was held insufficient to show that the mortgage was recorded where the partners resided.

Failure to show a right to possession in the mortgagee is a fatal defect in a complaint in replevin against a third person. Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231.

The mortgagee must allege a special property and a general allegation of a right to possession is held not to be sufficient. Kennett *v.* Peters, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274. But a right to possession is sufficiently shown by allegations that a mortgage was given to secure payment of certain notes and that a part of such indebtedness is due and unpaid. Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933. *Compare* Hill *v.* Campbell Commission Co., 54 Nebr. 59, 74 N. W. 388, holding that the mortgagee suing a third person in conversion must plead the facts which create his special ownership of the property and show his right to the possession of the same.

The precise nature of the interest of the mortgagee in the property need not be shown, for that is a matter of evidence merely. Harvey *v.* McAdams, 32 Mich. 472; J. I. Case Threshing Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324. *Compare* Dodds *v.* Johnson, 3 Thomps. & C. (N. Y.) 215, holding that plaintiff could allege ownership and then give the mortgage and other facts in evidence to show his right of possession.

Variance.— There is no variance where plaintiff alleges an immediate right to the possession of property and then proves a breach of a condition in a mortgage that in case of sale without the consent of the mortgagee the latter should be entitled to possession. Conwell *v.* Jeger, 21 Ind. App. 110, 51 N. E. 733. There is variance where the complaint alleges that defendant "received and purchased" the property and the proof shows that he did not purchase for himself but as agent for others; but it was error not to allow plaintiff to amend his complaint. Fields *v.* Karter, 121 Ala. 329, 25 So. 800.

Form of complaint in trespass by a mortgagee is set out in Karter *v.* Fields, 130 Ala. 430, 30 So. 504.

61. Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313; Strickland *v.* Minnesota Type-Foundry Co., 77 Minn. 210, 79 N. W. 674; Marcum *v.* Coleman, 8 Mont. 196, 19 Pac. 394, where the complaint showed that the mortgage debt was not due at the time it was filed.

62. Schneider *v.* Anderson, 77 Minn. 124, 79 N. W. 603 (where the doctrine is restricted to cases prior to the passage of Minn. Laws (1897), c. 292); Ensign *v.* Roggencamp, 13 Nebr. 30, 12 N. W. 811.

63. Rodgers *v.* Graham, 36 Nebr. 730, 55 N. W. 243; Malcom *v.* O'Reilly, 89 N. Y. 156 [*affirming* 46 N. Y. Super. Ct. 222].

64. Strohm *v.* Hayes, 70 Ill. 41, where the mortgage was attacked as fraudulent. *Compare* Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834, 60 Mich. 332, 27 N. W. 524, holding that under the general issue a sheriff could attack the mortgage for fraud or set up a title in himself as bailee or absolute owner.

65. Frisbee *v.* Langworthy, 11 Wis. 375. *Compare* Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823, holding that evidence of sales by the mortgagor of the mortgaged property was inadmissible to show misappropriation, when there was no allegation that the mortgage was fraudulent or void.

An answer setting up a change in the maturity of the mortgage debt must show that

6. Evidence — a. Burden of Proof. A mortgagee suing for the conversion of mortgaged property makes out a *prima facie* case by proving the execution of a chattel mortgage valid on its face, the possession of the property by the mortgagor, the record of the mortgage, and the maturity of the debt.[66] If defendant sets up payment of the mortgage the burden of proving this defense is on him,[67] and so is the burden of showing that he is entitled to be subrogated to a landlord's lien for advances.[68] The question whether the mortgage was given to defraud creditors or for a valuable consideration is for the jury,[69] and the burden of establishing good faith is sometimes put upon plaintiff by statute,[70] or by the particular circumstances of the case.[71]

b. Admissibility[72] — (i) *In General.* The chattel mortgage statutes of another state are admissible when properly pleaded,[73] but parol evidence to establish the relation of pledgor and pledgee is not admissible after the mortgage has

such a change would affect plaintiff's lien or that it was not made with the consent of all parties to correct a mistake, or it will be insufficient. Hemstreet *v.* Kutzner, 58 Ind. 319.

A plea failing to state the character of a prior lien which is claimed to be valid against the mortgage, how it was obtained, or that the mortgagee had notice of it is bad on demurrer. Collier *v.* White, 97 Ala. 615, 12 So. 385.

Where defendant failed to plead a release of the mortgage, the mortgagee bringing the suit is relieved from the necessity of pleading that the release was executed by mistake. Ross *v.* Strahorn-Hutton-Evans Commission Co., 18 Tex. Civ. App. 698, 46 S. W. 398.

66. Turner *v.* Langdon, 85 Mo. 438. But see Conwell *v.* Jeger, 21 Ind. App. 110, 51 N. E. 733, holding that the burden was on the mortgagee to show that the purchase by defendant was without his consent.

The burden of showing record of the mortgage within a statutory period of ten days has been held to be on the mortgagee who is suing an execution creditor of the mortgagor. Matlock *v.* Straughn, 21 Ind. 128; Chenyworth *v.* Daily, 7 Ind. 284.

Proof of mortgagor's title.— There is no presumption that title to the property described in the mortgage was in the mortgagor at the time the instrument was made (Union Bank *v.* First Nat. Bank, 2 Mo. App. Rep. 990), but the contrary seems to be true where defendant is a subsequent vendee of the mortgagor (Brooks *v.* Briggs, 32 Me. 447).

67. Gardner *v.* Roach, 111 Iowa 413, 82 N. W. 897; Brooks *v.* Briggs, 32 Me. 447. *Compare* Miller *v.* McElwain, 52 Kan. 91, 34 Pac. 396, holding that where a purchaser from the mortgagor who is sued in conversion claims that the mortgagee has appropriated sufficient of the property to satisfy the mortgage debt he has the burden of proving such claim.

The production of the mortgage has been held sufficient *prima facie* proof that the debt secured thereby was unpaid. Talbott *v.* Parker, 15 S. C. 617.

68. Gerson *v.* Norman, 111 Ala. 433, 20 So. 453.

69. Bishop *v.* Cook, 13 Barb. (N. Y.) 326.

70. Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296, holding that proof by plaintiff that the mortgage was given to secure an actual indebtedness and the amount thereof is *prima facie* evidence of good faith, in the absence of indications of fraud upon the face of the mortgage, and that plaintiff has not the burden of negativing other issues which might show fraud if affirmatively established.

71. Hogan *v.* Atlantic Elevator Co., 66 Minn. 344, 69 N. W. 1 (where defendant purchased the property covered by the mortgage in open market and paid for it); Fitzpatrick *v.* Hanson, 55 Minn. 195, 56 N. W. 814 (where defendant had purchased the rights of his tenant in certain land and had canceled the lease, and plaintiff had taken his mortgage on the crop before it was planted). *Compare* Woolsey *v.* Jones, 84 Ala. 88, 4 So. 190, where the mortgagee of a crop sued a third person for converting it, and it was held proper to require plaintiff to prove that the cotton in question was raised by the mortgagor.

To satisfy the burden put on plaintiff to prove good faith in the execution of his mortgage, the evidence offered by him must be clear and convincing, and unless such evidence is produced a verdict in favor of defendant will not be set aside on the ground that it is against evidence. Fitzgerald *v.* Meyer, 37 Nebr. 50, 55 N. W. 296.

72. Receipts issued to a mortgagor have been held to be admissible in an action by a mortgagee against a third person, although there was a mistake in the name of the mortgagor. Holst *v.* Harmon, 122 Ala. 453, 26 So. 157.

Parol agreements regarding possession.— It is allowable to prove a parol agreement regarding the right to possession of mortgaged property in order to defeat an action by the mortgagee against a third person (Pierce *v.* Stevens, 30 Me. 184), or to entitle the mortgagee to an immediate right to possession, even though the agreement was made subsequent to a levy on the property (Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661 [*following* 64 Mich. 488, 31 N. W. 461]).

73. Handley *v.* Harris, 48 Kan. 606, 29 Pac. 1145, 30 Am. St. Rep. 322, 17 L. R. A. 703.

been declared invalid.[74] When defendant alleges that a mortgage is fraudulent it is not error to permit plaintiff to prove the consideration therefor.[75]

(II) *ADMISSIONS.* Admissions by a mortgagor may under proper circumstances be binding on a mortgagee on the doctrine of agency[76] or on purchasers from the mortgagor under the principles of privity.[77]

(III) *THE MORTGAGE DOCUMENT.* After the execution of a chattel mortgage is properly proved[78] it is evidence of the amount due from the mortgagor to the mortgagee[79] and of the mortgagee's special ownership in the mortgaged property.[80] An unrecorded mortgage is admissible when the mortgagee has taken possession of the property,[81] and where the opposing party had actual notice of the mortgage the instrument is admissible in evidence, although it does not contain a sufficient description to identify the chattels.[82]

c. Proof of Mortgagee's Title. When an alleged mortgagee sues an officer for levying on mortgaged property, he must produce the note and mortgage in evidence or account for their absence and prove their contents;[83] the alleged

74. Marsh *v.* Wade, 1 Wash. 538, 20 Pac. 578.

75. Knapp *v.* Gregory, 20 N. Y. Suppl. 21, 47 N. Y. St. 408. *Compare* Kackley *v.* State, 91 Ind. 437, holding that where a sheriff sold mortgaged chattels under an execution on a subsequent lien, and delivered possession to the purchaser without requiring him to comply with the conditions of the mortgage, and the mortgagee brought an action for damages, and defendants insisted that the mortgage was executed without consideration, plaintiff may show that the mortgage was given him to secure him in part as the mortgagor's surety and in part for money loaned, and may read in evidence notes made by him in discharge of such obligation, although not paid by him until after the commencement of the suit.

Evidence as to the amount of grain which was included under a mortgage is properly admitted on the question of damages in an action against a third person for conversion. Ochsenreiter *v.* George C. Bagley Elevator Co., 11 S. D. 91, 75 N. W. 822.

Evidence showing plaintiff was only a mortgagee.— Where plaintiff had advertised property and given notice of foreclosure, the mortgage and notice of sale thereunder are admissible in favor of defendant to show that plaintiff was not an absolute owner but merely a mortgagee. Sweetman *v.* Ramsey, 22 Mont. 323, 56 Pac. 361.

Failure of consideration is not shown by evidence tending to establish that the mortgage was given as a cover, and therefore such evidence is not admissible. Bufford *v.* Raney, 122 Ala. 565, 26 So. 120.

Officer's return as evidence.— In the absence of any showing that the disposition of the property was material, the exclusion of the officer's return as evidence of what he did with the property was proper. Putnam *v.* Osgood, 52 N. H. 148.

76. Haenschen *v.* Luchtemeyer, 49 Mo. 51, where the mortgagor was the agent of the mortgagee to record the mortgage.

77. Clark *v.* Houghton, 12 Gray (Mass.) 38, where it was held that admissions by an alleged chattel mortgagor showing that he regarded it as a subsisting instrument are not binding on persons claiming under the alleged mortgagor otherwise than as purchasers, unless such admissions are brought home to them.

78. Askew *v.* Steiner, 76 Ala. 218, holding that execution must be proved by the production of the subscribing witnesses, or a proper foundation must be laid for proof by secondary evidence; and that an admission by the maker of the instrument not made in open court was not a substitute for such proof.

Objections must be specific and show the precise defect relied on for the exclusion of a copy of the mortgage document from the consideration of the jury as evidence. Evans *v.* Sprague, 30 Wis. 303.

79. Mantonya *v.* Martin Emerich Outfitting Co., 69 Ill. App. 62.

80. Scrafford *v.* Gibbons, 44 Kan. 533, 24 Pac. 968, although the dates on the mortgage and notes were not the same, when it is shown that they were executed at the same time.

81. State *v.* Flynn, 56 Mo. App. 236.

82. Ordway *v.* Kittle, 83 Iowa 752, 49 N. W. 1022; Plano Mfg. Co. *v.* Griffith, 75 Iowa 102, 39 N. W. 214. *Compare* Tompkins *v.* Henderson, 83 Ala. 391, 3 So. 774, where there was a slight misdescription of the property and strong evidence that defendant had actual notice of plaintiff's claim and also evidence to show that the property in controversy was the property covered by the mortgage, and it was held that the question of identity was for the jury.

A correct description of the property is immaterial when the mortgagee's action is against one who claims adversely to the mortgagor and the mortgagor has admitted the validity of the mortgage. Hamilton *v.* Miller, 46 Kan. 486, 26 Pac. 1030.

A prior mortgage may be given in evidence by a mortgagee who has received an assignment thereof, although it does not mention a particular chattel in controversy. Clark *v.* Houghton, 12 Gray (Mass.) 38.

83. Flynn *v.* Hathaway, 65 Ill. 462; Huls *v.* Kimball, 52 Ill. 391; Hendrie *v.* Canadian Bank of Commerce, 49 Mich. 401, 13 N. W. 792; Young *v.* Kimball, 59 N. H. 446. But

right of defendant to the property must be traced back to the mortgagor;[84] and it has been held necessary to show the validity of the mortgage before any question can be raised as to the soundness of the attachment claim.[85]

7. INSTRUCTIONS. The fact that the court in referring to plaintiff in its instructions used the word "owner" is immaterial,[86] and a failure to charge in regard to a point not in issue is not a ground for a new trial.[87]

8. VERDICT. Where a third person is sued by a mortgagee for conversion, a verdict is sufficient when the jury find for the successful party generally,[88] unless there are several mortgages given under different circumstances.[89]

9. DAMAGES — a. In General. In an action by the mortgagee against a third person, such as an attaching officer, for conversion of the mortgaged chattels, the measure of damages is usually the amount due on the mortgage debt plus interest

see Talbott *v.* Parker, 15 S. C. 617, where it was held that a mortgagee being the owner of the property need not produce the mortgage notes to enable him to recover in replevin against a levying officer.

The mortgage note need not be produced when the mortgage was given to indemnify the mortgagee from liability on a note which he indorsed as surety, for such a note is not presumed to be in his possession and the burden is on the party contesting the mortgage to show that there is no such note (Davis *v.* Mills, 18 Pick. (Mass.) 394), or when the mortgage fully describes the debt and the action is against a third person (Quinn *v.* Schmidt, 91 Ill. 84). See also Hill *v.* Merriman, 72 Wis. 483, 40 N. W. 399, where a mortgagee was sued for converting the mortgaged chattels, and it was held that he could defend by introducing the mortgage in evidence without producing the note it was given to secure.

Against one claiming adversely to the mortgagor the proof of the execution and delivery of a mortgage is not sufficient to enable a mortgagee to maintain an action of replevin, because the giving of the mortgage was *res inter alios acta*. Gibbs *v.* Childs, 143 Mass. 103, 9 N. E. 3.

Where neither party showed payment of a valuable consideration, a mortgagee bringing replevin against an execution purchaser of the property mortgaged was allowed to prevail. Thompkins *v.* Henderson, 83 Ala. 391, 3 So. 774.

84. Wilkes *v.* Gates, 68 Miss. 263, 8 So. 847.

85. Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660. But see Boynton *v.* Warren, 99 Mass. 172, where mortgaged property was attached and the mortgagee served a notice of his claim on the officer, but the attachment was abandoned within ten days. It was held that the mortgagee could maintain replevin against the officer levying the attachment, although the issue as to the validity of the mortgage raised in the action against the mortgagor had not been determined.

Effect of intervening assignment.—Although a mortgage is invalid against levying judgment creditors so that the mortgagee could not maintain replevin against the officer making the levy, when there has been an assignment passing title to the assignee, the sheriff cannot set up that the mortgage was fraudulent as to creditors, for that would not justify him in taking the property from plaintiff, whose possession would entitle him to maintain replevin. Guilford *v.* Mills, 57 Hun (N. Y.) 493, 11 N. Y. Suppl. 261, 33 N. Y. St. 37. *Compare* McDonald *v.* Bowman, 40 Nebr. 269, 58 N. W. 704 [*overruling* 35 Nebr. 93, 52 N. W. 828], holding that a sheriff could not defend against a replevin suit by a mortgagee by showing that the property was sufficient to satisfy both the mortgage and attachment claim, without regard to the *bona fides* of the mortgage.

Mortgagee need not show a legal title to the property in order to maintain an action of conversion against a purchaser who bought property with notice of the equitable lien thereon. Hurst *v.* Bell, 72 Ala. 336; Swinney *v.* Gouty, 83 Mo. App. 549. *Compare* Sloan *v.* Wilson, 117 Ala. 583, 23 So. 145, holding that a mortgagee of one partner's interest in firm property acquired a legal title to the property set off to his mortgagor on dissolution of the firm and could maintain detinue against a purchaser.

86. Hardy *v.* Graham, 63 Mo. App. 40. *Compare* Molineux *v.* Coburn, 6 Gray (Mass.) 124, where the court was held to be justified in refusing to instruct that plaintiff must show that all the property replevied was taken by defendants, and in instructing that the jury must be satisfied that the property replevied was included in the mortgage.

87. Potter *v.* Payne, 21 Conn. 361, holding that a stranger had no right to interfere between mortgagor and mortgagee and raise questions as to the mortgagee's right to sell the property before default.

The death of a wife who has executed a mortgage jointly with her husband does not justify the court in withdrawing from the jury all questions of the mortgagee's right to replevy the property. Carraway *v.* Wallace, (Miss. 1895) 17 So. 930.

88. Blakeslee *v.* Rossman, 44 Wis. 550, holding that a general verdict for defendant was equivalent to a finding of general property in the alleged mortgagors and of special property in the attaching officer.

89. Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390, holding that it is error under such circumstances to instruct the jury to find generally for plaintiffs if any of the mortgages are good.

and costs,[90] with a further limitation that the recovery shall not exceed the value of the property converted;[91] and the same rule seems to apply when defendant is a purchaser of the mortgaged property.[92] But there is authority for allowing a mortgagee to recover as damages the full value of the property, although it exceed the amount due on the mortgage,[93] and damages caused by the taking and

90. *Alabama.*— Seibold *v.* Rogers, 110 Ala. 438, 18 So. 312; Bates *v.* Murphy, 2 Stew. & P. (Ala.) 160 note.

California.—Wood *v.* Franks, 56 Cal. 217.

Georgia.— Benton *v.* McCord, 96 Ga. 393, 23 S. E. 392.

Illinois.— Mantonya *v.* Martin Emerich Outfitting Co., 172 Ill. 92, 49 N. E. 721 [*affirming* 69 Ill. App. 62].

Michigan.— Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578; Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661.

Minnesota.— Becker *v.* Dunham, 27 Minn. 32, 6 N. W. 406.

Missouri.— State *v.* White, 70 Mo. App. 1.

Nebraska.— Kasper *v.* Walla, 49 Nebr. 288, 68 N. W. 476; Watson *v.* Coburn, 35 Nebr. 492, 53 N. W. 477, 48 Nebr. 257, 67 N. W. 171.

New Hampshire.— Carpenter *v.* Cummings, 40 N. H. 158.

New York.— Clark *v.* McDuffie, 21 N. Y. Suppl. 174, 49 N. Y. St. 535. *Compare* Manning *v.* Monaghan, 1 Bosw. (N. Y.) 459, holding that a receiver who wrongfully sold mortgaged property, whereby the property was destroyed, was liable to the mortgagee for the face value of the mortgage with interest and interest on this aggregate amount from the time it fell due. But see Manning *v.* Monaghan, 28 N. Y. 585, where, in an action on the case for injury to plaintiff's reversionary interest, it was held that damages should be confined to the loss sustained by the dispersion of the property.

South Carolina.— Williams *v.* Dobson, 26 S. C. 110, 1 S. E. 421.

Washington.— Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.

Wyoming.— Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 353.

Attorney's fees and interest on the whole amount may be recovered as part of the damages in an action by a mortgagee against a third person who has converted the mortgaged property (McLester *v.* Somerville, 54 Ala. 670), even though it appears that part of the property was sold by the mortgagor to defendant with an agreement that he would satisfy the mortgage with the purchase-money (De Costa *v.* Comfort, 80 Cal. 507, 22 Pac. 218).

Expenses incurred by mortgagee.— A fair compensation for the time and money properly expended by plaintiff in the pursuit of the property may be recovered in an action against the sheriff. Sherman *v.* Finch, 71 Cal. 68, 11 Pac. 847. *Compare* Lander *v.* Propper, 6 Dak. 64, 50 N. W. 400, where the mortgagee had taken possession of the property before it was taken by the sheriff and he was allowed to recover the expenses necessarily incurred by him in holding possession.

91. Seibold *v.* Rogers, 110 Ala. 438, 18 So. 312; Coburn *v.* Watson, 48 Nebr. 257, 67 N. W. 171; Brotton *v.* Langert, 1 Wash. 227, 23 Pac. 803; Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.

An amount advanced to pay off a prior lien should be deducted from the value of the converted property in estimating damages to which a mortgagee was entitled. Holt County Bank *v.* Tootle, 25 Nebr. 408, 41 N. W. 291.

For conversion of a note and mortgage plaintiff is entitled to recover the full amount due thereon at the time of conversion. Keaggy *v.* Hite, 12 Ill. 99.

92. McFadden *v.* Hopkins, 81 Ind. 459; West *v.* White, 165 Mass. 258, 43 N. E. 103.

Contribution in equity.— Where chattels covered by a mortgage are sold to various purchasers, each one is liable to the mortgagee for the full value of the property purchased by him up to the point when the mortgage debt is satisfied, but equity will enforce contribution between the purchasers. Hughes *v.* Graves, 1 Litt. (Ky.) 317.

Exemplary damages.— It is error to instruct that the jury must infer malice from the acts of a purchaser which would necessarily injure the mortgagee's security and that exemplary damages should be given. McDonald *v.* Norton, 72 Iowa 652, 34 N. W. 458.

Interest is to be computed on the value of the property from the time of a resale by defendant and not from the time of his purchase from the mortgagor. Barry *v.* Bennett, 7 Metc. (Mass.) 354.

93. *Colorado.*— Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313.

Massachusetts.— Hanly *v.* Davis, 166 Mass. 1, 43 N. E. 523, where a levying officer had failed to pay the mortgage debt after it was demanded by the mortgagee.

Minnesota.—Adamson *v.* Petersen, 35 Minn. 529, 29 N. W. 321, where the action was against a stranger who showed no interest in the mortgaged property.

New York.— Bigelow *v.* Goble, 3 N. Y. App. Div. 391, 41 N. Y. Suppl. 299, 75 N. Y. St. 711.

Texas.— Cabell *v.* Johnston, 13 Tex. Civ. App. 472, 35 S. W. 946.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 353.

An attaching officer's appraisal of mortgaged goods does not bind the mortgagee as a rule of damages in his suit against the officer. Treat *v.* Gilmore, 49 Me. 34.

Against a subsequent mortgagee one holding a prior mortgage would only be entitled to recover the amount due thereon. Citizens Coal, etc., Co. *v.* Stanley, 6 Colo. App. 181, 40 Pac. 693. See also Kimball *v.* Marshall, 8 N. H. 291.

detention of the property;[94] so that a finding was held fatally defective which did not assess damages against the officer for the taking.[95] When judgment is entered for defendant in an action of replevin by a mortgagee he is entitled to recover the full value of the property.[96]

b. Against Mortgagor. Where a mortgagee obtains a judgment against the mortgagor for conversion of the mortgaged property the measure of damages is the value of the mortgagee's interest in the property,[97] and a judgment in the alternative should be for a return of the property or for payment of the mortgage debt and interest.[98] A judgment rendered for the mortgagor should be reduced by the amount due the mortgagee on the secured claim,[99] unless that would result in allowing the mortgagee to collect his claim before it matured.[1]

XIII. CONFUSION OF MORTGAGED GOODS.

To constitute a confusion of property there must be such a mixture that the part covered by the mortgage cannot be identified and separated from the rest.[2]

A sale of the property within a reasonable time may be used in estimating its value (Hume Bank *v.* Hartsock, 56 Mo. App. 291), but a sale made ten months after seizure is not admissible to show the measure of the mortgagee's damages, for it is too remote (Showman *v.* Lee, 79 Mich. 653, 44 N. W. 1061).

Setting apart an exemption out of part of the property levied on will not avail the officer as a ground for reduction of damages unless the mortgagee has ratified such act. Showman *v.* Lee, 79 Mich. 653, 44 N. W. 1061.

94. Mason *v.* Fenn, 13 Ill. 525; Allen *v.* Butman, 138 Mass. 586. *Compare* Codman *v.* Freeman, 3 Cush. (Mass.) 306, holding that the mortgagee could recover damages equal to the value of the property, although the mortgagor had become insolvent and the assignee had not claimed the property.

95. Bates *v.* Wilbur, 10 Wis. 415.

In mitigation of damages it can be shown that the mortgage was fraudulent as to creditors, although it covered exempt property only and therefore could not be set aside (Jewett *v.* Fink, 47 Wis. 446, 2 N. W. 1124), or that plaintiff had received his debt out of the goods left in his possession (Ward *v.* Henry, 15 Wis. 239); but a return of the property within the ten days limited for payment of the mortgage debt by the attaching officer cannot be considered to reduce damages (Robinson *v.* Sprague, 125 Mass. 582), nor will an application of the proceeds to pay off a lien which was prior to the mortgage (Keith *v.* Ham, 89 Ala. 590, 7 So. 234).

96. Blakeslee *v.* Rossman, 44 Wis. 550, holding that a special finding as to defendant's interest in the property was unnecessary. But see Coe *v.* Peacock, 14 Ohio St. 187, holding that the "right and proper" damages given by the statute to defendant in an action of replevin brought by the mortgagee against the officer, when it appears that the mortgage lien upon the property exceeds its value, is not the value of such property, or the amount of the execution levied upon it, but nominal merely.

97. Bates *v.* Murphy, 2 Stew. & P. (Ala.) 160 note; Parish *v.* Wheeler, 22 N. Y. 494.

Attorney's fees.— Where a chattel mortgage provides for the collection of attorney's fees for taking possession at maturity, and the mortgage is matured by the act of the mortgagor in removing the property, plaintiff cannot recover attorney's fees on an allegation only that he fears defendant will remove the property. McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414.

98. Wolfley *v.* Rising, 12 Kan. 535; Allen *v.* Judson, 71 N. Y. 77; Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156, holding that payment of the amount actually due on the mortgage would discharge the sureties on defendant's forthcoming bond. *Compare* Peters *v.* Lowenstein, 44 Mo. App. 406, holding that where there are several mortgages on the property in controversy judgment for the aggregate indebtedness could be rendered and the particular items need not be specified.

No sale of the property can be ordered in an action of replevin, for it is not a proceeding to foreclose. Marks *v.* McGehee, 35 Ark. 217.

99. Baldridge *v.* Dawson, 39 Mo. App. 527.

Effect of tender.— Where defendant before trial tendered the amount due on the mortgage and all costs, the measure of defendant's damages was the value of the goods at the time of the tender. Barbee *v.* Scoggins, 121 N. C. 135, 28 S. E. 259.

1. Manker *v.* Sine, 35 Nebr. 746, 53 N. W. 734. But see Fowler *v.* Hoffman, 31 Mich. 215, holding that a ruling that, in the absence of a continuing breach of the mortgage at the time suit was brought, defendant would be entitled to recover the full value of the property is erroneous under Mich. Comp. Laws (1871), § 6754, requiring a special finding in case either party has a lien on the property.

Substitution of similar property to take the place of that covered by the mortgage which had been sold cannot be allowed in mitigation of damages. Smith *v.* Anderson, 70 Vt. 424, 41 Atl. 441.

2. Caring *v.* Richmond, 28 Hun (N. Y.) 25, holding that intermingling did not render a mortgage invalid as to such of the articles as could be identified and distinguished. *Compare* Morrill *v.* Keyes, 14 Allen (Mass.) 222,

Where the mortgagee purposely or negligently commingles the mortgaged goods with like goods of his own, without the consent of the mortgagee, the latter can hold the whole under the mortgage,[3] but where the confused property forms a homogeneous mass, it has been held that each party would be entitled to his proportional part.[4] Where the mortgagee consents to the intermixture, the rights of third persons are not adversely affected thereby,[5] and a judgment creditor of the mortgagor may levy on and sell the whole mass, or so much thereof as may be necessary to satisfy the debt.[6] Where a mortgage covers after-acquired property, the intermingling of such property with the original stock is presumed to be with the mortgagee's consent.[7]

where an attaching officer refused to allow the mortgagee to identify the property and it was held that the mortgagee could recover the whole from him.

Parol evidence is admissible to identify the property described in the mortgage and separate it from the other chattels. Caring *v.* Richmond, 15 N. Y. Wkly. Dig. 546.

Detachable and easily distinguishable fixtures added to machinery after the execution of the mortgage are not confused so as to allow the mortgagee to claim them. Alley *v.* Adams, 44 Ala. 609.

3. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Illinois.— Simmons *v.* Jenkins, 76 Ill. 479.

Massachusetts.— Adams *v.* Wildes, 107 Mass. 123; Willard *v.* Rice, 11 Metc. (Mass.) 493, 45 Am. Dec. 226 (holding that the mortgagee could recover from the mortgagor's consignee the value of the whole mass).

New York.— Dunning *v.* Stearns, 9 Barb. (N. Y.) 630.

North Carolina.— Kreth *v.* Rogers, 101 N. C. 263, 7 S. E. 682, where third persons sold goods to the mortgagor knowing that he was likely to mingle them with the property covered by the mortgage.

Pennsylvania.— McKean *v.* Wagenblast, 2 Grant (Pa.) 462.

United States.— St. Paul Merchants' Nat. Bank *v.* McLaughlin, 1 McCrary (U. S.) 258, 2 Fed. 128.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 215.

Where mortgaged goods are sold mixed with other goods not covered by the mortgage, the purchaser of course can get no title to such portion of the property sold as was not included in the mortgage, and the mortgagor or his representatives are entitled to recover the value of such goods. Steinecke *v.* Uetz, 19 Mo. App. 145. See also Rochester Distilling Co. *v.* Rasey, 65 Hun (N. Y.) 512, 20 N. Y. Suppl. 583, 48 N. Y. St. 301, where a crop raised from seeds planted before the execution of the mortgage was sold mixed with the crop raised from seed planted subsequently to the execution. *Compare* Van Doren *v.* Balty, 11 Hun (N. Y.) 239, where the mortgagee of an undivided interest of a tenant in common of a chattel sold the whole chattel at the foreclosure sale, and it was held that the purchaser upon taking possession thereof was liable to the other tenant in common for a conversion of his interest.

4. Shepard *v.* Barnes, 3 Dak. 148, 14 N. W. 110; Mittenthal *v.* Heigel, (Tex. Civ. App. 1895) 31 S. W. 87. See also D. M. Osborne *v.* Cargill Elevator Co., 62 Minn. 400, 64 N. W. 1135, where, in determining the proportional part to which the mortgagee was entitled, it was assumed that the amounts of wheat raised per acre in two fields were the same. *Compare* Mowry *v.* White, 21 Wis. 417, where a mortgage covered logs cut and to be cut and all the logs were subsequently intermixed, and it was held that the mortgagee must share them with an attaching creditor in the ratio which the quantity cut before the execution of the mortgage bore to the quantity cut thereafter.

5. Hamilton *v.* Rogers, 8 Md. 301; Wagner *v.* Watts, 2 Cranch C. C. (U. S.) 169, 28 Fed. Cas. No. 17,040. To the same effect see McKean *v.* Wagenblast, 2 Grant (Pa.) 462, where the transaction was a pledge. *Compare* Tyson *v.* Weber, 81 Ala. 470, 2 So. 901, holding that where goods were confused by permission of the mortgagee he could prevent the mortgagor, in defense to an action against the latter by mortgagee, from showing that some of the goods were not included originally in the mortgage.

6. Baltimore First Nat. Bank *v.* Lindenstruth, 79 Md. 136, 28 Atl. 807, 47 Am. St. Rep. 366. But see Muse *v.* Lehman, 30 Kan. 514, 1 Pac. 804, holding that where by agreement the mortgagor retained possession and mingled the mortgaged chattels with others, and by consent of the mortgagee sold the chattels, a creditor of the mortgagor could not attach the proceeds.

7. Hamilton *v.* Rogers, 8 Md. 301. *Compare* Coder *v.* Stotts, 51 Kan. 382, 32 Pac. 1102, holding that in such case the mortgagee must identify the original goods before he can recover. But see Odell *v.* Gallup, 62 Iowa 253, 17 N. W. 502 (where the mortgagee was allowed to recover all the goods from a junior encumbrancer in the absence of evidence as to what had been added to the mortgaged stock); Hudson *v.* Warner, 2 Harr. & G. (Md.) 415 (holding that it would be presumed that sales made under a power in a mortgage deed of trust were of goods included in the original stock).

The burden is on the mortgagee to show that the goods he claims were on the premises at the time the mortgage was executed where future-acquired property has been intermingled with a mortgaged stock of goods. Hamilton *v.* Rogers, 8 Md. 301; Queen *v.* Wernwag, 97 N. C. 383, 2 S. E. 657.

Duty of mortgagor to point out.— If a mortgagor, having added new purchases to

XIV. RIGHT OF MORTGAGOR TO TRANSFER AND ENCUMBER MORTGAGED PROPERTY.

A. Creation of Liens—1. AGISTER'S LIEN. Although acts of a mortgagor in dealing with mortgaged animals bring them within the terms of a statute which causes a lien to arise in favor of a liveryman or agister, such lien is postponed to the rights of one holding a prior recorded mortgage upon the property,[8] unless the statute provides that the lien shall arise when the "lawful possessor" contracts for their care and keeping, and the mortgagor is entitled to possession by the terms of the mortgage.[9] The same rule has been applied to other statutory liens

mortgaged stock, refuse on demand to identify and separate the new goods from the old, when the mortgagee is rightfully taking possession, although there be no such confusion of goods as to absolutely destroy their separate identity, yet if they cannot be separated without the mortgagor's aid he cannot complain if some of the new are taken with the old.

Rights of parties upon redemption.— If additional goods are mingled with the mortgaged goods by the mortgagee and no separate accounts kept the mortgagor, upon redeeming, is entitled to all goods remaining unsold. Burr *v.* Dana, 72 Wis. 639, 39 N. W. 562, 40 N. W. 635.

8. *Alabama.*— Chapman *v.* Montgomery First Nat. Bank, 98 Ala. 528, 13 So. 764, 22 L. R. A. 78.

Colorado.— Wall *v.* Garrison, 11 Colo. 515, 19 Pac. 469; Auld *v.* Travis, 5 Colo. App. 535, 39 Pac. 357 (where the agister and the mortgagor were members of a firm using the mortgaged property jointly).

Illinois.— Charles *v.* Neigelsen, 15 Ill. App. 17, although the lienor acted in ignorance of the mortgage. *Compare* Blain *v.* Manning, 36 Ill. App. 214, where the lienor prevailed over the mortgagee because the property was allowed to remain in the possession of the mortgagor after one of the notes secured became due and the other mortgage note was fraudulent; there was besides a license to the mortgagor to take the property whenever he desired, which might have estopped the mortgagee.

Indiana.— Hanch *v.* Ripley, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61.

Kentucky.— Lee *v.* Vanmeter, 98 Ky. 1, 17 Ky. L. Rep. 548, 32 S. W. 137, where the agister had notice of the mortgage.

Massachusetts.— Howes *v.* Newcomb, 146 Mass. 76, 15 N. E. 123.

Michigan.— Reynolds *v.* Case, 60 Mich. 76, 26 N. W. 838.

Minnesota.— Petzenka *v.* Dallimore, 64 Minn. 472, 67 N. W. 365.

Missouri.— Miller *v.* Crabbe, 66 Mo. App. 660, 2 Mo. App. Rep. 1371; Lazarus *v.* Moran, 64 Mo. App. 239, 2 Mo. App. Rep. 1086; Pickett *v.* McCord, 62 Mo. App. 467; Stone *v.* Kelley, 59 Mo. App. 214, 1 Mo. App. Rep. 1.

Nebraska.— State Bank *v.* Lowe, 22 Nebr. 68, 33 N. W. 482, construing territorial act of Feb. 18, 1867.

New Hampshire.— Sargent *v.* Usher, 55 N. H. 287, 20 Am. Rep. 208.

New Jersey.— Sullivan *v.* Clifton, 55 N. J. L. 324, 26 Atl. 964, 39 Am. St. Rep. 652, 20 L. R. A. 719.

New York.— A livery-stable keeper cannot, by serving the statutory notice, acquire a lien on a horse, as against one to whom the horse was mortgaged by the owner before the notice was served. Jackson *v.* Kasseall, 30 Hun (N. Y.) 231.

North Dakota.— Mandan First Nat. Bank *v.* Scott, 7 N. D. 312, 75 N. W. 254.

Ohio.— Graham *v.* Winchell, 4 Ohio S. & C. Pl. Dec. 139, 3 Ohio N. P. 106; Monypeny *v.* Sells, 11 Ohio Dec. (Reprint) 615, 28 Cinc. L. Bul. 112.

South Dakota.— Wright *v.* Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792.

Tennessee.— McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654, even though the agister is without notice of the mortgage.

Vermont.— Ingalls *v.* Green, 62 Vt. 436, 20 Atl. 196, holding lien attaches to surplus remaining after satisfaction of the mortgage debt.

Contra, Case *v.* Allen, 21 Kan. 217, 220, 30 Am. Rep. 425, where Brewer, J., says: "The lien of the agister is not the mere creature of contract. It is created by statute from the fact of the keeping of the cattle." But see Howard *v.* Burns, 44 Kan. 543, 24 Pac. 981, where a second mortgagee who kept cattle claiming ownership adverse to the first mortgagee was not allowed to claim an agister's lien for care and pasturage against the prior mortgage.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 235.

No privity of contract exists between the mortgagee and the liveryman who claims a lien. Wright *v.* Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792; Ingalls *v.* Green, 62 Vt. 436, 20 Atl. 196.

No agency is created for the mortgagor to procure feed for mortgaged cattle in behalf of the mortgagee, by the fact that the mortgagee furnished feed for the stock while they were in the mortgagor's possession. Cleveland *v.* Koch, 108 Mich. 514, 66 N. W. 376.

9. Smith *v.* Stevens, 36 Minn. 303, 31 N. W. 55; Graham *v.* Winchell, 4 Ohio S. & C. Pl. Dec. 139, 3 Ohio N. P. 106. *Compare* McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654, where it was suggested

upon animals, for example the lien for service of a stallion, the lien for damages caused by stock running at large, etc.[10]

2. CONTRACTUAL LIEN. A mortgagor has no power to make a contract for a lien on the mortgaged property which would take precedence over a duly recorded mortgage;[11] but the consent of the mortgagee to the creation of the lien may be implied.[12]

3. LABORER'S LIEN. A mechanic's statutory lien has been held to be postponed to a prior valid mortgage;[13] but a laborer's lien on crops was entitled to prevail over the claims of the mortgagee of the crop.[14]

4. LANDLORD'S LIEN — a. Contractual.[15] Reserving a lien for rent on chattels located on leased premises will give the landlord a prior claim thereon, unless at

that the language of the lien act might be such that the lien would take precedence over the right of a prior mortgagee. In Smith *v.* Stevens, 36 Minn. 303, 31 N. W. 55, it was said that such a statute was not unconstitutional because the mortgagee was charged with knowledge of the adverse rights which could be acquired when he left the property in the possession of the mortgagor.

Allowing the mortgaged cattle to remain under the care of an agister with whom they had been placed by the mortgagor does not postpone the claim of the mortgagee to that of the agister's lien. Ingalls *v.* Vance, 61 Vt. 582, 18 Atl. 452.

Subsequent mortgages.— The lien of a liveryman on horses for their keep will be postponed to a mortgage executed subsequently to the contract which gives rise to the lien, when the horses are permitted to leave the possession of the lienor, for that invalidates the lien (Perkins *v.* Boardman, 14 Gray (Mass.) 481; Marseilles Mfg. Co. *v.* Morgan, 12 Nebr. 66, 10 N. W. 462), or where the lienor waives his lien for services and accepts a bill of sale of the mortgaged property after the execution of the mortgage (Murray *v.* Guse, 10 Wash. 25, 38 Pac. 753). *Compare* State *v.* Shevlin, 23 Mo. App. 598, where evidence showing the good faith of the mortgagee was held to be admissible when it was douhtful whether a stable keeper had lost his lien on a horse at the time it was mortgaged.

10. As to statutory liens upon animals see, generally, ANIMALS, 2 Cyc. 288.

The lien upon a mare for the service of a stallion is postponed to a prior duly recorded mortgage on such animal. Mayfield *v.* Spiva, 100 Ala. 223, 14 So. 47; Easter *v.* Goyne, 51 Ark. 222, 11 S. W. 212. But see Sims *v.* Bradford, 12 Lea (Tenn.) 434, where it was held that the lien given by statute to the owner of a stallion on the offspring was paramount to the right of a mortgagee of the mare while in foal, although the mortgage is registered before the foal is dropped.

The lien for damages caused by stock running at large which is given by statute has been held to be inferior to the lien of a prior chattel mortgage on the stock. Lehman *v.* Ferrell, 71 Ala. 458.

11. *Alabama.*— Mauldin *v.* Armistead, 14 Ala. 702, where a factor attempted to assert a lien on the proceeds of a sale of a crop which had been consigned to him.

Illinois.— Charles *v.* Neigelsen, 15 Ill. App. 17.

Iowa.— Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530.

Michigan.— Reynolds *v.* Case, 60 Mich. 76, 26 N. W. 838.

Nebraska.— State Bank *v.* Lowe, 22 Nebr. 68, 33 N. W. 482.

New York.— Bissell *v.* Pearce, 28 N. Y. 252; Jackson *v.* Kasseall, 30 Hun (N. Y.) 231.

North Dakota.— Grand Forks Second Nat. Bank *v.* Swan, 2 N. D. 225, 50 N. W. 357.

Ohio.— Graham *v.* Winchell, 4 Ohio S. & C. Pl. Dec. 139, 3 Ohio N. P. 106.

Tennessee.— McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654.

Vermont.— Ingalls *v.* Vance, 61 Vt. 582, 18 Atl. 452.

12. Howes *v.* Newcomb, 146 Mass. 76, 15 N. E. 123; Wright *v.* Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792. See also Lynde *v.* Parker, 155 Mass. 481, 30 N. E. 74, where consent to the creation of a lien was implied from the circumstance that the mortgagee knew the mortgaged horse was being boarded at a stable, although not at what stable.

Merely allowing the mortgagor to retain possession does not furnish a sufficient basis for an inference that the mortgagee consented to the creation of a lien. Wright *v.* Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792.

13. Gill *v.* Weston, 110 Pa. St. 305, 1 Atl. 917, holding that a sale on a subsequent mechanic's lien passes only an encumbered title.

Waiver of mortgagee's priority.— A mortgagee's promise to pay laborers who had partly harvested a crop did not constitute a waiver of his priority in favor of the harvesters' lien, when they failed to complete the harvest. Rourke *v.* Bergevin, (Ida. 1896) 44 Pac. 645.

14. Ross *v.* Wardlaw, (Miss. 1887) 3 So. 74.

15. **Taking receipts for rent in the mortgagee's name** will not bind mortgaged chattels upon the leased premises for future rent when the mortgagee had no right to recover possession of the premises and he had no knowledge that the mortgagor was taking receipts in his name. Sibley *v.* Walton, 2 Ohio Cir. Ct. 69.

the time the property is brought upon the premises it is subject to valid mortgage;[16] but such a reservation in favor of the landlord is in effect a mortgage and must be recorded to be effectual against a subsequent mortgage in ordinary form,[17] unless the subsequent mortgagee has notice of the reservation in the unrecorded lease.[18]

b. Statutory. A landlord's lien for rent will ordinarily be postponed to a prior chattel mortgage on the property,[19] but not where the mortgage is unrecorded.[20]

5. Lien For Storage, Manufacture, or Repairs. The lien of a warehouseman for storage of mortgaged property is inferior to the claim of the mortgagee to the

16. Kennedy *v.* Davis, 2 Tex. Unrep. Cas. 77, holding that a chattel mortgage executed for the purchase-price of furniture subsequently bought and put into a house by the lessee is superior to the lien reserved by the lessor. *Compare* Simmons *v.* Buckeye Supply Co., 21 Ohio Cir. Ct. 455, 11 Ohio Cir. Dec. 690, where no lien was reserved for rent.

17. Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711; Gandy *v.* Dewey, 28 Nebr. 175, 44 N. W. 106; Lanphere *v.* Lowe, 3 Nebr. 131; Thomas *v.* Bacon, 34 Hun (N. Y.) 88; Smith *v.* Worman, 19 Ohio St. 145. *Compare* Corbett *v.* Cushing, 15 Daly (N. Y.) 170, 4 N. Y. Suppl. 616, 23 N. Y. St. 55, where the mortgage was prior in time but unrecorded and the property was transferred as security for past rent and it was held that the landlord taking without notice was entitled to priority.

Postponement of first mortgage to lease bound second also.— Where a lease of a house reserved a lien on furniture for the rent, and a prior mortgagee consented to postpone his lien to that of the lessor, it was held that a second mortgage on the same furniture was likewise postponed to the landlord's claim. Shoenberger *v.* Mount, 1 Handy (Ohio) 566, 12 Ohio Dec. (Reprint) 292.

18. Hall *v.* Mullanphy Planing Co., 16 Mo. App. 454 (where the rent accrued after the execution of the mortgage); Wright *v.* Bircher, 5 Mo. App. 322.

19. *District of Columbia.*— Johnson *v.* Douglass, 2 Mackey (D. C.) 36. But see Hechtman *v.* Sharp, 3 MacArthur (D. C.) 90, where the note secured by a chattel mortgage was destroyed and a new note given, secured by a new deed to a different trustee, and the new trustee was held to be postponed to the landlord's lien for rent accruing prior to the giving of the new note and mortgage.

Iowa.— Perry *v.* Waggoner, 68 Iowa 403, 27 N. W. 292; Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530; Jarchow *v.* Pickens, 51 Iowa 381, 1 N. W. 598. *Compare* Thorpe *v.* Fowler, 57 Iowa 541, 11 N. W. 3, where the mortgage was executed after the lessor's term had commenced but the rent for which a superior lien was claimed accrued after the execution of the mortgage, and it was held that the mortgagee was entitled to priority.

Kentucky.— Fisher *v.* Kollerts, 16 B. Mon. (Ky.) 398.

New Jersey.— Woodside *v.* Adams, 40 N. J. L. 417.

Pennsylvania.— Miners' Bank *v.* Heilner, 47 Pa. St. 452, where the mortgage was on a leasehold estate which was sold on an execution for rent.

Texas.— Brackenbridge *v.* Millan, 81 Tex. 17, 16 S. W. 555 [*following* Hempstead Assoc. *v.* Cochran, 60 Tex. 620], where the mortgage was of equal date with a month-to-month lease and the rent for the first month had been paid. But see Rogers *v.* Grigg, (Tex. Civ. App. 1895) 29 S. W. 654, holding that a landlord's lien for rent for the full term of the lease is prior to that of a chattel mortgage made during the term, although when the mortgage was made no rent was due.

Contra, Strauss *v.* Baley, 58 Miss. 131, holding that when a landlord to whom mortgaged property has been delivered is sued in replevin by the mortgagee he can set up his statutory lien as a defense.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 230.

When no lien for rent exists until the landlord exercises his right to distrain, a mortgagee for value and in good faith, with forfeiture or condition broken prior to an attachment for rent, will have priority over such attachment. Stamps *v.* Gilman, 43 Miss. 456. *Compare* Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231, where there was a contest for priority between a mortgagee and one claiming under a levy of distress warrant, and in the absence of evidence that the levy and execution of the mortgage occurred at the same time, it was held proper to refuse to charge that the liens would be assumed to be of equal dignity.

Burden is on mortgagee to establish the priority of his lien over that of the landlord when the chattels were on the leased land at the time the mortgage was executed. Rogers *v.* Grigg, (Tex. Civ. App. 1895) 29 S. W. 654.

Waiver of lien.— Taking a chattel mortgage to secure rent for which a landlord has a statutory lien is not a waiver of the lien; so where the mortgage is invalid because not recorded the landlord may still rely on his statutory lien. Pitkin *v.* Fletcher, 47 Iowa 53.

Knowledge of the mortgagee that the mortgaged property was being used upon the leased premises will not postpone his claim to that of the lessor. Jarchow *v.* Pickens, 51 Iowa 381, 1 N. W. 598.

20. Berkey, etc., Furniture Co. *v.* Sherman Hotel Co., 81 Tex. 135, 16 S. W. 807; Rogers *v.* Grigg, (Tex. Civ. App. 1895) 29 S. W. 654.

property on which a lien is claimed,[21] and a lien for repairs or for labor bestowed in manufacturing is likewise postponed,[22] unless there is an implied consent on the part of the mortgagee that the mortgagor may incur expenses for repairing the property.[23]

6. LIEN ON CROPS — a. Contractual. An agreement giving a lien on crops must be registered to be effectual against a chattel mortgage thereon,[24] or there must be a delivery of the crop.[25]

b. Statutory — (i) *FOR ADVANCES ON CROPS.* Some statutes regarding statutory liens on crops for supplies advanced to enable the production thereof provide that such a lien shall take precedence over a prior valid mortgage.[26]

21. Whitlock Mach. Co. *v.* Holway, 92 Me. 414, 42 Atl. 799; Vette *v.* Leonori, 42 Mo. App. 217; Eisler *v.* Union Transfer, etc., Co., 16 Daly (N. Y.) 456, 12 N. Y. Suppl. 732, 35 N. Y. St. 190; Baumann *v.* Post, 16 Daly (N. Y.) 385, 12 N. Y. Suppl. 213, 34 N. Y. St. 308, 26 Abb. N. Cas. (N. Y.) 134; Baumann *v.* Jefferson, 4 Misc. (N. Y.) 147, 23 N. Y. Suppl. 685, 53 N. Y. St. 116; Tucker *v.* Werner, 2 Misc. (N. Y.) 193, 21 N. Y. Suppl. 264, 49 N. Y. St. 571. *Compare* Storms *v.* Smith, 137 Mass. 201, where the mortgagee was informed of the removal and storing of the mortgaged property and expressed no disapproval and the warehouseman was without notice of the mortgage, but the mortgagee was allowed to maintain an action for conversion of the property by the warehouseman without paying the storage fees.

The reason for this rule, it has been held, is because both the lien of the warehouseman and that of the mortgagee are common-law liens and so the senior one prevails. Baumann *v.* Post, 16 Daly (N. Y.) 385, 12 N. Y. Suppl. 213, 34 N. Y. St. 308, 26 Abb. N. Cas. (N. Y.) 134.

22. Globe Works *v.* Wright, 106 Mass. 207; Denison *v.* Shuler, 47 Mich. 598, 11 N. W. 402, 41 Am. Rep. 734; Hampton *v.* Seible, 58 Mo. App. 181.

A subsequent mortgage is postponed to an existing lien upon an article in favor of a manufacturer for labor bestowed in the process of construction. Renscher *v.* Klein, 35 N. Y. Super. Ct. 446.

23. Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615 (where a locomotive was mortgaged and by the terms of the mortgage it was to remain in the hands of the mortgagor for a long period and to be used by him); Hammond *v.* Danielson, 126 Mass. 294 (where the mortgaged property was a hack which was owned by a liveryman and was to be retained and used by him); Drummond Carriage Co. *v.* Mills, 54 Nebr. 417, 74 N. W. 966, 69 Am. St. Rep. 719, 40 L. R. A. 761 (where the mortgagee rode in the mortgaged buggy and knew its condition and knew that the buggy had been repaired at a previous time); Tucker *v.* Werner, 2 Misc. (N. Y.) 193, 21 N. Y. Suppl. 264, 49 N. Y. St. 571 (where the mortgagee had the right to take immediate possession of a mortgaged buggy, but allowed the mortgagor to use it in prosecuting his business and to continue in the apparent ownership). But see Globe Works *v.* Wright, 106 Mass. 207, where partly finished engines were mortgaged and the mortgagee told the mortgagor he might go ahead and complete them, and it was held that this neither gave the mortgagor a lien for the subsequent labor bestowed upon the engines nor gave him authority to contract for a lien to be given other than for completing them.

Repairs on ships are within the implied power of the mortgagor to contract for and so the mortgagee's interest is bound by the lien of the mechanic making the repairs. Scott *v.* Delahunt, 65 N. Y. 128 [*affirming* 5 Lans. (N. Y.) 372]. See, generally, SHIPPING.

24. Jones *v.* Chamberlin, 5 Heisk. (Tenn.) 210; Snyder *v.* Austin First Nat. Bank, (Tex. Civ. App. 1895) 30 S. W. 1121; Embree *v.* Strickland, 1 Tex. App. Civ. Cas. § 1299.

A recorded lien on future crops retained by a vendor of land, title to which shall only pass on payment of the purchase-money, is superior to the lien of beneficiaries under a trust conveyance made subsequently to the registration of the lien to secure them for future advances to the vendee. Polk *v.* Foster, 7 Baxt. (Tenn.) 98.

25. **Failure to deliver postpones** the rights of the lienor to those of a holder of a valid mortgage executed subsequently to the creation of the lien. Person *v.* Wright, 35 Ark. 169; Grand Forks Second Nat. Bank *v.* Swan, 2 N. D. 225, 50 N. W. 357. *Compare* Smith *v.* Roberts, 43 Minn. 342, 45 N. W. 336, where a tenant agreed to give other grain in exchange for seed wheat but was unable to do so and subsequently gave a "seed grain" note dated back to the time he received the wheat and it was held that the lien of the note was subject to that of a prior mortgage on the crop.

26. *Alabama.*— Hamilton *v.* Maas, 77 Ala. 283 (where the mortgage was to secure an existing debt); Stern *v.* Simpson, 62 Ala. 194.

Kentucky.— Rickets *v.* Hamilton, 16 Ky. L. Rep. 762, 29 S. W. 736, where the mortgagee was held to be entitled to the balance after satisfying the advances made.

Mississippi.— Herman *v.* Perkins, 52 Miss. 813.

North Carolina.— Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846. But see Brewer *v.* Chappell, 101 N. C. 251, 7 S. E. 670, where a mortgagee of the realty upon which the crops were grown was held to have priority over an

(11) *For Rent.* A landlord's statutory lien on crops accrues as soon as they come into existence, and hence has priority over any mortgage of the crops made by the tenant.[27]

7. Vendor's Rights.[28] A lien for purchase-money will be postponed to the

agricultural lien when the tenant had no term in the land.

North Dakota.— Yeatman *v.* King, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797.

Contra, Wilson *v.* Donaldson, 121 Cal. 8, 53 Pac. 404, 66 Am. St. Rep. 17, 43 L. R. A. 524. And *compare* Gosliner *v.* Grangers' Bank, 124 Cal. 225, 56 Pac. 1029, where a mortgagee of crops was held not to be liable for supplies furnished the mortgagor to enable him to raise the crop, in the absence of his express agreement to pay therefor.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 232.

Unless the advances are actually made the mortgage on the crop will have priority. Knight *v.* Rountree, 99 N. C. 389, 6 S. E. 762.

Advances made by a first mortgagee to enable the mortgagor to harvest a crop cannot be added to the sum secured by his mortgage so as to take precedence over the claims of a second mortgagee on the crop (Weathersbee *v.* Farrar, 98 N. C. 255, 3 S. E. 482, 97 N. C. 106, 1 S. E. 616); but when a first mortgage is taken to secure supplies for a cropper, a second mortgagee is estopped from asserting that articles which the mortgagor receives as a compliance with the first contract are not supplies within the meaning of the statute (Womble *v.* Leach, 83 N. C. 84).

Constitutionality.— It has been held that a statute giving a lien for advances on a crop priority over a previous chattel mortgage cannot constitutionally have a retroactive effect. Yeatman *v.* King, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797. See also Betts *v.* Ratliff, 50 Miss. 561, where a like result was reached in a case where a laborer was claiming a lien on crops by virtue of a statute passed after a mortgage thereon had been given. And *compare* Vreeland *v.* Jersey City, 37 N. J. Eq. 574, where a statute making a water-rate a prior lien to an existing chattel mortgage was allowed to have a retroactive effect. See, generally, Constitutional Law.

The supposed existence of a lien of which mortgagees had notice has been held not to vitiate or postpone an otherwise valid mortgage which was taken after notice of the supposed lien had been given. Baker *v.* Massengale, 83 Ga. 137, 10 S. E. 347.

Separate mortgage for advances.— A landowner let his land to laborers for one half the crop, mortgaged his share to secure debts due various persons, including future advances, and the laborers gave the landowner a lien on their shares to secure future supplies and other debts due him, which lien he transferred to one of his mortgage creditors. At the same time the other creditor took a mortgage from the laborers to secure the supplies and it was held that the latter mortgage was not taken as collateral to the original security, but as independent security for the supplies to be furnished the laborers, and that the other creditors were not entitled to have it brought into the trust fund. Rogers *v.* Vaughan, 31 Ark. 62.

27. *Alabama.*— Mecklin *v.* Deming, 111 Ala. 159, 20 So. 507, where land had been conveyed to the mortgagor with a charge thereon for its purchase-price, and after a mortgage on the crop had been executed the mortgagor reconveyed the land and rented it from the previous seller and the effect of these transactions was to give the mortgagee priority over the landlord's lien on the crop for rent. *Compare* Hamilton *v.* Maas, 77 Ala. 283, where a note given by the mortgagor for the unpaid purchase-money on the land where crops were raised was payable in produce and said to be a payment of rent, but it was held to be postponed to a mortgage on crops which were to be raised *in futuro.*

Arkansas.—Roth *v.* Williams, 45 Ark. 447; Meyer *v.* Bloom, 37 Ark. 43; Buck *v.* Lee, 36 Ark. 525; Watson *v.* Johnson, 33 Ark. 737; Lambeth *v.* Ponder, 33 Ark. 707; Tomlinson *v.* Greenfield, 31 Ark. 557; Smith *v.* Meyer, 25 Ark. 609.

Georgia.— Cofer *v.* Benson, 92 Ga. 793, 19 S. E. 56.

Mississippi.— Bacon *v.* Howell, 60 Miss. 362, where the relation of landlord and tenant was only to arise in case of the failure of a purchaser of land to comply with the requirements of a title bond which failure did in fact occur.

Texas.— McGee *v.* Titzer, 37 Tex. 27; Rogers *v.* Grigg, (Tex. Civ. App. 1895) 29 S. W. 654. *Compare* League *v.* Sanger, (Tex. Civ. App. 1901) 60 S. W. 898, where the contrary result was reached because the relation of landlord and tenant did not arise until after the mortgage lien had attached to crops *in esse.*

See 9 Cent. Dig tit. "Chattel Mortgages," § 230.

After the rent has been paid from the proceeds of the crop, the balance would go to a mortgagee of the crop before it could be applied on an open account due the landlord from the tenant. Cofer *v.* Benson, 92 Ga. 793, 19 S. E. 56.

After setting apart the tenant's share of the crop it is permissible for him to mortgage the share set off to him, and such a mortgage is valid, although made without the landlord's consent. Parkes *v.* Webb, 48 Ark. 293, 3 S. W. 521.

28. **When the vendor was in possession as a pledgee** to secure a debt other than that incurred for the purchase-price of the property, he was held to be entitled to prevail over the claims of persons who had gone as surety for the vendee to secure the payment of the purchase-price under an agreement to receive a chattel mortgage on the property

rights of a subsequent mortgagee who has neither actual nor constructive notice thereof,[29] except when the property comes into the mortgagor's hands saddled with a vendor's lien and is included in the mortgage under a clause covering future-acquired property;[30] and where no vendor's lien has been reserved, a mortgagee with notice will prevail over the claims of the seller to the property because the purchase-price is not paid.[31]

which was not executed till after the hypothecation to the vendor. Beekman *v.* Barber, (N. J. 1888) 13 Atl. 33.

29. *Georgia.*— Singer Mfg. Co. *v.* Bradfield, 114 Ga. 303, 40 S. E. 271; Goodwin *v.* May, 23 Ga. 205.

Iowa.— Manny *v.* Woods, 33 Iowa 265.

Maryland.— Lincoln *v.* Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446. *Compare* Butler *v.* Gannon, 53 Md. 333, reaching the same result, where the only consideration paid by the mortgagee was a preëxisting debt, but the lienor was guilty of misrepresentations.

Missouri.— Straus *v.* Rothan, 102 Mo. 261, 14 S. W. 940; Corning *v.* Rinehart Medicine Co., 46 Mo. App. 16; J. M. Brunswick, etc., Co. *v.* Martin, 20 Mo. App. 158, when the purchaser who made the mortgage got possession of the property by artifice. *Compare* Bell *v.* Barnes, 87 Mo. App. 451, where a mortgagor in actual possession of property under a valid contract of sale executed a mortgage thereon and the mortgagee was held to be entitled to prevail over the rights of the original vendor and those claiming through him.

Nebraska.— Manning *v.* Cunningham, 21 Nebr. 288, 31 N. W. 933.

New Jersey.—Page *v.* Kendig, (N. J. 1887) 7 Atl. 878.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 237.

Burden is on the mortgagee to show that he accepted his mortgage without knowledge of the rights of a vendor in the property who had failed to record his conditional sale thereof. Berner *v.* Kaye, 14 Misc. (N. Y.) 1, 35 N. Y. Suppl. 181, 69 N. Y. St. 297.

A defrauded vendor will also be postponed to the claim of *a bona fide* mortgagee of the vendee (Foster *v.* Foster, 11 La. 401); but the reverse is true when the mortgagee is not *a bona fide* purchaser for value (Van Slyck *v.* Newton, 10 Hun (N. Y.) 554).

Vendor's lien on land postponed to subsequent mortgage on crops.— A vendor's lien on land was reserved as security for payment of purchase-notes, and before the maturity of the notes the grantee mortgaged the crops to be raised to secure notes held by a third person who, it was decided, was entitled to priority over the vendor's lien as well as over *a* subsequent mortgagee of the crops who was charged with notice. Snyder *v.* Austin First Nat. Bank, (Tex. Civ. App. 1895) 30 S. W. 1121. *Compare* Howard *v.* Witters, 60 Vt. 578, 15 Atl. 303, where a vendor of land took a real estate mortgage on the land and on personal property situated thereon, and his lien on the personal property was held to be subordinate to that of a subsequent *bona fide* chattel mortgage.

Notice to the mortgagee of the defect in the mortgagor's title will postpone him to the right of a vendor from whom the property has been obtained by fraudulent means (Wafer *v.* Harvey County Bank, 46 Kan. 597, 26 Pac. 1032), or of a vendor in whom the title is to remain by agreement till the purchase-price is paid (Kingsland *v.* Drum, 80 Mo. 646).

Time of notice.— Notice after execution of the mortgage but before it is recorded will not postpone the rights of the mortgagee to those of the vendor who asserts a lien for unpaid purchase-money. Singer Mfg. Co. *v.* Bradfield, 114 Ga. 303, 40 S. E. 271.

30. Hammel *v.* Hancock First Nat. Bank, (Mich. 1901) 88 N. W. 397; Christian *v.* Bunker, 38 Tex. 234; New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434; Frank *v.* Denver, etc., R. Co., 23 Fed. 123. *Compare* Walker *v.* Vaughn, 33 Conn. 577, where a mortgage for a part of the purchase-money was given to the vendor of personal property upon the day of the sale, and soon after it, as part of the transaction, and it was held that it took precedence of a mortgage of the same property, given by the vendee before the sale to *a bona fide* mortgagee for a valuable consideration and recorded immediately.

Where the property subject to the vendor's lien became part of a machine covered by a previous mortgage, the original mortgagee prevailed as to such part but not as to the balance. Hudson Trust, etc., Inst. *v.* Carr-Curran Paper Mills Co., 58 N. J. Eq. 59, 43 Atl. 418.

Lease to mortgagor with power of sale.— After the execution of a mortgage by a railway company, it leased cars from a third person under an agreement giving the company a right to purchase them at the original cost; this contract was not recorded. Subsequently a receiver took charge of the road on an application of the mortgagee and operated it, but it was held that the failure to record the contract did not render the leased cars subject to the lien of the mortgage. Meyer *v.* Western Car Co., 102 U. S. 1, 26 L. ed. 59.

31. Kane *v.* Manley, 63 Mo. App. 43, 1 Mo. App. Rep. 590; Dunn *v.* Hastings, 54 N. J. Eq. 503, 34 Atl. 256, where the subsequently purchased property was held to pass to the mortgagee under a clause covering after-acquired property. *Compare* Finke *v.* Pike, 50 Mo. App. 564, where it was held that the statute making property liable to execution or attachment for unpaid purchase-money did not confer a lien, and so a mortgagee in good faith would prevail, although he knew of the claims of the vendor for the purchase-price.

A fortiori the mortgagee would prevail

B. Execution of Second Mortgage[32] — **1. In General.** A valid second mortgage on personal property may be made,[33] and the second mortgagee takes an equitable title to the property[34] which entitles him to possession against everyone except the first mortgagee and those claiming under him.[35]

2. Rights of First Mortgagee Against Second Mortgagee. One holding a valid mortgage on personal property may maintain an action of trover for the conversion of the property against a subsequent encumbrancer,[36] provided the first mortgagee has become entitled to possession by default or other condition broken,[37]

where he had no notice that the purchase-price had not been paid. Taylor *v.* Smith, 47 Mo. App. 141.

32. **The second mortgagee did not assume the mortgage debt** by agreeing "to secure" to the first mortgagee the payment of their lien and to set aside the said amount from the first moneys which might be passed to their credit from any source whatsoever. Clapp *v.* Halliday, 48 Ark. 258, 2 S. W. 853.

33. Smith *v.* Smith, 24 Me. 555; Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284. *Compare* Tootle *v.* Taylor, 64 Iowa 629, 21 N. W. 115, holding that a valid second mortgage could be made, even though it was made the crime of larceny for the mortgagor to destroy, conceal, sell, or dispose of the property. See *supra*, VII, A, 4, a [6 Cyc. 1039].

An assignee of a mortgagor may make a valid second mortgage on the property, and as to subsequent additions to the stock covered by the mortgages it will constitute a first lien. Coleman *v.* Nevin, 94 Ga. 427, 20 S. E. 345.

Fraud in one of a series of mortgages does not affect the validity of a *bona fide* mortgage which precedes (Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83) or follows (McDonald *v.* Swisher, 57 Kan. 205, 45 Pac. 593) the fraudulent one, even though the subsequent *bona fide* mortgage recognizes the validity of the prior fraudulent one (Eddy *v.* Ireland, 6 Utah 147, 21 Pac. 501). *Compare* Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692, applying the same doctrine to a case where all the mortgages were executed at the same time.

34. Cassidy *v.* Harrelson, 1 Colo. App. 458, 29 Pac. 525; Shoenberger *v.* Mount, 1 Handy (Ohio) 566, 12 Ohio Dec. (Reprint) 292.

Right of second mortgagee to redeem first mortgage.— When a second mortgagee does not make out his right to possession by the terms of his mortgage, he cannot secure a stay of proceedings under a prior mortgage, which are for the purpose of enabling the first mortgagee to realize out of the property. Smith *v.* Coolbaugh, 19 Wis. 106.

35. Sperry *v.* Ethridge, 70 Iowa 27, 30 N. W. 4; Newman *v.* Tymeson, 13 Wis. 172, 80 Am. Dec. 735. See also James *v.* Wilson, 8 N. D. 186, 77 N. W. 603, holding that when a second mortgagee sued the mortgagor for possession of the property, the latter could not set up in defense the title of a prior mortgagee who had not demanded possession.

After default in the condition of the first mortgage the second mortgagee cannot recover possession of the property from the mortgagor but his only remedy is to redeem the first mortgage. Martin *v.* Jenkins, 51 S. C. 42, 27 S. E. 947.

36. McFadden *v.* Hopkins, 81 Ind. 459.

A fortiori a prior encumbrancer may sue a subsequent one when the latter does not get his mortgage from the true owner of the property. Cutler *v.* Hake, 47 Mich. 80, 10 N. W. 116.

The first mortgagee's rights to take possession under his mortgage are not impaired by the execution of a subsequent mortgage on the property, although the property is in the joint possession of the mortgagor and second mortgagee. Coty *v.* Barnes, 20 Vt. 78.

A junior mortgagee is liable for conversion when he sells the property for a full consideration and without recognizing the rights of the prior mortgagee (Lafeyth *v.* Emporia Nat. Bank, 53 Kan. 51, 35 Pac. 805; Kleinberger *v.* Brown, 58 N. Y. Super. Ct. 4, 8 N. Y. Suppl. 866, 30 N. Y. St. 246; Lempke *v.* Peterson, 1 N. Y. City Ct. 15; Lowe *v.* Wing, 56 Wis. 31, 13 N. W. 892. But see Hale *v.* Omaha Nat. Bank, 39 N. Y. Super. Ct. 207), where he has appropriated the property to his own use (Burton *v.* Tannehill, 6 Blackf. (Ind.) 470; Brown *v.* Miller, 108 N. C. 395, 13 S. E. 167), where he induces a purchaser to buy from the mortgagor (Henderson *v.* Foy, 96 Ala. 205, 11 So. 441), where he received the property and put it beyond the reach of execution under the senior mortgage (Harris *v.* Grant, 96 Ga. 211, 23 S. E. 390), and where, after a legitimate foreclosure sale, the junior mortgagee resells the property, in which case no demand for a return of the property is necessary (Koehring *v.* Aultman, 7 Ind. App. 475, 35 N. E. 30).

Where the first mortgagee does not prove a conversion because his mortgage is not entitled to priority, the balance received by the second mortgagee over the amount necessary to discharge cannot be recovered in an action for a conversion but must be recovered in a suit for money had and received. Simpson *v.* Hinson, 88 Ala. 527, 7 So. 264. See also McRae *v.* O'Hara, 62 Minn. 143, 64 N. W. 146, where the first mortgagee held a mortgage on a one-third undivided interest and the second mortgagee held a mortgage on the entire property and after making a payment on each mortgage the mortgagor absconded. It was held that the first mortgagee could not recover from the second the amount of the payment.

37. Chandler *v.* West, 37 Mo. App. 631.

Expenses incurred by a second mortgagee in harvesting a crop and paying off a prior landlord's lien must be paid or tendered be-

or he may waive the tort and recover the proceeds in an action of assumpsit.[38]

3. Rights of Second Mortgagee Against First Mortgagee. A first mortgagee who is rightfully in possession is not liable in conversion to a subsequent mortgagee,[39] but the first mortgagee might become liable by reason of a void foreclosure sale,[40] because he has attached the mortgaged property[41] or because of his

fore a first mortgagee can recover the crop. McKennon *v.* May, 39 Ark. 442.

What constitutes a defense for a second mortgagee.— Where a first mortgagee brings replevin against the assignee of a second mortgage to recover the mortgaged chattels, and the assignee asks to have sums received by the first mortgagee and damage caused by him deducted from the first mortgage, he must further allege that such deductions would equal the mortgage debt in order to make out a good defense, under a statute allowing equitable defenses to be pleaded. Roberts *v.* White, 146 Mass. 256, 15 N. E. 568.

38. Leighton *v.* Preston, 9 Gill (Md.) 201. *Compare* Anderson *v.* Case, 28 Wis. 505, holding that where the second mortgagee of chattels took possession of and sold the goods with the consent of the first mortgagee, which was obtained under a false impression as to the respective rights of the parties, but without fraud on the part of the second mortgagee, an action would not lie against him for a conversion, although he was liable to a judgment in an action for money had and received.

Damages.—A first mortgagee who replevins mortgaged property from a second mortgagee without a previous demand is not entitled to damages for detention, because the possession of the defendant was rightful and he must accept a return of the property and cannot recover a money judgment against defendant. Nichols *v.* Sheldon Bank, 98 Iowa 603, 67 N. W. 582. *Compare* Campbell Printing Press, etc., Co. *v.* Roeder, 44 Mo. App. 324, holding that when a mortgagee of chattels after condition broken replevies the same from one who holds some of the notes secured by the mortgage, and those, moreover, first entitled to payment, the equities of the parties as between themselves can be adjusted in the action.

Necessary allegations in complaint.—When a first mortgagee sues a second mortgagee who has sold the property under his mortgage, the complaint must allege a right to possession or a demand for possession. Binman *v.* Baker, 6 Wash. 50, 32 Pac. 1008.

A money judgment against a first mortgage who seeks to replevy the property from a second mortgage is error, even though the jury find the property is sufficient in value to pay off both mortgages, for that would throw any risk of loss on the first mortgagee; if defendant wishes to keep the property he should tender the amount of plaintiff's lien. Olin *v.* Lockwood, 102 Mich. 443, 60 N. W. 972.

On an adjustment of accounts, a prior mortgagee of a crop is entitled to credit for amounts used by him to pay off a prior landlord's statutory lien, as the property before any of the money received by him will be applied in payment of the mortgage debt. Franklin *v.* Meyer, 36 Ark. 96.

39. Harris *v.* Grant, 96 Ga. 211, 23 S. E. 390 (where the senior mortgagee appropriated the property in payment of his claim at a fair price); Smith-McCord Dry Goods Co. *v.* Burke, 63 Kan. 740, 66 Pac. 1036 (until the prior mortgage has been satisfied); Clapp *v.* Campbell, 124 Mass. 50. But see Schmittdiel *v.* Moore, 120 Mich. 199, 79 N. W. 195, holding that a junior mortgagee could sue a senior one for conversion after a tender of the senior mortgage debt. And *compare* Hale *v.* Omaha Nat. Bank, 64 N. Y. 550, holding that a senior mortgagee was not liable to one claiming a prior equitable lien on the property by reason of his exercise of his legal right to foreclose.

A fortiori this is true when the second mortgagee has not a right to possession under the mortgage. Smith *v.* Coolbaugh, 19 Wis. 106.

Removal of the property by the mortgagor whereby it is lost does not make a first mortgagee liable to a junior encumbrancer when the former is not guilty of fraud or gross negligence. Shields *v.* Kimbrough, 64 Ala. 504. But see Peregoy *v.* Wheeler, 88 Iowa 732, 55 N. W. 462, holding that when the first mortgagee removed the property for an illegal purpose by reason of which it was confiscated, he was liable in conversion to subsequent encumbrancers.

Release of homestead property by a first mortgagee does not render him liable to a subsequent encumbrancer because other property must be exhausted before a resort could be made to the homestead. Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822. *Compare* Keese *v.* Coleman, 72 Ga. 658, applying the same doctrine to a mortgage by a partnership covering firm and individual property.

The second mortgagee cannot maintain trover against the first mortgagee, although the demand of the first mortgagee has been satisfied. Hume *v.* Breck, 4 Litt. (Ky.) 284. *Contra*, Clendening *v.* Hawk, 8 N. D. 419, 79 N. W. 878.

40. La Crosse Boot, etc., Co. *v.* Mons Anderson Co., 13 S. D. 301, 83 N. W. 331, holding that, where the rights of a purchaser from the mortgagor were prior to an unrecorded second mortgage, an illegal agreement for a foreclosure sale between the first mortgagee and the purchaser would not entitle the second mortgagee to priority. *Compare* Kimball *v.* Marshall, 8 N. H. 291, where the assignee of a mortgage caused the property to be levied on under a judgment recovered on the debt for which the original mortgagee went as surety, and it was held that the assignee was liable to a second mortgagee in trespass.

41. Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4.

refusal of a tender of the amount due on the first mortgage.[42] A second mortgagee may have the foreclosure of a prior mortgage enjoined on the ground that it is fraudulent even before the second mortgage has matured.[43]

4. Rights of Second Mortgagee Against Third Person. After the title of a first mortgagee has become absolute at law, a second mortgagee cannot bring an action in the nature of trover for a conversion of the property,[44] for the first mortgagee alone can bring such an action,[45] but a second mortgagee may maintain such an action when the property has been taken from his possession[46] or after the first mortgage has been discharged,[47] and a purchaser who is guilty of converting the mortgaged property seems to be liable to the second mortgagee for injury to his reversionary interest.[48]

42. Williamson *v.* Gottschalk, 1 Mo. App. 425, where the first mortgagee was not liable because he had satisfied the burden which rested on him to show that he had sold the property prior to the tender of the mortgage debt.

Negligence of prior mortgagee.— When the holder of a chattel mortgage who has control of the chattels negligently allows them to be lost, he loses, to the extent of their value, a first lien which he has on real estate, on which the holder of a second lien on the chattels also has a second lien; but the burden is on the second lienor to show that he is not secured by other property of sufficient value to pay his claim. Union Nat. Bank *v.* Moline, etc., Co., 7 N. D. 201, 73 N. W. 527.

The first mortgagee may recoup in damages when sued by a subsequent encumbrancer for foreclosing by private sale, and if the first mortgage debt was greater than the value of the property and the sale was without fraud there could be no recovery in the suit. Lovejoy *v.* Merchants' State Bank, 5 N. D. 623, 67 N. W. 956.

Although a prior mortgage was fraudulent, a second mortgagee cannot recover for depreciation of property which is not consumable by use while it is in the hands of the first mortgagee because the mortgagor or his grantee has a right to the use thereof till a demand by the mortgagee. Moore *v.* Wood, (Tenn. Ch. 1901) 61 S. W. 1063.

A second mortgagee cannot show that he acquired title from third persons other than the mortgagor when he has replevied the property from the first mortgagee, and the complaint alleges no such source of title. Campbell *v.* Dick, 80 Wis. 42, 49 N. W. 120.

43. McCormick *v.* Hartley, 107 Ind. 248, 6 N. E. 357. *Compare* Taylor *v.* Barker, 30 S. C. 238, 9 S. E. 115, giving priority to a second mortgage held by a principal over a first mortgage taken by his agent in fraud of the principal's rights.

44. Clapp *v.* Campbell, 124 Mass. 50; Landon *v.* Emmons, 97 Mass. 37; Rugg *v.* Barnes, 2 Cush. (Mass.) 591.

Contra.— Marks *v.* Robinson, 82 Ala. 69, 2 So. 292; Gardner *v.* Morrison, 12 Ala. 547 (holding that a second mortgagee could bring detinue against one claiming under the mortgagor, although his mortgage was executed after default in the condition of the first mortgage); Talcott *v.* Meigs, 64 Conn. 55, 59, 29 Atl. 131 (where it is said that the contrary is "the doctrine of the Massachusetts courts: . . . but it is there rested on the position that, in the case of chattel mortgages, the whole legal title and right of possession passes out of the mortgagor by the first mortgage, so that he can thereafter give only an equitable estate to a junior mortgagee, even as against a stranger. Such is not the law of Connecticut"); Treat *v.* Gilmore, 49 Me. 34 (where the second mortgagee's suit was against an attaching officer who had seized the property on process against the mortgagor before the first mortgagee had a right to possession); Moore *v.* Prentiss Tool, etc., Co., 133 N. Y. 144, 30 N. E. 736, 44 N. Y. St. 68 [*affirming* 59 N. Y. Super. Ct. 516, 15 N. Y. Suppl. 150, 39 N. Y. St. 361].

Where the title under the first mortgage becomes absolute before the act of conversion occurred, a second mortgagee cannot bring trover against the wrong-doer. Clapp *v.* Glidden, 39 Me. 448.

45. Ring *v.* Neale, 114 Mass. 111, 19 Am. Rep. 316 [*distinguishing* Treat *v.* Gilmore, 49 Me. 34]; Goodrich *v.* Willard, 2 Gray (Mass.) 203.

Intervention by first mortgagee after waiver of his lien is not permissible where a second mortgagee brings replevin for the property; but the second mortgagee becomes a trustee of the proceeds and must be charged as such in a separate action. Colwell *v.* Aitchison, 7 Ohio Dec. (Reprint) 101, 1 Cinc. L. Bul. 111.

46. White *v.* Webb, 15 Conn. 302, where the property was taken from the possession of the second mortgagee. *Compare* McGraw *v.* Sampliner, 107 Mich. 141, 64 N. W. 1060, holding that a second mortgagee who was not entitled to possession of the mortgaged property could not maintain trover against an attaching officer.

47. Henderson *v.* Murphree, 124 Ala. 223, 27 So. 405. *Compare* Hunt *v.* Daniels, 15 Iowa 146, holding that a mortgagee may make an agreement that the benefit of the mortgage shall inure to a third party; but, if such mortgage be satisfied or if the property remain unapplied thereon, a junior mortgagee will have the right of possession against such third party.

48. Sperry *v.* Ethridge, 70 Iowa 27, 30 N. W. 4; Newman *v.* Tymeson, 13 Wis. 172, 80 Am. Dec. 735. *Compare* Huellmantel *v.* Vinton, 116 Mich. 621, 74 N. W. 1004, holding that after the first mortgagee had recovered from a sheriff for levying on mortgaged chat-

5. Priority Between Successive Mortgages. Priority of record usually determines priority of lien between recorded mortgages,[49] even though given for indemnity;[50] but an agreement or understanding between all the parties will determine priority without regard to the time of record.[51]

tels under process against the mortgagor, a second mortgagee had a distinct right to bring trover and could recover such portion of the property as remained unappropriated by the former judgments.

Damages.— A second mortgagee in possession can recover the full value of the property in an action against a stranger and interest on the amount from the taking. White *v.* Webb, 15 Conn. 302. But see Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418, holding that a second mortgagee sustained no damages from a seizure of the property when it was insufficient in value to pay off the first mortgage.

49. *Arkansas.* — Washington *v.* Love, 34 Ark. 93.

Colorado.— Brereton *v.* Bennett, 15 Colo. 254, 25 Pac. 310.

Georgia.— Barnett *v.* McConnell, 101 Ga. 32, 28 S. E. 495; Kelly *v.* Shepherd, 79 Ga. 706, 4 S. E. 880.

Iowa.— Bradley *v.* Gelkinson, 57 Iowa 300, 10 N. W. 743, although the mortgage subsequently recorded was given for the purchase-price of seed grain.

Massachusetts.— Berry *v.* Levitan, (Mass. 1902) 63 N. E. 11, where the rule was applied, although the mortgagee who neglected to record paid off a prior mortgage to which the successful mortgage was expressly postponed.

Nebraska.— Patrick *v.* Paulson, 34 Nebr. 416, 51 N. W. 1029, unless the second mortgagees show that they gave credit in reliance on the non-existence of any encumbrance.

New York.— Tiffany *v.* Warren, 37 Barb. (N. Y.) 571, 24 How. Pr. (N. Y.) 293.

Ohio.— *In re* Dehner, 7 Ohio S. & C. Pl. Dec. 215, 5 Ohio N. P. 247.

Tennessee.— Copeland *v.* Bennet, 10 Yerg. (Tenn.) 355, where the prior mortgagee had notice of the subsequent mortgage before he filed his for record.

United States.— Capital City Bank *v.* Hodgin, 24 Fed. 1.

Contra, Vining *v.* Millar, 116 Mich. 144, 74 N. W. 459; Farmington Bank *v.* Ellis, 30 Minn. 270, 15 N. W. 243; De Courcey *v.* Collins, 21 N. J. Eq. 357. *Compare* Simpson *v.* Harris, 21 Nev. 353, 31 Pac. 1009, where plaintiff advanced money to defendant on the latter's promise to give him a mortgage and a mortgage was subsequently executed some months later which was duly placed on record. Intermediate between plaintiff's advance and the execution of his mortgage, a mortgage was executed to third persons who had extended credit to defendant and this last mortgage was preferred to plaintiff's, although it was subsequently filed. See also Davis *v.* Bowman, 25 Oreg. 189, 35 Pac. 264 [*overruling* Pittock *v.* Jordan, 19 Oreg. 7, 13 Pac. 510], where a mortgage was filed two days after it was executed and was held to be entitled to priority over a mortgage executed and filed within those two days, even though the subsequent mortgagee acted in good faith and gave a valuable consideration.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 241.

Contemporaneous filing.— To show the priority between three mortgages contemporaneously filed, testimony as to the acts of an agent of the three mortgagees, and his intent in performing the same, in executing and filing the mortgages, is competent. Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687.

Surrendering possession to first mortgagee before second mortgage has been recorded seems not to have an equivalent effect to record, for the first mortgagee has been held to be postponed, although the property was turned over to him before the second mortgage was recorded. Witherbee *v.* Taft, 51 N. Y. App. Div. 87, 64 N. Y. Suppl. 347. *Compare* Sheldon *v.* Brown, 72 Minn. 496, 75 N. W. 709, where it was held that in the absence of any agreement as to priority, mortgagees became tenants in common when their mortgages were filed contemporaneously.

A mortgage on a partner's undivided interest in firm property will have priority as to one half the proceeds over a mortgage given a retiring partner to secure the purchase-price of his interest. Burdette *v.* Woodworth, 77 Iowa 144, 41 N. W. 598.

50. McFadden *v.* Hopkins, 81 Ind. 459; Krutsinger *v.* Brown, 72 Ind. 466.

51. Grumme *v.* Firminich Mfg. Co., 110 Iowa 505, 81 N. W. 791; Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145; Chadbourn *v.* Rahilly, 28 Minn. 394, 10 N. W. 420.

Where a mortgagee relies for priority on an express agreement he cannot introduce evidence showing that the competing mortgages were fraudulent or that they were without consideration. Lewis *v.* Burnham, 41 Kan. 546, 21 Pac. 572.

Where the mortgagee did not assent the agreement as to priority was not binding on him, even though he had notice of it. Lazarus *v.* Henrietta Nat. Bank, 72 Tex. 354, 10 S. W. 252.

Evidence of the intentions of the mortgagees having mortgages on the same property as to priority may be given *dehors* the instrument itself, where the possession of the property remains in the mortgagor. Wray *v.* Fedderke, 43 N. Y. Super. Ct. 335.

A mortgage without consideration must yield to one given on good consideration where neither is acknowledged in statutory form but both are good between the parties. Machette *v.* Wanless, 2 Colo. 169.

A mortgagee proving his debt against the mortgagor in bankruptcy, without disclosing

C. Transfers by Way of Sale — 1. In General. In the absence of stipulation to the contrary a mortgagor in possession may sell his interest in the mortgaged property before a default has occurred in the condition of the mortgage,[52] but the vendee gets only the rights which the mortgagor had.[53]

2. Consent of Mortgagee to Sale — a. Generally. A purchaser from a mortgagor takes the title free from the lien of the mortgage if the sale was made with

his security, is not estopped from claiming the chattels against a subsequent mortgagee who has not proved his debt. Cook *v.* Farrington, 104 Mass. 212.

A mortgage securing money borrowed by the mortgagor to enable him to bid in the property at a sale under a first mortgage is subsequent to a previous second mortgage on the property. Kemerer *v.* Bloom, 65 Iowa 363, 21 N. W. 679.

If property subject to two mortgages, the second mortgagee having other security, is seized by a creditor under a prior claim against both the property mortgaged and the additional security, the first mortgagee is entitled to reimbursement out of the second mortgagee's additional security (Jones *v.* Phelan, 20 Gratt. (Va.) 229); and on the other hand, if property already mortgaged is subsequently mortgaged to different persons in separate parcels, the senior mortgagee, it seems, may satisfy his mortgage out of the proceeds of either parcel, and pay the surplus over to the holder of the second mortgage on the other parcel (Consolidated Barb-Wire Co. *v.* Guthrie Nat. Bank, 6 Kan. App. 775, 51 Pac. 233). *Compare* Pasley *v.* Beland, 111 Ga. 828, 36 S. E. 296, holding that Ga. Civ. Code, § 2741, which authorizes a mortgagee of personal property which is subject to more than one encumbrance, to cause the property to be sold, and the proceeds distributed among the lienors in order of priority, applies only where the encumbrances are all put on the same property by the same person, and does not apply to a case where the other encumbrances are put on the property by the vendee of the original mortgagor.

52. *Alabama.*— Heflin *v.* Slay, 78 Ala. 180.

Indiana.— McFadden *v.* Hopkins, 81 Ind. 459.

Massachusetts.— Jones *v.* Goodwillie, 143 Mass. 281, 9 N. E. 639, holding that the mortgagor could make a second mortgage and consent to a removal of the property by the second mortgagee.

Michigan.— Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52.

Minnesota.— Daly *v.* Proetz, 20 Minn. 411.

Missouri.— White *v.* Quinlan, 30 Mo. App. 54; Lafayette County Bank *v.* Metcalf, 29 Mo. App. 384.

Montana.— Davis *v.* Blume, 1 Mont. 463.

New Jersey.— Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219; Chapman *v.* Hunt, 13 N. J. Eq. 370.

New York.— Gregg *v.* Wittemann, 12 Misc. (N. Y.) 90, 32 N. Y. Suppl. 1131, 66 N. Y. St. 668.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 467.

A recognition of the mortgagee's rights is essential and the sale must not be in antagonism to the mortgage. La Fayette County Bank *v.* Metcalf, 40 Mo. App. 494.

An equity of redemption can be transferred by a mortgagor without any writing. Grice *v.* Haskins, 73 Ga. 700.

A statute regulating the sale of mortgaged property by the mortgagor has been held to have no application to a case where there was an agreement as to sale between a mortgagor and mortgagee. Hubbard *v.* Lyman, 8 Allen (Mass.) 520.

53. McFadden *v.* Hopkins, 81 Ind. 459; McCandless *v.* Moore, 50 Mo. 511; Leach *v.* Kimball, 34 N. H. 568. *Contra,* Fields *v.* Karter, 121 Ala. 329, 25 So. 800, holding that the purchaser was not restricted to those defenses which the mortgagor could have set up if the action had been brought against him. *Compare* Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517, holding that a purchaser of chattels from a mortgagor could not plead that the mortgage covering them was void because it contained a power of sale in favor of the mortgagor.

Even an innocent purchaser of the property takes subject to the lien where the mortgagee has not been negligent in giving notice. Blythe *v.* Crump, (Tex. Civ. App. 1902) 66 S. W. 885.

Purchaser cannot plead usury as a taint on the mortgage debt when the mortgagor did not himself set up such a defense. Greither *v.* Alexander, 15 Iowa 470.

No adverse right to a trustee under a mortgage deed of trust is acquired by a purchaser of the chattels covered thereby, who buys from a grantor during the time that his right to possession continues. Foster *v.* Goree, 5 Ala. 424.

A sale by the mortgagor as absolute owner transfers his equitable interest in them but does not transfer the title of the mortgagee. Dorsey *v.* Gassaway, 2 Harr. & J. (Md.) 402, 3 Am. Dec. 557.

Defects in the execution of the mortgage cannot be raised by one who has assumed payment of the mortgage debt. Sunny South Lumber Co. *v.* A. J. Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902; Pope *v.* Porter, 33 Fed. 7. But see Ridgely *v.* First Nat. Bank, 75 Fed. 808, holding that a purchaser from the mortgagor could attack a mortgage as void because not properly executed.

An assignee of the mortgagor's interests has no claim for protection when the mortgagee brings replevin for the property against attaching creditors, even though he had notice of the assignment. Martindale *v.* Evans, (Kan. App. 1898) 53 Pac. 889.

the express or implied consent of the mortgagee.[54] Consent to a sale by the mortgagor of part of the mortgaged property does not release the rights of the mortgagee against the balance.[55]

b. Conditional Consent. When a mortgagee's consent is given on condition that the purchaser make a certain payment, the condition must be performed in order to make the consent availing;[56] but non-performance of a condition imposed on the mortgagor will not affect the rights of a purchaser who does not

54. *Idaho.*— Knollin *v.* Jones, (Ida. 1900) 63 Pac. 638.

Illinois.— Brandt *v.* Daniels, 45 Ill. 453.

Indiana.— Carter *v.* Fately, 67 Ind. 427; Benedict *v.* Farlow, 1 Ind. App. 160, 27 N. E. 307.

Massachusetts.— Clark *v.* Hale, 8 Gray (Mass.) 187, holding furthermore that consent by a second mortgagee to a sale of the property did not prevent him from enforcing a first mortgage which had subsequently been assigned to him.

Michigan.— Marquette First Nat. Bank *v.* Weed, 89 Mich. 357, 50 N. W. 864.

Minnesota.— Fairweather *v.* Nelson, 76 Minn. 510, 79 N. W. 506; Partridge *v.* Minnesota, etc., Elevator Co., 75 Minn. 496, 78 N. W. 85.

Missouri.— Lafayette County Bank *v.* Metcalf, 29 Mo. App. 384, holding that a statute making it a penal offense for the mortgagor to sell without consent did not add to the requirements necessary for passing a title to the purchaser.

Nebraska.— Drexel *v.* Murphy, 59 Nebr. 210, 80 N. W. 813; Littlejohn *v.* Pearson, 23 Nebr. 192, 36 N. W. 477, where the giving of the consent was denied but the court held that it was established by the weight of evidence.

New Hampshire.— Gage *v.* Whittier, 17 N. H. 312.

New York.— Rider *v.* Powell, 28 N. Y. 310, 4 Abb. Dec. (N. Y.) 63, where the mortgagee agreed to accept a part of the pay from the purchaser as a consideration for his consent and to look to the personal responsibility of the mortgagor for the balance of the mortgage debt.

North Carolina.— Merritt *v.* Kitchin, 121 N. C. 148, 28 S. E. 358.

North Dakota.— Peterson *v.* St. Anthony, etc., Elevator Co., 9 N. D. 55, 81 N. W. 59, 81 Am. St. Rep. 528; New England Mortg. Security Co. *v.* Great Western Elevator Co., 6 N. D. 407, 71 N. W. 130.

Rhode Island.— Jenckes *v.* Goffe, 1 R. I. 511, where the absence of consent prevented a clear title from passing.

South Carolina.— Flenniken *v.* Scruggs, 15 S. C. 88.

Texas.— Houston, etc., R. Co. *v.* Garrison, (Tex. Civ. App. 1896) 37 S. W. 971. *Compare* Andrews *v.* Dun, 15 Tex. Civ. App. 124, 39 S. W. 209, holding that the mortgaged property was subject to levy after the mortgagee had given him consent to a sale and before the consent had been acted on. But see Godair *v.* Tillar, 19 Tex. Civ. App. 541, 47 S. W. 553, holding that a sale by a junior mortgagee did not pass the property free from the lien of the first mortgage, although the mortgagor had consent to make a sale which would pass a clear title to the property.

United States.— Pecos Valley Bank *v.* Evans-Snider-Buel Co., 107 Fed. 654, 46 C. C. A. 534, holding that the execution of a renewal mortgage did not affect the result flowing from a sale with consent.

Contra, Monson *v.* Renaker, 22 Ky. L. Rep. 1405, 60 S. W. 924, where purchaser became insolvent and the mortgagee was allowed to reassert his lien.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 473.

Effect on rights of second mortgagee.— Where a first mortgagee consents to a sale of the property by the mortgagor, this does not release the first mortgage so that the second mortgagee can claim the property without paying off the first mortgage; but the second mortgagee can insist that the proceeds of the sale be applied to pay off the mortgage debt. Madden *v.* Walker, 7 Kan. App. 697, 51 Pac. 914.

Agency of mortgagor for mortgagee.— Where the mortgagor is authorized to sell by the mortgagee, he acts as agent for the latter and can bind him by warranting the chattel (National Citizens' Bank *v.* Ertz, 83 Minn. 12, 85 N. W. 821, 85 Am. St. Rep. 438, 53 L. R. A. 174); but the opposite conclusion has been reached in a jurisdiction where a mortgage is merely a lien on the property (Blyth, etc., Co. *v.* Houtz, 24 Utah 62, 66 Pac. 611).

55. Wynn *v.* Ely, 8 Fla. 232; Preble *v.* Conger, 66 Ill. 370; Judson *v.* Easton, 1 Thomps. & C. (N. Y.) 598.

56. Dodson *v.* Dedman, 61 Mo. App. 209. See also Watson *v.* Mead, 98 Mich. 330, 57 N. W. 181, holding that the failure of the mortgagor to apply proceeds of sales toward payment of the mortgage debt entitled the mortgagee to replevy the balance of property. *Compare* Jones *v.* Webster, 48 Ala. 109, where a mortgagor was authorized to sell mortgaged property by a broker of his own selection, provided he turned the proceeds over to the mortgagee, and it was held that the mortgagee could bring trover against a broker who denied the mortgagee's right and refused to turn over the proceeds. But see Gates *v.* Johnston Lumber Co., 172 Mass. 495, 52 N. E. 736, holding that fixing a stated time within which mortgaged property should be removed did not make a condition upon non-compliance with which the mortgagee's consent to the sale was revoked.

Performance of an alleged condition will not render a sale valid unless it is also shown that the mortgagee consented to a sale in case the condition was fulfilled. Hol-

participate therein,[57] because an agreement to allow a mortgagor to sell and turn over the proceeds is a substitution of his personal obligation for the mortgage security.[58]

e. Manner of Sale. The mortgagor must strictly pursue the authority to make sales,[59] and cannot delegate such authority when it involves the exercise of discretion.[60]

d. Necessity For Written Consent. Even where it is made a criminal offense for the mortgagor of chattels to sell without written consent, a valid sale and transfer of the absolute title may be made with the mortgagee's oral consent.[61]

e. What Constitutes Consent. Whether the mortgagee has consented to a

loway *v.* Arnold, 92 Mo. 293, 5 S. W. 277.

A mortgage is not rendered fraudulent by the mortgagor's failure to comply with the condition imposed in regard to the disposition of the proceeds. Atchinson Saddlery Co. *v.* Gray, 63 Kan. 79, 64 Pac. 987. See also *supra*, XI, H [6 Cyc. 1104].

Between the parties the mortgage still exists as a valid instrument till the condition on which consent to a sale was given has been performed. Sanford *v.* Munford, 31 Nebr. 792, 48 N. W. 876.

57. New England Mortg. Security Co. *v.* Great Western Elevator Co., 6 N. D. 407, 71 N. W. 130; Flenniken *v.* Scruggs, 15 S. C. 88 (where the mortgagee consented to an exchange of the mortgaged property on condition a new mortgage was executed on the property received in exchange which was not done); Antigo Bank *v.* Ryan, 105 Wis. 37, 80 N. W. 440. See also Blalock *v.* Strain, 122 N. C. 283, 29 S. E. 408, holding that the original mortgagee would have no rights in the property received in exchange even against a subsequent mortgagee thereof who had notice of the agreement.

Compliance with the terms of the consent is essential, and an agreement of the mortgagee that the mortgaged property may be removed into one state will not justify its removal to another one. Armitage-Herschell Co. *v.* Potter, 93 Ill. App. 602.

Effect of surrender of exchanged property by purchaser.— An exchange of mortgaged property with the mortgagee's consent once made is complete and final and if the other party to the barter has been notified of his right he cannot surrender the mortgaged property to the mortgagee on demand and replevy the other property from the mortgagor. Carter *v.* Fately, 67 Ind. 427.

58. Harper *v.* Neff, 6 McLean (U. S.) 390, 11 Fed. Cas. No. 6,089.

59. Burks *v.* Hubbard, 69 Ala. 379, holding that a purchaser who claimed as vendee from a mortgagor authorized to sell for cash only must show that he paid cash. See also Barnard *v.* Eaton, 2 Cush. (Mass.) 294, holding that an authority to sell at retail did not authorize the mortgagor to put the property into a partnership as his share of the capital.

60. Drum *v.* Harrison, 83 Ala. 384, 3 So. 715.

61. *Illinois.*— Anderson *v.* South Chicago Brewing Co., 173 Ill. 213, 50 N. E. 655 [*reversing* 67 Ill. App. 300]; Brandt *v.* Daniels, 45 Ill. 453.

Kansas.— Frick Co. *v.* Western Star Milling Co., 51 Kan. 370, 32 Pac. 1103.

Massachusetts.— Pratt *v.* Maynard, 116 Mass. 388; Stafford *v.* Whitcomb, 8 Allen (Mass.) 518; Shearer *v.* Babson, 1 Allen (Mass.) 486, even though the mortgage forbade sales without written consent.

Michigan.— Marquette First Nat. Bank *v.* Weed, 89 Mich. 357, 50 N. W. 864.

Missouri.— Randol *v.* Buchanan, 61 Mo. App. 445, 1 Mo. App. Rep. 666; Coffman *v.* Walton, 50 Mo. App. 404.

Nebraska.— Littlejohn *v.* Pearson, 23 Nebr. 192, 56 N. W. 477.

New Hampshire.— Roberts *v.* Crawford, 54 N. H. 532; Patrick *v.* Meserve, 18 N. H. 300; Gage *v.* Whittier, 17 N. H. 312.

Vermont.— Perry *v.* Dow, 56 Vt. 569.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 474.

What constitutes written consent.— Where a mortgage prohibited sales by the mortgagor without the written consent of the mortgagee, a covenant allowing the mortgagor to retain and use the mortgaged property could not be construed as the written consent referred to in the covenant against selling. Estes *v.* Denver First Nat. Bank, 15 Colo. App. 526, 63 Pac. 788.

The purchaser's ignorance of the mortgage will not prevent him from acquiring a good title, provided the mortgagee has consented to the sale. Stafford *v.* Whitcomb, 8 Allen (Mass.) 518.

Effect of absence of written consent.— A mortgagor's sale of the mortgaged chattels, without the written assent of the mortgagee as required by statute, is not of sufficient validity to sustain an action for its enforcement, although, if there be actual payment and delivery, and in the absence of any other impediment, the title will pass. Gage *v.* Whittier, 17 N. H. 312.

Where sales in the ordinary course of business are authorized, either expressly or by implication, it has been held that a covenant in the instrument not to sell without written consent applies only to sales in bulk (National Mercantile Bank *v.* Hampson, 5 Q. B. D. 177, 49 L. J. Q. B. 480, 28 Wkly. Rep. 424; Walker *v.* Clay, 44 J. P. 396, 49 L. J. C. P. 560, 42 L. T. Rep. N. S. 369); but a sale in bulk will be bad, even though the purchaser took *bona fide* and without notice of the mortgagor's fraud (Payne *v.* Fern, 6

sale by the mortgagor is for the jury to determine,[62] and while consent could not be inferred from the fact that the mortgagee remained silent when told of an intended[63] or completed[64] sale, the reverse is true when the mortgagee remains silent in the presence of an actual sale[65] or accepts the proceeds of the sale with knowledge of the source from which they came.[66]

3. CONVERSION BY PURCHASER. Although an illegal sale by the mortgagor does not necessarily render the purchaser guilty of conversion,[67] the vendee is rendered

Q. B. D. 620, 50 L. J. Q. B. 446, 29 Wkly. Rep. 441; Taylor *v.* McKeand, 5 C. P. D. 358, 44 J. P. 784, 49 L. J. C. P. 563, 42 L. T. Rep. N. S. 833, 28 Wkly. Rep. 628. *Compare* Ryan *v.* Johnson, 93 Iowa 243, 61 N. W. 970, holding that credit sales did not give the mortgagee a right to replevin the property or sue for its value.

Parol consent given prior to the execution of the mortgage is a sufficient protection for one dealing with the mortgaged property. Holland *v.* Kimbrough, 52 Ala. 249.

62. Jenckes *v.* Goffe, 1 R. I. 511, where the mortgagor was allowed to remain in possession and to continue the business. *Compare* Knollin *v.* Jones, (Ida. 1900) 63 Pac. 638, where the evidence was held sufficient to justify a finding by the jury that the mortgagee gave his consent to the sale.

Consent to a sale of a portion of the mortgaged property does not imply the mortgagee's consent to a sale of the whole of it (Riley *v.* Conner, 79 Mich. 497, 44 N. W. 1040), and his rights against the balance of the property are in no way prejudiced (Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673, 34 S. W. 451), unless the release of part interferes with adverse claims against the property of which the mortgagee had knowledge at the time of the release (Loveland *v.* Cooley, 59 Minn. 259, 61 N. W. 138; Dillon *v.* Bennett, 14 Sm. & M. (Miss. 171).

63. Smith *v.* Chitwood, 44 N. C. 445.

64. Patterson *v.* Taylor, 15 Fla. 336.

Mortgagee may hold the purchaser to his bargain and give directions to the mortgagor not to allow the purchaser to return the property but to hold him for the purchase-price without losing his right to hold the purchaser for the value of the property received by him. Chittenden *v.* Pratt, 89 Cal. 178, 26 Pac. 626.

65. Brooks *v.* Record, 47 Ill. 30; Benedict *v.* Farlow, 1 Ind. App. 160, 27 N. E. 307. *Contra*, Steele *v.* Adams, 21 Ala. 534, where the sale was on an execution against the mortgagor. *Compare* Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673, 34 S. W. 451, where an immediate sale was made in attachment proceedings and a mortgagee of the property bought it in but it was held that he could assert his mortgage lien against the proceeds produced by the property.

Actual presence at the sale is not necessary to constitute consent thereto when the mortgagee allows the mortgagor to assume the credit of ownership. Thompson *v.* Blanchard, 4 N. Y. 303.

The knowledge of the mortgagee regarding the sale is immaterial when he actually consents to the sale. Pratt *v.* Maynard, 116 Mass. 388.

Conduct constituting waiver.— Where the mortgagors of consumable goods make daily sales therefrom with the knowledge of the mortgagee and replenish stock, it will be presumed that the mortgagee has waived his privilege of taking the goods on failure to pay and he cannot reclaim them from the hands of purchasers (Barnet *v.* Fergus, 51 Ill. 352, 99 Am. Dec. 547; Ogden *v.* Stewart, 29 Ill. 122); but when the mortgagee did not learn of the sale till after the property had been destroyed and he then promptly took steps to recover the property, he was held not to have ratified the sale (Mack *v.* Phelan, 92 N. Y. 20).

Prompt repudiation of the mortgagor's right to sell may be shown by the mortgagee when a purchaser from the mortgagor seeks to justify his possession in order to disprove acquiescence which would amount to a ratification. Burks *v.* Hubbard, 69 Ala. 379. *Compare* Harris *v.* Woodward, 96 N. C. 232, 1 S. E. 554, holding that the ratification of an exchange of the mortgaged property by the mortgagor did not operate as a ratification by the mortgagee when the latter demanded a return of the property.

A covenant to account for proceeds on the part of the mortgagor may be a sufficient basis for the inference of a power for him to sell. Abbott *v.* Goodwin, 20 Me. 408.

66. Lafayette County Bank *v.* Metcalf, 29 Mo. App. 384; Field *v.* Doyon, 64 Wis. 560, 25 N. W. 653. *Compare* Hicks *v.* Ross, 71 Tex. 358, 9 S. W. 315, holding that after the mortgagee had received the proceeds he could not claim the property originally covered by the mortgage without accounting for what he had received.

Receiving indirectly the proceeds of the sale, as where they are used to harvest other property covered by the mortgage, estops the mortgagee from suing the purchaser in conversion. Etheridge *v.* Hilliard, 100 N. C. 250, 6 S. E. 571.

67. Dean *v.* Cushman, 95 Me. 454, 50 Atl. 85, 85 Am. St. Rep. 425, holding that mere temporary possession would not make the purchaser liable in conversion without a demand and refusal. But see Nichols, etc., Co. *v.* Minnesota Thresher Mfg. Co., 70 Minn. 528, 73 N. W. 415, holding that, although a purchase for valuable consideration did not of itself constitute a conversion, the finding implied that the purchaser resold the property, and this exercise of dominion constituted a conversion.

The continuing possession of a bailee at will of the mortgaged property does not con-

liable by putting the property out of reach[68] or by selling in denial of the mortgagee interests.[69]

4. Conversion by Agent. The ignorance of the selling agent of the mortgage does not prevent his being liable to the mortgagee for a conversion,[70] even though such selling agent is an auctioneer;[71] but to create the liability the agent must be engaged to sell and not merely to remove.[72] A creditor who instigated the mortgagor to sell and received the proceeds is liable for conversion.[73]

5. Right to Proceeds of Sales. A mortgagee may waive the tort and recover the purchase-price from a purchaser of the mortgaged property from the mortgagor,[74] but the lien of the chattel mortgage follows the goods themselves and

stitute a conversion, but the hailee must take some affirmative action before he can be charged as a wrong-doer. Campbell *v.* Quackenbush, 33 Mich. 287.

No definite demand and refusal is shown by evidence that a purchaser of mortgaged property replied that "he knew nothing about it" and refused to do anything when told of the mortgagee's claim. Ware *v.* Georgetown First Cong. Soc., 125 Mass. 584.

68. La Fayette County Bank *v.* Metcalf, 40 Mo. App. 494.

Destruction of the chattel after the purchase renders the purchaser liable in conversion to the mortgagee, although he bought in good faith and the loss occurred without fault on his part. Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545.

Mixing the mortgaged property with property of his own rendered the purchaser guilty of a conversion. Duke *v.* Strickland, 43 Ind. 494.

69. *Indiana.*— Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; McFadden *v.* Hopkins, 81 Ind. 459; Duke *v.* Strickland, 43 Ind. 494.

Massachusetts.— Chamberlain *v.* Clemence, 8 Gray (Mass.) 389, where defendant, the purchaser, directed a teamster as to the disposition of the property and then resold and delivered to another.

New York.— Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396.

Oregon.— J. I. Case Threshing-Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324, where the sale was made by an assignee of the mortgagor.

South Carolina.— Anderson *v.* Aiken, 11 Rich. Eq. (S. C.) 232.

Tennessee.— Louisville Bank *v.* Hill, 99 Tenn. 42, 41 S. W. 349, where the property was shipped out of the state to the vendee of the mortgagor, but the only payment was the extinguishment of an antecedent debt.

Texas.— McCown *v.* Kitchen, (Tex. Civ. App. 1899) 52 S. W. 801; Western Mortg., etc., Co. *v.* Shelton, 8 Tex. Civ. App. 550, 29 S. W. 494; Brown *v.* Grinnan, 2 Tex. App. Civ. Cas. § 413. But see Gammage *v.* Silliman, 2 Tex. App. Civ. Cas. § 14, holding that the purchaser was not liable to the mortgagee merely for taking possession and selling.

But see Rosenbaum *v.* Dawes, 77 Ill. App. 295, holding that as long as the mortgagor was entitled to possession a resale by the mortgagor's vendee did not constitute a conversion and neither did the seller's failure to deliver on demand constitute one because the property had passed out of his control.

When the purchaser knows that sales are forbidden, purchase of a part of the mortgaged goods will make him liable to the mortgagee for conversion. Fisher *v.* Friedman, 47 Iowa 443.

Refusal to conform to a condition on which the property might be sold renders a purchaser guilty of conversion, as where the mortgagor is entitled to sell provided he uses proceeds to replenish stock and the purchaser only pays an antecedent debt. Dexter *v.* Curtis, 91 Me. 505, 40 Atl. 549, 64 Am. St. Rep. 266.

Application of purchase-money toward payment of a prior lien will not relieve a purchaser from the mortgagor from liability to the mortgagee for a conversion of the property. Belser *v.* Youngblood, 103 Ala. 545, 15 So. 863.

A claimant of the mortgaged property who removes it and thereby destroys the security of the mortgagee becomes liable to him for damages. Reid *v.* Matthews, 102 Ga. 189, 29 S. E. 173, 66 Am. St. Rep. 164.

70. Marks *v.* Robinson, 82 Ala. 69, 2 So. 292; La Fayette County Bank *v.* Metcalf, 40 Mo. App. 494; Knapp *v.* Hobbs, 50 N. H. 476; Flanders *v.* Colby, 28 N. H. 34; Spraights *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Dudley *v.* Hawley, 40 Barb. (N. Y.) 397. *Contra*, Hernandez *v.* Aaron, 73 Miss. 434, 16 So. 910, where the goods were shipped to a factor to be sold in another state from that where the mortgage was recorded.

71. Coles *v.* Clark, 3 Cush. (Mass.) 399; Moloughney *v.* Hegeman, 9 Abb. N. Cas. (N. Y.) 403.

72. Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289, holding that a servant who merely carried goods from one shop to another was not liable for conversion. *Compare* Strickland *v.* Barrett, 20 Pick. (Mass.) 415, holding that the mere removal of the goods at the request of the mortgagor would not make one who had no intention to deprive the mortgagee of his property guilty of conversion.

73. Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933, holding that the opportunity for the mortgagee to pursue the property and enforce his lien did not render the sale harmless.

74. Chittenden *v.* Pratt, 89 Cal. 178, 26 Pac. 626 (where the purchaser had notice of the mortgagee's rights); Bank *v.* Raymond, 57 N. H. 144 (where the purchaser was in-

does not attach to the purchase-money,[75] and the purchaser is not personally responsible for the payment of the mortgage debt,[76] unless he expressly agrees to pay it.[77]

XV. ATTACHMENT AND LEVY ON MORTGAGED PROPERTY.[78]

A. In General. At common law a mortgagor did not have such an interest in the mortgaged chattels as could be taken on attachment.[79] By the application of equitable principles and by force of statute it has been held that mortgaged property was subject to levy as long as the mortgagor retained the right of possession;[80]

formed of the mortgage before he paid the purchase-price and told that he would be held accountable); Nugent *v.* John McNeil Shoe Co., 62 N. J. Eq. 583, 50 Atl. 628. *Compare* Titsworth *v.* Spitzer, 42 Ark. 310, where it was held that the mortgagee could not recover from the purchaser property which had taken the place of the mortgaged property, but could recover the proceeds of sales.

The purchaser was not liable to the mortgagor for the purchase-price of the chattels sold without the mortgagee's consent when the property was returned after the sale (Bryant *v.* Pollard, 10 Allen (Mass.) 81), or where the mortgage was subsequently foreclosed and the original purchaser bought in at the foreclosure sale, although he would be liable for the use and hire of the chattels between the dates of the two sales (Alexander *v.* Maxwell, Rich. Eq. Cas. (S. C.) 302).

Equitable liens under special circumstances. — Where mortgaged property is sold by an assignee of the mortgagor for the benefit of creditors, the mortgagee has an equitable lien on the proceeds for the payment of the mortgage debt (Doughten *v.* Gray, 10 N. J. Eq. 323), and the same has been held of a sale by an administrator in winding up the mortgagor's estate (Whiteley *v.* Weber, 2 Ohio Cir. Ct. 336). *Compare* Kahler *v.* Hanson, 53 Iowa 698, 6 N. W. 57, holding that a mortgagee had no claim upon a note given in payment for a mortgaged chattel.

Transferee of proceeds cannot be held as trustee, as where the mortgagor turns over the amount realized to one of his creditors in payment of a note which is surrendered (Burnett *v.* Gustafson, 54 Iowa 86, 6 N. W. 132, 37 Am. Rep. 190), unless it took with knowledge that the fund was realized from the wrongful sale of mortgaged property (Alter *v.* Stockham Bank, 53 Nebr. 223, 73 N. W. 667).

75. Maier *v.* Freeman, 112 Cal. 8, 44 Pac. 357, 53 Am. St. Rep. 151 (where the proceeds of the sale were garnished by a creditor of the mortgagor); Waters *v.* Cass County Bank, 65 Iowa 234, 21 N. W. 582; Estes *v.* McKinney, (Tex. Civ. App. 1897) 43 S. W. 556.

Some agreement is necessary in the case where the property is sold with the consent of the mortgagee to entitle the mortgagee to a lien on the property or proceeds obtained in exchange therefor. Fairweather *v.* Nelson, 76 Minn. 510, 79 N. W. 506. *Compare* Mason First Nat. Bank *v.* Bernard, (Tex. Civ. App. 1895) 30 S. W. 580, holding that on similar facts the proceeds could not be recovered from a third person at law by alleging that he had converted them.

Waiver of right to proceeds. — Where a mortgagee turns over to the mortgagor the proceeds of a sale of mortgaged property, it waives its right to such proceeds, and a bank in which the proceeds are deposited is not liable to the mortgagee. Evans-Snider-Buel Co. *v.* Atchison County Bank, 76 Mo. App. 449.

Written directions sent after an application of the proceeds and relative thereto were of no effect, and the mortgagor by sending them could not alter the rights of the mortgagee. Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673.

Mortgagee must assert his claim to the proceeds of a receiver's sale before the receiver has distributed the proceeds among the junior lienors and has received his discharge. Trautwein *v.* McKinnon, 90 Ga. 301, 16 S. E. 85.

76. Nugent *v.* John McNeil Shoe Co., 62 N. J. Eq. 583, 50 Atl. 628.

Payments made by the purchaser to the mortgagee are to be credited on the mortgage debt whether the purchaser became paymaster of the note or not. McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163.

77. McCown *v.* Schrimpf, 21 Tex. 22, 73 Am. Dec. 221; Pope *v.* Porter, 33 Fed. 7. *Compare* Hamill *v.* Gillespie, 48 N. Y. 556, holding that an announcement made upon an auction sale of personal property that it was sold subject to a chattel mortgage, with the conditions of which the purchaser must comply, did not impose a personal obligation upon a purchaser who hears and assents to the announcement. See also Raithel *v.* Smith, 68 Mo. 258, where an express agreement to pay was not established.

Failure to pay the mortgage debt after he had assumed it was held to render the purchaser liable for conversion when he resold the property. Prescott *v.* Jordan, 57 Ala. 272.

Purchaser does not become the agent of the mortgagee by assuming to pay the mortgage debt, so as to entitle him to bring replevin in his own name against an officer who levies on the property in a suit against the mortgagor. McNorton *v.* Akers, 24 Iowa 369.

78. See also, generally, ATTACHMENT, 4 Cyc. 557 *et seq.*

79. See, generally, 4 Cyc. 557, note 42.

80. Pollock *v.* Douglas, 56 Mo. App. 487; Blauvelt *v.* Fechtman, 48 N. J. L. 430, 8 Atl. 728; Hamill *v.* Gillespie, 48 N. Y. 556; Randall *v.* Cook, 17 Wend. (N. Y.) 53; Cotton *v.* Watkins, 6 Wis. 629.

but after default in the terms of the mortgage,[81] or after the mortgagee has come into possession of the property,[82] his right to remain in possession cannot be interfered with on process running against the mortgagor.

B. Disposition of Mortgaged Property by Attaching Officer. After an officer has levied on mortgaged property it has been held that he is entitled to take the property into his possession for the purpose of effecting a sale,[83] but a

A right to possession for a definite period has been held to be essential in order that the mortgagor's interest should be subject to levy. Merritt *v.* Niles, 25 Ill. 282; Rindskoff *v.* Lyman, 16 Iowa 260; Swift *v.* Hart, 12 Barb. (N. Y.) 530; Porter *v.* Parmly, 43 How. Pr. (N. Y.) 445; Saxton *v.* Williams, 15 Wis. 292.

Rights of mortgagee after levy.— After a creditor has levied on mortgaged property before breach of condition the mortgagee cannot restrain the creditor from proceeding, but he may file a bill to ascertain and separate his interest and that of the debtor in consequence of a stipulation that the latter may remain in possession till default. Marriott *v.* Givens, 8 Ala. 694. *Compare* Hobart *v.* Jouvett, 6 Cush. (Mass.) 105, holding that a mortgagee could not foreclose his mortgage after being summoned as trustee, for that would defeat the attachment.

81. Butler *v.* Lee, 54 Miss. 476; Payne *v.* Kershaw, Harp. (S. C.) 275. *Contra,* Barber *v.* Amundson, 52 Minn. 358, 54 N. W. 733 (by force of statute and provided the mortgagee has not exercised his right to take possession); Roach *v.* St. Louis Type Foundry, 21 Mo. App. 118 (construing Texas law).

Rights after default.— Although there is a default in the condition of the mortgage while the sheriff who has levied on the chattels is proceeding to a sale, the mortgagee is not entitled to take the property out of the possession of the sheriff, for the latter is given by statute the right to retain possession. Nelson *v.* Ferris, 30 Mich. 497; Cary *v.* Hewitt, 26 Mich. 228. But see Ament *v.* Greer, 37 Kan. 648, 16 Pac. 102, holding that upon default the mortgagee could take possession from a sheriff who had previously taken possession of the property.

82. *Alabama.*—Perkins *v.* Mayfield, 5 Port. (Ala.) 182.

California.— Moore *v.* Murdock, 26 Cal. 514.

Illinois.— Nelson *v.* Wheelock, 46 Ill. 25; Palmer *v.* Forbes, 23 Ill. 237.

Missouri.— Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197 (mortgage deed of trust); Greeley *v.* Reading, 74 Mo. 309.

Nebraska.— Chicago Lumber Co. *v.* Fisher, 18 Nebr. 334, 25 N. W. 340.

Texas.— Raysor *v.* Reid, 55 Tex. 266.

Wisconsin.— Mendelson *v.* Paschen, 71 Wis. 591, 37 N. W. 815, even though the levy is made before default in the condition of the mortgage.

The existence of a prior mortgage does not affect the right of a mortgagee in possession to hold the property against an attaching creditor (Hellman *v.* Pollock, 47 Mo. App. 205), even though the second mortgage was made after breach of condition of the prior one (Pollock *v.* Douglas, 56 Mo. App. 487).

Garnishment of the mortgagee is the proper mode of procedure when the possession of the mortgaged chattels has been transferred to the mortgagee (Pike *v.* Colvin, 67 Ill. 227; Chicago Lumber Co. *v.* Fisher, 18 Nebr. 334, 25 N. W. 340), but the mortgagee's right of possession is not affected thereby (Smith *v.* Menominee Cir. Judge, 53 Mich. 560, 19 N. W. 184).

Unless the mortgagee is in possession of the property he cannot be held as a trustee in trustee process. Central Bank *v.* Prentice, 18 Pick. (Mass.) 396. *Compare* Newton First Nat. Bank *v.* Perry, 29 Iowa 266; Curtis *v.* Raymond, 29 Iowa 52, holding that a mortgagee was not bound to take possession of mortgaged property for the benefit of the creditor after he had been garnisheed in a suit against the mortgagor.

Landlord may distrain chattels on the leased premises in spite of a subsequent chattel mortgage covering such property, when the mortgagee does not take and keep possession of the property, even though the landlord has no lien for rent. Cartwright *v.* Widemann, 9 Hawaii 685. *Compare* Widemann *v.* Thomas, 10 Hawaii 366.

After a mortgagee takes possession of the mortgaged chattels a landlord cannot distrain for rent even as to future-acquired property. Harrison *v.* Marks, 11 Hawaii 506.

Right to complete contract not affected by levy.— Where the payment of wages was secured by a mortgage on personal property, a levy thereon by a creditor of the mortgagor was held not to affect the right of the mortgagee to complete the contract and earn the wages. Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687.

83. Foster *v.* Bringham, 99 Ind. 505; Emmons *v.* Hawn, 75 Ind. 356; Collins *v.* State, 2 Ind. App. 542, 30 N. E. 12 (resting on statute in Indiana); Philips *v.* Morton, 7 J. J. Marsh. (Ky.) 279. *Contra,* Cotton *v.* Watkins, 6 Wis. 629. *Compare* Gillespie *v.* Brown, 16 Nebr. 457, 20 N. W. 632, holding that the mortgagee is not deprived of the right to possession of the mortgaged property given by the mortgage by a levy upon and sale of the equity of redemption.

The mortgagee must surrender possession of the property to the levying officer to enable him to sell the mortgagor's interest, even though he has previously replevied it from him. McIsaacs *v.* Hobbs, 8 Dana (Ky.) 268.

Right of sale.— Although ordinarily the equity of redemption of a mortgage of chat-

delivery of the property is unlawful until the purchasers satisfy the mortgage.[84] The mortgagee of chattels may enjoin a sale of the mortgaged property by attaching creditors of the mortgagor if such sale endangers his rights.[85]

C. Mortgagee's Duty to Prevent Attachment. Consent to a levy on part of the mortgaged property will not prevent a mortgagee from enforcing his claims against the balance.[86] A mortgagee who learns of the levy of an attachment on the mortgaged property is under no obligation to notify the attaching creditor and get him to stop further proceedings in the attachment suit.[87]

D. Statutory Requirements For Tender of Mortgage Debt. It has been held that after the mortgagor had forfeited his right to possession of the mortgaged goods they could not be attached for his debts without first tendering to the mortgagee the amount due on the mortgage,[88] and in other jurisdictions tender is made necessary by statute regardless of the mortgagor's right to possession.[89]

tels in possession may be sold under an execution against the mortgagor, this court will not permit the creditor to exercise that right where, of necessity, it will greatly impair the rights of the mortgagee (Smithurst *v.* Edmunds, 14 N. J. Eq. 408); but it has been held that equity will not enjoin a sale in the absence of special circumstances (Spaulding *v.* Mozier, 57 Ill. 148; George *v.* Dyer, 1 Tex. App. Civ. Cas. § 780).

84. Slifer *v.* State, 114 Ind. 291, 14 N. E. 595, 16 N. E. 623 (statutory); State *v.* Milligan, 106 Ind. 109, 5 N. E. 871; Swigert *v.* Thomas, 7 Dana (Ky.) 220; Gammage *v.* Silliman, 2 Tex. App. Civ. Cas. § 14. But see Mercer *v.* Tinsley, 14 B. Mon. (Ky.) 220, holding that a purchaser at an execution sale had a right to retain possession against the mortgagee until a sale of the property was ordered, even though he had not executed the statutory forthcoming bond.

By statute in Michigan the mortgagee and the officer levying may have concurrent possession of the mortgaged chattels; the officer retaining custody until the mortgagee's sale, and having a right to know the amount and conditions thereof; and when the mortgagee sells he can protect the rights of the officer as well as his own. Haynes *v.* Leppig, 40 Mich. 602. But see Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630, holding that a sheriff had no right to retain the possession of mortgaged goods for the purpose of completing his inventory when the value of the property did not exceed the mortgage debt.

The statutory procedure in Rhode Island, which provides for the sale of mortgaged property which has been attached on application by the mortgagee, must be followed, and the mortgagee cannot take the property from the attaching officer. Arnold *v.* Maroney, 17 R. I. 579, 23 Atl. 1101.

85. Martin *v.* Jewell, 37 Md. 530; Bruce *v.* Levering, 23 Md. 288 (where it appeared that the property levied upon was inadequate to pay the mortgage debt); Long Dock Co. *v.* Mallery, 12 N. J. Eq. 93 (holding that before default the mortgagee may invoke the aid of equity to prevent the creditors of the mortgagor from taking the property, and may have the property sold and enough money to cover his mortgage paid into court to await a final settlement); Hall *v.* Bellows, 11 N. J. Eq. 333; Raysor *v.* Reid, 55 Tex. 266. See also Warner *v.* Paine, 3 Barb. Ch. (N. Y.) 630, holding that an injunction would not be granted to restrain a sale of the mortgaged chattels on an execution against the mortgagor, issued, although not levied, prior to the execution of the mortgage. But see Nott *v.* Burgess, 5 Hawaii 420, holding that a bill to enjoin the mortgagor from disposing of the mortgaged property was demurrable, on the ground that the mortgagee had an adequate remedy at law. *Compare* Marshall *v.* Colvert, 5 Leigh (Va.) 146, 27 Am. Dec. 589, holding that a surety to whom an indemnity mortgage is given may enjoin levy and sale of the mortgaged property by the creditor while it is uncertain whether or not the surety will sustain loss by reason of his suretyship.

86. Collins *v.* Gregg, 109 Iowa 506, 80 N. W. 562; Woolner *v.* Levy, 48 Mo. App. 469.

87. Canada *v.* Southwick, 16 Pick. (Mass.) 556; Wurmser *v.* Frederick, 62 Mo. App. 634, 1 Mo. App. Rep. 587.

88. Barrows *v.* Turner, 50 Me. 127; Deering *v.* Lord, 45 Me. 293; Smith *v.* Smith, 24 Me. 555; Barker *v.* Chase, 24 Me. 230; Wolfe *v.* Dorr, 24 Me. 104.

89. Boardman *v.* Cushing, 12 N. H. 105, holding that it was incumbent on the attaching creditor to tender performance of the condition, or otherwise the mortgagee could, upon condition broken, foreclose as if there had been no garnishment.

Necessity for tender.— A statutory requirement that an officer levying on mortgaged property should tender the mortgage debt to the mortgagee has been held to necessitate such a tender, even when the attachment suit was brought in another state (Mabry *v.* Metropolitan Trust Co., 94 Ga. 619, 21 S. E. 589), and mere inconvenience will not excuse a failure to make a tender (Foster *v.* Perkins, 42 Me. 168); but tender has been held to be unnecessary when the attaching creditor and the mortgagee were the same person (Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068). *Compare* Briggs *v.* Walker, 21 N. H. 72, holding that a tender was essential prior to the act of June 30, 1841.

E. Waiver of Lien by Mortgagee's Attachment of Property. A chattel mortgagee may waive his mortgage lien and attach the property in an action on the mortgage debt.[90] Where a chattel mortgage transfers the legal title to the mortgagee, an attachment by him of the property covered by the mortgage *ipso facto* constitutes a waiver of the mortgage,[91] but the reverse is true when a mortgage is only a lien.[92]

XVI. ASSIGNMENT OF MORTGAGE AND OF SECURED CLAIM.

A. In General. A mortgagee may assign his interests under the mortgage at any time before the right of redemption is barred,[93] and an assignment of a note and of a chattel mortgage securing it *prima facie* transfers the mortgagee's

Time of tender.— When a levy is made on mortgaged property, the creditor satisfies the requirement in regard to paying the mortgagee the amount due on the mortgage by paying within five minutes after the levy. Cowles *v.* Dickinson, 140 Mass. 373, 5 N. E. 302; Loomis *v.* Lewis, 140 Mass. 208, 5 N. E. 488.

Right of levying creditor to assignment of mortgage.— A judgment creditor who levies on mortgaged chattels is entitled to an assignment of the mortgage on tendering a sufficient amount to the mortgagee (Shutes *v.* Woodard, 57 Mich. 213, 23 N. W. 775), except where part of the chattels covered by the mortgage are exempt from execution (Cochrane *v.* Rich, 142 Mass. 15, 6 N. E. 781).

The mortgagee may waive the requirement as to tender, and if he does so the mortgagor and his assignee have no right to insist upon it. Willson *v.* Felthouse, 90 Iowa 315, 57 N. W. 878.

Where a mortgage is set aside as fraudulent an attaching creditor will prevail over a second mortgage executed subsequently to the levy of his attachment, even though he did not make the required statutory tender. Haydock *v.* Patton, 92 Iowa 247, 60 N. W. 533.

Amount of tender.— In determining the amount of the tender interest should be reckoned on the mortgage debt at the rate stipulated up to the time of the order, without regard to the attachment. McDonald *v.* Faulkner, 154 Mass. 34, 27 N. E. 883.

90. Whitney *v.* Farrar, 51 Me. 418; Buck *v.* Ingersoll, 11 Metc. (Mass.) 226.

91. *Arkansas.*— Cox *v.* Harris, 64 Ark. 213, 41 S. W. 426, 62 Am. St. Rep. 187.

Maine.— Libby *v.* Cushman, 29 Me. 429.

Massachusetts.— Evans *v.* Warren, 122 Mass. 303.

New Hampshire.— Kimball *v.* Marshall, 8 N. H. 291. But see Ellenwood *v.* Holt, 60 N. H. 57, where the mortgagee was held not to waive his lien by attachment as against a creditor who forcibly seized the property under a claim of prior attachment.

Oklahoma.— Dix *v.* Smith, 9 Okla. 124, 60 Pac. 303, 50 L. R. A. 714.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 223.

Attachment in suretyship mortgage.— Where a mortgage was given to indemnify a surety and the property delivered to the mortgagee, it was held that the surety did not waive his mortgage by directing the holder of the secured claim to attach the mortgaged property. Dyer *v.* Cady, 20 Conn. 563.

Attachment in a suit on another debt will constitute a waiver of the mortgage as well as attachment in a suit on the debt secured by the mortgage. Haynes *v.* Sanborn, 45 N. H. 429.

An attachment on other property than that secured by the mortgage does not constitute a waiver of the mortgage lien. Thurber *v.* Jewett, 3 Mich. 295.

92. Barchard *v.* Kohn, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803 [*reversing* 54 Ill. App. 629]; Byram *v.* Stout, 127 Ind. 195, 26 N. E. 687 [*disapproving* Evans *v.* Warren, 122 Mass. 303]; Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4; Howard *v.* Parks, 1 Tex. Civ. App. 603, 21 S. W. 269. *Compare* Atkins *v.* Byrnes, 71 Ill. 326, where a similar doctrine was applied to a case where a landlord holding a chattel mortgage on property levied a distress warrant on it.

93. Moody *v.* Ellerbe, 4 S. C. 21, where the assignment was made after seizure of the chattels by the mortgagor. But see Marseilles Mfg. Co. *v.* Rockford Plow Co., 26 Ill. App. 198, holding that an assignee could not foreclose under a power given to the mortgagee "his heirs, executors, administrators, or any of them." *Compare* Baumann *v.* Jefferson, 4 Misc. (N. Y.) 147, 23 N. Y. Suppl. 685, 53 N. Y. St. 116, where an assignment by a chattel mortgagee of a right of action for conversion of the mortgaged chattels was held to convey his interest in the mortgage.

Authority of agent.—A mortgagee is bound civilly by an assignment of the mortgage, executed by another as his agent, his silent partner being present at the time, and by the representation of the partner that the mortgage debt was the only claim held by the firm against the property. Foster *v.* State, 88 Ala. 182, 7 So. 185.

An assignment was not executed under duress merely because the creditor to whom it was made threatened to pursue his legal rights unless he received additional security. Kreider *v.* Fanning, 74 Ill. App. 230.

An equitable assignment to an attaching creditor is effected when the mortgagee accepts his tender of the mortgage debt and

interest in the mortgaged property to the assignee.[94] It seems that there is usually no implied warranty of his title to the mortgaged goods by the mortgagee making the assignment.[95]

B. Sufficiency[96]— **1. Assignment of Secured Claim Alone.** Where the holder of mortgage notes still retains his interest under the mortgage[97] an assignment of such notes or of the mortgage debt will operate as a transfer of the security as well, unless there is an express agreement to the contrary,[98] and an assignment

delivers to him the note and mortgage. Denno *v.* Nash, 60 Vt. 334, 14 Atl. 459.

Transfer of the right and title to a mortgage until a certain debt is paid has been held to transfer the legal title to the property as security for advances and not to constitute the transferee an assignee of the mortgage. Campbell *v.* Birch, 60 N. Y. 214.

Under a statute making assignment of collateral security before maturity criminal it was held that the title of an innocent assignee who took the security for value and without notice was not affected by the fraud of the assignor. Draper *v.* Saxton, 118 Mass. 427.

94. Robinson *v.* Fitch, 26 Ohio St. 659; Butt *v.* Ellett, 19 Wall. (U. S.) 544, 22 L. ed. 183 [*affirming* 1 Woods (U. S.) 214, 8 Fed. Cas. No. 4,384]. *Compare* Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133, where it was held that, although a chattel mortgage is not assignable or negotiable at law, yet a party taking an assignment of such an instrument acquires rights and an interest in the debt secured and the property pledged which courts of law as well as of equity will recognize and protect. See also Assignments, 4 Cyc. 72 *et seq.*

Even though a mortgage is void because it was given to secure an illegal consideration an assignment thereof confers a nominal legal title to the property to the assignee. Fellows *v.* Van Hyring, 23 How. Pr. (N. Y.) 230.

Suretyship mortgage not assignable before default.— Where a surety on a bond is secured by bond and he attempts to transfer the property covered by the mortgage before a breach in the condition of the mortgage, he does not thereby transfer any title to his assignee. Comley *v.* Dazian, 114 N. Y. 161, 21 N. E. 135, 22 N. Y. St. 813.

95. Jones *v.* Huggeford, 3 Metc. (Mass.) 515. *Compare* Provenchee *v.* Piper, 68 N. H. 31, 36 Atl. 552, where it was held that a breach of a warranty made by a chattel mortgagor on sale of his interest was no defense to an action by the mortgagee to recover the purchase-price for his interest in the property which had been sold to the same person who purchased from the mortgagor. But see Corwin *v.* Wesley, 34 N. Y. Super. Ct. 109, where the instrument was held to contain an implied warranty that the signature of the person who was described in the mortgage as the mortgagor was not a forgery.

96. Irregular foreclosure sale acts as an assignment of the mortgage. Walker *v.* Stone, 20 Md. 195.

97. After the mortgagee has parted with his interest under the mortgage by assigning it (Waller *v.* Staples, 107 Iowa 738, 77 N. W. 570) or by foreclosing it (Ross *v.* Aber, 64 Kan. 885, 67 Pac. 457) no interest therein is transferred by his assignment of the claim secured. But see Gilmore *v.* Roberts, 79 Wis. 450, 48 N. W. 522, where it was held that a chattel mortgage purporting to secure notes payable to the mortgagee "or bearer" was valid and followed the notes into whosesoever hands the notes might come, although the mortgage had never been delivered to the mortgagee and he never had had any interest in it.

98. *Alabama.*— Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369; Graham *v.* Newman, 21 Ala. 497.

Arkansas.— Gilchrist *v.* Patterson, 18 Ark. 575.

California.— Woodland Bank *v.* Duncan, 117 Cal. 412, 49 Pac. 414, where it was held that such an assignment was not invalid for want of conformity with the statutory requirements concerning chattel mortgages.

Colorado.— Crocker *v.* Burns, 13 Colo. App. 54, 56 Pac. 199.

Florida.— Stewart *v.* Preston, 1 Fla. 11, 44 Am. Dec. 621.

Illinois.— Petillon *v.* Noble, 73 Ill. 567 (before maturity of the note); Kreider *v.* Fanning, 74 Ill. App. 230.

Kansas.— Ketcham *v.* George R. Barse Live Stock Commission Co., 57 Kan. 771, 48 Pac. 29, where, however, the mortgagee corporation remained absolutely liable to the transferee on the mortgage notes and was entitled to pay them off at any time; and it was held that the corporation could maintain an action to recover the mortgaged property and, after payment to the transferee of the amount advanced on the mortgage note, could recover full value of its special interest on the mortgage.

Maryland.— Clark *v.* Levering, 1 Md. Ch. 178.

Missouri.— Campbell Printing Press, etc., Co. *v.* Roeder, 44 Mo. App. 324; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211 (before maturity); Kingsland, etc., Mfg. Co. *v.* Chrisman, 28 Mo. App. 308.

Nebraska.— Tilden *v.* Stilson, 49 Nebr. 382, 68 N. W. 478; Houck *v.* Linn, 48 Nebr. 227, 66 N. W. 1103; Kavanaugh *v.* Brodball, 40 Nebr. 875, 59 N. W. 517.

New York.— Langdon *v.* Buel, 9 Wend. (N. Y.) 80.

Vermont.— McLoud *v.* Wakefield, 70 Vt. 558, 43 Atl. 179, where the mortgage was delivered to the assignee.

Wisconsin.— W. W. Kimball Co. *v.* Mellon, 80 Wis. 133, 48 N. W. 1100 (where a mortgage lien was reserved in the note itself);

of one of several notes acts as a *pro tanto* assignment of the rights under the mortgage.[99]

2. Assignment of Mortgage Alone. Unless an assignment of a chattel mortgage is accompanied by an assignment of the debt thereby secured no right passes to the assignee;[1] and so where the debt secured was evidenced by no instrument other than the mortgage, an assignment of the mortgage was held to be an assignment of the debt as well.[2]

3. Formal Requirements[3]— a. Generally. The assignment of a mortgage need not be under seal,[4] and may be effected without a writing of any kind.[5]

b. Recording. It has been held that the statutory requirements relative to the filing of chattel mortgages do not apply to assignments of such instruments,[6]

Gilmore *v.* Roberts, 79 Wis. 450, 48 N. W. 522; Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

Wyoming.— Graham *v.* Blinn, 3 Wyo. 746, 30 Pac. 446.

United States.— Buckingham *v.* Dake, 112 Fed. 258, 50 C. C. A. 492.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 452; and, generally, Assignments, 4 Cyc. 73.

Extent of assignee's rights.— A sale and delivery of notes secured by a chattel mortgage, although unaccompanied by an assignment of the mortgage itself, has been held to authorize the purchaser to act as the mortgagee's agent and to do whatever he could have done to enforce the mortgage (McLoud *v.* Wakefield, 70 Vt. 558, 43 Atl. 179); the transferee may use the name of the mortgagee to enforce the mortgage at law (Graham *v.* Newman, 21 Ala. 497), and in equity he is regarded as the owner of the mortgage itself (Clark *v.* Levering, 1 Md. Ch. 178).

Effect of maturity of the indebtedness.— The rule that a mortgage passes as an adjunct to the note or claim secured by it applies with equal force when the assignment is made after the maturity of the claim (Langdon *v.* Buel, 9 Wend. (N. Y.) 80), and after the mortgagee has made a demand upon the mortgagor for the possession of the property (Buckingham *v.* Dake, 112 Fed. 258, 50 C. C. A. 492, where the assignee was allowed to maintain replevin for the property).

99. Martindale *v.* Burch, 57 Iowa 291, 10 N. W. 670; Harman *v.* Barhydt, 20 Nebr. 625, 31 N. W. 488; Dilley *v.* Freedman, (Tex. Civ. App. 1900) 60 S. W. 448.

Rights of assignees of part of mortgage claims.— The assignee of part of a claim secured by a chattel mortgage conferring a power of sale can only sell so much of the property as will cover the assigned interest (Emmons *v.* Dowe, 2 Wis. 322); but where the mortgagee seized the entire property and sold it, the assignee of one of the mortgage notes was held to be entitled to have an account for his proportionate share of the proceeds (Holway *v.* Gilman, 81 Me. 185, 16 Atl. 543).

1. Polhemus *v.* Trainer, 30 Cal. 685; Hamilton *v.* Browning, 94 Ind. 242. See also, generally, Assignments, 4 Cyc. 72.

The assignee does not become a creditor of the mortgagor unless the debt secured as well as the mortgage is included in the assignment. Carter *v.* Bennett, 4 Fla. 283.

2. Jones *v.* Huggeford, 3 Metc. (Mass.) 515; Earll *v.* Stumpf, 56 Wis. 50, 13 N. W. 701. In Jones *v.* Huggeford, 3 Metc. (Mass.) 515, the language used was that the mortgagee assigned all his "interest in the within instrument, and every clause, article or thing, therein contained," with power of attorney to take all legal measures for the complete recovery and enjoyment of the assigned premises. *Compare* Campbell *v.* Birch, 60 N. Y. 214, where the mortgage was assigned without the note which accompanied it and it was held that the assignee acquired an interest in the debt, for which both the note and mortgage were securities.

3. See, generally, Assignments, 4 Cyc. 39 *et seq.*

4. Gilchrist *v.* Patterson, 18 Ark. 575.

Sufficiency of assignment.— There was held to be an assignment of a mortgage where the language indorsed on the mortgage was: "For value received we hereon transfer the within fi. fa. to," followed by the name of a particular person and signed by the mortgagee (Adams *v.* Goodwin, 99 Ga. 138, 25 S. E. 24); or "Value received I hereby transfer this mortgage to H. W. Wahab" (Hodges *v.* Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545), or where there was a paper which stated "I hereby assign, release, and deliver to said James Sloan all my right, title, and interest in the security or property covered by the following described chattel mortgages" (Aultman *v.* Sloan, 115 Mich. 151, 73 N. W. 123).

5. Crain *v.* Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807, where the mortgage was delivered over in return for a valuable consideration.

6. Bigelow *v.* Smith, 2 Allen (Mass.) 264; Baxter *v.* Gilbert, 12 Abb. Pr. (N. Y.) 97.

Seven-year lease.— Where an assignment of a mortgage of a leasehold estate for a term of more than seven years is not recorded, no title passes and the assignee is not liable to pay rent and taxes, nor does the mortgagee acquire a right of action against the assignee for his failure to record the assignment. Lester *v.* Hardesty, 29 Md. 50.

No constructive notice was given by the record of an assignment of "so much of a mortgage and property therein described as will amount to" a certain sum and a subse-

and a failure to comply with a statute requiring assignments to be recorded only renders the transfer void against subsequent purchasers.[7] Acknowledgment is only necessary to entitle the assignment to record.[8]

4. Necessity For Consideration. The absence of consideration for the assignment of a mortgage does not affect the rights of the assignee against creditors of the mortgagor.[9]

C. Rights of Assignees — 1. In General.[10] The assignee of a note secured by a mortgage on chattels is entitled to the possession of such chattels as soon as the original mortgagee would have been entitled to their possession[11] and can exercise in his own behalf the rights conferred upon the mortgagee by an insecurity clause in the mortgage;[12] and the assignee is entitled to future-acquired property against the assignee in bankruptcy of the mortgagor, when such a claim was valid between the original parties.[13]

2. As Bona Fide Purchaser. Although there are authorities to the contrary[14]

quent purchaser from the mortgagee without notice of such assignment will take free from it. French *v.* Haskins, 9 Gray (Mass.) 195.

7. Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850. See also, generally, Assignments, 4 Cyc. 59.

8. Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850. See also Assignments, 4 Cyc. 59, note 81.

Proof of signature.— In the absence of a statute requiring assignments to be proved or registered, the signature of a mortgagee, assigning the mortgage by assignment thereon, may be proved as if written on a separate piece of paper. Hodges *v.* Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545.

9. Beach *v.* Derby, 19 Ill. 617. *Compare* Rue *v.* Scott, (N. J. 1891) 21 Atl. 1048, where it was held that one buying a chattel mortgage for less than its face value was entitled to recover the whole amount due. But see Haskins *v.* Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. (N. Y.) 63, where a mortgagor borrowed money to pay off a mortgage and procured an assignment of it to the lender and it was held that it became in his hands a mere pledge for the loan and was discharged by a tender of the amount borrowed.

As to necessity for consideration in assignments generally see Assignments, 4 Cyc. 30 *et seq.*

Abatement of mortgage.— Where a mortgage was sold for less than one half its face value, and it was agreed between the original parties that the mortgage was to be discharged upon payment of such sum, which agreement was known by the assignee, it was held that the purchaser could not enforce the mortgage for the entire amount it was given to secure. Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661. *Compare* Stewart *v.* Brown, 48 Mich. 383, 12 N. W. 499, where it was held that an assignee was not justified in refusing a tender of the amount he had paid for a mortgage plus interest, because the evidence showed it had been abated as to the balance.

10. Where rent is secured by a mortgage the landlord cannot assign his mortgage and subsequently sue out process against the property to recover the rent; in case this is done the trustee under the mortgage deed of trust can replevy the property from a purchaser with notice of the assignment. McRovie *v.* White, 52 Miss. 406.

Where the assignee pays off a prior lien he is entitled to be reimbursed, even though the mortgage of which he is assignee is held to be invalid. Randolph *v.* Brown, 21 Tex. Civ. App. 617, 53 S. W. 825.

11. Barbour *v.* White, 37 Ill. 164; Houck *v.* Linn, 48 Nebr. 227, 66 N. W. 1103; Satterthwaite *v.* Ellis, 129 N. C. 67, 39 S. E. 726. *Compare* Grant *v.* Smith, 88 Hun (N. Y.) 32, 34 N. Y. Suppl. 538, 68 N. Y. St. 671, where it was stipulated that a surety who was secured by a chattel mortgage should be entitled to possession of the mortgaged property after he paid the debt and it was held that a purchaser of the obligation which bore the surety's name was entitled to possession of the property after the mortgage had been assigned to him.

Limitations on assignee's right to take possession.— It was held that an assignee was precluded from taking possession of the mortgaged property for a cause which accrued prior to the assignment and which had been waived by the mortgagee (Fields *v.* Copeland, 121 Ala. 644, 26 So. 491), or where he took his assignment with knowledge of an agreement between the original parties to the mortgage releasing a portion of the property from the mortgage lien (Bernheimer *v.* Prince, 27 Misc. (N. Y.) 831, 58 N. Y. Suppl. 392).

12. Beach *v.* Derby, 19 Ill. 617; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211; Rich *v.* Milk, 20 Barb. (N. Y.) 616.

13. Williamson *v.* Nealey, 81 Me. 447, 17 Atl. 404.

Limitation upon the amount of property claimed by the assignee.—Where a mortgagee in possession assigned the mortgage after a levy had been made on part of the property, and delivered possession of all except that upon which levy was made, it was held that the assignee could not claim the property left in the possession of the officer. McDonald *v.* Richolson, 3 Kan. App. 235, 45 Pac. 95.

14. Anderson *v.* South Chicago Brewing Co., 173 Ill. 213, 50 N. E. 655 [*reversing* 67 Ill. App. 300]; Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971; Bryant *v.* Vix, 83

the prevailing rule seems to be that a *bona fide* assignee of a mortgage note for a valuable consideration will take the mortgaged property free from equitable defenses which would be good against the mortgagee,[15] and *a fortiori* an assignee cannot be deprived of any rights to which the mortgagee was entitled.[16] Where the legal title of the mortgagee is transferred to a *bona fide* purchaser for value, this shuts out equitable claims of third persons against the mortgagor which only bound the mortgagee because he took with notice thereof or without payment of value,[17] but after the mortgagee has lost his right to the mortgaged property by

Ill. 11; Petillon *v.* Noble, 73 Ill. 567; Barbour *v.* White, 37 Ill. 164; Stevens *v.* Hurlburt, 25 Ill. App. 124; Oster *v.* Mickley, 35 Minn. 245, 28 N. W. 710. *Compare* Scott *v.* Hough, 151 Pa. St. 630, 31 Wkly. Notes Cas. (Pa.) 175, 25 Atl. 123, where an assignee taking without inquiry was presumed to have notice of a defense to a mortgage.

A fortiori a mala fide purchaser from a mortgagee will take subject to defenses which are valid against the original mortgagee. Costigan *v.* Howard, 100 Mich. 335, 58 N. W. 1116; Meyerfeld *v.* Strube, 9 Ohio S. & C. Pl. Dec. 514. *Compare* Black *v.* Howell, 56 Iowa 630, 10 N. W. 216, where an assignee of a mortgage was held to be bound by the mortgagee's agreement to release the property from the lien thereof, when the assignee had notice of the agreement prior to the assignment.

A purchaser of a mortgage was charged with notice of recitals in a previous mortgage duly recorded, in renewal of which the purchased instrument had been given, when such earlier mortgage had not been surrendered or satisfied of record. Northwestern Nat. Bank *v.* Freeman, 171 U. S. 620, 19 S. Ct. 36, 43 L. ed. 307. See also Hargreaves *v.* Reese, 66 Minn. 434, 69 N. W. 223, where the taking by assignment of an unacknowledged mortgage which could not for that reason be recorded in the state where it was executed was held not to be an acquisition in good faith, although the transfer was made in another state.

The assignee stands in the shoes of the mortgagee in so far as his rights to take possession of the mortgaged property under the terms of the mortgage are concerned, and so he cannot maintain replevin against an officer attaching the property when the mortgagee could not have done so. Stanton First Nat. Bank *v.* Summers, 75 Mich. 107, 42 N. W. 536.

15. *Iowa.*— Gibson *v.* McIntire, 110 Iowa 417, 81 N. W. 699.

Michigan.— Sanford *v.* Pettit, 83 Mich. 499, 47 N. W. 357. See also Judge *v.* Vogel, 38 Mich. 569, 573, *per* Cooley, J., to the effect that the assignee "takes the security for what it is worth as between the original parties. . . . This rule is without qualification except where the mortgage is accompanied by negotiable paper."

New York.— Gould *v.* Marsh, 1 Hun (N. Y.) 566, 4 Thomps. & C. (N. Y.) 128.

North Carolina.— Satterthwaite *v.* Ellis, 129 N. C. 67, 39 S. E. 726.

Texas.— Wynne *v.* Admire, 4 Tex. Civ. App. 45, 23 S. W. 418.

Wyoming.— Graham *v.* Blinn, 3 Wyo. 746, 30 Pac. 446.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 458; Jones Chatt. Mortg. (4th ed.) § 501.

The doctrine regarding real estate mortgages is the same by the weight of authority. Pierce *v.* Faunce, 47 Me. 507; Carpenter *v.* Logan, 16 Wall. (U. S.) 271, 21 L. ed. 313. See, generally, MORTGAGES.

The assignee is not bound by subsequent contracts made by the mortgagee in respect to the mortgaged property. Tilden *v.* Stilson, 49 Nebr. 382, 68 N. W. 478.

Where a gratuitous chattel mortgage is given for the purpose of being sold, the mortgagor is estopped from asserting against the assignee thereof that it was not given to secure a real debt. Judge *v.* Vogel, 38 Mich. 569.

After the institution of a foreclosure suit an assignee takes a mortgage subject to all the equities and infirmities which can attach to it by reason of the final decree in such suit; but he is not bound by a collateral proceeding unless he has notice of it and is given an opportunity to be heard. Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133.

16. Mayer *v.* Soulier, 48 Mich. 411, 12 N. W. 632; Dalrymple *v.* Sheehan, 20 Mich. 224. *Compare* Hunt *v.* Hotlon, 13 Pick. (Mass.) 216, where a delivery of the property to the mortgagee was held to avail his assignees, although the property was redelivered to the mortgagor by the mortgagee.

17. *Alabama.*— Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323, where a mortgage given to indemnify a surety was held to pass by assignment free from the claims of the principal creditor.

Illinois.— Barbour *v.* White, 37 Ill. 164.

Massachusetts.— Sleeper *v.* Chapman, 121 Mass. 404, where the mortgage was given in fraud of creditors.

Missouri.— Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211, where the mortgage was fraudulent as to creditors.

New Hampshire.— McNally *v.* Bailey, 65 N. H. 208, 18 Atl. 745, where the property in the hands of the mortgagor was subject to a vendor's lien but the assignee took in ignorance thereof.

North Carolina.— Lawrence *v.* Weeks, 107 N. C. 119, 12 S. E. 120.

Texas.— Wynne *v.* Admire, 4 Tex. Civ. App. 45, 23 S. W. 418, where the assignee of a second mortgagee was held not to be bound by an agreement that the first mortgage should stand for an additional loan, although the second mortgagee himself had notice of the agreement when he took his mortgage.

allowing it to remain in the mortgagor's possession after default, his assignee acquires no rights against a *bona fide* purchaser from the mortgagor.[18]

3. ACTIONS BY ASSIGNEE — a. Generally. After a mortgagee has assigned his record title to a mortgage he cannot maintain an action for conversion of the property,[19] but the right of action which the assignee seeks to enforce must have occurred subsequently to the assignment;[20] and it has been held that the assignee cannot maintain an action of debt against a purchaser of the mortgaged property who assumed the mortgage debt.[21] The assignee must proceed according to law to test the validity of the mortgage when it is disputed;[22] but the mortgagor cannot defend by setting up a prior mortgage upon the same chattels, as that implies a breach of his warranty to the mortgagee.[23]

b. In His Own Name.[24] After a mortgagor has forfeited his right to possession of the mortgaged chattels, an assignee of the mortgage has a general right to maintain in his own name an action of trover to recover damages for a wrongful conversion of the property;[25] and under similar circumstances he may file

United States.— Myers *v.* Hazzard, 50 Fed. 155, where the adverse rights against the property were held by an assignee in bankruptcy but it was held that the property was not brought *in custodia legis* by the assignment prior to the purchase of the mortgage notes.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 459.

The assignee of a prior encumbrancer, it has been held, is not bound by an agreement on the part of his assignor that his mortgage should be postponed to another mortgage on the same property when the assigned instrument had priority of record and the assignee took without notice of the agreement. Gould *v.* Marsh, 1 Hun (N. Y.) 566, 4 Thomps. & C. (N. Y.) 128. *Contra,* David Stevenson Brewing Co. *v.* Iba, 155 N. Y. 224, 49 N. E. 677 [*affirming* 12 Misc. (N. Y.) 329, 33 N. Y. Suppl. 642, 1 N. Y. Annot. Cas. 356]. *Compare* Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709, where it was held that a subsequent encumbrancer could not raise the objection that the act of the plaintiff's assignor in taking a mortgage was *ultra vires.*

18. Brooks *v.* Record, 47 Ill. 30.

19. Horne *v.* Briggs, 98 Mass. 510. But see Eddy *v.* McCall, 77 Mich. 242, 43 N. W. 911, where a mortgagee pledged a mortgage as collateral security and the property was seized under an attachment against the mortgagor, and it was held that, after the mortgage had been surrendered by the assignee, the mortgagee could maintain an action against the attaching officer.

20. Bowers *v.* Bodley, 4 Ill. App. 279. But see *contra,* Bryan *v.* Roberts, 1 Strobh. Eq. (S. C.) 334, where, however, the assignment was to sureties who had guaranteed the payment of the mortgage debt and taken an assignment of the mortgage after fulfilling their guaranty.

21. Gable *v.* Scarlett, 56 Md. 169, under Md. Code, art. 9, § 1, authorizing an assignee of a chose in action to sue in his own name the debtor named therein.

Rights against mortgagee not waived.— Although a purchaser of a portion of mortgaged property from a mortgagee could have prevented a sale by the latter's assignee, and fails to do so, he can nevertheless recover damages from the mortgagee for his fraudulent act in transferring the mortgage in breach of a guaranty. Lain *v.* Simon, 19 S. C. 270.

22. Devlin *v.* Kosel, 3 Misc. (N. Y.) 40, 22 N. Y. Suppl. 361, 51 N. Y. St. 130, holding that a purchaser of chattels cannot retain them and refuse to pay the price on the ground that he is the assignee of a mortgage on such property, the validity of which is in dispute.

23. Gottschalk *v.* Klinger, 33 Mo. App. 410, where it did not appear that the condition of the first mortgage had been broken.

24. See also, generally, ASSIGNMENTS, 4 Cyc. 91 *et seq.*

Assignee's rights of intervention.— Where part of the notes secured by a chattel mortgage have been assigned, the assignee is entitled to intervene in an action of replevin brought by the mortgagee to recover possession of the goods. Harman *v.* Barhydt, 20 Nebr. 625, 31 N. W. 488.

25. *Alabama.*— Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879.

Illinois.— Flynn *v.* Hathaway, 65 Ill. 462, holding that the note described in the mortgage was not admissible in evidence without proof of its execution.

Massachusetts.— Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159, holding that a mortgage on chattels and an assignment thereof to plaintiff are admissible to show plaintiff's title.

Michigan.— Hull *v.* Bernatz, 106 Mich. 551, 64 N. W. 473.

New York.— Langdon *v.* Buel, 9 Wend. (N. Y.) 80.

South Carolina.— Southworth *v.* Sebring, 2 Hill (S. C.) 587; Montgomery *v.* Kerr, 1 Hill (S. C.) 291.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 464; and, generally, TROVER AND CONVERSION.

Parol assignment of a mortgage has been held to be insufficient to enable the assignee to bring an action in his own name. Nicholson *v.* Whaley, 90 Ga. 257, 16 S. E. 84. *Con-*

a bill in equity,[26] or maintain detinue,[27] or replevin[28] to recover the property itself, and trespass to recover for an injury caused by a third person.[29]

c. Trial. Plaintiff may show anything to make out his case which is covered by the opening of his counsel.[30] A pledge of the property by the mortgagee prior to the assignment is admissible on the question of damages.[31]

XVII. CRIMINAL LIABILITY FOR SALE OR REMOVAL OF MORTGAGED PROPERTY.

A. Elements of Offense — 1. INTENT. Under the statutes generally in force making it a crime to sell, remove, or otherwise dispose of mortgaged personal property, it has been held that an intent to defraud is not an essential element of the offense,[32] but there are decisions to the contrary.[33] It is for the jury to pass

tra, Hyma *v.* Three Rivers Nat. Bank, 79 Mich. 167, 44 N. W. 427, statutory.

26. Bryan *v.* Robert, 2 Rich. Eq. (S. C.) 11, holding that a surety who obtained an assignment of the mortgage of a slave given by his principal to secure the same debt on account of which he is surety could file a bill against an innocent purchaser from the mortgagor for a specific delivery of the slave.

27. Russell *v.* Walker, 73 Ala. 315.

28. Gafford *v.* Lofton, 94 Ala. 333, 10 So. 505; Graham *v.* Newman, 21 Ala. 497; Woodland Bank *v.* Duncan, 117 Cal. 412, 49 Pac. 414 (although the mortgage notes had been reassigned subsequently to the wrongful act of the mortgagor in taking the property from the assignee); Barbour *v.* White, 37 Ill. 164; Christy *v.* Scott, 31 Mo. App. 331; Kingsland, etc., Mfg. Co. *v.* Chrismas, 28 Mo. App. 308.

29. Mayer *v.* Taylor, 69 Ala. 403, 44 Am. Rep. 522; Langdon *v.* Buel, 9 Wend. (N. Y.) 80.

The assignee must use his own name to enforce a mortgage in any proceeding at law after the mortgage itself has been transferred in the proper form, for that passes the legal title to the assignee. Graham *v.* Newman, 21 Ala. 497; Langdon *v.* Buel, 9 Wend. (N. Y.) 80.

Where the mortgage was not assigned in writing it has been held that the indorsee of a negotiable promissory note secured thereby could not maintain replevin in his own name against the mortgagor for the mortgaged property (Ramsdell *v.* Tewksbury, 73 Me. 197); but a contrary conclusion has been reached on similar facts (Kingsland, etc., Mfg. Co. *v.* Chrisman, 28 Mo. App. 308), even though the note was merely indorsed for collection (Willison *v.* Smith, 52 Mo. App. 133).

30. Canning *v.* Harlan, 50 Mich. 320, 15 N. W. 492, where plaintiff's counsel claimed in his opening that plaintiff owned the property, that defendant had never paid anything for his assignment of the mortgage, and that the mortgage had been paid in full prior to the assignment, and it was held sufficient to notify the assignee that plaintiff intended to go into a full investigation of the dealings between the parties.

Instructions were misleading where an assignee replevied property from an attaching officer who had appointed the original mortgagee his keeper to retain possession of the property and the court instructed that the jury might find for the assignee on the ground that the attachment was waived by the sheriff's failure to retain possession of the attached property. Moresi *v.* Swift, 15 Nev. 215.

31. Haskins *v.* Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. (N. Y.) 63.

Damages recoverable by assignee.— In trover by an assignee of a mortgage against an attaching officer, the amount paid by the plaintiff at a foreclosure sale should be deducted from the debt in estimating damages, and not a larger amount for which the assignee sold the property soon after. Hull *v.* Bernatz, 106 Mich. 551, 64 N. W. 473.

32. Beard *v.* State, 43 Ark. 284; State *v.* Bronkol, 5 N. D. 507, 67 N. W. 680.

33. Foster *v.* State, 88 Ala. 182, 7 So. 185 (where it was held that one who has assigned a mortgage on a crop and has acquired a landlord's claim for unpaid rent is not criminally liable for removing the crop, if he acquired the lien after transferring the mortgage, or, if he acquired it before, unless he knew that when the mortgage was transferred such representations had been made as would estop him from asserting any other lien); Satchell *v.* State, 1 Tex. App. 438 (holding that it constitutes the gist of the offense and hence must be sufficiently averred and proved). *Compare* De Vaughn *v.* Harris, 103 Ga. 102, 29 S. E. 613, holding that to render defendant guilty the removal must have been for the purpose of defeating the mortgage.

Knowledge of the mortgagee's lien on the part of defendant is sometimes made a necessary element of the offense. Jones *v.* State, 113 Ala. 95, 21 So. 229.

An intent to defraud will be inferred from the intentional making of the sale and need not be specifically proved. Com. *v.* Cutler, 153 Mass. 252, 26 N. E. 855. But no inference of a fraudulent intent will be made from the fact that the removal and sale was wilfully and knowingly made so as to take away from the jury its province of passing upon the question of actual fraudulent intent. State *v.* Manning, 107 N. C. 910, 12 S. E. 248. See also State *v.* Rice, 43 S. C. 200, 20 S. E. 986, where the act of taking the prop-

upon all issues of fraudulent intent accompanying the sale or removal of the mortgaged goods.[34]

2. Sale and Removal. Where the offense is removal, a mere sale to one who afterward removes the goods sold will not support an indictment.[35] A transfer by exchange for other property has been held to constitute a sale,[36] but some statutes require that the property disposed of shall be of a certain value.[37]

B. What Mortgages Are Protected. While the statutes generally refer to mortgages of personal property only, they have been construed to include property which partook of the nature of real estate, such as crops,[38] and intangible property, such as a liquor-tax certificate[39] or the undivided interest of a cropper on shares.[40] To come within the protection of the statutes, the mortgage must be founded upon a debt, since without one no valid lien can exist;[41] but equitable mortgages and liens, as well as legal, are held to be covered by the statutes.[42]

erty beyond the limits of the state was not regarded as sufficient, irrespective of the intent with which it was done.

Where the mortgagee consents to the sale, an intent to misappropriate the proceeds does not in some jurisdictions render the mortgagor liable for the statutory offense (Walker *v.* Camp, 69 Iowa 741, 27 N. W. 800), and the same is true where the mortgagor, having obtained the mortgagee's consent to the sale conditional on his receipt of the proceeds, fails to observe the condition (Dempsey *v.* State, 94 Ga. 766, 22 S. E. 57).

Criminal and civil liability of the mortgagee may not be coextensive, as where he sells or removes the mortgaged property, following an assignment by his agent of which he has no knowledge. Foster *v.* State, 88 Ala. 182, 7 So. 185.

34. Glass *v.* State, 23 Tex. App. 425, 5 S. W. 131.

To disprove an intent to defraud on the part of the mortgagor, evidence may be offered that at the time of the sale the buyer agreed to return the goods, if found to be covered by the mortgage, and stood ready so to do (Griffin *v.* State, (Tex. Crim. 1898) 46 S. W. 644); that the proceeds of the sale by the mortgagor would necessarily be entirely consumed in discharging a prior lien (State *v.* Ellington, 98 N. C. 749, 4 S. E. 534); or that the sale was made in order to pay prior mortgages, the subsequent mortgagee refusing the balance of the proceeds (Conner *v.* State, 97 Ala. 83, 12 So. 413). But see State *v.* Holmes, 120 N. C. 573, 26 S. E. 692, holding that proof of a prior mortgage would not of itself defeat the *prima facie* case made out for the state by showing an unsatisfied mortgage and a sale of the property.

To prove a fraudulent intent previous disposition of other property included in the mortgage may be shown. Martin *v.* State, 28 Tex. App. 364, 13 S. W. 151.

35. Polk *v.* State, 65 Miss. 433, 4 So. 540.

Removal of a portion of the mortgaged goods has been held equivalent to a removal of the whole. Wilson *v.* State, 43 Nebr. 745, 62 N. W. 209.

A removal of mortgaged goods occurred where the mortgagee verbally instructed defendant to "haul the cotton to Owen's Landing and ship it to Rome," defendant simply delivering it at Owen's Landing where it was destroyed by fire. Dyer *v.* State, 88 Ala. 225, 7 So. 267.

36. Johnson *v.* State, 69 Ala. 593. But see State *v.* Austin, (Miss. 1898) 23 So. 34, holding that no sale takes place if money does not pass.

The statutory words "otherwise dispose of the property" have been held to require a disposition in the nature of a sale. Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

Consignment over a railroad of the mortgaged goods, the same to be used at the pleasure of the consignee, has been held to be a conveyance. Lippman *v.* State, 104 Ala. 61, 16 So. 130.

The offense of selling mortgaged goods is not committed where a laborer, who mortgages his share in the profits of land under cultivation, delivers a portion of the crop to the landlord. Cody *v.* State, 69 Ga. 743.

Execution of mortgage before enactment of statute is no objection to the validity of an accusation for selling mortgaged goods, if the sale is subsequent to the passing of the statute. Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

37. People *v.* Schultz, 85 Mich. 114, 48 N. W. 293, holding that this requirement has nothing to do with the value of the mortgagee's interest.

38. Hamilton *v.* State, 94 Ga. 770, 21 S. E. 995 (matured crops); State *v.* Williams, 32 Minn. 537, 21 N. W. 746 (growing crops). But see Hardeman *v.* State, 16 Tex. App. 1, 49 Am. Rep. 821, where a growing and unripe crop of cotton was not regarded as personal property so as to be within the purview of a statute of the kind under consideration.

39. People *v.* Durante, 19 N. Y. App. Div. 292, 45 N. Y. Suppl. 1073.

40. Beard *v.* State, 43 Ark. 284.

41. McCaskill *v.* State, 68 Ark. 490, 60 S. W. 234.

A mortgage to secure a surety satisfies this rule as the obligation of the principal is in the nature of a debt. Conley *v.* State, 85 Ga. 348, 11 S. E. 659, holding that a mortgagee may testify that he has made payments as surety for the mortgagor in order to establish the necessary debt.

42. Varnum *v.* State, 78 Ala. 28.

Although a statute covered recorded liens

C. What Persons Are Protected. While primarily enacted for the benefit of the mortgagee, most of the statutes are broad enough to protect a purchaser of the property from the fraud of the mortgagor;[43] and one statute has been construed to protect an assignee of the mortgage from the fraud of the mortgagee.[44]

D. Defenses. Payment of the debt for which the mortgage was given is a good defense to a prosecution for a subsequent removal or sale of the mortgaged goods,[45] but the payment must have been made prior to the sale which is complained of.[46] The mortgagor may also show by way of defense that he was induced by fraud to give up the mortgaged goods.[47] Where the statute requires the written consent of the mortgagee to validate a sale of mortgaged goods, his verbal consent will not suffice to protect the mortgagor from prosecution.[48] The fact that defendant informed the purchaser of the mortgage is not a defense, although it may serve to negative a fraudulent intent.[49] An offer to the mortgagee of other property in satisfaction for that sold or removed will not protect the mortgagor from conviction,[50] and it follows that the mere ownership of such property by the mortgagor is equally unavailable by way of defense,[51] unless the substitution was made prior to the sale complained of.[52]

E. Sufficiency of Indictment or Information — 1. In General. It is not necessary that the indictment describe the offense in the language of the statute,[53]

only, it was held to protect a mortgage or deed of trust, actually filed for record, but which the law did not require to be recorded. Cooper *v.* State, 37 Ark. 412, 421.

43. May *v.* State, 115 Ala. 14, 22 So. 611. *Contra*, State *v.* Ruhnke, 27 Minn. 309, 7 N. W. 264, holding that the "intent to defraud" in the statute means an intent to defraud the mortgagee.

A purchaser without notice of the mortgagor's failure to obtain the mortgagee's consent to the sale may, however, acquire title subject to the mortgage lien, although the mortgagor be committing a crime. Sanford *v.* Duluth, etc., Elevator Co., 2 N. D. 6, 48 N. W. 434.

By informing the purchaser of the mortgage lien the mortgagor, under some statutes, may escape prosecution. Com. *v.* Damon, 105 Mass. 580.

44. Foster *v.* State, 88 Ala. 182, 7 So. 185.

45. People *v.* Stone, 16 Cal. 369.

46. Steed *v.* Knowles, 79 Ala. 446; Nixon *v.* State, 55 Ala. 120; Briggs *v.* State, (Tex. Crim. 1898) 44 S. W. 491 (where the sales were made to enable the mortgagor to procure the means of paying the mortgage debt).

47. State *v.* Munsen, 72 Mo. App. 543, where the fraud was made possible by the fact that prolonged intoxication had temporarily impaired defendant's reason, the court admitting evidence that upon her recovery she sought out the mortgagee and told him of the alleged fraud and the location of the property.

48. State *v.* Plaisted, 43 N. H. 413.

Proof by parol permissible.— Consent of mortgagee to the sale given at the time the mortgage was executed may be proved by parol evidence, although contradicting the terms of the instrument (Walker *v.* Camp, 69 Iowa 741, 27 N. W. 800); and such consent may be established by evidence that the clerk of the mortgagee who had filled in the mortgage had afterward said to defendant that he supposed it would be all right for him to sell the property provided "they got their money" (Atwell *v.* State, 63 Ala. 61).

49. Briggs *v.* State, (Tex. Crim. 1898) 44 S. W. 491.

Recording of the mortgage, it follows, is likewise no defense (Thornton *v.* State, 34 Tex. Crim. 469, 31 S. W. 372), and in some jurisdictions only recorded mortgages come within the statute (Cooper *v.* State, 37 Ark. 412, 421).

50. Cooper *v.* State, 37 Ark. 412.

51. Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449.

52. Fountain *v.* State, 98 Ala. 40, 13 So. 492, holding that it was for the jury to determine whether there had been such a substitution.

53. Williams *v.* State, 27 Tex. App. 258, 11 S. W. 114, where the allegation that the mortgagor did "run" the mortgaged property out of the state was held to be equivalent to "remove" in the statute.

The words "having executed a mortgage" in an indictment, whether effectual to pass an interest or not, are equivalent to the statutory clause "having conveyed by mortgage." State *v.* Williams, 32 Minn. 537, 21 N. W. 746.

Allegation as to time of execution of mortgage.— The words "having theretofore, to wit, on June 22, 1895, executed and delivered to the said Charley Richardson a valid mortgage, in writing" were held to be a sufficient allegation that a mortgage was executed previous to the act of removal. Haile *v.* State, (Tex. Crim. 1898) 43 S. W. 999.

Charge against third person for abetting sale.— Where the statute provides for the punishment of third parties "assisting, aiding or abetting the unlawful disposition" of the mortgaged property, an indictment charg-

nor need it always allege the presence of an intent to defraud, even where such intent is necessary to make the act a crime.[54] The place where the sale took place should be alleged,[55] and it has been held to be necessary to state in the indictment the name of the purchaser of the mortgaged property.[56]

2. DESCRIPTION OF PROPERTY. It is enough if the indictment describe the property sufficiently to identify it, although not as fully as the mortgage itself.[57]

3. DESCRIPTION OF MORTGAGE. Since the existence of the mortgage as a valid and subsisting lien at the time when the offense was committed must be alleged,[58]

ing that defendant "sold and disposed" was held defective. State *v.* Woods, 104 N. C. 898, 10 S. E. 555.

No distinction between principals and accessories before the fact exists in this offense. Thus a charge that defendant concealed and aided to conceal the mortgaged chattels is unobjectionable. Com. *v.* Wallace, 108 Mass. 12.

A description of the act in the alternative, as that defendant "did remove, conceal, or sell" the mortgaged property, has been held sufficiently definite. Glenn *v.* State, 60 Ala. 104; Nixon *v.* State, 55 Ala. 120. *Contra*, Cooper *v.* State, 37 Ark. 412.

Duplicity.— No duplicity was held to exist where it was alleged that defendant did "sell and dispose of, to one P. W. Glenn, and divers other persons" not known to the grand jury "the personal property described in said mortgage and thereby conveyed, and the whole thereof, to wit, 400 bushels of No. 2 wheat." But one offense was held to be charged, a sale to divers persons; not divers sales to divers persons. State *v.* Williams, 32 Minn. 537, 21 N. W. 746.

Repugnancy.— No repugnancy was found where the words "disposed of" were used in one part of the indictment and "sold" in another. State *v.* Crawford, 64 Ark. 194, 41 S. W. 425.

54. State *v.* Hurds, 19 Nebr. 316, 27 N. W. 139. *Contra*, Satchell *v.* State, 1 Tex. App. 438.

Consent of mortgagee.— The indictment need not allege the absence of a writing containing the consent on the part of the mortgagee to the disposition of the goods. It is enough to aver that his consent was not obtained. State *v.* Pepin, 22 Ind. App. 373, 53 N. E. 842; State *v.* Munsen, 72 Mo. App. 543. *Contra*, State *v.* Hughes, 38 Nebr. 366, 56 N. W. 982.

Discharge of lien.— Where the statute renders the removal or sale of mortgaged property criminal without an immediate discharge of the lien by the mortgagor, it is necessary for the indictment to state that no discharge took place. Polk *v.* State, 65 Miss. 433, 4 So. 540.

55. State *v.* Burns, 80 N. C. 277; State *v.* Pickens, 79 N. C. 652. But see Hampton *v.* State, 67 Ark. 266, 54 S. W. 746, holding that the place of sale, if not named in the indictment, would be taken to have been within the jurisdiction of the court. *Compare* McCallum *v.* State, (Miss. 1901) 30 So. 47, where an allegation that the sale was in P county was held sufficient, although it was not alleged that the property itself was in P county.

56. State *v.* Hughes, 38 Nebr. 366, 56 N. W. 982; State *v.* Burns, 80 N. C. 277; State *v.* Pickens, 79 N. C. 652; Armstrong *v.* State, 27 Tex. App. 462, 11 S. W. 462; Alexander *v.* State, 27 Tex. App. 94, 10 S. W. 764; Smith *v.* State, 26 Tex. App. 577, 10 S. W. 218. *Contra*, State *v.* Crawford, 64 Ark. 194, 41 S. W. 425.

57. Jones *v.* State, 35 Tex. Crim. 565, 34 S. W. 631; Glass *v.* State, 23 Tex. App. 425, 5 S. W. 131. See also State *v.* Surles, 117 N. C. 720, 23 S. E. 324, holding sufficient a description of the land on which the mortgaged crops were grown as "18 acres on my [defendant's] own land in Averasboro township, Harnett county."

The description was held sufficient where the indictment described the property as "a large quantity of ready made clothing, the whole of the value of five hundred dollars, . . . and a large quantity of hats and caps, the whole of the value of five hundred dollars, which said personal property the jurors cannot more particularly describe." Com. *v.* Strangford, 112 Mass. 289.

Incorrect description in mortgage.— If the property is incorrectly described in the mortgage the indictment should nevertheless contain a true description, after alleging the description in the mortgage. Coleman *v.* State, 21 Tex. App. 520, 2 S. W. 859.

Value of the property at time of the sale has been held to be a necessary allegation. State *v.* Ladd, 32 N. H. 110. *Contra*, Wilson *v.* State, 43 Nebr. 745, 62 N. W. 209.

Property not in existence.— Where the property mortgaged is not in existence at the time of the execution of the mortgage, it has been held that an allegation that the mortgage became a lien thereon when acquired must be inserted in the indictment. Mooney *v.* State, 25 Tex. App. 31, 7 S. W. 587.

The existence of a mortgageable interest in the mortgagor at the time the mortgage was executed need not be alleged. State *v.* Williams, 32 Minn. 537, 21 N. W. 746.

58. State *v.* Gustafson, 50 Iowa 194; State *v.* Hughes, 38 Nebr. 366, 56 N. W. 982; State *v.* Burns, 80 N. C. 277; State *v.* Pickens, 79 N. C. 652; Satchell *v.* State, 1 Tex. App. 438.

That a writing was in existence and actually held by the injured party is a necessary averment in some jurisdictions. Moye *v.* State, 9 Tex. App. 88.

The allegation of a conditional mortgage, without an allegation that it has become

the indictment must state the existence of the mortgage debt;[59] but it is not necessary for the indictment to aver that the mortgage was recorded or filed for record[60] or that it was duly acknowledged.[61]

4. VARIANCE. To constitute a variance the inconsistency between the indictment and the proof offered to sustain it must relate to a material allegation.[62]

F. Procedure and Trial — 1. VENUE. The place of the sale or other disposition of the property has been held to determine the venue, and not that of its purchase or of the execution of the mortgage.[63]

2. BURDEN OF PROOF. As to the existence of a fraudulent purpose, the burden of proof is held to rest upon the prosecution, to be proved beyond a reasonable doubt, the same as any other allegation.[64] On the other hand, where the absence of the mortgagee's consent is made an element of the offense, it has been held unnecessary for the prosecution, in the first instance, to prove that the sale took place without it.[65]

3. INSTRUCTIONS. The instructions of the court to the jury must clearly present the issue on the facts. Thus an erroneous refusal to instruct is not remedied by a subsequent instruction that fails so to do.[66] They must also be free from argumentativeness and must not give undue prominence to the testimony of a single witness.[67]

absolute by the happening of the condition, does not meet the above rule. State *v.* Devereux, 41 Tex. 383.

59. McCaskill *v.* State, 68 Ark. 490, 60 S. W. 234.

That the mortgagee named in the deed continued to hold the mortgage at the time of the offense need not be averred in the indictment (McCallum *v.* State, (Miss. 1901) 30 So. 47); and the fact that title to the mortgage is erroneously laid in the administrators of the mortgagee and not in his heirs will not render the indictment defective (State *v.* Maxey, 41 Tex. 524). See also Wilson *v.* State, 43 Nebr. 745, 62 N. W. 209, holding that it was not necessary to aver that the owner of the mortgage was the owner of the debt thereby secured.

60. Barnett *v.* State, (Ark. 1898) 44 S. W. 1037.

61. State *v.* Harberson, 43 Ark. 378.

62. Coleman *v.* State, 21 Tex. App. 520, 2 S. W. 859, where descriptive matter serving to identify the property, such as the brand, age, and color of a horse, was held material.

There was no variance where the mortgage purported to cover two cows and the indictment added their two calves, since the subsequent offspring of mortgaged animals are subject to the mortgage lien (Dyer *v.* State, 88 Ala. 225, 7 So. 267), and equally harmless is the fact that the mortgage covers more property than was stated to have been disposed of in the indictment (Jones *v.* State, 35 Tex. Crim. 565, 34 S. W. 631).

A defective description of the vendee may constitute a variance, as where he is alleged to be a person unknown to the grand jury, but the evidence shows that he was either known or could have been by the exercise of slight diligence. Presley *v.* State, 24 Tex. App. 494, 6 S. W. 450.

Failure to describe mortgagee as trustee will not result in a variance. Sweat *v.* State, (Tex. Crim. 1900) 59 S. W. 265.

Describing joint mortgagor.— The allegation that the mortgage was executed by defendant, when in fact he was one of two mortgagors, does not constitute a variance. Nixon *v.* State, 55 Ala. 120.

63. Robberson *v.* State, 3 Tex. App. 502.

64. Hampton *v.* State, 67 Ark. 266, 54 S. W. 746.

No strong presumption in favor of defendant is raised by the fact that the sale was open and without any attempt to conceal, although such evidence is admissible to disprove fraud. Cobb *v.* State, 100 Ala. 19, 14 So. 362.

65. State *v.* Williams, 35 S. C. 344, 14 S. E. 819.

A prima facie case may be established by proving that the mortgagee's consent was not given. State *v.* Surles, 117 N. C. 720, 23 S. E. 324.

Proof of place of sale.— When necessary to establish the place of the sale or removal, evidence that the mortgagor with the mortgagee's consent had at various times removed the property into different counties is not admissible to prove that a subsequent removal to another state without such consent occurred in either of the said counties. State *v.* Julien, 48 Iowa 445.

A mistaken description in the mortgage, even though alleged in the indictment, may not be proved by showing that it was intended to cover a bay horse mule, instead of "one bay mare mule." Barclay *v.* State, 55 Ga. 179.

66. Sweat *v.* State, (Tex. Crim. 1900) 59 S. W. 265, where the court refused to instruct that if, at the time of the sale, the debt was unpaid, but the purchaser agreed to secure payment of the debt, and if defendant sold the property in good faith, without fraudulent intent, he should be acquitted, is open to this objection.

67. Fountain *v.* State, 98 Ala. 40, 13 So. 492, where the mortgagee, having testified that March 10, when the mortgage fell due, defendant did not have possession of the

XVIII. PAYMENT AND TENDER OF MORTGAGE DEBT AND DISCHARGE OF MORTGAGE.

A. In General.[68] When the debt secured by a mortgage has been wholly paid, the title transferred by the mortgage is extinguished,[69] and with it terminates the right of the mortgagee to possession,[70] so that a subsequent assignment is beyond the authority of the holder of the security.[71]

property, but that he did have it ten days before, there being other evidence that in the preceding December defendant had sold the property, an instruction that if defendant had the property in his possession about March 1 he was not guilty of the sale in December was properly refused.

68. An election to terminate a lease, which contains a "chattel-mortgage clause," for breach of covenants therein does not discharge the lien of the mortgage created by such clause. Ludlum *v.* Rothschild, 41 Minn. 218, 43 N. W. 137.

69. *Alabama.*— Fields *v.* Copeland, 121 Ala. 644, 26 So. 491; Marcus *v.* Robinson, 76 Ala. 550; Frank *v.* Pickens, 69 Ala. 369; Shiver *v.* Johnston, 62 Ala. 37; Dryer *v.* Lewis, 57 Ala. 551; Harrison *v.* Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638.

Arkansas.— Hudson *v.* Snipes, 40 Ark. 75.

Illinois.— Wallard *v.* Worthman, 84 Ill. 446.

Iowa.— Bellamy *v.* Doud, 11 Iowa 285.

Maine.— Butler *v.* Tufts, 13 Me. 302.

Massachusetts.— Shepardson *v.* Whipple, 107 Mass. 279; Parks *v.* Hall, 2 Pick. (Mass.) 206.

Michigan.— Place *v.* Grant, 9 Mich. 42, holding that evidence of an appropriation by the mortgagee of an amount sufficient to satisfy the mortgage was admissible in defending an action of trover brought by a mortgagee to recover mortgaged property.

New Jersey.— Freeman *v.* Freeman, 17 N. J. Eq. 44.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 497.

Payment of the entire debt is essential and it was therefore held to be error to permit evidence of the payment of part of the debt, as that was an immaterial inquiry. Morrison *v.* Judge, 14 Ala. 182. *Compare* Coffin *v.* Reynolds, 21 Minn. 456, where the parties thought a sufficient quantity of wood had been delivered to satisfy the condition of a mortgage but subsequently discovered their mistake and the mortgage was held not to be discharged.

Releasing certain portion of mortgaged chattels.— Payment by a mortgagor will not be applied to release from the mortgage lien a certain portion of the mortgaged property which has been sold, where the purchaser has not paid for the property and has given it away to defraud his creditors. Dorsey *v.* Gassaway, 2 Harr. & J. (Md.) 402, 3 Am. Dec. 557.

Payment after default discharges the lien of a chattel mortgage (Fontaine *v.* Beers, 19 Ala. 722; Harrison *v.* Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638; Parks *v.* Hall, 2 Pick. (Mass.) 206), provided the payment was made before the doing of the act regarding which complaint is made by a third person (Thornton *v.* Cochran, 51 Ala. 415). *Compare* Mathews *v.* Fisk, 64 Me. 101, where a mortgagor who had paid the mortgage debt after its maturity was held to be entitled, by virtue of statute, to bring trover or replevin for the property when the mortgagee refused to deliver it upon demand.

Payment after the institution of a suit by the mortgagee does not bar the action. Hanson *v.* Tarbox, 47 Minn. 433, 50 N. W. 474, holding that the receipt of part of the mortgage claim in cash and part in a new note did not operate as payment unless the new note had been taken in full payment.

Nothing further than payment is necessary, such as redelivery, resale, or cancellation of the mortgage, in order that the title shall revest in the mortgagor. Harrison *v.* Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638; Parks *v.* Hall, 2 Pick. (Mass.) 206.

70. Fields *v.* Copeland, 121 Ala. 644, 26 So. 491; Bellamy *v.* Doud, 11 Iowa 285; Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059.

Acceptance of a late delivery of goods, the delivery of which was intended to be secured by a chattel mortgage, discharges the lien created by the mortgage. Butler *v.* Tufts, 13 Me. 302.

The bar of the statute of limitations against recovery on a mortgage note does not operate as payment and the mortgagee's title is not thereby defeated. Crain *v.* Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807. *Compare* Packard *v.* Kingman, 11 Iowa 219, holding that anything which extinguishes the mortgage debt extinguishes the mortgage.

An action at law may be maintained by the mortgagor to recover possession of the mortgaged chattel after the mortgage debt has been paid. Blanchard *v.* Kenton, 4 Bibb (Ky.) 451.

Duty of mortgagee in regard to returning property.— The mortgagee should tender the goods back to the mortgagor upon payment of the debt, but the latter cannot insist upon their being returned to him but must take them at the place where the mortgagee had stored them for safe-keeping. Gale Mfg. Co. *v.* Phillips, 78 Mich. 86, 43 N. W. 1035.

71. *Alabama.*—Brooks *v.* Ruff, 37 Ala. 371; Harrison *v.* Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638.

Iowa.— Kemerer *v.* Bloom, 65 Iowa 363, 21 N. W. 679.

Massachusetts.— Bowditch *v.* Green, 3 Metc. (Mass.) 360.

B. Change in Form of Debt.[72] The binding force of a mortgage is not affected by substitution of new notes for those originally given as evidence of the mortgage debt,[73] and a change from a simple contract debt to a personal judgment against the mortgagor does not release a mortgage.[74]

C. Merger. The assignment of the interests of both mortgagor and mort-

Michigan.— Long *v.* Moore, 56 Mich. 23, 22 N. W. 97.

Texas.— Canfield *v.* Moore, 16 Tex. Civ. App. 472, 41 S. W. 718.

A mortgage cannot be revived after the mortgage note has been paid and the mortgage surrendered to the mortgagor by the redelivery of the instrument to the mortgagee upon the occasion of his making a new loan. Douglas *v.* Stetson, 159 Mass. 428, 34 N. E. 542, 38 Am. St. Rep. 442.

72. **An agreement to accept payment of mortgage notes in cotton** at an agreed price per pound does not destroy the legal effect of the mortgage as security for the note. Lehman *v.* Marshall, 47 Ala. 362.

73. *Alabama.*— Boyd *v.* Beck, 29 Ala. 703; Cullum *v.* Mobile Branch Bank, 23 Ala. 797.

Connecticut.— Smith *v.* Prince, 14 Conn. 472, where notes for which the mortgagee was surety were renewed but he remained liable for payment of those given in renewal.

Iowa.— Packard *v.* Kingman, 11 Iowa 219.

Massachusetts.— Pomroy *v.* Rice, 16 Pick. (Mass.) 22; Watkins *v.* Hill, 8 Pick. (Mass.) 522. *Compare* Davis *v.* Maynard, 9 Mass. 242, where accepting a recognizance in place of a mortgage note was held not to discharge a mortgage.

Michigan.— Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52; Thurber *v.* Jewett, 3 Mich. 295.

Minnesota.— Hanson *v.* Tarbox, 47 Minn. 433, 50 N. W. 474; Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

Nebraska.— Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677.

New York.— Hill *v.* Beebe, 13 N. Y. 556; Balz *v.* Shaw, 13 Misc. (N. Y.) 181, 34 N. Y. Suppl. 5, 67 N. Y. St. 861.

North Carolina.— Vick *v.* Smith, 83 N. C. 80.

South Carolina.— Allston *v.* Allston, 2 Hill (S. C.) 362.

Texas.— Burns *v.* Staacke, (Tex. Civ. App. 1899) 53 S. W. 354; Kennedy *v.* Davis, 2 Tex. Unrep. Cas. 77.

Vermont.— Austin *v.* Bailey, 64 Vt. 367, 24 Atl. 245, 33 Am. St. Rep. 932.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 498, 499.

It is a question of fact whether the giving of a new note for the balance due has the effect of releasing the security of the mortgage (Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52), for to bring about such a result the new note for the balance must be received in full payment (Hanson *v.* Tarbox, 47 Minn. 433, 50 N. W. 474).

A new note executed to correct a mistake in the original one and the accompanying surrender of the defective one does not discharge the mortgage. Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

Taking the note of a third person in lieu of the notes which were described in the mortgage as being secured does not of itself discharge the mortgage. Balz *v.* Shaw, 13 Misc. (N. Y.) 181, 34 N. Y. Suppl. 5, 67 N. Y. St. 861.

Estopped by allowing note to be marked "paid."— Where a mortgagee surrendered the mortgage note on payment of a portion of the amount due and allowed it to be marked "paid," he was held to be estopped to claim that a balance was still due against a *bona fide* purchaser of the property. Finks *v.* Buck, (Tex. Civ. App. 1894) 27 S. W. 1094.

Application of payments.— Under the rule that payments by a debtor will be applied to the discharge of secured rather than unsecured indebtedness, although not specifically applied by him, a mortgage was held to be discharged where the parties had an accounting and new notes were given, it appearing that past payments by the mortgagor exceeded the mortgage debt. Laeber *v.* Langhor, 45 Md. 477.

Upon an adjustment of accounts, of which a debt secured by mortgage forms a part, payment of the balance due from the mortgagor by a note operates to discharge the mortgage. Christofferson *v.* Howe, 57 Minn. 67, 58 N. W. 830.

Negotiation of the new note given for the balance due on the mortgage was held not to discharge the mortgage, although the mortgagee signed the note to facilitate the negotiation; and the assignee of the mortgage who had discounted the note was allowed to enforce his security for the balance due. Hyma *v.* Three Rivers Nat. Bank, 79 Mich. 167, 44 N. W. 427.

74. *Indiana.*— Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358; Holmes *v.* Hinckle, 63 Ind. 518; Duck *v.* Wilson, 19 Ind. 190; Jenkinson *v.* Ewing, 17 Ind. 505.

Kansas.— Osborne *v.* Connor, 4 Kan. App. 609, 46 Pac. 327.

Massachusetts.— Fisher *v.* Fisher, 98 Mass. 303.

Michigan.— Thurber *v.* Jewett, 3 Mich. 295.

New York.— Butler *v.* Miller, 1 N. Y. 496. *Compare* Butler *v.* Miller, 1 Den. (N. Y.) 407, where the mortgagor gave the mortgagee a warrant of attorney to confess judgment for the mortgage debt and for another debt, and it was held that the subsequent proceedings of the parties evinced an intention to substitute the judgment for the mortgage security and that the lien of the latter was gone.

A fortiori the mere commencement of suit upon the mortgage note will not operate to discharge it. Thurber *v.* Jewett, 3 Mich. 295.

gagee to the same person will not operate to discharge the mortgage on the doctrine of merger, unless the parties so intended it,[75] the law being the same in this respect as in the case of mortgages of real estate.[76]

D. Obtaining Additional Security. The validity of a mortgage is not affected by the fact that the mortgagee holds independent collateral security,[77] and acquiring such additional security does not operate as payment so as to prevent the mortgagee from enforcing his mortgage,[78] unless it is accepted as a substitute for the original collateral.[79]

E. Renewal of Mortgage. Where a new mortgage on personal property is executed in renewal of an existing one, whether for the same amount, for a balance due, or for a greater sum, the new mortgage will not operate as a discharge of the original security unless the parties so intended it;[80] but if the new

75. Denham *v.* Sankey, 38 Iowa 269; Milliken *v.* Condon, 7 Kan. App. 450, 53 Pac. 531; Christy *v.* Scott, 31 Mo. App. 331; Brown *v.* Rich, 40 Barb. (N. Y.) 28. *Compare* Waterloo First Nat. Bank *v.* Elmore, 52 Iowa 541, 3 N. W. 547, where merger did not take place because there were intervening mortgages.

A fortiori after the mortgagee has parted with his interest an assignment of the equity of redemption to him does not extinguish the mortgage. Baxter *v.* Gilbert, 12 Abb. Pr. (N. Y.) 97.

Extinguishment by operation of law.— Personal property subject to two mortgages was sold on execution and purchased by one of the mortgagees, who afterward paid off the other mortgage and then brought suit against the mortgagor on his own mortgage note. It was held that the mortgage was extinguished by operation of law. Merritt *v.* Niles, 25 Ill. 282. But see Milliken *v.* Condon, 7 Kan. App. 450, 53 Pac. 531, where the purchase of mortgaged chattels at an execution sale by the assignee of the mortgage was held not to be a satisfaction thereof.

76. See, generally, MORTGAGES.

77. Ayres *v.* Wattson, 57 Pa. St. 360.

Where a mortgagee realized on collateral security and applied to his own use a sufficient amount of the sum thus received to pay the mortgage, he could not maintain an action to foreclose (Farmsley *v.* Anderson Foundry, etc., Works, 90 Ind. 120); but a chattel mortgage was held not to be discharged by a transfer of real estate which was covered by a mortgage to secure the same debt unless the parties intended the transfer to operate as payment (Wilhelmi *v.* Leonard, 13 Iowa 330). *Compare* Fisher *v.* Jones Co., 103 Ga. 557, 29 S. E. 759, where the acceptance of new notes in settlement of notes given as collateral security to a mortgage was held to release the mortgagor from further liability.

Unless the right to apply the proceeds is exercised, as where a mortgagee bank received deposits from the mortgagor to a greater amount than the mortgage debt with a right to apply them in payment but allowed them to be drawn out on check, the mortgage is not paid. McCord *v.* Albany County Nat. Bank, 7 Wyo. 9, 48 Pac. 1058.

Foreclosure of collateral mortgage.—Where an entire debt was secured by a mortgage on real estate and a part of it by a chattel mortgage, the latter was held to be discharged when the decree of foreclosure of the real estate mortgage became absolute, because that operated as payment of the chattel mortgage debt. Calkins *v.* Clement, 54 Vt. 635.

78. Miller *v.* Lockwood, 32 N. Y. 293. *Compare* Burrit *v.* Sheffer, 13 N. Y. Suppl. 849, 37 N. Y. St. 591, where a mortgage was given to secure a present indebtedness and future loans, and between the time when the indebtedness was paid and the future loan was made further security for such loan was given, but it was held that the mortgage could be enforced as security for the loan which was subsequently made.

79. Cobb *v.* Malone, 87 Ala. 514, 6 So. 299.

80. *Alabama.*— Miller *v.* Griffin, 102 Ala. 610, 15 So. 238 (where there was an intervening claimant); Boyd *v.* Beck, 29 Ala. 703.

Arkansas.— Challis *v.* German Nat. Bank, 56 Ark. 88, 19 S. W. 115, where the second mortgage was defective.

Colorado.— Hobkirk *v.* Walrich, 14 Colo. App. 181, 59 Pac. 414, where the original mortgage had been delivered to the mortgagor but was reclaimed from him by the mortgagee when he heard of adverse intervening claims.

Illinois.— Kingman *v.* Glover, 67 Ill. App. 481, where the new mortgage omitted some property which was covered by the original one. *Contra,* Stoner *v.* Good, 81 Ill. App. 405. *Compare* Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801 [*affirming* 18 Ill. App. 378], holding that, where a mortgage was foreclosed and a new mortgage executed to the original mortgagee, the latter must retain possession of the property till his mortgage was recorded or he would be postponed to intervening encumbrancers.

Iowa.— Boone City Bank *v.* Radtke, 87 Iowa 363, 54 N. W. 435 (where the second mortgage was expressly made subject to an intervening encumbrance); Packard *v.* Kingman, 11 Iowa 219.

Kansas.— Howard *v.* Hutchinson First Nat. Bank, 44 Kan. 549, 24 Pac. 983.

Michigan.— Brown *v.* Dunckel, 46 Mich. 29, 8 N. W. 537.

Missouri.— Christy *v.* Scott, 31 Mo. App. 331.

note and mortgage are taken in payment of the former one that extinguishes the lien of the first mortgage.[81]

F. Tender — 1. In General. A chattel mortgage is discharged by a tender of the amount secured thereby on the law day of the mortgage,[82] and a chattel mortgagee who refuses to accept such a tender is liable in trover for not restoring the goods.[83] A tender is essential to the mortgagor's right of action,[84] and is not

New York.— Walker *v.* Henry, 85 N. Y. 130; Shuler *v.* Boutwell, 18 Hun (N. Y.) 171; Wray *v.* Fedderke, 43 N. Y. Super. Ct. 335; Gregory *v.* Thomas, 20 Wend. (N. Y.) 17. *Compare* Hill *v.* Beebe, 13 N. Y. 556, where the same result was reached, although the new mortgage was for a slightly increased amount.

Texas.— Ploeger *v.* Johnson, (Tex. Civ. App. 1894) 26 S. W. 432, where the second mortgage was to one of the joint holders of the original security.

Vermont.— Austin *v.* Bailey, 64 Vt. 367, 24 Atl. 245, 33 Am. St. Rep. 932, where the second mortgage was for an increased amount.

United States.—Alferitz *v.* Ingalls, 83 Fed. 964. But see Cox *v.* Beck, 83 Fed. 269, holding that the lien of the original mortgage was gone when the new mortgage was executed to secure an additional indebtedness.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 503.

81. Daly *v.* Proetz, 20 Minn. 411. But see Irwin *v.* McDowell, (Cal. 1893) 34 Pac. 708, where a contract of pledge was intended to supersede a chattel mortgage, but the property had not been delivered in pursuance of the contract, and it was held that the mortgage was not discharged because the pledge was not valid without delivery.

The jury determines the effect of the execution of a second mortgage between the same parties on a prior mortgage covering the same subject-matter, because it depends on the intention of the parties. Brown *v.* Dunckel, 46 Mich. 29, 8 N. W. 537.

The burden of proof is on a purchaser of the property to show that the execution of a second mortgage on the same property and between the same parties was intended to operate as satisfaction of the first. Challis *v.* German Nat. Bank, 56 Ark. 88, 19 S. W. 115.

The earlier mortgage was held to be discharged by the giving of a new mortgage on the same property where there was a change in the person of the mortgagor without the consent of the original mortgagor (Woodman *v.* Hunter, 53 Kan. 393, 36 Pac. 713) or in the person of the mortgagee (Herr *v.* Denver Milling, etc., Co., 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641), or by a substantial change in the subject-matter covered by the two mortgages (Paine *v.* Waite, 11 Gray (Mass.) 190). *Compare* Paul *v.* Hayford, 22 Me. 234, where a surety who was protected by a mortgage paid the secured debt and took a new mortgage on the same property to secure the amount paid and it was held that the first mortgage was discharged.

Where the first mortgage was invalid, it was held to be discharged by the giving of a second mortgage for the original amount and an additional sum, so that the second mortgage was not invalid as to the amount of the first mortgage. Walker *v.* Henry, 85 N. Y. 130.

82. *Michigan.*—Shattuck *v.* Cole, 91 Mich. 580, 52 N. W. 69, where it was held that a mortgagee who took possession under an insecurity clause could not continue to hold after a tender.

Missouri.— Johnson *v.* Simmons, 61 Mo. App. 395, 1 Mo. App. Rep. 662.

Nebraska.— Tompkins *v.* Batie, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361.

Washington.— Helphrey *v.* Strobach, 13 Wash. 128, 42 Pac. 537.

Wisconsin.— Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465 (where the goods had been seized under an insecurity clause before the tender, but the mortgage debt was not yet due); Harder *v.* Hosp, 69 Wis. 288, 34 N. W. 145 (holding that after tender a mortgagee could not exercise his right to take possession of the property under an "insecurity" clause in the mortgage).

United States.—Mitchell *v.* Roberts, 5 McCrary (U. S.) 425, 17 Fed. 776.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 501.

A tender to one of several mortgagees is sufficient when the mortgage runs to them jointly. Flanigan *v.* Seelye, 53 Minn. 23, 55 N. W. 115.

The loss falls on the mortgagee who has refused to return the property after a tender of the amount due in the event of the destruction of the mortgaged property. Goodman *v.* Pledger, 14 Ala. 114.

83. Eslow *v.* Mitchell, 26 Mich. 500 (even though the mortgagee has previously sold the goods); Fuller *v.* Parrish, 3 Mich. 211.

An agreement extending the time for payment, when supported by a valid consideration, will entitle a mortgagor to maintain trover against the mortgagee after making a tender at the deferred time for payment. Pierce *v.* Hasbrouck, 49 Ill. 23. *Compare* Baxter *v.* Spencer, 33 Mich. 325, where a distinct arrangement was made by a purchaser of the equity of redemption of mortgaged property to extend the time of payment four days, and tender on the day named was held to operate as a satisfaction of the mortgage.

Tender after the institution of a suit by the mortgagor to recover the property is not sufficient, although before a breach of the condition of the mortgage. Wildman *v.* Radenaker, 20 Cal. 615.

84. Brown *v.* Coon, 59 Mich. 596, 26 N. W. 780. But see Burton *v.* Randall, 4 Kan. App. 593, 46 Pac. 326, where it was held that the

excused by the fact that the debt secured by the mortgage bears usurious interest[85] or that the mortgagee claims to be the absolute owner of the property.[86]

2. After Default. Tender after the law day of the mortgage does not entitle the mortgagor to an action of trover,[87] for it does not divest the legal title of a mortgagee in possession of the property;[88] but when the mortgagor is in posses-

mortgagor need not make a tender when the value of the property for which he is suing the mortgagee in conversion exceeds the mortgage debt.

Sufficiency of tender.— It has been held that the tender of the amount due under the mortgage must be actual and that an offer in the pleadings is not enough (Hall *v.* Ditson, 5 Abb. N. Cas. (N. Y.) 198, 55 How. Pr. (N. Y.) 19), and that the tender must be unconditional (Moore *v.* Norman, 52 Minn. 83, 53 N. W. 809, 38 Am. St. Rep. 526, 18 L. R. A. 359; Noyes *v.* Wyckoff, 114 N. Y. 204, 21 N. E. 158, 23 N. Y. St. 105 [*affirming* 30 Hun (N. Y.) 466]) and *bona fide* (Horan *v.* Harrington, 130 Cal. 142, 62 Pac. 400); but an offer in writing to pay the amount due on the mortgage which was not accepted has been held to be a sufficient tender (Bartel *v.* Lope, 6 Oreg. 321). *Compare* Coffin *v.* Reynolds, 21 Minn. 456, where the condition of a mortgage was the delivery of wood at a designated place and the offer of the proper amount of wood on the ground was held not to be a valid tender which would release the mortgage.

Sufficiency of tender by second mortgagee. — Where a first mortgagee has replevied property from a second one, after the latter's refusal to deliver on demand, the second mortgagee must add the costs incurred in the replevin suit to the amount he must tender to release the lien of the first mortgage (Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449); but the second mortgagee need only tender the prescribed statutory costs, even though the mortgage contains a stipulation entitling the mortgagee to more extensive costs (De Luce *v.* Root, 12 S. D. 141, 80 N. W. 181). See also Hull *v.* Godfrey, 31 Nebr. 204, 47 N. W. 850, where the first mortgagee recovered possession from the second mortgagee in a replevin suit and advertised the property for sale under a clause in the mortgage authorizing him to sell when he felt insecure, and it was held to be unnecessary for the second mortgagee to include in his tender the expenses of advertising when there was no proof that the first mortgagee had reasonable grounds to believe himself insecure.

The source from which the tendered money comes is immaterial so long as the mortgagee could have gotten payment by accepting the tender. Eslow *v.* Mitchell, 26 Mich. 500.

Authority of agent.— Where a tender is made by an agent, the mortgagee must have a reasonable opportunity to ascertain the agent's authority (Eslow *v.* Mitchell, 26 Mich. 500); but even a subagent who is instructed to take possession of the mortgaged property has authority to accept a tender of the amount due (Wienskawski *v.* Wisner, 114 Mich. 271, 72 N. W. 177).

Only the amount due to an assignee of the mortgage need be tendered to him by the mortgagor in order to extinguish the mortgage lien and give the mortgagor plenary right of possession. Stewart *v.* Brown, 48 Mich. 383, 12 N. W. 499. *Compare* Chandler *v.* Loomis, 87 Iowa 151, 54 N. W. 341, where the assignee of a chattel mortgage had the property seized by a sheriff and after expense had been incurred for keeping the property the attorney for the mortgagor paid the sheriff the amount due on the mortgage and offered his personal responsibility for expenses to date, which the sheriff refused; and it was held that, as the mortgage was to be a lien for expenses incurred in keeping the property, the tender was insufficient and was properly refused.

Tender of the notes of a third person in satisfaction of the mortgage debt does not constitute a satisfaction of the mortgage and extinguishment of the lien on the property, although the mortgagee had agreed to accept them previous to the making of the tender. Coleman *v.* Low, (Miss. 1893) 13 So. 227.

A levy on the mortgaged property by the mortgagee is a recognition, it has been held, of the validity of a prior tender by the mortgagor of the amount due on the mortgage debt. Daugherty *v.* Byles, 41 Mich. 61, 1 N. W. 919.

85. Lucas *v.* Latour, 6 Harr. & J. (Md.) 100, holding that a tender must be made of the amount actually loaned. *Compare* Shiver *v.* Johnston, 62 Ala. 37, where it was held that a tender of the principal without interest, kept good by bringing the money into court, would discharge a mortgage when the debt secured bore usurious interest.

86. Card *v.* Fowler, 120 Mich. 646, 79 N. W. 925. *Contra*, Watts *v.* Johnson, 4 Tex. 311. *Compare* Iler *v.* Baker, 82 Mich. 226, 46 N. W. 377, where it was held that a mortgagee of chattels in possession, who has sold part for enough to pay the debt and denied the debtor's title to the rest, was liable in trover without either tender or demand.

87. Blain *v.* Foster, 33 Ill. App. 297; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61; Langdon *v.* Buel, 9 Wend. (N. Y.) 80; Ackley *v.* Finch, 7 Cow. (N. Y.) 290; Brown *v.* Bement, 8 Johns. (N. Y.) 96. *Contra*, Lowery *v.* Gregory, 60 S. C. 149, 38 S. E. 257, under statute. *Compare* McClendon *v.* Wells, 20 S. C. 514, holding that after a rightful seizure of mortgaged chattels for breach of condition, the mortgagor's tender of the debt and costs would not entitle him to maintain an action for damages.

88. *Alabama.*— Maxwell *v.* Moore, 95 Ala. 166, 10 So. 444, 36 Am. St. Rep. 190; Frank *v.* Pickens, 69 Ala. 369, in which cases the point was left undecided.

Illinois.— Blain *v.* Foster, 33 Ill. App. 297.

sion, a tender after default in the condition of the mortgage is sufficient to discharge the mortgage,[89] and a tender after the law day is also good in equity.[90]

3. Keeping Tender Good. Where a tender of the amount due on a mortgage is not made till after the maturity of the mortgage debt, it must be kept good by bringing the money into court;[91] but such a precaution seems to be unnecessary where the tender is made before a breach in the condition of the mortgage.[92]

G. What Constitutes Payment—1. Counter-Claims Against Mortgagee. The fact that a chattel mortgagee is indebted to the mortgagor in an amount equal to the mortgage indebtedness does not of itself discharge a mortgage;[93] but an

Missouri.— Jackson *v.* Cunningham, 28 Mo. App. 354.

Nebraska.— Tompkins *v.* Batie, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361.

New York.— Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179; Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Charter *v.* Stevens, 3 Den. (N. Y.) 33, 45 Am. Dec. 444; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61.

South Carolina.— McClendon *v.* Wells, 20 S. C. 514; Reese *v.* Lyon, 20 S. C. 17.

Vermont.— Blodgett *v.* Blodgett, 48 Vt. 32.

United States.— Mitchell *v.* Roberts, 5 McCrary (U. S.) 425, 17 Fed. 776, holding further that the general rule in this respect was not followed in New York, Michigan, and New Hampshire.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 502.

89. *Alabama.*— Maxwell *v.* Moore, 95 Ala. 166, 10 So. 444, 36 Am. St. Rep. 190.

Nebraska.— Knox *v.* Williams, 24 Nebr. 630, 39 N. W. 786, 8 Am. St. Rep. 220. *Compare* Gould *v.* Armagost, 46 Nebr. 897, 65 N. W. 1064 (where a purchaser at execution sale of mortgaged chattels of which the mortgagor was in possession tendered the amount of the debt to the mortgagee, who had subsequently taken possession, with all expenses incurred in taking possession, and kept the tender good, and it was held that the lien of the mortgage was thereby divested); Knox *v.* Williams, 24 Nebr. 630, 39 N. W. 786, 8 Am. St. Rep. 220 (where the mortgagor made the tender while in possession, but the mortgagee refused it and took possession of the property and it was held that the mortgagor could maintain an action to recover possession of the property).

New York.— Hutchings *v.* Munger, 41 Barb. (N. Y.) 396.

North Carolina.— Barbee *v.* Scoggins, 121 N. C. 135, 28 S. E. 259.

Wisconsin.— Musgat *v.* Pumpelly, 46 Wis. 660, 1 N. W. 410.

90. Blain *v.* Foster, 33 Ill. App. 297; Flanders *v.* Chamberlain, 24 Mich. 305.

No right of recaption of the mortgaged property is acquired by the mortgagor by tender of the money subsequently to the maturity of the mortgage indebtedness, but the mortgagor must resort to equity. Boone *v.* Rains, 7 T. B. Mon. (Ky.) 384.

91. Frank *v.* Pickens, 69 Ala. 369; Blain *v.* Foster, 33 Ill. App. 297; Smith *v.* Phillips, 47 Wis. 202, 2 N. W. 285. *Compare* Roberts *v.* White, 146 Mass. 256, 15 N. E. 568, where a tender made by a second mortgagee after the first mortgagee had brought replevin was ineffectual because it was not kept good by bringing the money into court.

A tender was sufficiently kept good by keeping subject to the mortgagee's order the money which had been offered to him for the avowed purpose of paying off the mortgage debt and paying it into court at the trial. Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465.

92. Stewart *v.* Brown, 48 Mich. 383, 12 N. W. 499; Eslow *v.* Mitchell, 26 Mich. 500; Moore *v.* Norman, 43 Minn. 428, 45 N. W. 857, 19 Am. St. Rep. 247, 9 L. R. A. 55; Tompkins *v.* Batie, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361. See also Potts *v.* Plaisted, 30 Mich. 149, where an absolute tender made in good faith was held to defeat a subsequent bill to foreclose, although the tender was not kept up. *Contra*, Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465. See also Long *v.* Howard, 35 Iowa 148, where the mortgagor was required to keep good a tender made by him while still in possession of the mortgaged property but presumably after the maturity of the mortgaged debt.

Under a statute authorizing replevin if mortgaged property is not restored forthwith upon payment or tender, it has been held unnecessary to make profert of the money or to renew the tender at the trial. Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905.

93. McCullars *v.* Harkness, 113 Ala. 250, 21 So. 472; Hudson *v.* Snipes, 40 Ark. 75; Woodland Bank *v.* Duncan, 117 Cal. 412, 49 Pac. 414. *Compare* Dryer *v.* Lewis, 57 Ala. 551 (where a mortgagor was allowed to show, as evidence of payment, that he delivered to plaintiff a note executed by one for whom he had performed services, that plaintiff assumed payment for such services, and that their value was greater than the amount due on the mortgage); Putnam *v.* Osgood, 51 N. H. 192 (where it had been agreed that the balance due the mortgagor from the mortgagee should be applied in satisfaction of the mortgage unless the mortgagor needed the money. The mortgagor balanced the account with a credit entry without the mortgagee's knowledge and it was held to be a question of fact depending on the intention of the parties whether there had been a *pro tanto* payment).

A bequest by a mortgagee to a mortgagor does not extinguish a mortgage debt *pro tanto*, unless there is something in the terms of the bequest showing such an intention. Harrington *v.* Brittan, 23 Wis. 541.

agreement to apply a claim in favor of the mortgagor in payment of the mortgage will operate to discharge it, although such claim is filed in set-off in another action between the parties.[94]

2. PAYMENT BY THIRD PERSONS [95] — a. In General. Payment of a debt secured by chattel mortgage may be made by a person other than the debtor and without his knowledge,[96] and where one who has become the owner of the equity of redemption pays off the debt the mortgage is extinguished;[97] but a voluntary payment by a third person will not operate to discharge the mortgage unless that is manifestly his intention or such a result is clearly to his interest.[98]

94. McCullars *v.* Harkness, 113 Ala. 250, 21 So. 472.

The agreement regarding application must be carried out, and where a mortgagor who worked for the mortgagee under an agreement that his services were to go toward payment of the mortgage debt was allowed to draw almost all the amount due for work in cash the mortgage was held not to be discharged. McRae *v.* Davenport, 51 Mich. 633, 17 N. W. 213.

A receiver appointed under a chattel mortgage has authority to enter into an arrangement whereby a claim of the mortgagor for services shall be satisfied by a release of a portion of the property covered by the mortgage. Ayers *v.* Hawk, (N. J. 1887) 11 Atl. 744.

95. **A payment by a coöwner of the mortgaged property,** or even an express promise on his part to pay a portion of the mortgage debt, does not bring his share of the property within a mortgage put upon the property by his coöwner. Keables *v.* Christie, 47 Mich. 594, 11 N. W. 400.

96. Harrison *v.* Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638. See also Lucking *v.* Wesson, 25 Mich. 443 (where a holder of a subsequent execution lien on mortgaged chattels was allowed to pay off the mortgage to prevent his own lien from being cut off); Downs *v.* Kissam, 10 How. (U. S.) 102, 13 L. ed. 346 (where it was held that any creditor of the mortgagor may pay the mortgage debt and proceed against the property).

97. Clouston *v.* Gray, 48 Kan. 31, 28 Pac. 983; Doolittle *v.* Naylor, 2 Bosw. (N. Y.) 206. See also Thompson *v.* Van Vechten, 27 N. Y. 568, where a chattel mortgage was held to be extinguished by payment, made with the mortgagor's money, by a purchaser of the chattel at a sheriff's sale, who acted in collusion with the mortgagor to defraud his creditors.

No recovery of payment made by the purchaser of the equity of redemption can be had against the original mortgagor where the purchaser assumed payment of the mortgage debt. Stuckman *v.* Rose, 147 Ind. 402, 46 N. E. 680.

98. Walker *v.* Stone, 20 Md. 195. See also Johnson *v.* Skowhegan Sav. Bank, 93 Me. 516, 45 Atl. 501, where the evidence was held insufficient to substantiate the contention of a purchaser of the mortgaged property that the mortgagee had accepted his notes in payment of the mortgage. But see Baumgartner *v.* Vollmer, (Ida. 1897) 49 Pac. 729, where a creditor sought to subject mortgaged property of his debtor and paid to the mortgagee the amount of the mortgage debt as provided by statute and it was held that such payment discharged the mortgage and the creditor could not afterward enforce it.

It is optional with the third person paying the mortgage indebtedness whether he will have such payment operate to discharge the mortgage or as an assignment of it. Brown *v.* Rich, 40 Barb. (N. Y.) 28. *Compare* Haley *v.* Manufacturers' F. & M. Ins. Co., 120 Mass. 292, where it was held that a partial payment, made under a contract to purchase a chattel mortgage by one not the owner of the equity of redemption, would not be considered as extinguishing the mortgage *pro tanto* in an action by the mortgagee on a policy insuring his interest, where said contract stipulated that, in case of the purchaser's failure to complete all his payments, the mortgagee should resume his right to foreclose the mortgage.

Taking up mortgage notes for the makers was held not to discharge the mortgage securing the notes, when it was the intention of the parties that it should continue in force (Dilley *v.* Freedman, (Tex. Civ. App. 1900) 60 S. W. 448); but where the money was supplied to the assignee in part by the mortgagor, the mortgage is *pro tanto* discharged (McLemore *v.* Pinkston, 31 Ala. 266, 68 Am. Dec. 167). *Compare* McGillivary *v.* Case, 107 Iowa 17, 77 N. W. 483, where the notes ran to a corporation and were taken up by its president who, it was held, acted for himself and not in behalf of the corporation so that the mortgage was not discharged.

A tender of payment by a junior encumbrancer, when accompanied by a demand for an assignment, does not extinguish the mortgage. Schmittdiel *v.* Moore, 120 Mich. 199, 79 N. W. 195.

Paying insurance money to the mortgagee on a policy which had been taken out by him without the knowledge of the mortgagor was held not to extinguish the mortgage, but the insurer was entitled to accept an assignment of the mortgage and be subrogated to the claim of the mortgagee. Honore *v.* Lamar F. Ins. Co., 51 Ill. 409.

Subrogation:— Where a surety pays a claim which is also secured by a chattel mortgage executed by the principal debtor, the surety is entitled to be subrogated to the principal creditor and can enforce the mortgage in his own behalf. Lewis *v.* Palmer, 28 N. Y. 271.

b. Indemnity Mortgagees. Payment by the mortgagor of the debt for which the mortgagee went surety will discharge the mortgage,[99] but payment by the surety will not have a like effect[1] unless such was the intention of the parties.[2]

3. Payment to Mortgagee in Ignorance of Assignment. Where a mortgagor in ignorance of an assignment of the mortgage performs the obligations secured thereby for the benefit of the mortgagee, the assignee cannot enforce a second performance for his own benefit.[3]

4. Satisfaction of Debt Out of Mortgaged Property. A transfer of the mortgaged property to the mortgagee absolutely operates to extinguish the mortgage debt when that was the intention of the parties,[4] but the transaction must

99. *Iowa.*— Packard *v.* Kingman, 11 Iowa 219.

Kentucky.— Ward *v.* Deering, 4 T. B. Mon. (Ky.) 44.

Maine.— Franklin Bank *v.* Pratt, 31 Me. 501.

Minnesota.— Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671.

New York.— Hill *v.* Beebe, 13 N. Y. 556; Newsam *v.* Finch, 25 Barb. (N. Y.) 175.

A release of the surety by the principal creditor discharges the mortgage, although the mortgage had been assigned to such creditor and was intended to be a continuing security for him. Sumner *v.* Batchelder, 30 Me. 35. *Compare* Shepardson *v.* Whipple, 107 Mass. 279, where a mortgage was to indemnify the mortgagee from liability on a bond to release attachment and the bond was never executed, but a receipt for the property was given by the mortgagee and it was held that protection against liability on the receipt was not within the condition of the mortgage.

1. Draper *v.* Saxton, 118 Mass. 427; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583; Knight *v.* Rountree, 99 N. C. 389, 6 S. E. 762. *Compare* Chapman *v.* Jenkins, 31 Barb. (N. Y.) 164, where the mode of payment by the surety was by indorsing a new note for the mortgagor from the proceeds of which the former note was paid.

2. Packard *v.* Kingman, 11 Iowa 219; Bryant *v.* Pollard, 10 Allen (Mass.) 81; Davis *v.* Maynard, 9 Mass. 242. But see Paul *v.* Hayford, 22 Me. 234, holding that where a surety paid the debt for which he went as surety and took a new mortgage of the same goods to secure to him the repayment of the money paid by him, this was a waiver of all rights acquired under the first mortgage.

The surety has authority to release a mortgage executed to indemnify him from liability as indorser of certain notes which will be binding on *bona fide* purchasers of the notes making no claim to the property before the execution of the release. Thrall *v.* Spencer, 16 Conn. 139.

3. Commercial Bank *v.* King, 107 Ala. 484, 18 So. 243. *Compare* Rice *v.* Jones, 71 Ala. 551, where the assignee of a mortgage attempted to recover property which had been paid by the mortgagor to the mortgagee in discharge of the obligation of the mortgage, but it was held that he could not do so because the property had come into the hands of innocent third parties.

Where a mortgagor procured an assignment of the mortgage to secure a loan, it was held that the assignment constituted a pledge and not a mortgage and that the original mortgagee who made the assignment could enforce his lien by sale of the mortgaged property, subject to the interest of the assignee. Haskins *v.* Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. (N. Y.) 63.

4. Rowley *v.* Bates, 97 Mich. 406, 56 N. W. 769 (where the mortgagee promised to pay off another chattel mortgage on the property); Atwater *v.* Underhill, 22 N. J. Eq. 599 (where the mortgagee agreed to pay all the debts of the mortgagor). *Compare* Clayborn *v.* Hill, 1 Wash. (Va.) 177, 1 Am. Dec. 452, where a release of an equity of redemption was held to extinguish a mortgage so that the subsequent possession of the property by the mortgagee without record of the release would render the transaction fraudulent and void.

Conversely a transfer in payment operates to give the mortgagee an absolute legal title to the mortgaged chattel. Jordan *v.* Wells, 104 Ala. 383, 16 So. 23.

A transfer was not intended as payment where the mortgagee was simply put in possession with directions to sell and apply the proceeds to the mortgage debt, but there was no conversation as to the valuation at which the property should be taken and the alleged application of the proceeds was denied. Quinn, etc., Brewing Co. *v.* Hart, 48 Hun (N. Y.) 393, 1 N. Y. Suppl. 388, 16 N. Y. St. 321.

After the mortgage has been assigned to a third person, a conveyance of the property to the mortgagee, without the knowledge of the assignee, in satisfaction of the mortgage debt, will not operate to extinguish the mortgage, even though the assignment is not recorded. Baxter *v.* Gilbert, 12 Abb. Pr. (N. Y.) 97.

A purchaser who takes a bill of sale from both mortgagor and mortgagee acquires a title discharged from the mortgage. Bangs *v.* Friezen, 36 Minn. 423, 32 N. W. 173.

A locus penitentiæ was given the mortagee after he had accepted a bill of sale of the mortgaged property in satisfaction of the debt, where the mortgagor had induced him to accept the property by falsely alleging that it was free from adverse liens. Hamilton *v.* Seeger, 75 Ill. App. 599.

be established as fully as any other transfer of property in payment of a debt.[5] The mortgagee's seizure of the chattels after default does not, *ipso facto*, extinguish the mortgage,[6] unless the value of the property is greater than the mortgage debt;[7] but an absolute disposition of the property has been held to prevent the mortgagee from suing for the mortgage debt.[8]

H. Release[9]— **1. In General.** A parol agreement for a release is suffieient, although the mortgage is under seal[10] and the debt unpaid;[11] for no formal discharge or release of a chattel mortgage need be executed[12] or recorded,[13] in order to discharge the property from the lien of the mortgage.

2. Proof of Discharge. Where a mortgagee who has exercised his right to take possession of the mortgaged property on the maturity of the indebtedness subsequently delivers it to the mortgagor, this furnishes *prima facie* evidence

The existence of a prior lien upon the goods which were turned over to the mortgagee in payment of the mortgage will not affect the title of a purchaser of the mortgaged property to whom the mortgagor showed the mortgage and mortgage note. Wilkinson *v.* Solomon, 83 Ala. 438, 3 So. 705.

5. Blakeslee *v.* Rossman, 43 Wis. 116.

When the validity of the transfer is in question the burden is on the mortgagee to show that the sale was voluntarily made and the consideration fair. Jones *v.* Franks, 33 Kan. 497, 6 Pac. 789.

A gift of an equity of redemption by the mortgagor to the mortgagee is valid without any new consideration. Stone *v.* Jenks, 142 Mass. 519, 8 N. E. 403.

6. Beadleston *v.* Morton, 16 Misc. (N. Y.) 72, 37 N. Y. Suppl. 663, 73 N. Y. St. 283 (where the property was taken from the possession of a purchaser of the equity of redemption); Moody *v.* Ellerbe, 4 S. C. 21.

To the extent of the value of the property at the time of seizure the mortgage debt is extinguished by the action of the mortgagee in taking possession of the property. Davis *v.* Rider, 5 Mich. 423; *In re* Haake, 2 Sawy. (U. S.) 231, 11 Fed. Cas. No. 5,883, 7 Nat. Bankr. Reg. 61.

A temporary use of the property by the mortgagee with the assent of the mortgagor does not extinguish the lien of the mortgage. Albert *v.* Lindau, 46 Md. 334. *Contra*, Landon *v.* White, 101 Ind. 249. *Compare* Lathers *v.* Hunt, 13 N. Y. Suppl. 813, 37 N. Y. St. 748, 16 Daly (N. Y.) 349, 10 N. Y. Suppl. 529, 32 N. Y. St. 691, 16 Daly (N. Y.) 135, 9 N. Y. Suppl. 494, 30 N. Y. St. 432, where a tenant abandoned property which had been mortgaged to his landlord for rent and the landlord took possession of it and cared for it, but it was held that this did not amount to an appropriation of the property in satisfaction of the mortgage debt.

An application of part of the property to mortgagee's own use shows that it has been taken *pro tanto* in satisfaction of the mortgage. Brong *v.* Brown, 42 Mich. 119, 3 N. W. 291. *Compare* Moody *v.* Haselden, 1 S. C. 129, where a debt was secured by mortgages on real and on personal estate, the mortgagee seized the mortgaged chattels, and it was held that a purchaser of the equity of redemption in the real estate could force the mortgagee to apply the value of the chattels seized in satisfaction of the mortgage debt or show that they were lost without fault on his part before he could go against the real estate.

7. Hartman *v.* Ringgenberg, 119 Ind. 72, 21 N. E. 464; Landon *v.* White, 101 Ind. 249; Grady *v.* Newman, 1 Indian Terr. 620, 43 S. W. 754 (holding that the mortgagee was estopped to set up a claim to the property through an adverse title); Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179; Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296; Case *v.* Boughton, 11 Wend. (N. Y.) 106. *Compare* Nixon *v.* Colvert, 24 Ind. App. 648, 57 N. E. 284, where wheat was delivered to a chattel mortgagee sufficient to satisfy his claim under the mortgage but no application had been made of it. Subsequently other wheat covered by the mortgage was sold to a third person and the mortgagee sued him in conversion attempting to apply the other wheat delivered to him in payment of other advances due from the mortgagor, but it was held that he could not do this.

8. Upchurch *v.* Darnall, 3 Sneed (Tenn.) 443.

Levy on the property in an action on the mortgage debt does not constitute a satisfaction thereof so as to release the mortgage where the levy is released before any sale of the property is made. Conway *v.* Wilson, 44 N. J. Eq. 457, 11 Atl. 734.

9. **Effect of release of record.**— A release of record executed by the holder of the mortgage and secured note will protect a subsequent purchaser of the property against a subsequent assignee of the mortgagee's interest. Gottstein *v.* Harrington, 25 Wash. 508, 65 Pac. 753.

10. Acker *v.* Bender, 33 Ala. 230.

11. Wallis *v.* Long, 16 Ala. 738.

12. House *v.* Fultz, 13 Sm. & M. (Miss.) 39; Rickerson *v.* Raeder, 4 Abb. Dec. (N. Y.) 60, 1 Keyes (N. Y.) 492.

Statutory requirements.— Where it was required that a release must be in writing signed by the mortgagee or his agent, a marginal entry by the recording officer which was not so signed was held not to defeat the lien of the mortgage. Aultman *v.* Sloan, 115 Mich. 151, 73 N. W. 123.

13. Smith *v.* Smith, 24 Me. 555; Bigelow *v.* Smith, 2 Allen (Mass.) 264; Hand *v.* Nelson Distilling Co. 46 Mo. App. 671.

that the mortgage is satisfied.[14] Payment of a large amount over the mortgage debt leads to the same conclusion.[15]

I. Entry of Satisfaction[16] — **1. Generally.** The statutory right of action given against a mortgagee for failure to enter satisfaction after the mortgage debt is paid only arises in favor of the owner of the property[17] and against the mortgagee or his assignee of record,[18] and after a proper demand for such an entry has been made on the mortgagee.[19]

2. Fraud and Mistake. The execution and filing of a release of a chattel mortgage are not conclusive evidence of the payment thereof,[20] and fraudulent misrepresentations on the part of the mortgagor in obtaining the release will justify its cancellation.[21]

14. Carpenter *v.* Bridges, 32 Miss. 265.

Sufficiency of evidence.— Where a mortgagee executed a written agreement to discharge a mortgage which was given to a purchaser of the property and a marginal note to this effect was made by the recording officer, the jury was held to be justified in finding that there had been a *bona fide* discharge. Stowell *v.* Goodale, 6 Cush. (Mass.) 452.

15. Vette *v.* Johnson, 43 Mo. App. 300, where, in an action to foreclose a chattel mortgage, it was admitted that the mortgage had been given four years before for a loan of one hundred and eighty dollars, and that since then defendants had paid four hundred and sixty dollars. Plaintiff claimed that the money had been paid him for extensions of the loan from month to month, but it was held that the jury were warranted in finding that the mortgage had been paid. *Compare* Conley *v.* Maher, 93 Ga. 781, 20 S. E. 647, where the receipt and acceptance by a mortgagee of one half the fine imposed on the mortgagor of personalty as a punishment for fraudulently selling the mortgaged property was held to operate as an extinguishment of the mortgage.

Applying proceeds of sales in payment of mortgage debt.— Under an agreement that the proceeds of sales made by the mortgagor of the mortgaged property should be applied in payment of the mortgage debt, sales of future additions cannot be added to augment the amount of the mortgaged property sold. Kackley *v.* State, 91 Ind. 437. *Compare* Banner Cigar Co. *v.* Kamm, etc., Brewing Co., 145 Ind. 266, 44 N. E. 455, where the mortgage was held not to be satisfied because it was satisfactorily established that sales had been made entirely of property other than that covered by the mortgage.

16. **In Indiana** it has been held that the statute invalidating a mortgage for mortgagee's failure to give receipt for payments made thereon cannot be waived by agreement between the mortgagor and mortgagee. Zermpfe *v.* Gentry, 153 Ind. 219, 54 N. E. 805.

In Maine there is no rule of law or statute which requires the mortgagee in a chattel mortgage which has been paid before foreclosure expired to surrender up or cancel the mortgage. Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059.

17. Thomas *v.* Reynolds, 29 Kan. 304; Curd *v.* Brown, 3 Kan. App. 553, 43 Pac. 846.

A purchaser of the property at the time the cause of action accrued is the proper one to bring an action against the mortgagee for failure to enter satisfaction of the mortgage. Coffman *v.* Hillard, 44 Kan. 538, 24 Pac. 1098.

18. Parkhurst *v.* Clyde First Nat. Bank, 53 Kan. 136, 35 Pac. 1116; Thomas *v.* Reynolds, 29 Kan. 304.

19. Hall *v.* Hurd, 40 Kan. 374, 19 Pac. 302; Clearwater Bank *v.* Kurkonski, 45 Nebr. 1, 63 N. W. 133.

A written notice by a chattel mortgagor, who has paid the debts secured by several mortgages to the mortgagee, to "have all my mortgages marked 'satisfied' on the record" is a sufficient notice to support an action for the statutory penalties for failure to satisfy such mortgages. Hoffman *v.* Knight, 127 Ala. 149, 28 So. 593.

A defense to a statutory action for a penalty will be made out by showing that the mortgagee honestly believed that the mortgage had not been paid (Parkhurst *v.* Clyde First Nat. Bank, 53 Kan 136, 35 Pac. 1116) or by showing an entry of satisfaction after the statutory period therefor (Clearwater Bank *v.* Kurkonski, 45 Nebr. 1, 63 N. W. 133).

20. Waggoner *v.* Creighton First Nat. Bank, 43 Nebr. 84, 61 N. W. 112, where no adverse rights intervened. *Compare* Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318, where it was held that an entry of satisfaction could be shown by parol to have been made by mistake when no one had been misled to his prejudice.

Where a third person relies on the release, the mortgagee is estopped to dispute its validity, although it was in fact executed without consideration. Kennedy *v.* Strobel, 77 Hun (N. Y.) 96, 28 N. Y. Suppl. 452, 59 N. Y. St. 58. But see Ross *v.* Strahorn-Hutton-Evans Commission Co., 18 Tex. Civ. App. 698, 46 S. W. 398, where the doctrine of constructive notice from record of a mortgage was applied in favor of a mortgagee, but the same rule regarding a mistaken release which was fraudulently recorded was not applied in favor of a purchaser.

21. Lynch *v.* Tibbits, 24 Barb. (N. Y.) 51, where the mortgagee was induced by fraud to accept a new mortgage on different property and his failure to tender back the new

3. Actions to Enforce Penalty — a. In General. A complaint in an action for a penalty is sufficient where it states the date when the mortgage was recorded and when it was due, that the mortgagee failed to satisfy the mortgage after the secured debt had been paid, and that he had been notified in writing to release the same.[22]

b. Damages Recoverable Against Mortgagee. Under a statute providing a penalty for mortgagee's failure to release the mortgage after it has been satisfied, it has been held unnecessary for the mortgagor to prove any damage;[23] and the fixing of a definite sum as a penalty does not prevent the additional recovery of such damages as were the natural result of the mortgagee's omission.[24]

XIX. Rights and Interests of Parties After Default.

A. Title to the Property. Except in a few jurisdictions an absolute legal title to mortgaged personal property passes to the mortgagee immediately upon the failure of the mortgagor to perform the condition of the mortgage;[25] the

mortgage did not prevent him from repudiating the release when it had not gone into effect as between the immediate parties. Lambert *v.* Leland, 2 Sweeny (N. Y.) 218. *Compare* Bloch *v.* Edwards, 116 Ala. 90, 22 So. 600, where it was held that a mortgagee would be estopped to retain the new property received as security and also to deny the agreement for the release of the property formerly held.

Misrepresentation in regard to the value of goods from which a mortgage has been released does not afford a ground for canceling a release because the statements of value were mere opinions upon which the mortgagee was not justified in relying. Hoffman *v.* Wilhelmi, 68 Iowa 510, 27 N. W. 483.

A release by mortgagee after an assignment of his rights, as where a judgment was secured by a chattel mortgage and the mortgagee assigned the judgment and then entered satisfaction thereof, will give those buying in good faith a right to treat the property as released from the mortgage. Page *v.* Benson, 22 Ill. 484.

22. Hoffman *v.* Knight, 127 Ala. 149, 28 So. 593.

A declaration may properly join in one count a request for the penalty and for all damages occasioned by the mortgagee's neglect. Giffen *v.* Barr, 60 Vt. 599, 15 Atl. 190.

Evidence of usury in the mortgage note is admissible on the question whether the amount legally due had been paid before defendant was called upon to discharge the mortgage. Giffen *v.* Barr, 60 Vt. 599, 15 Atl. 190.

23. Hoffman *v.* Knight, 127 Ala. 149, 28 So. 593.

24. Deering *v.* Miller, 33 Nebr. 654, 50 N. W. 1056. *Compare* Giffen *v.* Barr, 60 Vt. 599, 15 Atl. 190, where it was held that exemplary damages beyond the amount of the penalty could not be recovered.

Allegations of damages.— Under an allegation of "other damages," a mortgagor cannot recover for his time and expense in going to a third person, falsely stated by the mortgagee to have the mortgage in his possession, to ascertain whether it had been discharged; as such damages were recoverable, if at all, only on a special allegation. Giffen *v.* Barr, 60 Vt. 599, 15 Atl. 190.

25. *Alabama.*— Mervine *v.* White, 50 Ala. 388; Brown *v.* Lipscomb, 9 Port. (Ala.) 472.

California.— Wright *v.* Ross, 36 Cal. 414; Heyland *v.* Badger, 35 Cal. 404; Moore *v.* Murdock, 26 Cal. 514.

Colorado.— Horn *v.* Reitler, 12 Colo. 310, 21 Pac. 186; Crocker *v.* Burns, 13 Colo. App. 54, 56 Pac. 199; Cassidy *v.* Harrelson, 1 Colo. App. 458, 29 Pac. 525. In Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781, it was held that a receiver appointed over the estate of the mortgagor could not interfere with the rightful possession of the mortgagee after default.

Florida.— Phillips *v.* Hawkins, 1 Fla. 301.

Illinois.— Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; McConnell *v.* People, 84 Ill. 583; Simmons *v.* Jenkins, 76 Ill. 479; Larmon *v.* Carpenter, 70 Ill. 549; Durfee *v.* Grinnell, 69 Ill. 371; Constant *v.* Matteson, 22 Ill. 546; Rhines *v.* Phelps, 8 Ill. 455.

Iowa.— Bean *v.* Barney, 10 Iowa 498.

Kentucky.— Brown *v.* Phillips, 3 Bush (Ky.) 656; Brookover *v.* Hurst, 1 Metc. (Ky.) 665.

Maine.— Winchester *v.* Ball, 54 Me. 558; Flanders *v.* Barstow, 18 Me. 357.

Michigan.—Thurber *v.* Jewett, 3 Mich. 295; Tamahill *v.* Tuttle, 3 Mich. 104, 61 Am. Dec. 480.

Minnesota.— Gates *v.* Smith, 2 Minn. 30. See also Melin *v.* Reynolds, 32 Minn. 52, 19 N. W. 81, where it was held that the mortgagee of an undivided half interest in property was after default a tenant in common of the whole and therefore entitled to possession of the whole against a stranger.

Mississippi.— Illinois Cent. R. Co. *v.* Hawkins, 65 Miss. 200, 3 So. 410; Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682; Stamps *v.* Gilman, 43 Miss. 456; Thornhill *v.* Gilmer, 4 Sm. & M. (Miss.) 153.

Missouri.— State *v.* Adams, 76 Mo. 605; Bowens *v.* Benson, 57 Mo. 26; Robinson *v.* Campbell, 8 Mo. 365; Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97; Jones *v.* H. Martini Furnishing Co., 77 Mo. App. 474; Jackson *v.* Cunningham, 28

contrary doctrine treats chattel mortgages like mortgages of real estate as mere security and requires further action on the part of the mortgagee to get the title out of the mortgagor.[26]

Mo. App. 354; State *v.* Carroll, 24 Mo. App. 358; Beckham *v.* Carter, 19 Mo. App. 596.

Nebraska.— Lathrop *v.* Cheney, 29 Nebr. 454, 45 N. W. 617.

Nevada.— Bryant *v.* Carson River Lumbering Co., 3 Nev. 313, 93 Am. Dec. 403.

New Hampshire.— Leach *v.* Kimball, 34 N. H. 568.

New Jersey.— Hall *v.* Snowhill, 14 N. J. L. 8; Freeman *v.* Freeman, 17 N. J. Eq. 44. *Compare* Woodside *v.* Adams, 40 N. J. L. 417, where the mortgagor continued to have an interest in the property until it was extinguished by sale or by foreclosure.

New York.— Tremaine *v.* Mortimer, 128 N. Y. 1, 27 N. E. 1060, 38 N. Y. St. 740; Leadbetter *v.* Leadbetter, 125 N. Y. 290, 26 N. E. 265, 34 N. Y. St. 929, 21 Am. St. Rep. 738; Judson *v.* Easton, 58 N. Y. 664; Lewis *v.* Palmer, 28 N. Y. 271; Mattison *v.* Baucus, 1 N. Y. 295; Cody *v.* Springfield First Nat. Bank, 63 N. Y. App. Div. 199, 71 N. Y. Suppl. 277; Champlin *v.* Johnson, 39 Barb. (N. Y.) 606; Dane *v.* Mallory, 16 Barb. (N. Y.) 46; Swift *v.* Hart, 12 Barb. (N. Y.) 530; Huntington *v.* Mather, 2 Barb. (N. Y.) 538, 6 N. Y. Leg. Obs. 206; Pulver *v.* Richardson, 3 Thomps. & C. (N. Y.) 436; Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Wray *v.* Fedderke, 43 N. Y. Super. Ct. 335; Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296; Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. (N. Y.) 211; Charter *v.* Stevens, 3 Den. (N. Y.) 33, 45 Am. Dec. 444; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61; Ferguson *v.* Lee, 9 Wend. (N. Y.) 258; Langdon *v.* Buel, 9 Wend. (N. Y.) 80; Ackley *v.* Finch, 7 Cow. (N. Y.) 290; Brown *v.* Bement, 8 Johns. (N. Y.) 96; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583.

Oregon.— Reinstein *v.* Roberts, 34 Oreg. 87, 55 Pac. 90, 75 Am. St. Rep. 564.

South Carolina.— Martin *v.* Jenkins, 51 S. C. 42, 27 S. E. 947; National Exch. Bank *v.* Holman, 31 S. C. 161, 9 S. E. 824; *Ex p.* Knobeloch, 26 S. C. 331, 2 S. E. 612; Williams *v.* Dobson, 26 S. C. 110, 1 S. E. 421; McClendon *v.* Wells, 20 S. C. 514; Wolff *v.* Farrell, 3 Brev. (S. C.) 68; Pledger *v.* Mandeville, 1 Brev. (S. C.) 286.

Vermont.— Blodgett *v.* Blodgett, 48 Vt. 32.

Wisconsin.— Lowe *v.* King, 56 Wis. 31, 13 N. W. 892; Smith *v.* Konst, 50 Wis. 360, 7 N. W. 293; Smith *v.* Phillips, 47 Wis. 202, 2 N. W. 285; Flanders *v.* Thomas, 12 Wis. 410; Nichols *v.* Webster, 2 Pinn. (Wis.) 234, 1 Chandl. (Wis.) 203.

United States.— St. Paul Merchants' Nat. Bank *v.* McLaughlin, 1 McCrary (U. S.) 258, 2 Fed. 128; *In re* Haake, 2 Sawy. (U. S.) 231, 11 Fed. Cas. No. 5,883, 7 Nat. Bankr. Reg. 61.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 293.

Reducing the property to possession by the mortgagee is not necessary. Hulsen *v.* Walter, 34 How. Pr. (N. Y.) 385.

Mortgagor holds as bailee merely when he is allowed to retain possession after default in performance of the condition of the mortgage. Baltes *v.* Ripp, 1 Abb. Dec. (N. Y.) 78, 3 Keyes (N. Y.) 210; Porter *v.* Parmly, 43 How. Pr. (N. Y.) 445. *Compare* Moody *v.* Haselden, 1 S. C. 129, where the mortgagor secured possession of mortgaged property from the mortgagee, after default, on a forthcoming bond, and it was decided that he held as a bailee.

The only qualification upon the mortgagee's title is the mortgagor's right to redeem the property by paying the mortgage debt. Lambert *v.* Leland, 2 Sweeny (N. Y.) 218; Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296. But see Greene *v.* Dingley, 24 Me. 131, where the mortgagee took the mortgaged property into his possession, after the money had become payable, with the full understanding of the parties that the same was taken in full discharge of the note secured by the mortgage, and it was held that his title became perfect, and nothing short of a repurchase would restore the mortgagor to his former rights. *Compare* Hixon *v.* Hubbell, 4 Okla. 224, 44 Pac. 222, where it was held that all interest of a mortgagor in mortgaged property could be divested by actual delivery of possession to the mortgagee in satisfaction of the mortgage debt.

Two persons, each holding a note secured by a chattel mortgage running to the two jointly, become tenants in common of the mortgaged property upon default in payment of the notes. Ashland Lodge No. 63, I. O. O. F. *v.* Williams, 100 Wis. 223, 75 N. W. 954, 69 Am. St. Rep. 912.

26. *Michigan.*— Kohl *v.* Lynn, 34 Mich. 360; Baxter *v.* Spencer, 33 Mich. 325; Cary *v.* Hewitt, 26 Mich. 228; Lucking *v.* Wesson, 25 Mich. 443.

Nebraska.— Gould *v.* Armagost, 46 Nebr. 897, 65 N. W. 1064; Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231; Sharp *v.* Johnson, 44 Nebr. 165, 62 N. W. 466; Randall *v.* Persons, 42 Nebr. 607, 60 N. W. 898; Musser *v.* King, 40 Nebr. 892, 59 N. W. 744, 42 Am. St. Rep. 700.

North Dakota.— Sanford *v.* Duluth, etc., Elevator Co., 2 N. D. 6, 48 N. W. 434.

Oregon.— Chapman *v.* State, 5 Oreg. 432. But see J. I. Case Threshing Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324, where the doctrine that a chattel mortgage passes no title was severely criticized.

Texas.— Soell *v.* Hadden, 85 Tex. 182, 19 S. W. 1087; Wright *v.* Henderson, 12 Tex. 43.

Washington.—Possession by a chattel mortgagee after the maturity of his debt does not

B. Right to Possession — 1. In General. With the legal title which the mortgagee acquires upon a breach in the condition of the mortgage, he also obtains an immediate right to possession of the property;[27] it is not necessary that the mortgagor consent to the taking of possession,[28] and the mortgagee's right to possession is not defeated by a tender of the mortgage debt after default.[29]

vest in him a legal title which is subject to attachment. Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 293.

Some interest remains in the mortgagor, even after default, it has been held, until the mortgage has been foreclosed or the right of redemption is lost by lapse of time. Frankenthal *v.* Mayer, 54 Ill. App. 160.

27. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271, holding that the right to take possession was unaffected by partial payments on the mortgage.

Arkansas.— Gilchrist *v.* Patterson, 18 Ark. 575.

Illinois.— Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; O'Neil *v.* Patterson, 52 Ill. App. 26.

Indiana.— Burton *v.* Tannehill, 6 Blackf. (Ind.) 470.

Iowa.— Bradley *v.* Redmond, 42 Iowa 452. *Compare* Norris *v.* Hix, 74 Iowa 524, 38 N. W. 395, where the mortgagee was held to be entitled to possession against a junior mortgagee of part of the property, even though he had released from his mortgage the property not covered by the junior mortgage.

Kentucky.—Brown *v.* Phillips, 3 Bush (Ky.) 656; Swigert *v.* Thomas, 7 Dana (Ky.) 220.

Maine.— Greene *v.* Dingley, 24 Me. 131.

Massachusetts.— Simpson *v.* McFarland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602, holding that a mortgagor could not plead property in a sheriff after an attachment had been dissolved.

Minnesota.— Close *v.* Hodges, 44 Minn. 204, 46 N. W. 335; Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364. *Compare* Thompson *v.* Scheid, 39 Minn. 102, 38 N. W. 801, 12 Am. St. Rep. 619, holding that the mortgagee was entitled to possession only for the purpose of foreclosure and that he could not recover the value of the use of the property as special damages in replevin.

Mississippi.— Dreyfus *v.* Cage, 62 Miss. 733.

Missouri.— Bowens *v.* Benson, 57 Mo. 26; Pace *v.* Pierce, 49 Mo. 393; Lacey *v.* Giboney, 36 Mo. 320, 88 Am. Dec. 145.

Nebraska.— Lathrop *v.* Cheney, 29 Nebr. 454, 45 N. W. 617.

New Jersey.— Hall *v.* Snowhill, 14 N. J. L. 8, holding that an agreement between the parties as to the temporary possession did not alter the rights of the mortgagee.

New York.— Talman *v.* Smith, 39 Barb. (N. Y.) 390; Baumann *v.* Post, 16 Daly (N. Y.) 385, 12 N. Y. Suppl. 213, 34 N. Y. St. 308, 26 Abb. N. Cas. (N. Y.) 134.

Ohio.— Root *v.* Davis, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445.

South Carolina.— Martin *v.* Jenkins, 51 S. C. 42, 27 S. E. 947.

Wisconsin.—Cotton *v.* Watkins, 6 Wis. 629.

United States.—People's Sav. Inst. *v.* Miles, 76 Fed. 252, 22 C. C. A. 152, holding that this right was not affected by the South Dakota statute. Merchants' Nat. Bank *v.* McLaughlin, 2 Fed. 128.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 286.

Rights of assignee in bankruptcy.— A mortgagee may be prevented from taking possession of mortgaged chattels after the maturity of the mortgage from an assignee in bankruptcy, although the assignee has no funds to redeem, as the court may order a sale of the property. Foster *v.* Ames, 1 Lowell (U. S.) 313, 9 Fed. Cas. No. 4,965, 2 Am. L. T. Bankr. Rep. 65, 2 Nat. Bankr. Reg. 455.

Under the laws of Texas a mortgagor of personal property is entitled to possession of it till foreclosure. Roach *v.* St. Louis Type Foundry, 21 Mo. App. 118.

The mortgagor's receiver in supplementary proceedings could not after default maintain trover against the mortgagor for refusing to surrender possession, since neither party had any longer an interest subject to conversion. Gardner *v.* Smith, 29 Barb. (N. Y.) 68.

28. Meyer Bros. Drug Co. *v.* Self, 77 Mo. App. 284. *Contra,* McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062. See also Van Dusen *v.* Arnold, 5 S. D. 588, 59 N. W. 961, where a mortgagee took possession of the mortgaged chattels to foreclose his mortgage and it seems would have been liable to the mortgagor for a conversion but for the fact that the element of non-consent by the mortgagor was not proved.

The arrest of the mortgagor upon process issued to recover the debt secured by the mortgage does not affect the right of the mortgagee to take possession of the mortgaged property. Hamilton *v.* Bredeman, 12 Rich. (S. C.) 464. See also Stilwell *v.* Van Epps, 1 Paige (N. Y.) 615.

29. Blain *v.* Foster, 33 Ill. App. 297; McClendon *v.* Wells, 20 S. C. 514; Reese *v.* Lyon, 20 S. C. 17.

Mortgagor cannot maintain an action after default in regard to the mortgaged property because his right of possession has ceased. Jayne *v.* Dillon, 28 Miss. 283.

Indemnity mortgages.— Where a mortgage is given to indemnify one as surety for the mortgagor, the mortgagee is entitled to possession of the mortgaged property when the debt for payment of which he is surety becomes due and is unpaid (Mattingly *v.* Paul, 88 Ind. 95; Spaulding *v.* Scanland, 4 B. Mon. (Ky.) 365), for otherwise the transaction would be open to the objection that the mortgagor was allowed to remain in possession after default (Dunlap *v.* Epler, 88 Ill. 82);

2. EFFECT OF STIPULATIONS IN THE MORTGAGE. A stipulation that on default the mortgagee may take possession and sell is valid,[30] but the permission to take possession confers no greater right than the mortgagee would have had by operation of law;[31] and although a mortgage authorizes a mortgagee to sell the property on default, this does not prevent the title from becoming absolute in him without a sale.[32]

and *a fortiori* the surety is entitled to possession of the mortgaged property when he has paid the debt for which he went as surety (Mills *v.* Malott, 43 Ind. 248). *Compare* Norris *v.* Hix, 74 Iowa 524, 38 N. W. 395, where the surety indorsed his mortgage note over to the holder of the secured claim as further collateral and the note was reassigned after the surety had paid the debt and it was held that the surety was entitled to the possession of the property covered by the mortgage.

The mortgagee incurs no liability as a trespasser in taking possession of the property covered by the mortgage after forfeiture of the condition. Bryant *v.* Woodruff, 5 N. Y. Leg. Obs. 139.

An agreement for temporary possession to be in the mortgagor after default will not make it a conversion for the mortgagee to refuse to give up possession when the mortgagor demands it, not for temporary use but as general owner. Bell *v.* Shrieve, 14 Ill. 462.

In equity, it has been held, a mortgagee is not entitled to have the mortgaged property delivered to him in specie and to have an account for the rents and profits, but the chattels must be sold and sufficient of the proceeds appropriated to the payment of the mortgage debt. Whitmore *v.* Parks, 3 Humphr. (Tenn.) 95.

Effect of claim in set-off on right to possession.— Where unliquidated damages in contract exceed the mortgage debt, the mortgagee is not entitled to possession of the property covered by the mortgage as against the mortgagor who pleads such damages in an action founded upon the note and mortgage. Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584. *Compare* Spicer *v.* Hoop, 51 Ind. 365, where a printing establishment was sold, a mortgage was given for the purchase-price, and the seller agreed not to engage in the same business; upon a breach of his agreement by the seller it was held that he could be enjoined from prosecuting an action to obtain possession of the mortgaged property.

30. Scott *v.* Davis, 4 Kan. App. 488, 44 Pac. 1001 (holding that it did not authorize another county to sell where the mortgage required the mortgagor to keep the property within the county); Marseilles Mfg. Co. *v.* Perry, 62 Nebr. 715, 87 N. W. 544. *Compare* Keefer *v.* Greene, 16 N. Y. Suppl. 498, 41 N. Y. St. 452, where it was held that the mortgagee's title to the goods on default was not affected by the fact that the mortgagor had moved away from his residence and had stored the goods on the premises of a third person, and that a purchaser from the mortgagor after default came into possession of them there; the mortgagee being entitled to the goods as much in one place as another.

The death of the mortgagor does not defeat a provision in a mortgage that the mortgagee may take possession of the property on default in performance of the condition of the mortgage, but the right may be exercised against the mortgagor's executor. Purdin *v.* Archer, 4 S. D. 54, 54 N. W. 1043.

Election in mortgagee.— It was held that the mortgagee had an election as to when he would declare a default where a mortgage provided that he might take possession upon default in payment of notes secured thereby or of any of them (Chapin *v.* Whitsett, 3 Colo. 315); and where notes although not due by their terms should become payable on the happening of certain contingencies which in fact occurred (Wilson *v.* Rountree, 72 Ill. 570; McConnell *v.* Scott, 67 Ill. 274; Barbour *v.* White, 37 Ill. 164).

A default in payment of interest may be made a condition upon which the mortgagee may take possession of the property, although a statute provides that a mortgagee is not entitled to possession unless authorized by the express terms of the mortgage. Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434.

Construction of requirement for five days' notice.— Where five days' notice was required in a mortgage authorizing the mortgagee to take possession and sell upon default in payment of a mortgage note or entry of judgment against the mortgagor, it was held that this requirement for notice applied to the sale alone, and that an immediate right of possession vested in the mortgagee upon default. Leadbetter *v.* Leadbetter, 11 N. Y. Suppl. 228, 32 N. Y. St. 890.

Stipulation as to proceeds.— An additional clause in a power of sale that the mortgagee shall hold the surplus proceeds subject to the mortgagor's order does not render the transaction fraudulent. Coulter *v.* Lumpkin, 88 Ga. 277, 14 S. E. 614.

31. Roberts *v.* Norris, 67 Ind. 386. But see Marseilles Mfg. Co. *v.* Perry, 62 Nebr. 715, 87 N. W. 544, where it was held that under a provision in a mortgage that the mortgagee might take possession and sell on default the mortgagee was entitled to possession only for the purpose of foreclosure, and that he would be deemed to have elected to take the property in satisfaction of the debt when he held it an unreasonable time, and would be accountable for its value.

32. Durfee *v.* Grinnell, 69 Ill. 371; Jefferson *v.* Barkto, 1 Ill. App. 568; Burdick *v.* McVanner, 2 Den. (N. Y.) 170; Nichols *v.* Webster, 2 Pinn. (Wis.) 234, 1 Chandl. (Wis.) 203.

A mortgage merely authorizing possession

3. MANNER OF TAKING POSSESSION — a. Generally. The only restrictions upon the mode by which the mortgagee shall secure possession of the mortgaged property after breach of condition is that he must act in an orderly manner and without creating a breach of the peace,[33] and must not intimidate by securing the aid of an officer who pretends to act *colore officii*.[34]

b. After Foreclosure. After foreclosure the mortgagee is entitled to take possession of the chattels covered by the mortgage for the purpose of delivering them to the purchaser under the foreclosure proceeding,[35] and to obtain possession for such purpose, the mortgagee has an implied, irrevocable license to enter in a peaceable and reasonable manner upon the premises and take away the goods mortgaged.[36]

c. Recovering Possession by Suit. After the mortgage debt has become due and is unpaid, the mortgagee may maintain an action of detinue or replevin against the mortgagor to recover possession of the mortgaged property,[37] and it is

to be taken by the mortgagee upon the happening of some event before default does not entitle the mortgagee to sell before default. Carroll Bank *v.* Taylor, 67 Iowa 572, 25 N. W. 810; Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

Failure to sell does not make the possession of the mortgagee after default wrongful. Bradley *v.* Redmond, 42 Iowa 452; Sherman *v.* Slayback, 58 Hun (N. Y.) 255, 12 N. Y. Suppl. 291, 34 N. Y. St. 383.

An irregularity in the sale under a power contained in the mortgage will not defeat the title of the mortgagee which vests after default. Jefferson *v.* Barkto, 1 Ill. App. 568. *Compare* Murray *v.* Erskine, 109 Mass. 597, where the sale by the mortgagor was not in accordance with the terms of the deed and nevertheless the title of the mortgagee was valid.

An agricultural lien is not invalidated by an insertion of a power of sale to the mortgagee, although the code creating such liens provides for a different remedy. Crinkley *v.* Egerton, 113 N. C. 142, 18 S. E. 341.

33. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271; Street *v.* Sinclair, 71 Ala. 110; Thornton *v.* Cochran, 51 Ala. 415.

Arkansas.— McClure *v.* Hill, 36 Ark. 268.

Illinois.— Whisler *v.* Roberts, 19 Ill. 274.

Iowa.— State *v.* Boynton, 75 Iowa 753, 38 N. W. 505.

Texas.— Gillett *v.* Moody, (Tex. Civ. App. 1899) 54 S. W. 35.

United States.— Kilpatrick *v.* Haley, 66 Fed. 133, 27 U. S. App. 752, 13 C. C. A. 480.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 292.

Acts permissible in taking possession.— When a mortgagee was peaceably admitted to the house of the mortgagor, he was allowed to use reasonable force in overcoming resistance to the removal of the property so long as he did not commit a breach of the peace (Edmundson *v.* Pollock, 5 Ohio Cir. Ct. 185), and where the mortgage expressly so provided, it was held that the mortgagee could enter the mortgagor's premises for the purpose of removing the mortgaged property without the latter's consent (Street *v.* Sinclair, 71 Ala. 110), and it was held that the mortgagee could enter the premises of the mortgagor at night and seize the mortgaged property, provided he did not violate the criminal law in so doing (Satterwhite *v.* Kennedy, 3 Strobh. (S. C.) 457).

A wanton trespass by the mortgagee in taking possession of the property entitles the mortgagor to damages, even though the condition of the mortgage has been broken. Jones *v.* A. Martini Furnishing Co., 77 Mo. App. 474.

34. Street *v.* Sinclair, 71 Ala. 110; Thornton *v.* Cochran, 51 Ala. 415; Holloway *v.* Arnold, 92 Mo. 293, 5 S. W. 277.

Securing property by writ of sequestration is a proper way for the mortgagee to exercise his right to take possession of mortgaged property upon default as provided by the terms of the mortgage, and such proceedings cannot be made the ground for an action of damages by the mortgagor. Wedig *v.* San Antonio Brewing Assoc., (Tex. Civ. App. 1901) 60 S. W. 567.

What constitutes a voluntary taking.— When a constable secures possession of mortgaged chattels by telling the mortgagor that it is his duty to take them under the mortgage, there is not such a voluntary yielding of possession as to render a demand by the mortgagor necessary before he can bring replevin. Kidd *v.* Johnson, 49 Mo. App. 486.

What property mortgagee may take possession of.— A mortgagee was guilty of conversion when by mistake he took possession of two cattle which were not included in the herd covered by the mortgage (Jones *v.* Annis, 47 Kan. 478, 28 Pac. 156), and where he took possession of after-acquired articles used to replenish stock, and such new goods were not covered by the terms of the mortgage (Fleming *v.* Graham, 34 Mo. App. 160).

35. Pace *v.* Pierce, 49 Mo. 393.

36. McNeal *v.* Emerson, 15 Gray (Mass.) 384, where the mortgagor was only a tenant in common of the premises upon which the goods were situated, and where the premises being a dwelling-house, the door of which was open, and no objections being made, it was held that the mortgagee had a right to enter and take away the mortgaged property, without previous notice.

37. *Alabama.*— Mervine *v.* White, 50 Ala. 388 (although the mortgage itself contains

not a bar to such an action that a bill in equity is pending to foreclose the mortgage.[38]

4. Necessity For Proceeding to Foreclose. A mortgagee who takes possession of the property upon default, and then for an unreasonable time retains the same without taking the proper steps to foreclose the mortgagor's rights therein, is liable to the mortgagor for the difference between the value of the property and the amount of the mortgage debt;[39] and he may be sued for a conversion of such property.[40]

C. What Constitutes a Default — 1. In General.[41] Default occurs immediately upon the mortgagor's failure to perform his obligation strictly according to the tenor of the mortgage,[42] unless there is an agreement extending the time

no provision entitling him to possession); Hopkins *v.* Thompson, 2 Port. (Ala.) 433.

Arkansas.— Hudson *v.* Snipes, 40 Ark. 75 (as long as any part of the mortgage debt remains unpaid); Gilchrist *v.* Patterson, 18 Ark. 575.

Illinois.— Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636.

Kentucky.— Mercer *v.* Tinsley, 14 B. Mon. (Ky.) 220; Spaulding *v.* Scanland, 4 B. Mon. (Ky.) 365.

Minnesota.— Gates *v.* Smith, 2 Minn. 30.

Mississippi.—Harmon *v.* Short, 8 Sm. & M. (Miss.) 433.

Missouri.— Sink *v.* Loflin, 76 Mo. App. 463, where the mortgagees were sureties and were given the right to take possession and sell the property and pay the secured claim with the proceeds. *Compare* Wurmser *v.* Sivey, 52 Mo. App. 424, holding that the statute requiring a tender back of the instalments paid before a chattel sold on a condition could be recovered back did not apply to a case of absolute sale with a mortgage back.

Nebraska.— Lathrop *v.* Cheney, 29 Nebr. 454, 45 N. W. 617.

North Carolina.— Gulley *v.* Copeland, 102 N. C. 326, 9 S. E. 137, where the liens upon the property had been adjusted by the court and it had been decreed that the mortgagor pay the mortgagee a certain amount.

Wisconsin.— Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980, where the mortgage was given to secure the purchase-price of the property.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 310.

38. Lorch *v.* Aultman, 75 Ind. 162; Jones *v.* Henry, 3 Litt. (Ky.) 46. *Contra,* Cederholm *v.* Loofborrow, 2 Ida. 176, 9 Pac. 641.

The mortgagee cannot be required to account in an action at law for part of the mortgaged property which he already has in his possession, when he sues to recover possession of the balance. Brock *v.* Headen, 13 Ala. 370.

An agent of the mortgagee from whose possession the mortgaged property was taken by the mortgagor has been allowed to maintain an action of replevin therefor in his own name. Eldridge *v.* Sherman, 70 Mich. 266, 38 N. W. 255.

A previous assignment of the mortgage as security does not affect the right of the mortgagee to replevy the property after the mortgage has been returned to his hands. Rotten *v.* Collier, 105 Ala. 581, 16 So. 921.

39. Miller *v.* McElwain, 52 Kan. 91, 34 Pac. 396; Denny *v.* Faulkner, 22 Kan. 89; Murray *v.* Loushman, 47 Nebr. 256, 66 N. W. 413; Pulver *v.* Richardson, 3 Thomps. & C. (N. Y.) 436. See also Hinckley *v.* Cheney, 31 Ill. App. 527, holding the mortgagee liable where the mortgagor had assented to the retention at the request of the mortgagee.

40. Howery *v.* Hoover, 97 Iowa 581, 66 N. W. 772. But see Bragelman *v.* Daue, 69 N. Y. 69, holding also that where the mortgagee has taken possession upon default, the mortgagor cannot recover as for a conversion the difference between the market value of the goods and the mortgage debt.

The question of diligence is one both of law and of fact. It is for the court to determine what time, under the circumstances, is reasonable, and for the jury to say whether the mortgage was foreclosed within that time. Wooley *v.* Fry, 30 Ill. 158. See *infra,* XXI.

41. Failure to insure does not constitute a default so that the mortgagor forfeits his right of possession where it was provided that on mortgagor's failure to insure the mortgagee might do so and charge the premiums on to the mortgage debt (Baldridge *v.* Dawson, 39 Mo. App. 527), but the procuring of insurance by the mortgagee does not satisfy a stipulation that the mortgagor shall insure so as to cure the breach on his part (Fowler *v.* Hoffman, 31 Mich. 215).

Maturity of the debt secured by mortgage see V, C, 10 [6 Cyc. 1021].

42. Houston *v.* Nord, 39 Minn. 490, 40 N. W. 568. *Compare* Shellman *v.* Scott, R. M. Charlt. (Ga.) 380, where there was a mortgage written for three years, with interest annually, and it was held that upon nonpayment of the first instalment of interest, the mortgagee could foreclose and collect the whole debt, under a provision in the mortgage authorizing him to sell on default of payment of the principal or interest "at any time when the same should become due."

Indemnity mortgage.— While default in a mortgage to indemnify a surety does not occur till the surety has suffered some damage on his contract of suretyship (Honaker *v.* Vesey, 57 Nebr. 413, 77 N. W. 1100), payment of the creditor by the surety is not a condition precedent to his right to foreclose such mortgage (Varney *v.* Hawes, 68 Me. 442). *Compare* Park *v.* Parsons, 10 Utah

for performance of the condition.[43] Where the debt secured by a mortgage is payable on demand, and the mortgagor is entitled to possession until breach of condition, the mortgage will not become absolute so that the mortgagee will have the right of possession till demand for payment is made.[44]

2. INSTALMENT MORTGAGES. Unless the language of the instrument expresses a contrary intention,[45] failure to pay the first instalment of the mortgage debt when it falls due constitutes a breach of the condition of the mortgage,[46] but it is optional with the mortgagee whether he will take possession then or wait till the maturity of the other instalments.[47] The prevailing rule is that enough property may be sold to satisfy the entire debt upon default in payment of the first instalment, whether the mortgage contains a provision to that effect or not.[48]

330, 37 Pac. 570, holding that where the mortgagee consented to a sale of the mortgaged property by the surety mortgagee before the latter had been damnified on his contract of suretyship, such sale was valid and passed an absolute title.

43. Until the extended time has elapsed the mortgagee cannot replevin the property (Baldridge *v.* Dawson, 39 Mo. App. 527) or seize it without cause (Baxter *v.* Spencer, 33 Mich. 325). *Compare* Juchter *v.* Boehm, 67 Ga. 534, where the mortgagee foreclosed in violation of an agreement not to enforce the mortgage for a certain time and was held liable for such action without proof of actual malice or proof of probable cause.

44. Ashmead *v.* Kellogg, 23 Conn. 70; Ely *v.* Carnley, 19 N. Y. 496. *Compare* Carpenter *v.* Town, Lalor (N. Y.) 72, where a chattel mortgage secured two notes, one overdue and one not due, with condition to pay upon demand and it was held that the mortgagor had no right of possession till demand was made.

Demand for payment is not necessary to entitle the mortgagee to possession of the property under a mortgage payable on demand and allowing the mortgagor to remain in possession until breach of condition where the mortgagor sells the entire property for his own benefit (Ashmead *v.* Kellogg, 23 Conn. 70), or where the mortgaged property had been seized by a sheriff in an action against the mortgagor (Howland *v.* Willett, 3 Sandf. (N. Y.) 607).

45. No foreclosure till whole debt is due.— Where the mortgage was to be void if three notes due at different times were paid when due there could not be a sale on default in payment of a single note, but only in case of default when the last note became due; the sum referred to in the sale clause being the total sum of the notes. Earle *v.* Gorham Mfg. Co., 2 N. Y. App. Div. 460, 37 N. Y. Suppl. 1037, 74 N. Y. St. 333. See also Parker *v.* Parshall, 5 N. Y. Leg. Obs. 418, reaching the same result because the instalments were to be paid weekly in small sums. and *compare* Gaar *v.* Centralia First Nat. Bank, 20 Ill. App. 611, holding that where a chattel mortgage secures an aggregate indebtedness made up of notes payable to several mortgagees, and maturing at successive periods, no one mortgagee has the right to take possession of the property when his claim becomes due.

46. *Indiana.*— Burton *v.* Tannehill, 6 Blackf. (Ind.) 470.

Maine.— Flanders *v.* Barstow, 18 Me. 357.

Massachusetts.— Murray *v.* Erskine, 109 Mass. 597.

New York.—Pulver *v.* Richardson, 3 Thomps. & C. (N. Y.) 436; Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Willis *v.* O'Brien, 35 N. Y. Super. Ct. 536; Baumann *v.* Cornez, 15 Daly (N. Y.) 450, 8 N. Y. Suppl. 480, 29 N. Y. St. 320. *Compare* Tyler *v.* Taylor, 8 Barb. (N. Y.) 585, where personal property was mortgaged to several persons to secure debts owing to them separately by the mortgagor. By the terms of the mortgage the whole property was to be forfeited by a single default, and it was held that upon such default it was forfeited to the holders of the mortgage jointly, that they became tenants in common of the whole property, and that neither of the mortgagees, on his debt becoming due, acquired any such sole and separate ownership thereof as would authorize him to dispose of the property and to appropriate the proceeds to his own use.

North Carolina.— Kiger *v.* Harmon, 113 N. C. 406, 18 S. E. 515.

It is necessary to return the previous instalments which have been paid, less a reasonable allowance for use of the chattel, when a mortgagee takes possession upon default of payment of an instalment. Baker *v.* Speyer, 12 Ohio Cir. Ct. 118, 5 Ohio Cir. Dec. 335, under statutory provision.

An agreement by one joint mortgagee that he will not take possession after default in payment of an instalment will not defeat the right of his co-mortgagee to take possession. Hanrahan *v.* Roche, 22 Alb. L. J. 134.

47. Chapin *v.* Whitsett, 3 Colo. 315; Wilson *v.* Rountree, 72 Ill. 570; McConnell *v.* Scott, 67 Ill. 274; Barbour *v.* White, 37 Ill. 164; Marseilles Mfg. Co, *v.* Rockford Plow Co., 26 Ill. App. 198; Wheeler, etc., Mfg. Co. *v.* Howard, 28 Fed. 741.

48. *California.*— Maddox *v.* Wyman, 92 Cal. 674, 28 Pac. 838, where the mortgage provided that upon failure to pay the instalments as they fell due, the mortgagee should take possession of the property, sell it, and out of the proceeds pay the whole amount specified in the note, and such provision was held to authorize a foreclosure for full amount of note, upon failure to pay one instalment, notwithstanding Cal. Code Civ. Proc. § 728,

D. Waiver of Forfeiture. A waiver of forfeiture may be effected by an agreement to that end on the part of the mortgagee,[49] and by his acquiescence in the breach,[50] as where he demands payment after the mortgage debt is overdue,[51] but the authorities are not uniform as to the effect of a demand.[52] While acceptance of payment in full after default is a waiver of forfeiture,[53] acceptance of part payment is generally held not to constitute a waiver.[54]

XX. REDEMPTION.

A. In General. Although at law the mortgagee of chattels after breach of condition has an absolute title to the property covered by the mortgage,[55] the

which declares that if the mortgage debt is not all due the sale on foreclosure must stop as soon as enough has been realized to pay the amount due.

Colorado.— Metzler *v.* James, 12 Colo. 322, 19 Pac. 885.

Georgia.— Paul *v.* Roney, 94 Ga. 133, 21 S. E. 283, by statute, where it was further held that a garnishment of the mortgagor in an action against the mortgagee would not prevent such foreclosure.

Illinois.— McConnell *v.* Scott, 67 Ill. 274.

Montana.— Clark *v.* Baker, 6 Mont. 153, 9 Pac. 911.

Nebraska.— Coad *v.* Home Cattle Co., 32 Nebr. 761, 49 N. W. 757, 29 Am. St. Rep. 465.

New York.— Willis *v.* O'Brien, 35 N. Y. Super. Ct. 536; Robinson *v.* Wilcox, 2 N. Y. Leg. Obs. 160.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 523.

Proceeds of sale may be retained by mortgagee to meet the payment of subsequent instalments as they fall due. Flanders *v.* Barstow, 18 Me. 357.

Rule in Michigan.— Upon default in payment of the first instalment the mortgagee may take possession of the entire property, but unless there is an agreement permitting it he can only sell enough to pay the amount due with interest and costs. Brink *v.* Freoff, 44 Mich. 69, 6 N. W. 94, 40 Mich. 610.

49. Orcutt *v.* Williams, 63 Ill. App. 407, holding that an agreement to extend time for payment and to accept payments in instalments, followed by acceptance of some payments subsequently to the maturity of the mortgage debt, is a waiver of the mortgagee's right to foreclose for default in payment. But see Gibson *v.* McIntire, 110 Iowa 417, 81 N. W. 699, where it was held that an agreement by the mortgagee to postpone foreclosure did not bind a subsequent assignee of the mortgage without actual notice.

A mortgagor may show a parol agreement to extend the period of redemption, and an offer to discharge the mortgage in pursuance of such extension. Deshazo *v.* Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769.

50. Acquiescence in breach.— Where a tenant gave a chattel mortgage to his landlord which authorized foreclosure in case any goods were removed from the premises, it was held that by giving the tenant notice to quit at the expiration of his term and allowing him at that time to remove the mortgaged goods without objection, the mortgagee had by acquiescence waived his right to insist on forfeiture for the removal. Grinlee *v.* Rockhill, (N. J. 1888) 13 Atl. 609.

51. Greene *v.* Dingley, 24 Me. 131; Van Loan *v.* Willis, 13 Daly (N. Y.) 281. See Greene *v.* Dingley, 24 Me. 131, holding that where forfeiture has been waived by demand of payment, the mortgagee, nevertheless, may take the property into his possession and hold it subject to redemption, unless he has relinquished such power.

52. Demand not a waiver.— Hale *v.* Utsey, 44 S. C. 393, 22 S. E. 371.

53. *Alabama.*— Frank *v.* Pickens, 69 Ala. 369. But see Brown *v.* Lipscomb, 9 Port. (Ala.) 472, which holds that payment of a mortgage debt after the estate has become absolute in the mortgagee by forfeiture of the condition cannot, at law, divest him of the estate.

Michigan.— Thurber *v.* Jewett, 3 Mich. 295.

Missouri.— McMillan *v.* Grayston, 83 Mo. App. 425; Jackson *v.* Cunningham, 28 Mo. App. 354.

New Hampshire.— Leighton *v.* Shapley, 8 N. H. 359, holding that the mortgagee is liable in trover if he detains the property after acceptance of payment.

New York.— West *v.* Crary, 47 N. Y. 423; Earle *v.* Gorham Mfg. Co., 2 N. Y. App. Div. 460, 37 N. Y. Suppl. 1037, 74 N. Y. St. 333; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61.

South Carolina.— Sumner *v.* Kelly, 38 S. C. 507, 17 S. E. 364.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 524.

54. Thurber *v.* Jewett, 3 Mich. 295; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61; Wallingford *v.* Aiken, 44 S. C. 396, 22 S. E. 372. *Contra*, Winchester *v.* Ball, 54 Me. 558.

55. Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905; Burtis *v.* Bradford, 122 Mass. 129; Taber *v.* Hamlin, 97 Mass. 489, 93 Am. Dec. 113; Wendell *v.* New Hampshire Bank, 9 N. H. 404. See also Hixon *v.* Hubbell, 4 Okla. 224, 44 Pac. 222, holding that after default in a chattel mortgage the interest of the mortgagor in the mortgaged property may be divested by actual delivery of possession in satisfaction of the mortgage debt, without resort to foreclosure proceedings.

"At common law, a mortgage of personal property gave an absolute title to the mortgagee on breach of the condition. No process

mortgagor, or any person standing in his place, has a right to redeem, which may be enforced in equity,[56] or in some jurisdictions by statutory proceedings;[57] and the same rule applies where the mortgage takes the form of an absolute bill of sale of the property,[58] although in such case it has been held that equity will give no relief unless the person seeking to redeem has strictly performed his part of the agreement.[59]

B. Extinguishment — 1. **Foreclosure as a Bar.**[60] The right to redeem is cut off by a foreclosure, legally and honestly conducted;[61] but if there is fraud or unfair conduct on the part of the mortgagee in foreclosing, such as the purchase of the mortgaged property by himself at a grossly inadequate price,[62] or by selling

of foreclosure was necessary and there was no right of redemption." Endicott, J., in Burtis *v.* Bradford, 122 Mass. 129, 131.

56. *Alabama.*— Davis *v.* Hubbard, 38 Ala. 185. See Locke *v.* Palmer, 26 Ala. 312, holding that even if the mortgaged property has been sold with the mortgagor's consent he may still file a bill to redeem.

Arkansas.— Hannah *v.* Carrington, 18 Ark. 85.

California.— Heyland *v.* Badger, 35 Cal. 404; Wilson *v.* Brannan, 27 Cal. 258; Smith *v.* Forty-Nine & Fifty-Six Quartz Min. Co., 14 Cal. 242.

Colorado.— Metzler *v.* James, 12 Colo. 322, 19 Pac. 885; Leapold *v.* McCartney, 14 Colo. App. 442, 60 Pac. 640.

Illinois.— Hammers *v.* Dole, 61 Ill. 307; Wylder *v.* Crane, 53 Ill. 490; Waite *v.* Dennison, 51 Ill. 319; Dupuy *v.* Gibson, 36 Ill. 197.

Indiana.— Broadhead *v.* McKay, 46 Ind. 595; Sidener *v.* Bible, 43 Ind. 230; Heimberger *v.* Boyd, 18 Ind. 420.

Kentucky.— Blanchard *v.* Kenton, 4 Bibb (Ky.) 451.

Maine.— Flanders *v.* Barstow, 18 Me. 357; Cutts *v.* York Mfg. Co., 18 Me. 190.

Maryland.— Evans *v.* Merriken, 8 Gill & J. (Md.) 39.

Massachusetts.— A bill in equity to redeem can be maintained only in case the statutory mode of redemption proves inadequate. Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905; Bushnell *v.* Avery, 121 Mass. 148; Gordon *v.* Clapp, 111 Mass. 22; Boston, etc., Iron Works *v.* Montague, 108 Mass. 248.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305; Van Brunt *v.* Wakelee, 11 Mich. 177.

Missouri.— Jackson *v.* Cunningham, 28 Mo. App. 354.

Nebraska.— Adams *v.* Nebraska City Nat. Bank, 4 Nebr. 370.

New Jersey.— Lambert *v.* Miller, 38 N. J. Eq. 117; Freeman *v.* Freeman, 17 N. J. Eq. 44.

New York.— Bragelman *v.* Daue, 69 N. Y. 69; West *v.* Crary, 47 N. Y. 423; Stoddard *v.* Dennison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296; Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. (N. Y.) 211.

Rhode Island.— Anthony *v.* Shaw, 7 R. I. 275.

South Carolina.— McClendon *v.* Wells, 20 S. C. 514; Reese *v.* Lyon, 20 S. C. 17.

Vermont.— Blodgett *v.* Blodgett, 48 Vt. 32.

Virginia.— Dabney *v.* Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503.

Wisconsin.— Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521; Smith *v.* Coolbaugh, 21 Wis. 427; Saxton *v.* Williams, 15 Wis. 292; Flanders *v.* Thomas, 12 Wis. 410.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 581.

An equity of redemption exists till it is extinguished by a sale of the property or by a suit in equity to foreclose. Porter *v.* Parmly, 43 How. Pr. (N. Y.) 445.

The mortgagor must act with fairness, when seeking to redeem, and hence when redemption is to be made in some commodity other than money, which is fluctuating in value, the mortgagor is required to redeem when the article is at a fair value. Perry *v.* Craig, 3 Mo. 516.

57. Mass. Rev. Laws (1902), c. 198, § 4; Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905; Stone *v.* Jenks, 142 Mass. 519, 8 N. E. 403; Leach *v.* Kimball, 34 N. H. 568.

58. *Kentucky.*— Cook *v.* Colyer, 2 B. Mon. (Ky.) 71.

Maryland.— Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469.

Michigan.— Murphy *v.* Charlton, 118 Mich. 141, 76 N. W. 305.

Missouri.— Phillips *v.* Hunter, 22 Mo. 485, holding that such right to redeem would pass by an administrator's sale.

South Carolina.— Hogan *v.* Hall, 1 Strobh. Eq. (S. C.) 323.

Tennessee.— Scott *v.* Britton, 2 Yerg. (Tenn.) 214.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 581.

Parol evidence is admissible to prove that an absolute bill of sale was intended to operate as a mortgage merely. Cook *v.* Colyer, 2 B. Mon. (Ky.) 71.

59. Gray *v.* Prather, 2 Bibb (Ky.) 223; Scott *v.* Britton, 2 Yerg. (Tenn.) 214.

60. See *infra*, XXI, C, 4, a.

61. Adams *v.* McKenzie, 18 Ala. 698; Wylder *v.* Crane, 53 Ill. 490; Burtis *v.* Bradford, 122 Mass. 129.

An agreement between mortgagor and mortgagee to submit to arbitration the right of the mortgagor to redeem is not an admission that the mortgagor has such right. Kea *v.* Council, 55 N. C. 345.

62. Goodman *v.* Pledger, 14 Ala. 114; Sasserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000, 30 N. Y. St. 92.

on foreclosure at an unfavorable season,[63] equity will allow the mortgagor to redeem even after strict foreclosure. And while the mortgagor must come into equity with clean hands when he invokes its aid,[64] his suit to redeem will not be dismissed on the ground merely that the mortgage was originally given in part to delay his creditors.[65] Where a mortgage has been foreclosed by suit in equity but no sale has been made under the decree, the mortgagee waives his rights under the decree and reopens the equity of redemption by taking a judgment at law for the entire amount of the mortgage debt.[66]

2. LAPSE OF TIME[67] — a. Generally. In the absence of statutory provisions no general rule can be stated as to the length of time within which a bill to redeem may be brought; for while there is one line of cases holding that a lapse of time equivalent to that required by law to bar an action to recover personal property will preclude the mortgagor from redeeming,[68] and another line of cases holding that the right to redeem is barred by the same period which will bar suit on the mortgage note,[69] there are also many cases which hold that the bill to redeem may be brought within a reasonable time after forfeiture; and what is a reasonable time is to be determined with reference to the particular facts of each case.[70]

63. Byrne *v.* Carson, 70 Mo. App. 126, holding that a parol agreement by a mortgagee not to foreclose at a certain season, although without consideration, was admissible as evidence of actual fraud, in an action to set aside the sale and redeem.

64. Dabney *v.* Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503, holding, where the mortgage had been foreclosed as a result of the mortgagor's attempt to remove the mortgaged property out of the state in order to defraud the mortgagee, that the mortgagor should not be permitted to redeem.

65. Cook *v.* Colyer, 2 B. Mon. (Ky.) 71.

66. Clarke *v.* Robinson, 15 R. I. 231, 10 Atl. 642; Hazard *v.* Robinson, 15 R. I. 226, 2 Atl. 433. *Compare* Clarke *v.* Robinson, 16 R. I. 180, 13 Atl. 124, where, after foreclosure of a chattel mortgage given to two persons to secure two distinct debts, one mortgagee assigned his claim to his co-mortgagee. The latter then recovered judgment for the amount of his own original claim. It was held that the equity of redemption was not opened as to all the mortgaged property, but only as to so much as corresponded to the debt for which judgment had been recovered.

Right to recover deficiency.— "The better opinion is that after a foreclosure, with or without a subsequent sale, the mortgagee may sue at law for the deficiency, to be ascertained in the one case by the proceeds of the sale, and in the other by an estimate and proof of the real value of the pledge at the time of the foreclosure. Whether the action at law will open the foreclosure and let in the equity of redemption, is an unsettled question." 4 Kent Comm. (12th ed.) *182. But see Hazard *v.* Robinson, 15 R. I. 226, 229, 2 Atl. 433, per Stiness, J.: "In case of a sale under a foreclosure, there is no question that a mortgagee may sue for a deficiency. The point of [sic] doubt seems to be, whether such a suit, where there has been no sale, opens the estate to redemption. We do not see why it should have that effect. With or without a sale the foreclosure is not, in fact, a satisfaction of the debt to any greater extent than the value of the property. That value may be as well shown in a suit for a deficiency, without a sale, as it is in other suits where the value of property has to be proved."

67. Lapse of time, it has been suggested, may operate to extinguish the equity of redemption. Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296.

68. *Alabama.*— Byrd *v.* McDaniel, 33 Ala. 18; Freeman *v.* Baldwin, 13 Ala. 246; Sims *v.* Canfield, 2 Ala. 555; Humphres *v.* Terrell, 1 Ala. 650.

Kentucky. — Baker *v.* Baker, 13 B. Mon. (Ky.) 406.

Missouri.— Perry *v.* Craig, 3 Mo. 516.

Rhode Island.— Greene *v.* Dispeau, 14 R. I. 575.

Tennessee.— Wood *v.* Jones, Meigs (Tenn.) 513.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 583.

That the mortgage authorizes the mortgagee to keep possession of the property until the debt is paid will not prevent the barring of the mortgagor's right to redeem by lapse of time, on analogy to the statute of limitations (Byrd *v.* McDaniels, 33 Ala. 18); but it has been held that no length of possession by a mortgagee, under an agreement that he keep possession in lieu of interest, would bar the mortgagor's right to redeem (Bartlett *v.* Thynes, 2 Hill Eq. (S. C.) 171).

If the mortgagor retains possession of the mortgaged property until default, the period of limitation does not begin to run until the property goes into the hands of the mortgagee. Sims *v.* Canfield, 2 Ala. 555.

The mere presence of a power of sale in a mortgage does not extend the time of redemption until a sale under such power. Thurber *v.* Jewett, 3 Mich. 295.

69. Fenwick *v.* Macey, 1 Dana (Ky.) 276; Huntington *v.* Mather, 2 Barb. (N. Y.) 538, 6 N. Y. Leg. Obs. 206.

70. The mortgagee must first begin to hold adversely, before the period limiting the time

b. Statutory Period. An arbitrary period during which redemption is allowed is fixed by statute in several jurisdictions,[71] and after the period fixed by statute has expired, there can be no redemption under any circumstances, for the mortgagee is thenceforth the absolute owner of the property.[72]

c. Voluntary Surrender. If the transfer is a mortgage rather than a conditional sale, there is an equity of redemption after default and a stipulation in the instrument that the mortgagor will give up all claim to the property on default does not cut off this equity.[73] Strong evidence is required to raise a presumption of the subsequent waiver or abandonment of the right to redeem by the mortgagor.[74]

for redemption begins to run. Shoecraft *v.* Beard, 20 Nev. 182.

Reasonable time.— A bill to redeem has been held to be brought within a reasonable time when brought within eight months (Lavigne *v.* Naramore, 52 Vt. 267), within three years (Overton *v.* Bigelow, 3 Yerg. (Tenn.) 513), or within five years (Fenwick *v.* Macey, 1 Dana (Ky.) 276) of the time when the right first accrued; and the time within which the right to redeem may be enforced may be extended by the neglect on the part of the mortgagee to enforce his rights (Arnold *v.* Chapman, 13 R. I. 586). See Ross *v.* Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422, holding that possession of the mortgagee for five years, without payment of interest or acknowledgment of the right to redeem, raises a presumption that such right has been abandoned, but that such presumption may be rebutted.

It has been held unreasonable delay and consequently a bar to relief in equity, where the bill to redeem was not filed within two years (Robinson *v.* Lewis, 55 N. C. 25), within four years (Bobo *v.* McBeth, 2 Bailey (S. C.) 489), within six years (Greene *v.* Dispeau, 14 R. I. 575), or within nine years (Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375) of the time when the right to redeem accrued. See Baker *v.* Baker, 13 B. Mon. (Ky.) 406, holding that the right to redeem was lost where a suit to redeem was suffered to remain on the docket for four or five years, without action, and upon the death of the mortgagor was not revived for fifteen years.

The right of a prior mortgagee, whose mortgage was forfeited when the second mortgagee took possession, is barred after the expiration of the period of limitation from such time, and not from the time when the mortgagor's right to redeem is barred. Bobo *v.* McBeth, 2 Bailey (S. C.) 489.

The right to redeem is not kept open by the absence of a final order dismissing a bill to redeem. Hazard *v.* Robinson, 15 R. I. 226, 2 Atl. 433.

71. **In Kentucky** the period is five years. Fenwick *v.* Macey, 1 Dana (Ky.) 276.

In Maine, Massachusetts, Minnesota, and Rhode Island the statutory period is sixty days from default. Clapp *v.* Glidden, 39 Me. 448; Burtis *v.* Bradford, 122 Mass. 129; Minn. Gen. Stat. (1891), § 4204 *et seq.*; Murphy *v.* Eddy, 19 R. I. 41, 31 Atl. 435.

The sixty days begin to run upon default, and therefore an administrator of the mortgagor cannot redeem within sixty days of his appointment, if more than sixty days have elapsed since default (Murphy *v.* Eddy, 19 R. I. 41, 31 Atl. 435); but under the Maine, Massachusetts, and Minnesota statutes the sixty days do not begin to run until notice of the mortgagee's intention to foreclose has been recorded (Trask *v.* Pennell, 59 Me. 419; Burtis *v.* Bradford, 122 Mass. 129; Mass. Rev. Laws, c. 102, § 54, c. 198, § 7; Minn. Gen. Stat. (1891), § 4204 *et seq.*), and its running will be interrupted if the forfeiture is waived by the acceptance of part payment (Winchester *v.* Ball, 54 Me. 558); furthermore the limitation period of sixty days does not in Maine apply to mortgages for less than thirty dollars, they being forfeited absolutely by failure merely to perform the conditions thereof (Winchester *v.* Ball, 54 Me. 558).

Under the Maine statute providing that the mortgagee's title became absolute unless the mortgagor redeemed within sixty days after default in the condition of the mortgage, the conduct of the parties may be such that they waive the forfeiture and extend the time for redemption beyond sixty days. Thompson *v.* Moore, 36 Me. 47.

In South Carolina the period of redemption was fixed at two years by statute in 1712. Mosely *v.* Crocket, 9 Rich. Eq. (S. C.) 339; Hogan *v.* Hall, 1 Strobh. Eq. (S. C.) 323.

72. Winchester *v.* Ball, 54 Me. 558; Clapp *v.* Glidden, 39 Me. 448; Flanders *v.* Barstow, 18 Me. 357; Burtis *v.* Bradford, 122 Mass. 129. But see Arnold *v.* Chapman, 13 R. I. 586, allowing redemption after the expiration of the statutory period on the ground that the mortgagee by neglect in enforcing his rights and taking possession of the property had misled the mortgagor, and that equity accordingly would give relief. *Compare* Ingram *v.* Smith, 41 N. C. 97, holding that in order to rebut the presumption of abandonment of the right to redeem under the North Carolina statute, the evidence must be strong, as the statute was intended to quiet rights.

73. Landers *v.* George, 49 Ind. 309; Bunacleugh *v.* Poolman, 3 Daly (N. Y.) 236; Lavigne *v.* Naramore, 52 Vt. 267. See Hughes *v.* Harlam, 166 N. Y. 427, 60 N. E. 22, holding that the right of redemption could not be waived, even by a stipulation in the mortgage that if the mortgagor died before payment the conveyance should become absolute.

74. Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469. *Compare* Landers *v.* George, 49 Ind. 309, holding that delivery of the mortgaged property to the mortgagee upon de-

C. Parties.[75] The right to redeem may be exercised by the mortgagor, or by any person who has obtained a title to or lien upon the mortgaged property, under or through the mortgagor, subsequent to the mortgage from which redemption is sought.[76] Thus the administrator of the mortgagor[77] or his widow, in case the mortgaged property has been set off to her,[78] are entitled to redeem. The right may be exercised by a purchaser of the mortgaged property[79] or by a junior mortgagee;[80] and it has been held to extend to any creditor of the mortgagor who has acquired any interest in or lien upon the mortgaged property, as by judicial process,[81] or through a creditor by purchase on an execution sale.[82] All persons having an interest in the mortgaged property, which would be lost by foreclosure, are necessary parties defendant to a bill to redeem,[83] and a co-mortgagor who refuses to join as plaintiff may be made a party defendant.[84]

D. Practice and Procedure — 1. In General. It is generally held that equity has jurisdiction over bills by mortgagors against mortgagees to redeem and for an accounting, not only where there is no adequate remedy at law,[85] but also in those cases where a remedy at law exists,[86] and that the claims of all parties can be adjusted without resort to another action.[87] In some jurisdictions, how-

fault did not amount to a waiver of the equity of redemption. See also Hackleman *v.* Goodman, 75 Ind. 202, holding, where a mortgagor of growing wheat turned the same over to the mortgagee, to sell and apply the proceeds on the debt, and then, as the employee of the mortgagee, harvested the wheat, that these facts did not show an extinguishment of the equity of redemption.

The mortgagor may release his equity of redemption, however, after the mortgagee has taken possession, and such release may be by parol. Stone *v.* Jenks, 142 Mass. 519, 8 N. E. 403.

75. See also, generally, PARTIES.

The right to redeem may be delegated, it seems, by power of attorney; and if such power of attorney is lost, parol evidence as to its contents is admissible, although a copy thereof is in evidence, for all secondary evidence is of the same degree. Eslow *v.* Mitchell, 26 Mich. 500.

76. Hinman *v.* Judson, 13 Barb. (N. Y.) 629.

77. Hughes *v.* Harlam, 37 N. Y. App. Div. 528, 55 N. Y. Suppl. 1106.

78. Recker *v.* Kilgore, 62 Ind. 10.

79. Summers *v.* Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Scott *v.* Henry, 13 Ark. 112; Hinman *v.* Judson, 13 Barb. (N. Y.) 629; Dust *v.* Conrod, 5 Munf. (Va.) 411.

80. Treat *v.* Gilmore, 49 Me. 34; Culbertson *v.* Young, 50 Mich. 190, 15 N. W. 77; Smith *v.* Coolbaugh, 21 Wis. 427.

81. Scott *v.* Henry, 13 Ark. 112; Lucking *v.* Wesson, 25 Mich. 443; Hinman *v.* Judson, 13 Barb. (N. Y.) 629.

Execution creditor.— McDermutt *v.* Strong, 4 Johns. Ch. (N. Y.) 687; Morgan *v.* Spangler, 20 Ohio St. 38.

Judgment creditor.— Lambert *v.* Miller, 38 N. J. Eq. 117.

82. Porter *v.* Parmly, 43 How. Pr. (N. Y.) 445.

83. Hazard *v.* Robinson, 15 R. I. 226, 2 Atl. 433.

Necessary parties to a bill to redeem.— A subsequent encumbrancer (Macey *v.* Fenwick, 4 B. Mon. (Ky.) 306), the administrator of a deceased mortgagor, the assignee and subassignee of the mortgage, or their personal representatives (Hazard *v.* Robinson, 15 R. I. 226, 2 Atl. 433) are necessary parties to a bill to redeem; but the purchaser of the mortgaged property at an unlawful sale is neither a necessary nor proper party to an action against the mortgagee to redeem and for an accounting, if no relief against such purchaser is sought (Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521).

A decree allowing redemption is not binding upon persons who have acquired interests in the mortgaged property through the mortgagee, unless they are made parties to the bill to redeem. Macey *v.* Fenwick, 9 Dana (Ky.) 198.

84. Metzler *v.* James, 12 Colo. 322, 19 Pac. 885, holding that the fact that one of two co-mortgagors refuses to join in a bill to redeem, and is therefore made a party defendant, does not limit the recovery of the other mortgagor to one half of the amount of the mortgage; but that his recovery is for the same sum as if both mortgagors were plaintiffs.

85. Leapold *v.* McCartney, 14 Colo. App. 442, 60 Pac. 640; Boston, etc., Iron Works *v.* Montague, 108 Mass. 248. See also Myers *v.* Amey, 21 Md. 302, holding, in an action by a creditor of the mortgagor to redeem from prior encumbrances, that equity would enjoin the mortgagor from disposing of the property pending suit, on the ground of irreparable loss to plaintiff.

86. Sims *v.* Canfield, 2 Ala. 555; Smith *v.* Forty-Nine & Fifty-Six Quartz Min. Co., 14 Cal. 242; Wilkins *v.* Sears, 4 T. B. Mon. (Ky.) 343; Anthony *v.* Shaw, 7 R. I. 275. See also Rose *v.* Page, 82 Mich. 105, 46 N. W. 227, holding that an action of tort would not lie against a mortgagee who had in good faith sold the property, but that the proper remedy was by bill to redeem or by action of assumpsit to recover the surplus proceeds of the sale, if any.

87. Frank *v.* Jones, 39 Kan. 236, 17 Pac. 663. See Reed *v.* Lansdale, Hard. (Ky.) 6,

ever, where a statutory mode of foreclosure and redemption of chattel mortgages is provided, it is held that a bill in equity for redemption cannot be maintained, unless from the peculiar circumstances of the case the mortgagor's rights cannot be fully protected by the proceedings authorized by statute.[88]

2. COMPLAINT.[89] The petition or complaint in an action to redeem must allege all material facts necessary to entitle the complainant to relief.[90]

3. JUDGMENT AND DECREE.[91] If judgment is rendered in favor of redemption, the amount due under the mortgage should be fixed by the decree, and a day appointed for its payment; and in case of non-payment the bill should be dismissed or the property sold.[92] If the mortgaged property cannot be restored, a personal decree against the mortgagee for its excess in value over the amount of the mortgage should be entered,[93] and such decree operates to vest the title to the mortgaged property in any person who has purchased it from the mortgagee, and to bar further action by the mortgagor in respect thereto.[94]

4. LIABILITY FOR COSTS.[95] A mortgagor, seeking to redeem, must generally pay costs; but if the mortgagee has unreasonably refused to accept payment upon tender,[96] or has set up an absolute title in himself,[97] the general rule does not apply, and the mortgagee may be held for costs.

E. Tender of Mortgage Debt — 1. EFFECT. The effect of a tender of the amount necessary to redeem merely gives the mortgagor the right to redeem, it does not revest title in him.[98] A refusal on the part of the mortgagee to accept

holding that in such action the value of the use of the property while in the hands of the mortgagee may be determined.

88. Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059; Gordon *v.* Clapp, 111 Mass. 22. See Boston, etc., Iron Works *v.* Montague, 108 Mass. 248, holding that the statutory remedy was inadequate and that a bill in equity would therefore lie where a mortgagee of patent rights refused to render an account, without which the mortgagor could not ascertain the amount due so as to make payment or tender for the redemption of the property.

89. See also, generally, EQUITY; PLEADING.

90. Crowe *v.* La Mott, 14 Mont. 355, 36 Pac. 452, holding that such a complaint was defective for failing to allege that the mortgagee had not foreclosed upon and sold the property and turned over the surplus to the plaintiff as provided by the terms of the mortgage. See also Cody *v.* Springfield First Nat. Bank, 63 N. Y. App. Div. 199, 71 N. Y. Suppl. 277, holding that a bill to redeem was demurrable for failure to set forth a state of facts showing a conversion of the property by the mortgagee.

A tender of the mortgage debt must be alleged and proved; a mere offer in the pleadings to pay what is found due is not enough. Hall *v.* Ditson, 5 Abb. N. Cas. (N. Y.) 198, 55 How. Pr. (N. Y.) 19.

Where a bill to redeem is filed by two mortgagors, and the evidence shows that the property belongs to one of them only, this is not such a material variance as to defeat the action. Locke *v.* Palmer, 26 Ala. 312.

91. See also, generally, EQUITY; JUDGMENTS.

92. Woodard *v.* Fitzpatrick, 2 B. Mon. (Ky.) 61; Chaney *v.* Cooke, 5 T. B. Mon. (Ky.) 248.

93. *Colorado.*— Metzler *v.* James, 12 Colo. 322, 19 Pac. 885.

Iowa.— Alger *v.* Farley, 19 Iowa 518.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.

Missouri.— Moore *v.* Thompson, 40 Mo. App. 195.

Vermont.— Blodgett *v.* Blodgett, 48 Vt. 32.

Wisconsin.— Mowry *v.* Baraboo First Nat. Bank, 54 Wis. 38, 11 N. W. 247, holding that the mortgagee is to be charged with the value of the property at the time it was taken by him.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 588.

94. Whitesides *v.* Dorris, 7 Dana (Ky.) 101, so holding on a bill to redeem by the remainderman where a life-tenant of slaves had mortgaged them and the mortgagee had sold them out of the state.

95. See also, generally, COSTS.

96. Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. (N. Y.) 211.

97. May *v.* Eastin, 2 Port. (Ala.) 414; Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. (N. Y.) 211.

98. *Alabama.*— Frank *v.* Pickens, 69 Ala. 369; Brown *v.* Lipscomb, 9 Port. (Ala.) 472.

California.— Heyland *v.* Badger, 35 Cal. 404.

Missouri.— Jackson *v.* Cunningham, 28 Mo. App. 354.

Nebraska.— Tomkins *v.* Batie, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361.

New York.— Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296; Charter *v.* Stevens, 3 Den. (N. Y.) 33, 45 Am. Dec. 444; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61; Langdon *v.* Buel, 9 Wend. (N. Y.) 80; Ackley *v.* Finch,

a proper tender made by a mortgagor seeking to redeem may subject the mortgagee to liability for damages.[99]

2. Sufficiency — a. In General.[1] A tender of the amount due on the mortgage which shall entitle the mortgagor to redeem must be unconditional.[2] It is also necessary that the mortgagor make his tender good by payment into court.[3] A mere offer in the pleadings to pay what may be found due, although not sufficient in some jurisdictions,[4] is generally held to be a substitute for prior tender;[5] and in any case failure to make tender previous to commencing suit is important only in its effect upon costs.[6]

b. Amount. The mortgagor or person claiming the right to redeem must, as a condition precedent to enforcing such right of redemption, pay or tender the mortgagee the entire debt secured by the mortgage,[7] together with

7 Cow. (N. Y.) 290; Brown *v.* Bement, 8 Johns. (N. Y.) 96; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583.

South Carolina.— Pledger *v.* Mandeville, 1 Brev. (S. C.) 286.

Vermont.— Blodgett *v.* Blodgett, 48 Vt. 32.

United States.— Mitchell *v.* Roberts, 5 McCrary (U. S.) 425, 17 Fed. 776.

Contra, Schayer *v.* Commonwealth Loan Co., 163 Mass. 322, 39 N. E. 1110, holding that a refusal by the mortgagee to accept a proper tender operated to discharge the lien of the mortgage.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 585; and *supra,* XVIII.

99. Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465. See Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999, holding that Sanborn & B. Anno. Stat. Wis. § 2316*a*, providing that in case of the sale of property taken under a chattel mortgage in less than five days after the same was actually taken, the owner may recover twenty-five dollars liquidated damages in addition to actual damages, and the mortgage debt shall he deemed paid, entitles the owner, in case of such sale, even if merely a pretended sale, to recover as actual damages only the value of the property, less the mortgage debt and necessary costs and expenses, and any special damages which he has suffered. See also Schmittdiel *v.* Moore, 120 Mich. 199, 79 N. W. 195, holding that a senior mortgagee who acquires the equity of redemption from the mortgagor, after a refusal to accept a tender of payment of his mortgage from a junior encumbrancer, is liable to the latter for the amount of his lien, where the property is sufficient to pay both liens.

1. The insufficiency of a tender may be waived by a refusal to allow redemption on the ground that the property has been sold (Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999), or by the mortgagee's declining either to accept or reject the tender until he has consulted counsel (Lambert *v.* Miller, 38 N. J. Eq. 117).

2. Noyes *v.* Wyckoff, 114 N. Y. 204, 21 N. E. 158, 23 N. Y. St. 105.

3. *Alabama.*— Frank *v.* Pickens, 69 Ala. 369.

Missouri.— Jackson *v.* Cunningham, 28 Mo. App. 354.

Nebraska.— Tompkins *v.* Batie, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361.

New York.— Noyes *v.* Wyckoff, 114 N. Y. 204, 21 N. E. 158, 23 N. Y. St. 105; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61.

Wisconsin.— Gauche *v.* Milbrath, 94 Wis. 674, 69 N. W. 999; Smith *v.* Phillips, 47 Wis. 202, 2 N. W. 285.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 501, 585.

Contra.— *Massachusetts.*— Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905; Roberts *v.* White, 146 Mass. 256, 15 N. E. 568.

Michigan.— Shattuck *v.* Cole, 91 Mich. 580, 52 N. W. 69; Blaisdell *v.* Scally, 84 Mich. 149, 47 N. W. 585; Bateman *v.* Blaisdell, 83 Mich. 357, 47 N. W. 223; Bateman *v.* Blake, 81 Mich. 227, 45 N. W. 831; Flanders *v.* Chamberlain, 24 Mich. 305.

Minnesota.— Moore *v.* Norman, 43 Minn. 428, 45 N. W. 857, 19 Am. St. Rep. 247, 9 L. R. A. 55.

Oregon.— Bartel *v.* Lope, 6 Oreg. 321.

United States.— Mitchell *v.* Roberts, 5 McCrary (U. S.) 425, 17 Fed. 776.

A refusal by the mortgagee to accept tender when made at a proper time will operate to discharge the lien of the mortgage (Schayer *v.* Commonwealth Loan Co., 163 Mass. 322, 39 N. E. 1110), and to render the mortgagee liable for conversion if he subsequently sells the property (Bacon *v.* Hooker, 173 Mass. 554, 54 N. E. 253), and further gives the mortgagor a right to maintain replevin for the mortgaged property, without bringing the money due upon the debt into court (Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905).

If the property is destroyed, after rejection of a sufficient tender, the mortgagee must bear the loss. Goodman *v.* Pledger, 14 Ala. 114.

4. Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296; Hall *v.* Ditson, 5 Abb. N. Cas. (N. Y.) 198, 55 How. Pr. (N. Y.) 19.

5. Flanders *v.* Chamberlain, 24 Mich. 305; Arnold *v.* Chapman, 13 R. I. 586; Lavigne *v.* Naramore, 52 Vt. 267.

6. Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521.

7. Thompson *v.* Campbell, 6 T. B. Mon. (Ky.) 120; Chaney *v.* Cooke, 5 T. B. Mon. (Ky.) 248; Hughes *v.* Harlan, 37 N. Y. App. Div. 528, 55 N. Y. Suppl. 1106; Halstead *v.*

interest,[8] and all expenses and costs properly and reasonably incurred by the mortgagee in the protection of his rights under the mortgage.[9] It has been held that the tender must include all that the mortgagor owes the mortgagee, whether secured by the mortgage or not,[10] but the better view seems to be that the tender need include only the entire mortgage debt.[11]

F. Accountability of Mortgagee — 1. In General. A part of the relief ordinarily given in a suit to redeem is to require the mortgagee to account for the rents and profits of chattels of which he has had the possession and use.[12]

Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Hall *v.* Ditson, 5 Abb. N. Cas. (N. Y.) 198, 55 How. Pr. (N. Y.) 19. See Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736, holding that on a bill to redeem slaves the tender must equal the value of the slaves mortgaged, and of young slaves born since the mortgage, and — if the mortgagor is in possession — the net hire of the slaves from the time of bringing the bill. See also Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289, holding, where a mortgage given to secure ten notes was defaulted by failure to pay the note first due, that the mortgagor could redeem only by paying or tendering the entire debt secured. *Contra*, Casserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000, 30 N. Y. St. 92 [*reversing* 28 N. Y. Wkly. Dig. 388], holding, where redemption was sought on the ground of fraud on the part of the mortgagee in conducting the foreclosure sale, that it was not necessary for plaintiff, either before action or in his complaint, to tender or offer to pay the amount which should be found to be due upon the mortgage.

The authority of an agent of the mortgagee to receive payment of the mortgage debt must first be shown before evidence of a tender to him is admissible. Bacon *v.* Hooker, 173 Mass. 554, 54 N. E. 253.

8. Thompson *v.* Campbell, 6 T. B. Mon. (Ky.) 120.

9. The mortgagor's tender must include expenses incurred by the mortgagee in harvesting the crop mortgaged, where necessary to preserve it (Shutes *v.* Woodard, 57 Mich. 213, 23 N. W. 775); in attempting, although unsuccessfully, to take possession of the mortgaged property (Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489); and in recovering the property — as in the case of a runaway mortgaged slave (Webb *v.* Patterson, 7 Humphr. (Tenn.) 431).

Money paid by the mortgagee for insurance on the mortgaged property, when the mortgage provides that the property shall be kept insured, must be repaid the mortgagee by a subsequent mortgagee seeking to redeem. Carr *v.* Hodge, 130 Mass. 55.

A tender of the entire debt without expenses is sufficient if not objected to. Vreeland *v.* Waddell, 93 Wis. 107, 67 N. W. 51. See also to the same effect Lambert *v.* Miller, 38 N. J. Eq. 117, where a tender covering principal and interest, but not expenses incurred in preparation for foreclosure sale, refused by the mortgagee until he had consulted counsel as to his rights was held sufficient.

The amount of the tender may be reduced by the hire of the property since the mortgagee took possession (Thompson *v.* Campbell, 6 T. B. Mon. (Ky.) 120); and also when made by a purchaser from the mortgagor, by any part of the mortgaged property which the mortgagee might have used to satisfy the debt, but which he has sacrificed or released for the benefit of the mortgagor (Miles *v.* Blanton, 3 Dana (Ky.) 525).

Where the mortgagee has bought at a discount the mortgage debt, as by paying in depreciated money (May *v.* Eastin, 2 Port. (Ala.) 414), it has been held that he is entitled only to the amount which he actually paid, and not to the face value of the debt (*Ex p.* Ames, 1 Lowell (U. S.) 561, 1 Fed. Cas. No. 323, 7 Nat. Bankr. Reg. 230).

Where the debt is payable in services to be paid for at a specified rate, a tender of the sum due in money according to the rate fixed for the services is sufficient (Ferguson *v.* Hogan, 25 Minn. 135), and the rule is the same where the debt is payable in money or some other commodity, as lumber (Leapold *v.* McCartney, 14 Colo. App. 442, 60 Pac. 640).

10. McClendon *v.* Wells, 20 S. C. 514; Reese *v.* Lyon, 20 S. C. 17. *Compare* Craik *v.* Clark, 3 N. C. 175, where, after stating that an heir cannot, by the English law, redeem without payment of a specialty debt, although not secured by mortgage, the court doubted whether it was so with regard to executors, but upon consideration decreed a redemption on payment by the administrator of the mortgage money and also a bond debt not secured by the mortgage.

11. Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Clarke *v.* Robinson, 16 R. I. 180, 13 Atl. 124.

12. Davis *v.* Hubbard, 38 Ala. 185; Frank *v.* Jones, 39 Kan. 236, 17 Pac. 663; Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. (N. Y.) 211.

Account incident to redemption.— The right of a mortgagor to call upon the mortgagee for an accounting is incident to, and as a general rule can arise only under, a bill to redeem, unless the mortgagee has put it out of his power to return the property. In that case the mortgagee must account for the value of the property or the amount it brought at the sale. Craft *v.* Bullard, Sm. & M. Ch. (Miss.) 336.

A mortgagee who fails to take possession of the property mortgaged will not be allowed credit, on an accounting, for portions

While the right of redemption exists a mortgagee in possession is liable to account for the income, profits, and proceeds of the mortgaged chattels,[13] but he is chargeable for the usual hire only, and not for what was really made out of the use of the property.[14]

2. DUTY TO PRESERVE PROPERTY. While the right of redemption exists, a mortgagee in possession is liable for loss caused by his neglect in the management of the property,[15] and if the nature of the property permits, he is bound to exercise reasonable diligence in keeping it employed;[16] but if he be without fault, he is not responsible, even though the property covered by the mortgage is destroyed.[17]

3. EXPENSES INCURRED IN REGARD TO MORTGAGED PROPERTY. A mortgagee in possession of mortgaged property is entitled to be credited with all reasonable and actual expenses in caring for it,[18] but although the mortgagor is responsible for

of the property sold by a junior mortgagee. Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

13. *Kentucky.*— Woodard *v.* Fitzpatrick, 2 B. Mon. (Ky.) 61; Clark *v.* Robbins, 6 Dana (Ky.) 349; Thompson *v.* Campbell, 6 T. B. Mon. (Ky.) 120; Wilkins *v.* Sears, 4 T. B. Mon. (Ky.) 343.

Maine.— Covell *v.* Dolloff, 31 Me. 104.

Mississippi.— Craft *v.* Bullard, Sm. & M. Ch. (Miss.) 366.

New York.— Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. (N. Y.) 211.

Tennessee.— Overton *v.* Bigelow, 10 Yerg. (Tenn.) 48.

Virginia.— Ross *v.* Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 300.

Interest on the hire of mortgaged property is chargeable against a mortgagee in possession from the end of each year. Morrow *v.* Turney, 35 Ala. 131; Booth *v.* Baltimore Steam Packet Co., 63 Md. 39.

Rents and profits must be applied in payment of the mortgage, and part thereof cannot be diverted toward the payment of unsecured claims due to the mortgagee from the mortgagor without the express consent of the latter. Caldwell *v.* Hall, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64.

Duty of mortgagee.— If the mortgagee acts in good faith in hiring out the mortgaged property, he will be accountable only for the amount which he contracted for, although a more advantageous contract might have been made, but he must suffer the loss incurred by the insolvency of the person hiring the property. Clark *v.* Robbins, 6 Dana (Ky.) 349.

Where the mortgagee is entitled to immediate possession of the mortgaged property, as under a bill of sale intended to operate as a mortgage, he is not liable to account to the mortgagor for the earnings of the property after he has taken possession of and sold it, even though he had verbally promised the mortgagor to leave the property in his possession. Tenney *v.* State Bank, 20 Wis. 152.

14. Davenport *v.* Tarlton, 1 A. K. Marsh. (Ky.) 243.

Extent of liability.—The mortgagee is liable for hire of the property only for five years next preceding the action to redeem (Fenwick *v.* Macey, 1 Dana (Ky.) 276), and it is not error to fail to charge the mortgagee with the hire of the property where the court is not asked so to do (Van Dusen *v.* Arnold, 5 S. D. 588, 59 N. W. 961).

If the property is destroyed while in the mortgagee's possession without fault on his part, he is accountable only for the net profits accruing before the loss. Covell *v.* Dolloff, 31 Me. 104.

15. Wann *v.* Coe, 31 Fed. 369, holding that a mortgagor's right to maintain a bill for an accounting is not barred by an agreement with the mortgagee that a certain sum shall be deemed the sum actually due under the mortgage.

16. Bennett *v.* Butterworth, 12 How. (U. S.) 367, 13 L. ed. 1026, holding it to be no excuse for the mortgagee to show that he managed the property as the mortgagor had done.

17. Morrow *v.* Turney, 35 Ala. 131; Tucker *v.* Toomer, 36 Ga. 138; Covell *v.* Dolloff, 31 Me. 104. See also Shannon *v.* Speers, 2 A. K. Marsh. (Ky.) 311, holding that a mortgagee was not liable for the value of a mortgaged slave, who died after a tender and refusal of the consideration, if the slave was laboring under the disease of which he died, at the time of delivery to the mortgagee and tender.

18. Schultz *v.* Jerrard, (N. J. 1886) 3 Atl. 265, 9 N. J. L. J. 123 (holding that the mortgagee was not entitled to rent for storing mortgaged property on his own shelves); Coe *v.* Cassidy, 72 N. Y. 133 [*affirming* 6 Daly (N. Y.) 242]; Harden *v.* Wagner, 22 W. Va. 356 (holding that feed for mortgaged horses in the possession of a trustee could be charged to the trust fund). *Compare* Boshart *v.* Easton, 34 Misc. (N. Y.) 241, 69 N. Y. Suppl. 623 [*affirmed* in 74 N. Y. Suppl. 1121], where a mortgage made by an insolvent was set aside as in fraud of creditors and a mortgagee was allowed the expenses incurred by him in taking care of the property. See also *Ex p.* Davega, 31 S. C. 413, 10 S. E. 72, holding that if, without carrying on the business, the mortgagee sells the mortgaged property at auction, he is entitled to be credited with the expense of the auction sale.

Trouble in managing mortgaged property cannot be charged for by the mortgagee.

taxes[19] and for ordinary expenses[20] he does not have to allow the mortgagee the amounts of insurance premiums on the mortgaged goods in the absence of express stipulation.[21]

XXI. FORECLOSURE.

A. In General — 1. RIGHT. The holder of a chattel mortgage has, in general, upon breach of condition, the same right to pursue all his remedies at the same time that a mortgagee of real estate has.[22] The existence of, or resort to, other remedies does not prevent the holder of a chattel mortgage from foreclosing his mortgage.[23]

Clark *v.* Robbins, 6 Dana (Ky.) 349; Schultz *v.* Jerrard, (N. J. 1886) 3 Atl. 265. *Compare* Imboden *v.* Hunter, 23 Ark. 622, 79 Am. Dec. 116, where a mortgagee was held not to be entitled to compensation for effecting a sale of the mortgaged property where the deed provided for paying the expenses of the sale but was silent as to compensation.

Money advanced to avoid waste and destruction of mortgaged crops by the mortgagee thereof is chargeable against the mortgagor in an equitable accounting and can be added to the mortgage debt. Caldwell *v.* Hall, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64.

Effect of kind of property.— A mortgagee in possession of a mortgaged slave, it has been held, must support the slave at his own cost. Overton *v.* Bigelow, 10 Yerg. (Tenn.) 48.

Expenses incurred in improving the mortgaged property while in the possession of the mortgagee should be charged to the mortgagor. Ross *v.* Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422.

Expenses of a receiver.— As between the mortgagor and the mortgagee of personal property, the mortgagor is not entitled to have any part of the expenses of a receivership deducted from the amount of his indebtedness in the final judgment on the claim, where, on order taking the property from the receiver and placing it in the hands of prior mortgagees, it was stipulated that the rights of the parties as to liability for receiver's costs should not be affected. Newhorg *v.* Sproat, 10 Kan. App. 311, 62 Pac. 544.

Where the mortgagee holds adversely to the mortgagor and denies his right to redeem he cannot deduct charges incurred for repairs to the chattels while they were thus held (Booth *v.* Baltimore Steam Packet Co., 63 Md. 39); nor can expenses incurred in the care of the property be allowed in his favor (Howery *v.* Hoover, 97 Iowa 581, 66 N. W. 772).

19. Morrow *v.* Turney, 35 Ala. 131. *Compare* Dunsmuir *v.* Port Angeles Gas, etc., Co., 24 Wash. 104, 63 Pac. 1095, where the same result was reached because the court held that a law requiring the mortgagee to pay taxes applied only to mortgages of real property.

20. Kreider *v.* Fanniry, 74 Ill. App. 237, holding that where the mortgagor fed grain to mortgaged cattle and employed his minor son to care for them, he could not charge these expenses up against the mortgagee.

Liability for injury caused by mortgaged goods.— A mortgagee who has not taken actual possession is not liable in trespass for an injury occasioned by the mortgaged goods. Campbell *v.* Reid, 14 U. C. Q. B. 305.

Under necessary expenses which can be charged by the mortgagor in regard to the sawing of logs into lumber, under a stipulation to that effect in a mortgage, it has been held proper to include money expended in necessary repairs to the sawmill. Friendly *v.* McCullough, 9 Oreg. 109.

21. Booth *v.* Baltimore Steam Packet Co., 63 Md. 39. See Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636, holding it proper to refuse to credit the mortgagee with the expenses incurred in selling part of the mortgaged property.

Expense incurred by the mortgagee in the action to redeem cannot be charged against the mortgagor in the accounting. Beckley *v.* Munson, 22 Conn. 299.

22. Jones Chatt. Mortg. (4th ed.) § 758.

23. **Arrest on execution.**— Although as a general rule a creditor who has the body of his debtor in execution cannot proceed against the debtor's property, he is nevertheless not prevented by this rule from foreclosing any mortgage he may hold as security for his debt. Stilwell *v.* Van Epps, 1 Paige (N. Y.) 615.

Conversion of property mortgaged.— If the goods covered by the mortgage are converted by a third person the mortgagee may elect whether to foreclose or sue for conversion. Stewart *v.* Long, 16 Ind. App. 164, 44 N. E. 63; Ambler *v.* Warwick, 1 Leigh (Va.) 195.

The issue of an extent does not bar foreclosure of a chattel mortgage given by a town collector to secure his official bond covering the delinquency for which the extent was issued. Perry *v.* Shumway, 73 Vt. 191, 50 Atl. 1069.

Replevin by mortgagee.— A mortgagee who replevies the mortgaged property and has judgment rendered against him because of his violation of statutory provisions (Conn *v.* Bernheimer, 67 Miss. 498, 7 So. 345) or because he is a tenant in common with the mortgagor (Gaar *v.* Hurd, 92 Ill. 315) may nevertheless thereafter maintain a bill to foreclose; and conversely a mortgagee may, after default, maintain replevin to obtain possession of the chattels, although he does

2. Manner or Mode. Where the mortgage itself contains no power of sale, there is one line of cases holding that the mortgagee cannot upon default take possession of and sell the property, but must proceed in equity,[24] while another line of cases holds that under such circumstances the mortgagee may take possession and sell without resort to the courts.[25] Where different modes of foreclosure exist, the mortgagee may elect which one he will pursue; whether he will proceed under the power of sale contained in the mortgage,[26] without a decree of court,[27] or whether he will resort to the courts for a decree of foreclosure,[28] for such a course is not precluded by the existence of a power of sale in the mortgage deed. A statutory mode of foreclosure has been held to supersede other remedies,[29] although it is generally held not to prevent the mortgagee from bringing a bill in equity to foreclose;[30] and even in these jurisdictions where the

not seek to foreclose the mortgage in such action (Harper *v.* Gordon, 128 Cal. 489, 61 Pac. 84). *Compare* Rein *v.* Callaway, (Ida. 1901) 65 Pac. 63, where, under the Idaho statute which prescribes the modes of foreclosure, it was held that the mortgagor could not authorize the mortgagee, by provision in the mortgage, to take possession of and sell the property upon default.

Right to reclaim goods upon non-payment of purchase-price does not preclude foreclosure of mortgage given to secure such payment. Whitehead *v.* Lane, etc., Co., 72 Ala. 39.

Suit for debt secured by mortgage does not prevent mortgagee from foreclosing. The remedies are concurrent. Burtis *v.* Bradford, 122 Mass. 129; Satterwhite *v.* Kennedy, 3 Strobh. (S. C.) 457. See also Elston *v.* Carpenter, (N. J. 1885) 3 Atl. 357 (holding that if the mortgage is secured by bond the mortgagee may elect to proceed on that); and *supra*, XVIII, B.

Under the Montana statute relating to the foreclosure of mortgages, it was held that a creditor could not waive his chattel mortgage security, sue on the debt, and attach his debtor's property, but must bring suit to foreclose. Largey *v.* Chapman, 18 Mont. 563, 46 Pac. 808.

Against what property.— The mortgagee's right to foreclose extends only to property included and described in the mortgage deed, and even the mortgagor's assent cannot make valid foreclosure proceedings against property not so included and described. Solinsky *v.* O'Connor, (Tex. Civ. App. 1899) 54 S. W. 935.

The right of the mortgagee is not affected by the fact that his interest is a partial one (Reuscher *v.* Klein, 35 N. Y. Super. Ct. 446), or by the fact that the mortgagor, with the knowledge of the mortgagee, has chartered the mortgaged property — a boat — to third persons for the navigating season (Judson *v.* Easton, 1 Thomps. & C. (N. Y.) 598).

The mortgagee must present himself as an adversary to the mortgagor in order to maintain his claim against the claims of other creditors. Wyeth *v.* Covert, 7 Ohio S. & C. Pl. Dec. 442, 7 Ohio N. P. 268.

Intervening sales of mortgaged property.— The right to foreclose is not affected by sales of the mortgaged property by the mortgagor (Ambler *v.* Warwick, 1 Leigh (Va.) 195), even if the mortgagee has erroneously, but *bona fide*, stated the amount of his mortgage to the purchaser (Preble *v.* Conger, 66 Ill. 370).

24. Pope *v.* Jenkins, 30 Mo. 528; Davis *v.* Childers, 45 S. C. 133, 22 S. E. 784, 55 Am. St. Rep. 757 (where, however, the mortgage was only an equitable mortgage).

Inherently a matter of equity jurisdiction. — In the absence of any controlling statute the foreclosure of a chattel mortgage is inherently a matter of equity jurisdiction. McCormick *v.* Hartley, 107 Ind. 248, 6 N. E. 357.

25. Chapman *v.* Hunt, 13 N. J. Eq. 370; Johnson *v.* Vernon, 1 Bailey (S. C.) 527.

26. Broadhead *v.* McKay, 46 Ind. 595; Dowie *v.* Christen, 115 Iowa 364, 88 N. W. 830; O'Reilly *v.* Hendricks, 2 Sm. & M. (Miss.) 388.

27. Chapman *v.* Hunt, 13 N. J. Eq. 370; Johnson *v.* Vernon, 1 Bailey (S. C.) 527.

28. *Colorado.*— Bennett *v.* Reef, 16 Colo. 431, 27 Pac. 252.

Minnesota.— Forepaugh *v.* Pryor, 30 Minn. 35, 14 N. W. 61.

Mississippi.— Green *v.* Gaston, 56 Miss. 748; Marx *v.* Davis, 56 Miss. 745.

New Jersey.— Long Dock Co. *v.* Mallery, 12 N. J. Eq. 93; Hall *v.* Bellows, 11 N. J. Eq. 333.

New York.— Blake *v.* Crowley, 12 N. Y. St. 650.

29. Calkins *v.* Clement, 54 Vt. 635. See also Rein *v.* Callaway, (Ida. 1901) 65 Pac. 63 (holding that the method for foreclosing chattel mortgages given by Ida. Rev. Stat. §§ 3390, 4520, is exclusive, and that even a provision in the mortgage authorizing the mortgagee to take possession and sell upon default cannot confer a right to foreclose in any manner other than that provided by the statute); Titcomb *v.* McAllister, 77 Me. 353 (holding, where the maker of a note gave to a surety on the same, by way of indemnity, a bill of sale of an interest in a vessel, taking in return an agreement to reconvey when the maker paid the note, that this constituted a mortgage which should be foreclosed by the statute mode and not in equity).

30. Rubey *v.* Missouri Coal, etc., Co., 21 Mo. App. 159; Meeker *v.* Waldron, 62 Nebr. 689, 87 N. W. 539. *Contra*, Dupuy *v.* Gibson, 36 Ill. 197.

statutory mode is in most cases held exclusive, it is conceded that resort may be had to a bill in equity in exceptional cases.[31] In some jurisdictions, however, statutes provide that mortgages upon certain classes of chattels may be foreclosed only in a court of record.[32]

3. MODIFYING CIRCUMSTANCES.[33] While the right to foreclose may be lost by destruction of the subject-matter of the mortgage,[34] it is not lost by an agreement on the part of the mortgagee to postpone foreclosure proceedings[35] or to accept payment of the mortgage debt in a particular manner,[36] by an abandonment of foreclosure proceedings prior to a final adjudication,[37] by secretly taking a new mortgage in place of a prior unrecorded mortgage,[38] or by a purchase by the mortgagee of part of the chattels included in the mortgage.[39]

4. TIME OF ACCRUAL. The right to foreclose usually arises upon the breach of any one of the conditions named in the mortgage,[40] but there must be a default within the terms of the mortgage,[41] and, unless thereto expressly authorized by the terms of the mortgage, a mortgagee has no right to commence foreclosure

31. **Resort may be had to equity where** the sum actually due on the mortgage is in dispute (Stillwell-Buice, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68), where there are successive liens and encumbrances on the mortgaged property and various rights and interests to be adjusted (Dupuy *v.* Gibson, 36 Ill. 197), or where the mortgagee refuses to give up possession of the mortgaged chattels so that foreclosure can be had in the manner provided by the mortgage (Sears *v.* Abrams, 10 Oreg. 499).

32. **Foreclosure in a court of record is required by statute in** the case of mortgages upon household goods in Illinois and Ohio. Such statutes are constitutional (Mahoney *v.* Kinney, 7 Ohio S. & C. Pl. Dec. 405, 5 Ohio N. P. 336), but do not apply to the sale of furniture on the instalment plan by regular dealers (Bernstein *v.* Zolotkoff, 70 Ill. App. 369); nor is a piano "necessary household goods" within the meaning of such statutes, unless used as a means of earning a livelihood (Thompson *v.* Elliott, 86 Ill. App. 440; Johnson *v.* Wise, 66 Ill. App. 501).

33. **War suspends right to foreclose** where the mortgagor by reason thereof becomes an alien enemy to the mortgagee. Dean *v.* Nelson, 10 Wall. (U. S.) 158, 19 L. ed. 926.

34. Judge *v.* Forsyth, 11 Fla. 257 (holding that the right to foreclose is lost where the property ceases to be the subject of ownership); Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. 722 (holding that if the property covered by the mortgage is destroyed, ceases to exist, or loses its identity the right to foreclose is gone).

Agreement for cancellation of mortgage.— One tenant in common of a mill mortgaged the realty to his cotenant by one mortgage and the machinery by a second mortgage. Afterward it was agreed that the chattel mortgage be canceled and the machinery be treated as part of the realty. It was held that the mortgagee could not thereafter foreclose the chattel mortgage. Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108.

35. Fox *v.* Kitton, 19 Ill. 519. See also Gibson *v.* McIntire, 110 Iowa 417, 81 N. W. 699 (where the sale was by the assignee of the mortgage who was ignorant of the agreement to foreclose); Beckman *v.* Noble, 115 Mich. 523, 73 N. W. 803 (holding that, where a chattel mortgage recited that it was given on condition that the mortgagees extend the obligations secured by it for forty days and also recited that the trustee under the deed should take possession of and sell the chattels mortgaged when he deemed the indebtedness insecure, the clause extending the time of payment was not inconsistent with the act of the trustee in taking possession of the property at once and beginning to sell).

Breach of agreement as evidence of fraud. — A parol agreement by the mortgagee not to foreclose at a certain season, although unsupported by a consideration, may be evidence of fraud on his part and hence admissible in an action to set aside the sale and redeem. Byrne *v.* Carson, 70 Mo. App. 126.

36. Avery *v.* Bushnell, 123 Mass. 349, holding that an agreement by which the mortgagee was to retain in payment of the mortgage debt a portion of the price of goods manufactured for him by the mortgagor did not preclude him from foreclosing upon breach of condition.

37. Hart *v.* Hatcher, 71 Ga. 717 (holding, where a chattel mortgage had been foreclosed and levied and a counter-affidavit had been filed and returned for trial, that the execution was mesne and not final process and that plaintiff might still dismiss his suit and again foreclose); Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309 (holding, where a mortgage covered both real and personal property, that the fact that in the foreclosure of the real estate mortgage the mortgagee petitioned for a foreclosure of all personal property claimed under the lien did not defeat his right to proceed at law as to such personalty).

38. Letts *v.* McMaster, 83 Iowa 449, 49 N. W. 1035.

39. Connolly *v.* Dillrance, 50 Iowa 92.

40. Cassel *v.* Cassel, 26 Ind. 90; Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; Leland *v.* Collver, 34 Mich. 418; Clark *v.* Baker, 6 Mont. 153, 9 Pac. 911.

41. Edling *v.* Bradford, 30 Nebr. 593, 46 N. W. 836.

proceedings before default.[42] Such right may be conferred by a clause giving the mortgagee a right to take possession and sell at such time as he chooses,[43] at any time that he feels insecure,[44] or if the mortgagor attempts to remove or dispose of the property mortgaged.[45] The right to foreclose before default, where given, is for the benefit of the mortgagee, who cannot be compelled to exercise it.[46] What rights in this respect are conferred by the mortgage is a question of law for the court, and it is error to submit it to the jury.[47]

5. When Barred. On analogy to the statute of limitations, it has been held that the right to foreclose is barred after the lapse of the period within which an action at law may be brought for the possession of the property[48] or to collect the mortgage debt.[49] The statutory period does not begin to run until the time of forfeiture,[50] or, even after forfeiture, as long as the possession of the mortgagor is permissive and not adverse to the rights of the mortgagee.[51] It has also been held that delay for a shorter time tends to raise a presumption that the mortgage debt is satisfied.[52]

B. By Suit in Equity — 1. In General. Unless a different form of procedure has been prescribed by statute[53] proceedings to foreclose a chattel mortgage are properly cognizable in equity,[54] and the general equity power of ascertaining and

42. Koster *v.* Seney, 100 Iowa 558, 69 N. W. 868; Gaulden *v.* McPhaul, 4 La. Ann. 79; Thorn *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335. See also Spaulding *v.* Barnes, 4 Gray (Mass.) 330 (holding that a sale by a mortgagee before foreclosure was a conversion for which the mortgagor could maintain an action); Campbell *v.* Doggett, (Miss. 1898) 23 So. 371 (holding that if a new mortgage is taken to replace an old one, the right to take foreclosure proceedings depends upon matters occurring after the execution of the second instrument and not before).

43. Robinson *v.* Gray, 90 Iowa 699, 57 N. W. 614, 23 L. R. A. 780; Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356.

44. Cole *v.* Shaw, 103 Mich. 505, 61 N. W. 869; Schmittdiel *v.* Moore, 101 Mich. 590, 60 N. W. 279; Rich *v.* Milk, 20 Barb. (N. Y.) 616; Evans *v.* Graham, 50 Wis. 450, 7 N. W. 380.

45. Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356; Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88.

46. Kelly *v.* Bogardus, 51 Mich. 522, 16 N. W. 885, dismissing a bill brought before maturity of the mortgage debt to compel a mortgagee to foreclose and sell the property in a certain order, so as to protect plaintiff in his purchase of certain of the property from the mortgagor. *Compare* New York Cent. Trust Co. *v.* Worcester Cycle Co., 110 Fed. 491, holding that a provision in a chattel mortgage delaying foreclosure for six months after default is for the benefit of the mortgagor only, and if waived by him his general creditors cannot attack a foreclosure prematurely brought.

47. Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356.

48. Ewell *v.* Tidwell, 20 Ark. 136; Sullivan *v.* Hadley, 16 Ark. 129; Young *v.* Wiseman, 7 T. B. Mon. (Ky.) 270, 18 Am. Dec. 176. *Compare* Blake *v.* Lane, 58 N. C. 412, holding that a mortgagee had abandoned his right to foreclose when he had permitted the mortgagor to remain in possession for ten years without making payments.

49. Prewitt *v.* Wortham, 79 Ky. 287. See also Hope *v.* Johnston, 28 Fla. 55, 9 So. 830, holding that a mortgage not under seal is barred after five years from the time the right of action accrued.

50. Byrd *v.* McDaniel, 33 Ala. 18; Joyner *v.* Vincent, 20 N. C. 535.

51. Lewis *v.* Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511; Mertens *v.* Kielmann, 79 Mo. 412; McGowan *v.* Reid, 27 S. C. 262, 3 S. E. 337; Smith *v.* Woolfolk, 115 U. S. 143, 5 S. Ct. 1177, 29 L. ed. 357.

52. Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. 617; Harkness *v.* Toulmin, 25 Mich. 80 (delay of seven years); Blake *v.* Lane, 58 N. C. 412 (delay of sixteen years); Union Nat. Bank *v.* Moline, etc., Co., 7 N. D. 201, 73 N. W. 527 (six years). *Contra*, Boyd *v.* Beck, 29 Ala. 703; Magerstadt *v.* Harder, 95 Ill. App. 303. See also Pitts Agricultural Works *v.* Baker, 11 S. D. 342, 77 N. W. 586, where it was held that failure to comply with the statute requiring sale within twenty days after seizure of the mortgaged property did not destroy the mortgagee's lien, but that he might still bring an action to foreclose.

53. Hatch *v.* Bates, 54 Me. 136; Boston, etc., Iron Works *v.* Montague, 108 Mass. 248.

If an adequate remedy exists outside of equity, as by sale under a power, equity may decline to take jurisdiction. Hannah *v.* Carrington, 18 Ark. 85; Hammers *v.* Dole, 61 Ill. 307; Ricks *v.* Pinson, 21 Tex. 507.

54. *Alabama.*— Humes *v.* Scott, 130 Ala. 281, 30 So. 788.

Florida.— Weston *v.* Jones, 41 Fla. 188, 25 So. 888, holding that attachments in aid of foreclosure proceedings are statutory chancery writs and hence that proceedings to dissolve the attachment must be taken under the rules of chancery practice.

Georgia.— Brown *v.* Greer, 13 Ga. 285.

Illinois.— McCauley *v.* Rogers, 104 Ill. 578;

adjusting the rights of all parties before the court will be exercised.[55] It follows that in such actions liens equitably entitled to priority over the mortgage may be enforced.[56]

2. CONDITIONS PRECEDENT — a. Demand. Neither the mortgagor, the junior mortgagee,[57] nor a purchaser of the mortgaged property, where the mortgage is duly recorded,[58] is entitled to a demand from the mortgagee before suit to foreclose.

b. Recording Notice. In some jurisdictions a notice of the intended foreclosure must be recorded in a prescribed place and within a certain time, in order to foreclose a chattel mortgage by action.[59]

3. VENUE. In the absence of controlling statutes [60] an equitable action to foreclose a chattel mortgage may be brought in any court with equity powers which has jurisdiction over the person of the mortgagor without regard to the *locus* of the mortgaged property,[61] even though in a state other than that where the mortgage was executed.[62] In some jurisdictions it is provided by statute that such

Gaar *v.* Hurd, 92 Ill. 315; Morris *v.* Tillson, 81 Ill. 607; Aldrich *v.* Goodell, 75 Ill. 452; Wylder *v.* Crane, 53 Ill. 490; Dupuy *v.* Gibson, 36 Ill. 197. See also Gilbert *v.* Block, 51 Ill. App. 516, holding, however, that equity would not take jurisdiction unless it appeared in the bill that there was a controversy between the parties and that the mortgagee needed relief.

Indiana.— Brown *v.* Russell, 105 Ind. 46, 4 N. E. 428; Broadhead *v.* McKay, 46 Ind. 595; Blakemore *v.* Taber, 22 Ind. 466; Lasselle *v.* Godfroy, 1 Blackf. (Ind.) 297.

Iowa.— Packard *v.* Kingman, 11 Iowa 219.

Michigan.— Strong *v.* Tomlinson, 88 Mich. 112, 50 N. W. 106.

Montana.— Clark *v.* Baker, 6 Mont. 153, 9 Pac. 911.

New Jersey.—Freeman *v.* Freeman, 17 N. J. Eq. 44; Hall *v.* Bellows, 11 N. J. Eq. 333.

New York.— Blake *v.* Corbett, 120 N. Y. 327, 24 N. E. 477, 31 N. Y. St. 31; Briggs *v.* Oliver, 68 N. Y. 336.

South Carolina.— Bryan *v.* Robert, 1 Strobh. Eq. (S. C.) 334.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 553, 554.

Where action to foreclose is pending a second action by same plaintiff to enforce his claim cannot be maintained. Cederholm *v.* Loofborrow, 2 Ida. 176, 9 Pac. 641.

Where mortgaged property is replevied pending foreclosure proceedings the lien of the mortgagee is not destroyed, and the property, or its proceeds if sold, is held subject to an express trust in his favor, which may be enforced in equity. Humes *v.* Scott, 130 Ala. 281, 30 So. 788.

55. *Connecticut.*— Norton *v.* Ladd, 22 Conn. 203.

Missouri.— Rubey *v.* Missouri Coal, etc., Co., 21 Mo. App. 159.

New York.—Ostrander *v.* Weber, 114 N. Y. 95, 21 N. E. 112, 22 N. Y. St. 979.

South Carolina.— Bryan *v.* Robert, 1 Strobh. Eq. (S. C.) 334.

Washington.— Moody *v.* Noyes, 15 Wash. 128, 45 Pac. 732.

56. Moody *v.* Noyes, 15 Wash. 128, 45 Pac. 732. And see also Shepard, etc., Lumber Co. *v.* Hurd, 55 N. Y. App. Div. 627, 66 N. Y. Suppl. 766, 8 N. Y. Annot. Cas. 264, holding that after action brought the mortgagee could not by agreement with the mortgagor settle the amount due under the mortgage, which had previously been in dispute, so as to bind other encumbrancers who were parties to the suit.

Under guise of an action to foreclose a mortgagee cannot maintain a bill to intercept the money due on a judgment in favor of the mortgagor against a third person to whom he had sold the mortgaged goods. Briggs *v.* Oliver, 68 N. Y. 336.

57. Woodward *v.* Wilcox, 27 Ind. 207.

58. Zehner *v.* Aultman, 74 Ind. 24; Lacy *v.* Gentry, (Tex. Civ. App. 1900) 56 S. W. 949, the latter case holding, however, that failure to make a demand may have an important bearing upon the question of costs.

59. Hatch *v.* Bates, 54 Me. 136; Goodrich *v.* Willard, 2 Gray (Mass.) 203; Southwick *v.* Hapgood, 10 Cush. (Mass.) 119. See also Burtis *v.* Bradford, 122 Mass. 129 (holding that the failure of the town-clerk to index such notice did not affect the validity of the foreclosure); Taber *v.* Hamlin, 97 Mass. 489, 93 Am. Dec. 113 (holding that in cases where a chattel mortgage is valid without record the notice of intention to foreclose is also valid without record). *Compare* Wynn *v.* Ely, 8 Fla. 232, holding that notice of suit to foreclose may be properly given by handing a copy thereof to defendant.

60. See O'Fallon *v.* Elliott, 1 Mo. 364, holding that the circuit court of St. Louis county had no jurisdiction to foreclose chattel mortgages.

61. Brown *v.* Greer, 13 Ga. 285; Means *v.* Worthington, 22 Ohio St. 622; Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517; Jacobs *v.* McCalley, 8 Oreg. 124.

62. Hubbard *v.* Andrews, 76 Ga. 177. See also Carter *v.* Bennett, 6 Fla. 214, holding that a mortgage executed in Georgia and covering both real estate and personal property could be foreclosed in Florida as to the personal property which had been carried there.

What law governs see *supra*, IX [6 Cyc. 1060].

action must be brought in the county where the mortgage is filed,[63] where the notes are payable,[64] or where the mortgagor resides,[65] unless he resides without the state,[66] in which case the proper venue is the county in which the property is found.[67]

4. PARTIES — a. In General. The general rule in regard to parties defendant is that all persons against whom the mortgagee seeks judgment are necessary parties to an action to foreclose[68] and that the foreclosure decree does not affect the rights of persons not parties to the action.[69] While purchasers of the mortgagor's equity in the chattels mortgaged are not only always proper parties,[70] but usually necessary parties as well,[71] subsequent encumbrancers are proper but not necessary parties;[72] and the same distinction has been made in regard to creditors of the mortgagor who have seized the mortgaged property on execution,[73] and persons who have wrongfully converted the mortgaged property to their own use.[74]

b. Mortgagees. It seems on principle better, and in practice safer, to make all mortgagees parties,[75] and after the decease of any mortgagee his personal rep-

63. Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517.

64. Mathews *v.* Denison, 1 Tex. App. Civ. Cas. § 1256. See also Oxsheer *v.* Watt, (Tex. Civ. App. 1897) 42 S. W. 121, holding that if brought in the county in which the notes are payable the court has jurisdiction over a purchaser from the mortgagor who is a nonresident of such county.

65. Harper *v.* Grambling, 66 Ga. 236; Rich *v.* Colquitt, 65 Ga. 113; Callaway *v.* Walls, 54 Ga. 167. See also Brown *v.* Greer, 13 Ga. 285, holding that foreclosure proceedings must be instituted in the county where the mortgagor resided at the time of the execution of the mortgage.

The fiat for foreclosure and the execution thereunder in an action properly brought may be issued by a judge or clerk of courts for any county, without reference to the residence of defendant mortgagor. Guerard *v.* Polhill, R. M. Charlt. (Ga.) 237.

66. Rich *v.* Colquitt, 65 Ga. 113.

67. Hubbard *v.* Andrews, 76 Ga. 177; Griffin *v.* Marshall, 45 Ga. 549.

68. Chapman *v.* Hunt, 14 N. J. Eq. 149; Goodyear *v.* Brooks, 4 Rob. (N. Y.) 682, 2 Abb. Pr. N. S. (N. Y.) 296.

Mortgage of membership in an association. — Inasmuch as a membership in a stock exchange or other association of like nature can be held only by persons to whom the privileges of membership are voluntarily accorded by the association, such association is a necessary party to an action to foreclose a mortgage on a certificate of membership. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. 722.

69. Catlin *v.* Currier, 1 Sawy. (U. S.) 7, 5 Fed. Cas. No. 2,518. See also Cassily *v.* John Church Co., 21 Ohio Cir. Ct. 197, 11 Ohio Cir. Dec. 461 (holding that such a person, if the owner of the goods, may replevy them); Lippincott *v.* Shaw Carriage Co., 34 Fed. 570 (holding that, where a chattel mortgage has been foreclosed in the state courts, it may subsequently be set aside in the federal courts by a creditor, not a party to the foreclosure proceedings, on the ground that it was a preference, but that in such case the mortgagee is obliged to account to such creditor only for his proportionate share of the proceeds). *Compare* Brooks *v.* Lewis, 83 Tex. 335, 18 S. W. 614, 29 Am. St. Rep. 650, holding, where a mortgagee brought an action to foreclose without joining as parties the attaching creditor or the sheriff who held possession under the attachment, that the creditor by purchasing at the sale made under his attachment bought only the equity of redemption.

A mortgagee may enjoin execution of a decree foreclosing a prior mortgage made in an action to which he was not a party. Rucks *v.* Taylor, 49 Miss. 552.

70. Greither *v.* Alexander, 15 Iowa 470.

71. Trittipo *v.* Edwards, 35 Ind. 467; Davis *v.* Diamond, 1 Tex. App. Civ. Cas. § 590 (holding that unless joined as a party the property cannot be taken from the possession of such purchaser).

72. Parrot *v.* Hughes, 10 Iowa 459; Gregory *v.* Cable, 26 N. J. Eq. 178; Rowan *v.* Mercer, 10 Humphr. (Tenn.) 359.

73. Bolling *v.* Vandiver, 91 Ala. 375, 8 So. 290; Krall *v.* Campbell Printing Press, etc., Co., 79 Tex. 556, 15 S. W. 565. See also Mittenthal *v.* Heigel, (Tex. Civ. App. 1895) 31 S. W. 87, holding that the purchaser at an execution sale of the mortgaged property is a proper party.

74. Boydston *v.* Morris, 71 Tex. 697, 10 S. W. 331; McDaniel *v.* Chinski, 23 Tex. Civ. App. 504, 57 S. W. 922 (because if he has disposed of the property a personal judgment may be entered against him).

75. Chapman *v.* Hunt, 14 N. J. Eq. 149, holding that any person having an interest in the mortgage, whether named as mortgagee or not, should be joined as a party in the foreclosure suit. But see Avery *v.* Popper, (Tex. 1898) 48 S. W. 572 [*modifying* (Tex. Civ. App. 1898) 45 S. W. 951], holding that any one of several co-mortgagees may foreclose without joining the others.

Right to foreclose in general see *supra*, XXI, A, 1.

An assignee in trust of the mortgage and notes should be a party to a foreclosure suit. Potter *v.* Holden, 31 Conn. 385.

resentatives should be made parties in his place;[76] but after a legal[77] assignment the original mortgagee is not a necessary party.[78]

c. Mortgagors. As long as a mortgagor[79] continues to hold the equity of redemption he is a necessary party to an action to foreclose;[80] but not after he has parted with his interest,[81] unless it is intended to enforce his personal liability on the note.[82]

d. Persons Entitled to Intervene. Claimants of the mortgaged property, whether claiming as owners[83] or as attaching[84] or judgment[85] creditors, may intervene in an action to foreclose;[86] but general creditors cannot do so.[87] A junior encumbrancer may also be made a party to a foreclosure suit upon his own application,[88] but after final decree an order requiring plaintiff to add new parties is irregular.[89]

5. Pleadings — a. Petition or Complaint. In actions to foreclose[90] the petition or complaint should allege such facts as the mortgagee must prove to establish his case or it will be held bad upon demurrer.[91] Thus a complaint is demurrable which

A junior mortgagee may be joined as a party. Parrott *v.* Hughes, 10 Iowa 459.

76. Harrison *v.* Harrison, 1 Call (Va.) 419.

77. An equitable assignment does not do away with the necessity of making the original mortgagee a party. Fulgham *v.* Morris, 75 Ala. 245.

78. Buckingham *v.* Dake, 112 Fed. 258, 50 C. C. A. 492, holding that such mortgagee after assignment is not a necessary party, although under the mortgage he had a right to certain commissions in case of consignment and sale of the property in a certain manner.

79. Legatees of a mortgagor who dies pending an action to foreclose are not necessary parties (Johnson *v.* Meyer, 54 Ark. 442, 16 S. W. 123), but his personal representatives should be made defendants (Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33).

80. Greither *v.* Alexander, 15 Iowa 470. See also Daniels *v.* Henderson, 5 Fla. 452, holding that where husband and wife executed the mortgage the wife was a necessary party in foreclosure proceedings.

81. Farnsley *v.* Anderson Foundry, etc., Works, 90 Ind. 120; Weir *v.* Rathbun, 12 Wash. 84, 40 Pac. 625. *Contra*, Singleton *v.* Gayle, 8 Port. (Ala.) 270.

82. Goodyear *v.* Brooks, 4 Rob. (N. Y.) 682, 2 Abb. Pr. N. S. (N. Y.) 296; Blake *v.* Crowley, 12 N. Y. St. 650.

83. Oshorne *v.* Barge, 30 Fed. 805, holding that the claim need not be reduced to judgment prior to intervention.

84. Ephraim *v.* Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604.

85. Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 43 Fed. 223, holding, however, that in such case the creditor must disclaim any intention of interfering with the possession of a receiver appointed in such action. *Compare* Donohue *v.* Jackson, 15 N. Y. Suppl. 458, 39 N. Y. St. 916, holding, where mortgagees foreclosed upon chattels which they had allowed to remain in the mortgagor's possession, after commencement of supplementary proceedings by a judgment creditor of the mortgagor, but before such creditor had acquired a specific lien on the property, that the mortgagees had reclaimed their property by the foreclosure and were not liable to such creditor for a conversion.

A judgment creditor cannot garnish the proceeds of the sale under foreclosure or a portion thereof in the hands of the purchaser on the ground that the sale was fraudulent. The very act of the creditor in garnishing the proceeds of the sale operates to affirm it so far as he is concerned. Park *v.* Johnson, 23 Tex. Civ. App. 46, 56 S. W. 759.

The judgment must be prior to the foreclosure suit in point of time in order to entitle the creditor obtaining it to intervene. Standard Oil Co. *v.* R. D. Cole Mfg. Co., 108 Ga. 227, 33 S. E. 825. See also McCauley *v.* Rogers, 104 Ill. 578 [*affirming* 10 Ill. App. 559], holding that a purchaser under such judgment takes no title as against the mortgagee.

86. To make a prima facie case against a claimant the mortgagee must show possession or title of the mortgagor at the date of the mortgage. McCommons *v.* English, 100 Ga. 653, 28 S. E. 386.

87. Ephraim *v.* Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 86 Fed. 35.

88. Parrott *v.* Hughes, 10 Iowa 459.

89. Jouitt *v.* Gaither, 6 T. B. Mon. (Ky.) 251.

90. Service of process. — Notice of the institution of an action to foreclose a chattel mortgage may be served by handing a copy to defendant. Wynn *v.* Ely, 8 Fla. 232.

91. Maddox *v.* Wyman, 92 Cal. 674, 28 Pac. 838.

The complaint must contain the title of the action, the county and court, the names of parties, a statement of facts constituting the cause of action, and a demand for the relief claimed. Murphy *v.* Russell, (Ida. 1901) 67 Pac. 421. *Compare* Barker *v.* Maskell, 101 Cal. 9, 35 Pac. 641, holding that, although Cal. Civ. Code, § 2955, allowed mortgages on furniture in boarding-houses, if given to secure the purchase-price of the furniture, a petition in an action to foreclose a mortgage on furniture in such a house was sufficient

fails to allege the recording of the mortgage in the proper county,[92] that the mortgage debt is due and unpaid,[93] and that there has been a default in the performance of the condition of the mortgage.[94] The complaint must also show of what the mortgaged property consists,[95] the mortgagor's title thereto,[96] and that it is within the jurisdiction of the court,[97] but need not state its value.[98]

b. Plea, Answer, or Cross Complaint. The plea, answer, or cross complaint must state clearly and precisely which allegations of the petition or complaint it admits as true,[99] which ones are denied,[1] and what defenses are to be relied upon,[2]

without an averment that it was given to secure the purchase-price of such furniture.

Where several notes are secured by one mortgage a petition to foreclose the mortgage and for a personal judgment in case of deficiency states only one cause of action. Richardson *v.* Opelt, 60 Nebr. 180, 82 N. W. 377.

Where third persons are made parties to an action to foreclose for the purpose of charging them with the value of the property sufficient facts must be alleged to show the ground of their liability. Albany City Nat. Bank *v.* Hudson River Brick Mfg. Co., 79 Hun (N. Y.) 387, 29 N. Y. Suppl. 793, 61 N. Y. St. 499; Newsom *v.* Beard, 45 Tex. 151. *Compare* Smith *v.* Ellis, 3 Wash. Terr. 328, 21 Pac. 385, holding that the complaint in an action to foreclose a chattel mortgage in which a vendee of the mortgagor was made a defendant was demurrable for failure to allege that defendant had notice, actual or constructive, of plaintiff's mortgage.

Where there is a discrepancy between allegations in the complaint and in the facts which appear in the exhibits annexed thereto, the facts appearing in the exhibits are to be taken as correct. Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86.

An allegation of the assignment of the mortgage is essential where the action to foreclose is brought by an assignee. Chapman *v.* Hunt, 14 N. J. Eq. 149.

The word "foreclosure" need not be used to constitute a valid complaint if all essential allegations are made. Graham *v.* Blinn, 3 Wyo. 746, 30 Pac. 446.

92. Stengel *v.* Boyce, 143 Ind. 642, 42 N. E. 905.

The reasonable intendment of an allegation is, however, to be given it, and so an allegation that the mortgagor resided in a certain county at the date of giving the mortgage is to be taken as meaning that he resided there at the time of its record (Gregory *v.* Cable, 26 N. J. Eq. 178); an allegation that the mortgage was filed by copy together with "a statement of the amount claimed thereon as provided by statute" is a sufficient averment of compliance with the statute requiring the filing of a statement of the mortgagee's interest upon renewal of a chattel mortgage (Gregory *v.* Cable, 26 N. J. Eq. 178); and a complaint which alleges record of the mortgage in A county and has annexed to it a copy of the mortgage which states that the mortgagor resides in A county is not demurrable for failure to allege that the mortgage was recorded in the county in which the mortgagor resided (Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334. *Contra*, Stengel *v.* Boyce, 143 Ind. 642, 42 N. E. 905, holding that an allegation that the mortgage was filed in A county where the mortgagor then lived is not a sufficient averment that the mortgage was recorded in the county where the mortgagor resided at the time of its execution). *Compare* Stringer *v.* Davis, 30 Cal. 318, holding that an averment that certain mortgaged goods were furnished for and used in furnishing the hotel in San Francisco known as the "Willows" was not an allegation that the goods were used in a "hotel" or in a building called the "Willows" or that the "Willows" was a hotel.

93. Chapman *v.* Hunt, 14 N. J. Eq. 149. See also Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334, holding that failure to allege expressly that the mortgage debt was due was cured by the annexing of a copy of the mortgage to the complaint which showed that the debt had matured.

No denial of all known counter-claims need be made to render the complaint sufficient. Blake *v.* Crowley, 44 Hun (N. Y.) 344.

94. Donovan *v.* St. Anthony, etc., Elevator Co., 7 N. D. 513, 75 N. W. 809, 66 Am. St. Rep. 674.

95. Boob *v.* Hall, 107 Cal. 160, 40 Pac. 117 (holding that a statement that the property mortgaged consisted of "ten shares of the capital stock of the Lugonia Water Company, a corporation" was sufficient description); Howell *v.* Frances, (N. J. 1887) 9 Atl. 379; Chapman *v.* Hunt, 14 N. J. Eq. 149. *Compare* Odell *v.* Gallup, 62 Iowa 253, 17 N. W. 502, holding that where the property has been removed to another building by the mortgagor it is not necessary to allege this fact in the petition.

96. Chapman *v.* Hunt, 14 N. J. Eq. 149. *Compare* Edwards *v.* Trittipo, 62 Ind. 121, holding that the complaint need not allege that at the date of executing the mortgage the chattels were the property of the mortgagor.

97. Chapman *v.* Hunt, 14 N. J. Eq. 149.

98. Maddox *v.* Wyman, 92 Cal. 674, 28 Pac. 838.

99. Iowa, etc., Bank *v.* Price, 9 S. D. 582, 70 N. W. 836.

1. McCrea *v.* Hopper, 35 N. Y. App. Div. 572, 55 N. Y. Suppl. 136 [*affirmed* in 165 N. Y. 633, 59 N. E. 1125], holding that if an allegation is not denied it is deemed admitted and evidence to contradict it is not admissible.

2. Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. 638. See also Zumpfe *v.*

for it is a well-settled principle of the law that no defense is available unless properly set up by pleadings.[3]

6. Hearing and Determination. At the trial of an action to foreclose, issues should be framed for the determination of all material questions in controversy, such as the validity of the mortgage[4] and the rights of other encumbrancers to priority.[5] The burden of proof which rests upon the party alleging new matter[6] is successfully sustained by showing an admission of the opposite party.[7]

Kelley, 150 Ind. 634, 50 N. E. 747, holding that a cross complaint claiming the property under a prior mortgage was insufficient for failure to allege that the property covered both mortgages is the same.

The plea must set forth the facts upon which it bases its claim to relief, and it is not sufficient to allege that the mortgage was obtained by fraud, misrepresentation, or duress. The facts constituting such fraud, misrepresentation, or duress should be stated specifically. Bennett *v.* Reef, 16 Colo. 431, 27 Pac. 252; Hartman *v.* Ringgenberg, 119 Ind. 72, 21 N. E. 464; Iowa, etc., Bank *v.* Price, 9 S. D. 582, 70 N. W. 836. But see Riggs *v.* Wilson, 30 S. C. 172, 8 S. E. 848, holding that an answer setting up failure of consideration, fraud, and duress was sufficient, although the facts constituting the alleged duress were not set out. See also Wynne *v.* Admire, (Tex. Civ. App. 1896) 37 S. W. 33, holding that under an allegation merely that he has a superior lien a defendant cannot show a parol agreement, after execution of plaintiff's mortgage, giving defendant priority.

Averment of want of notice.— Purchasers from the mortgagor, who rely upon want of notice of the mortgage, must expressly deny, not only notice before purchase but notice before payment of the purchase-money, and such averment cannot be supplied by intendment. Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736 [*affirming* Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469].

The mortgagor cannot be credited with payments which he claims to have made on the mortgage debt unless the same are properly pleaded (Tatum *v.* Yahn, 130 Ala. 575, 29 So. 201), and the circumstances surrounding such payments and showing that they were made to the proper party set forth (Dunham *v.* Stevens, 160 Mo. 95, 60 S. W. 1064).

3. MacFarlane *v.* Richardson, 56 N. J. Eq. 191, 39 Atl. 131, holding that if the answer fails to set up the defense that the mortgage was not recorded the mortgage cannot be decreed invalid on that ground.

4. Mobile Branch Bank *v.* Taylor, 10 Ala. 67.

Special verdicts are advisory only as foreclosure is an equitable proceeding. Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625.

A certified copy of the mortgage is admissible in evidence. Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 1118.

Payment of the mortgage debt may be proved by a bill of sale of cattle to the mortgagee, the proceeds of which were to be credited on the mortgage, and by the fact that the mortgagee has subsequently sold cattle. Watts *v.* Dubois, (Tex. Civ. App. 1902) 66 S. W. 698.

To prove fraud or duress in obtaining the mortgage evidence of a former transaction between the parties which led to the execution of the mortgage (Riggs *v.* Wilson, 30 S. C. 172, 8 S. E. 848), or evidence of statements made by the agent through whom the mortgagee obtained the mortgage (Watts *v.* Dubois, (Tex. Civ. App. 1902) 66 S. W. 698) is admissible.

What constitutes a defense.— The fact that the mortgagee has violated a verbal promise to the mortgagor which was collateral to the mortgage and formed no part of the original contract does not furnish a defense to a suit to foreclose. Robards *v.* Cooper, 16 Ark. 288.

5. Blythe *v.* Crump, (Tex. Civ. App. 1902) 66 S. W. 885. See also Ott *v.* Doak, 46 Kan. 561, 26 Pac. 1040, holding that all encumbrancers have a right to have the question of their right to priority over the mortgage and to the mortgaged property heard and determined, notwithstanding that the lien of one encumbrancer has already been decided to be superior to the mortgage.

To prove a prior lien upon the property mortgaged, by purchase at an execution sale, the record of the judgment upon which execution issued is not admissible to show the existence of indebtedness prior to its rendition (Troy *v.* Smith, 33 Ala. 469); and the absence of the claimant of the prior lien to avoid testifying justifies an inference that the lien was created subsequently to the mortgage (Chaytor *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250).

6. **The burden of proving increase** of the property mortgaged, where the mortgage is on stock and its increase, is on the mortgagee. In the absence of evidence it will be presumed that there was none. Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340.

The burden of proving that conditional notes were to have been given but that the mortgagee substituted unconditional notes therefor is upon the mortgagor. Scott *v.* Cotten, 91 Ala. 623, 8 So. 783.

7. **The written consent of the mortgagor** to a judgment of foreclosure is sufficient evidence to warrant the rendering of such judgment. Mains *v.* Des Moines Nat. Bank, 113 Iowa 395, 85 N. W. 758.

An agreement as to the amount due on the mortgage made between the mortgagor and the mortgagee, after action brought, is not conclusive evidence as to the amount really due as against other parties to the action. Shepard, etc., Lumber Co. *v.* Franklin Trust

7. Judgment and Decree — a. In General. The practice on foreclosure of a chattel mortgage is, by interlocutory decree, to allow until the next term to redeem, and, in default of redemption, then to issue a final decree barring redemption,[8] which is conclusive as to the rights of parties and cannot be made the subject of attack in a collateral proceeding.[9] In case of the mortgagor's death pending foreclosure the action must be revived against his legal representatives, otherwise no valid foreclosure can be decreed.[10]

b. Requisites and Validity — (i) *In General.* The decree of foreclosure should state in unambiguous terms[11] the order of the court directing foreclosure and the mode in which such order is to be carried out.[12] It should also describe the property affected with reasonable certainty.[13] A decree containing mistakes in material matters is reversible for error.[14]

Co., 55 N. Y. App. Div. 627, 66 N. Y. Suppl. 766, 8 N. Y. Annot. Cas. 264.

Execution of the mortgage.— The recitals of indebtedness in the mortgage and the certificate of acknowledgment are sufficient *prima facie* evidence of the due execution of the mortgage and note. Andrews *v.* Reed, (Kan. 1897) 48 Pac. 29.

Allowance of attorney's fees.— It has been held that, under local rules of practice in one jurisdiction, an attorney's fee for taking judgment in a foreclosure suit cannot be recovered (Holmes *v.* Hinkle, 63 Ind. 518); under the rules of another state the court allowed reasonable counsel fees in a suit to foreclose without regard to the amount of the fee stipulated for in the mortgage (Horan *v.* Harrington, 130 Cal. 142, 62 Pac. 400). *Compare* Missouri Glass Co. *v.* Marsh, (Tex. Civ. App. 1897) 43 S. W. 546, where an attorney who was paid "to support a mortgage" was not allowed to collect a fee for answering in a garnishment suit.

8. Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736 [*affirming* Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469].

If the mortgagor pays all money then due under the mortgage, after action to foreclose is begun, the court cannot render a provisional decree of foreclosure to take effect in case of subsequent default. Fulgham *v.* Morris, 75 Ala. 245.

Where the cross petition of a junior mortgagee seeking to establish the priority of his lien is not supported by the evidence the proper practice is to render judgment against the mortgagor and not to dismiss the cross petition. Hartney *v.* Jordan, 100 Iowa 646, 69 N. W. 1037.

9. Dubuque *v.* Stich, 16 Wash. 641, 48 Pac. 344, holding that the objection that notes are not subjects of chattel mortgage cannot be raised in a collateral proceeding where the mortgage had been foreclosed in a court of competent jurisdiction. See also Gilmore *v.* Kilpatrick-Koch Dry Goods Co., 101 Iowa 164, 70 N. W. 175, holding that one who wrongfully took part of the mortgaged chattels could not claim that the mortgagee had abandoned the mortgage as against the chattels so taken, by taking a decree of foreclosure only on the remaining chattels.

10. Binkley *v.* Forkner, (Ind. 1888) 15 N. E. 343.

11. Mathews *v.* Denison, 1 Tex. App. Civ. Cas. § 1256, holding that an ambiguous decree should be reversed.

12. Pacific Invest. Co. *v.* Ross, 131 Cal. 8, 63 Pac. 67, holding that the decree properly contained a direction to the commissioner appointed to execute it to take immediate possession of the property for the purpose of the sale. *Compare* Frankel *v.* Byers, 71 Tex. 308, 9 S. W. 160, holding that it was error to include in a decree, where the property is claimed by a purchaser, an order that such purchaser deliver the property to the sheriff, and in case of failure so to do that the mortgagee recover its value of him.

13. General Electric Co. *v.* Wightman, 3 N. Y. App. Div. 118, 39 N. Y. Suppl. 420.

14. Filgo *v.* Citizens' Nat. Bank, (Tex. Civ. App. 1896) 38 S. W. 237, holding, where the verdict foreclosed on twenty-three head of cattle only, that a decree foreclosing upon twenty-four was error.

Omissions upon immaterial points, as a failure to make a specific finding that one of the parties was the mortgagor's wife, where the fact appeared in the pleadings (Hall *v.* Glass, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77) or a failure to include in the decree a portion of the property mortgaged, which consisted of crops, it appearing that the crops had all been sold, fed, or seeded (Gammon *v.* Buel, 86 Iowa 754, 53 N. W. 340) are not fatal to the validity of the decree.

An interlocutory order directing a receiver to take possession of and sell the mortgaged property does not render erroneous a final decree directing the master commissioner to sell the property. Hill *v.* Cohen, 22 Ky. L. Rep. 1438, 60 S. W. 922.

Joint mortgagees.— Under a decree foreclosing a chattel mortgage executed to two mortgagees to secure distinct debts, without indicating whether they take as joint tenants or tenants in common, the mortgagees are entitled to the property as joint tenants in proportion to their debts as they then exist, although one debt may have been reduced more than the other. Clarke *v.* Robinson, 16 R. I. 180, 13 Atl. 124.

Where judgment is entered on the note alone and not on the mortgage a subsequent *bona fide* purchaser of the property will,

(II) *Amount.* The sum decreed as due must not exceed the amount due at the time of the decree,[15] including of course interest and legal expenses.[16]

(III) *Personal Judgment on Mortgage Debt.* Against the original mortgagor[17] and against subsequent purchasers of the property who have disposed of or converted it to their own use,[18] a personal judgment for the mortgage debt may be entered in the same action. Where a mortgagee fails to establish his claims to priority in a suit to foreclose, he cannot have a personal judgment against the mortgagor, there being an adequate remedy at law, unless such relief is prayed for in the bill.[19] The same is true in regard to those claiming under the mortgagor who were not personally liable for the debt which the mortgage secured.[20]

c. Sequestration and Receivership. A receiver will not be appointed pending a suit to foreclose, where the mortgagee has an adequate remedy at law,[21] but

nevertheless, obtain a valid title. Johnson *v.* Murphy, 17 Tex. 216.

A lien on the book-accounts of a business is properly included in a decree foreclosing a mortgage upon a stock of goods left in the possession of the mortgagor to sell and to apply the proceeds to the mortgage debt. Dunham *v.* Stevens, 160 Mo. 95, 60 S. W. 1064.

Repayment to an assignee for the benefit of the mortgagor's creditors of sums paid by him on account of the mortgage debt is not a condition precedent to judgment for the mortgagee in an action to foreclose. M. Rumley Co. *v.* Moore, 151 Ind. 24, 50 N. E. 574.

Where two notes are secured by the mortgage, one of which had not matured when the foreclosure proceedings began, judgment may be rendered on both notes, if the mortgage so authorizes. Dalian *v.* Hollacher, 2 Tex. App. Civ. Cas. § 528.

Where valuation laws are waived by the note, but not by the mortgage, judgment may be entered for a sale of the property to satisfy the indebtedness. Mansfield *v.* Shipp, 128 Ind. 55, 27 N. E. 427.

15. Danielson *v.* Gude, 11 Colo. 87, 17 Pac. 283; Wood *v.* Weimar, 104 U. S. 786, 26 L. ed. 779. See also Musselman *v.* Bradley, 22 Nebr. 784, 36 N. W. 282, holding that the sum decreed as due must be reduced to an amount equal to the real value of the property when mortgaged with interest.

Judgment for a sum greater than that specified as due on the mortgage, in the complaint in the action to foreclose, cannot be entered. Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396.

16. Stickney *v.* Stickney, 77 Iowa 699, 42 N. W. 518; Pennington *v.* Pyle, 3 Dana (Ky.) 529; Freiberg *v.* Brunswick-Balke-Collender Co., (Tex. App. 1890) 16 S. W. 784.

17. Handy *v.* Tracy, 150 Mass. 524, 23 N. E. 226; Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350; Whitney *v.* Willard, 13 Gray (Mass.) 203; Lathers *v.* Hunt, 16 Daly (N. Y.) 135, 9 N. Y. Suppl. 494, 30 N. Y. St. 432; Ricks *v.* Pinson, 21 Tex. 507; Gunn *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 278. But see Redlands Hotel Assoc. *v.* Richards, 125 Cal. 569, 58 Pac. 152, holding that the report of the commissioner in regard to the value of the property, estimated without a sale, was insufficient to form the basis for a deficiency judgment.

18. Comer *v.* Lehman, 87 Ala. 362, 6 So. 264; Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517; Sears *v.* Abrams, 10 Oreg. 499. See also Gaar *v.* Hurd, 92 Ill. 315 (holding that when the owner of a one-third interest in chattels, the remaining two-thirds interest in which was subject to a mortgage to plaintiff, removed the chattels from the state the court could order him to pay plaintiff two thirds of their value, instead of ordering a sale); Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. 485 (holding that in an action to foreclose a mortgage, judgment for the debt was properly entered against the mortgagor, and for foreclosure against an assignee of the property in whose possession it was); Moore *v.* Masterson, 19 Tex. Civ. App. 308, 46 S. W. 855 (holding that, where in an action to foreclose intervening creditors had rendered the property worthless and had converted to their own use enough of it to pay the debt, it was proper to enter judgment against them for the amount of the mortgage debt, without ordering foreclosure).

19. Wylder *v.* Crane, 53 Ill. 490. See also Madison *v.* Grant, 6 J. J. Marsh. (Ky.) 641, holding that a mortgagee was not entitled to a personal judgment unless he asked for it. *Compare* Marks *v.* Goldmeyer, 7 Ohio Dec. (Reprint) 454, 3 Cinc. L. Bul. 328, holding that, where a decree of foreclosure is entered without personal judgment against the mortgagor and the case is appealed, no personal judgment can be entered after the appeal.

The impossibility of producing the property must be shown in order to entitle the mortgagee to a personal judgment against the mortgagor for the amount secured. Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517.

20. Weed *v.* Covill, 14 Barb. (N. Y.) 242; Edwards *v.* Dargan, 30 S. C. 177, 8 S. E. 858; Weir *v.* Rathbun, 12 Wash. 84, 40 Pac. 625. *Compare* Daniels *v.* Henderson, 5 Fla. 452, holding that where A and B executed a mortgage to secure A's note, no personal judgment could be entered against B.

21. Minnesota Linseed Oil Co. *v.* Maginnis, 32 Minn. 193, 20 N. W. 85, after forfeiture and pending foreclosure.

equitable grounds for relief may be shown which will justify action. Among these are the inadequacy of property to secure the debt, the insolvency of the mortgagor, and danger that the property will be lost or materially injured.[22] The court cannot order a sale in advance of the regular foreclosure sale on the ground that there is danger of the property suffering a depreciation in value,[23] unless the property is of a perishable nature.[24] In every case the defendants in foreclosure must be given an opportunity to be heard.[25] The property may be released by the execution of a bond by the mortgagor with good security to have the property forthcoming for the fulfilment of the foreclosure decree.[26]

d. Enforcement of Order or Decree — (i) *In General.* The person in possession of the property may be forced to deliver it to the commissioner appointed to conduct the sale by an order of attachment.[27] After the commissioner has sold in accordance with the decree,[28] he must report his doings to the court,[29]

Statute authorizing injunction but not appointment of receiver.— It has been held that section 3317 of the Iowa Code of 1873, which allowed any person interested to contest the right of a chattel mortgagee to foreclose and authorized the issuing of an injunction if necessary, did not authorize the appointment of a receiver. Silverman *v.* Kuhn, 53 Iowa 436, 5 N. W. 523.

22. State Journal Co. *v.* Commonwealth Co., 43 Kan. 93, 22 Pac. 982, holding that, where the mortgagor was a corporation and by reason of dissensions among its officers the property was in danger of suffering material injury, a receiver could be appointed in an action by the mortgagee to foreclose.

Where mortgagee in possession was garnished and had brought suit to foreclose it was held that he was entitled to the appointment of a receiver. Maish *v.* Bird, 59 Iowa 307, 13 N. W. 298.

Where property upon which there were three chattel mortgages was seized on execution by a fourth creditor and a forthcoming bond given therefor, it was held that one of the mortgagees, although vested with power of sale, could upon default by the mortgagor maintain a bill for foreclosure and for the appointment of a receiver to preserve the property from sale under the execution. Bolling *v.* Vandiver, 91 Ala. 375, 8 So. 290.

The affidavit for sequestration in foreclosure proceedings need not name the defendants or allege the name of the person in possession of the property. Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. 638.

Although the appointment of a receiver before suit brought to foreclose is void, it has been held that such appointment may become good if the mortgagor appears in the action subsequently brought and contests the appointment on other grounds. Guy *v.* Doak, 47 Kan. 236, 366, 27 Pac. 968.

23. Wilson *v.* Aultman, etc., Co., 91 Ky. 299, 12 Ky. L. Rep. 881, 15 S. W. 783, holding that neither the statutory provision authorizing the appointment of a receiver in such case (Ky. Civ. Code, § 299) nor the provision of the mortgage itself that the mortgagee upon default might sell at private sale authorized a judge to order a sale in advance of the foreclosure sale.

24. Hill *v.* Cohen, 21 Ky. L. Rep. 1356, 55 S. W. 1; Howell *v.* Frances, (N. J. 1887) 9 Atl. 379 (holding that horses are perishable property). See also Des Moines Valley Nat. Bank *v.* H. B. Claflin Co., 108 Iowa 504, 79 N. W. 279, holding that, under Iowa Code, § 3822, a receiver may be appointed in an action to foreclose a mortgage on personal property in process of manufacture, where, by reason of prior liens, the mortgagee is not entitled to possession and the property mortgaged is likely to depreciate in value unless the manufacture and sale is continued.

25. Meyer *v.* Thomas, 131 Ala. 111, 30 So. 89, refusing to appoint a receiver without notice to the defendants, although the bill alleged collusion between the mortgagor and a junior lienor to whom the mortgagor was about to dispose of the chattels mortgaged.

Obtaining possession by attachment pending foreclosure.— The affidavit to obtain an attachment of mortgaged property for the benefit of the mortgagee need not state that the claim is due over and above all counterclaim. Blake *v.* Crowley, 44 Hun (N. Y.) 344.

26. Williams *v.* Noland, 2 Tenn. Ch. 151.

The party receiving property under a bond in foreclosure proceedings holds it in express recognition of the mortgagee's rights and as trustee for him. Humes *v.* Scott, 130 Ala. 281, 30 So. 788.

27. Com. *v.* Ragsdale, 2 Hen. & M. (Va.) 8.

A receiver's possession in an action to foreclose is that of the mortgagee and cannot be interfered with by creditors of the mortgagor (Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 43 Fed. 223) or by a trustee in insolvency of the mortgagor (New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 86 Fed. 35).

28. Stone *v.* Thacker, (Indian Terr. 1901) 62 S. W. 70, holding that under Indian Terr. Anno. Stat. (1899), § 3376, requiring foreclosure sales made by order of court to be on three months' credit, a sale for cash was invalid.

29. Conger *v.* Robinson, 4 Sm. & M. (Miss.) 210, holding that the mortgage, decree, and commissioner's report are to be taken together as one entire thing; and that, if the property be described in the mortgage, the decree fol-

and the court may order a confirmation which will relate back to the time of sale.[30]

(II) *ADVERTISEMENT.* The description of the property to be sold at the foreclosure sale must be given with reasonable certainty in the advertisement and notice of sale.[31]

(III) *EFFECT.* A sale under a decree of foreclosure satisfies the mortgage debt to the extent of the net proceeds obtained;[32] and by force of statutory provision it has been held to discharge the debt entirely when the person liable therefor was not made a party to the proceedings.[33] In the absence of fraud the price obtained at such sale conclusively fixes the value of the property,[34] and the person conducting the sale is protected against all adverse claimants of the property.[35]

(IV) *RIGHT OF MORTGAGEE TO PURCHASE.* The holder of a mortgage may purchase at the sale, under a decree of foreclosure,[36] and cannot be disturbed in his purchase by the trustee in bankruptcy of the mortgagor, on account of irregularities in the sale.[37]

8. APPEAL. An appeal from a judgment of foreclosure operates as a stay of execution,[38] but presents to the appellate court for review nothing except the judgment of the lower court.[39] Slight uncertainties as to the identity of the property foreclosed upon with the property mortgaged are not sufficient grounds for reviewing the judgment of foreclosure.[40]

lows the mortgage, and the report certifies to the sale of the property described in the decree, the report identifies the property with sufficient certainty.

30. Ruggles *v.* Centreville First Nat. Bank, 43 Mich. 192, 5 N. W. 257, holding, however, that an order directing the correction of a commissioner's report of a foreclosure sale and ordering that upon filing said corrected report the sale shall be in all respects confirmed is irregular but does not make the proceeding void.

31. General Electric Co. *v.* Wightman, 3 N. Y. App. Div. 118, 39 N. Y. Suppl. 420; Sampson *v.* Camperdonn Cotton Mills, 64 Fed. 939.

32. Earnest *v.* Nappier, 19 Ga. 537. *Compare* Chisolm *v.* Chittenden, 45 Ga. 213, holding that the fact that part of the property sold was applied by the mortgagee and mortgagor in compromising the claims of other creditors of the mortgagor did not affect the right of contesting creditors or claimants to have the value of all the property sold credited upon the mortgage debt.

33. Ansonia Nat. Bank's Appeal, 58 Conn. 257, 18 Atl. 1030, 20 Atl. 394, holding that the statutory provision to this effect applied as well to mortgages of chattels as to mortgages of realty and to foreclosure by judicial sale as well as to strict foreclosures.

34. Dehority *v.* Paxon, 115 Ind. 124, 17 N. E. 259, holding that a junior mortgagee by showing that the property did not sell at its full value cannot have the first mortgage satisfied to any larger amount than the price paid. *Contra*, Blackburn *v.* Selma R. Co., 3 Fed. 689, holding that a sale under a decree of foreclosure may be set aside for an advance of price before the sale is confirmed.

Where an appraisement is required by statute, before sale, the fact that the mortgagor waived such requirement does not preclude the mortgagee from moving to set aside the sale for failure to have an appraisement. Minneapolis Threshing Mach. Co. *v.* Beck, 95 Iowa 725, 64 N. W. 637.

35. Carter *v.* Clark, 28 Conn. 512, holding, where a mortgage, void because given to secure the price of liquors sold contrary to law, was foreclosed by order of court, that the officer selling under such order was not liable to a person who has acquired a valid title to the goods prior to foreclosure.

36. Wright *v.* Ross, 36 Cal. 414, holding that in case of such purchase the mortgagee would hold the property subject to no other trust than to pay the surplus, if any, to the mortgagor. See also Ledyard *v.* Phillips, 47 Mich. 305, 11 N. W. 170, holding, where an entire crop was mortgaged except enough to pay for harvesting, that the mortgagee was not precluded by such reservation, upon purchasing on foreclosure, from taking the entire interest sold, without any reservation in the mortgagor's favor.

37. Lyle *v.* Palmer, 42 Mich. 314, 3 N. W. 921, holding that, even if the sale were void for irregularities, the purchaser had at least the rights of a mortgagee in possession.

38. Powers *v.* Crane, 67 Cal. 65, 7 Pac. 135.

39. Marks *v.* Goldmeyer, 7 Ohio Dec. (Reprint) 454, 3 Cinc. L. Bul. 328, holding that plaintiff, by taking judgment by default for the sale of the mortgaged property, waived his claim for judgment on the note; and that upon appeal nothing would be before the appellate court except the mortgage, on which plaintiff would be entitled to an order of sale but not to a personal judgment on the note.

40. Hoffman *v.* Brungs, 83 Ky. 400, holding that a judgment foreclosing upon a stock of goods in a retail store would not be set aside because it did not appear that the stock had not been changed since the giving of the mortgage. See also Edwards *v.* Osman, 84 Tex. 656, 19 S. W. 868, holding, where a mortgage on cattle designated by brands had

C. By Sale Under a Power[41] — **1. AUTHORITY TO SELL.** There is commonly inserted in a chattel mortgage a power authorizing the mortgagee upon default to sell in the manner provided in the mortgage; or else giving a similar right to a third person, in which case the mortgage is called a deed of trust and the third person, to whom the power of sale is given, is called the trustee.[42] Where a power of sale is coupled with an interest neither the mortgagor nor any person claiming through him can prevent its exercise by the mortgagee,[43] even after death of the mortgagor.[44] Statutes often provide that chattel mortgages may be foreclosed by a sale, carried on under prescribed rules, and in such case the provisions of the statute must be followed.[45] It is generally held that under a power of sale mortgage the mortgagee may lawfully foreclose by sale without resort to any court for a decree of foreclosure[46] and if there are two or more mortgagees,

been foreclosed without offering evidence that the increase of the cattle mortgaged had been similarly branded, that a judgment for plaintiff would not be set aside, even assuming the mortgage did not cover such increase.

41. A power to sell confers only a right to sell; and hence it does not authorize the mortgagee to take and retain possession of the mortgaged property without selling. Christian Feigenspan *v.* Mulligan, (N. J. 1902) 51 Atl. 191, a case of the mortgage of a liquor license. *Compare* Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802, holding that such conduct on the part of the mortgagee cannot be questioned by third persons.

42. Jones Chatt. Mortg. (4th ed.) c. 18.

The words creating power of sale need not be express. Thus where promissory notes of a third person were pledged as collateral security, an authority to collect or negotiate such notes, upon default in payment of the debt which they secured, was held to authorize a sale of such collateral notes at public auction. Foraker *v.* Reeve, 36 Wis. 85.

43. Harvey *v.* Smith, 179 Mass. 592, 61 N. E. 217, holding that such power of sale was not revocable by the mortgagor and was not affected by a decree in a suit to which the mortgagee was not a party, which restrained the mortgagor from transferring any interest of any kind in the property mortgaged. *Compare,* however, Fulghum *v.* Williams Co., 114 Ga. 643, 40 S. E. 695, holding that if, after due advertisement of but before actual sale to foreclose, an execution against the mortgagor is levied upon the property, the foreclosure sale will be void and ineffectual to pass title.

44. Cocke *v.* Montgomery, 75 Iowa 259, 39 N. W. 386. *Contra,* Kater *v.* Steinruck, 40 Pa. St. 501, holding the mortgagee who sold after the mortgagor's death liable to the latter's administrator in trover.

Duration of power.— The power to sell upon default does not terminate with the expiration of the period of time for which the mortgage was given. Parlin, etc., Co. *v.* Hanson, 21 Tex. Civ. App. 401, 53 S. W. 62; Sanger *v.* Harris, (Tex. Civ. App. 1897) 42 S. W. 645. *Compare* Shelby *v.* Burtis, 18 Tex. 644, holding that the power of a trustee under a mortgage deed of trust is determined by a suit by the creditor to enforce the security by foreclosure.

45. *California.*—Bendel *v.* Crystal Ice Co., 82 Cal. 199, 22 Pac. 1112; Cal. Civ. Code, § 3005.

Idaho.— Blumauer-Frank Drug Co. *v.* Braustetter, (Ida. 1895) 43 Pac. 575; Ida. Rev. Stat. §§ 3390, 3391.

Illinois.— Lynch *v.* Naylor, 63 Ill. App. 107; Ill. Rev. Stat. c. 75, § 11. See also Robley *v.* Culwell, 69 Ill. App. 272, holding that the Illinois act of June 21, 1895, which provides for an itemized statement of sale to be furnished to the mortgagor, does not apply where the validity of the sale under the mortgage is denied.

Iowa.— Gibson *v.* McIntire, 110 Iowa 417, 81 N. W. 699; Cocke *v.* Montgomery, 75 Iowa 259, 39 N. W. 386; Iowa Code, § 3307; McClain's Code Iowa, § 4543.

Massachusetts.— Burtis *v.* Bradford, 122 Mass. 129; Mass. Rev. Laws, c. 198.

Minnesota.— Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148; Minn. Gen. Laws (1885), c. 171.

Nebraska.— Hall *v.* Aitkin, 25 Nebr. 360, 41 N. W. 192; Loeb *v.* Milner, 21 Nebr. 392, 32 N. W. 205; Nebr. Comp. Stat. c. 12, §§ 2, 6.

South Dakota.— Felker *v.* Grant, 10 S. D. 141, 72 N. W. 81; S. D. Laws (1889), c. 26, § 4.

Washington.— Pickle *v.* Smalley, 21 Wash. 473, 58 Pac. 581; E. C. Meacham Arms Co. *v.* Strong, 3 Wash. Terr. 61, 13 Pac. 245; 2 Ballinger's Anno. Codes & Stat. Wash. §§ 5871, 5872.

Wisconsin.— Vreeland *v.* Waddell, 93 Wis. 107, 67 N. W. 51; Welcome *v.* Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913; Stevens *v.* Breen, 75 Wis. 595, 44 N. W. 645; Wis. Laws (1887), c. 294; Sanb. & B. Anno. Stat. Wis. § 2316*a*.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 533 *et seq.*; and Jones Chatt. Mortg. (4th ed.) cc. 17, 18.

46. *Arkansas.*— Hannah *v.* Carrington, 18 Ark. 85.

Kansas.— Denny *v.* Van Dusen, 27 Kan. 437.

Kentucky.— Spalding *v.* Mattingly, 89 Ky. 83, 8 Ky. L. Rep. 343, 1 S. W. 488.

Missouri.— Keating *v.* Hannenkamp, 100 Mo. 161, 13 S. W. 89.

New Jersey.— Freeman *v.* Freeman, 17 N. J. Eq. 44.

whether joint or several, each has a right to exercise the rights conferred by a power of sale in the mortgage.[47]

2. Demand. A demand upon the mortgagor that he perform the condition of his mortgage is a condition precedent to a valid sale where there can be no default until demand,[48] as where the mortgage note is payable on demand;[49] but even in such case a notice of intention to foreclose has been held equivalent to a demand of payment and to entitle the mortgagee to possession of the mortgaged property.[50] Demand is not necessary if the mortgage waives it,[51] as by authorizing a sale upon default without notice[52] or at such time as the mortgagee deems himself insecure.[53]

3. Conduct of Sale — a. In General. The manner of conducting a sale under the power contained in a chattel mortgage is regulated by the terms of the mortgage itself, supplemented in some jurisdictions by local statutes; and any substantial departure from the manner therein prescribed will render the sale void[54] or at the least voidable;[55] but slight irregularities in the conduct of the sale will not necessarily invalidate it, especially if the rights of no person are thereby prejudiced.[56] The terms of the mortgage may vest in the mortgagee a discretion as

United States.— Samuel *v.* Holladay, Woodw. (U. S.) 400, 21 Fed. Cas. No. 12,288, McCahon (Kan.) 214, 1 Kan. 612.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 533 *et seq.*

47. **Joint mortgagees.**— Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284.

Joint and several mortgagees.— Wilson *v.* Brannan, 27 Cal. 258; Sloan *v.* Thomas Mfg. Co., 58 Nebr. 713, 79 N. W. 728.

A sale by one of several mortgagees has been held to operate to foreclose the entire interest of all the mortgagees, and the proceeds of the sale must be held for the benefit of all the mortgagees (Seattle First Nat. Bank *v.* Woolery, 6 Wash. 215, 33 Pac. 357); but there is authority to the effect that such a sale by one mortgagee makes the purchaser a tenant in common with the other mortgagee (Wilson *v.* Brannan, 27 Cal. 258).

48. Goodrich *v.* Willard, 2 Gray (Mass.) 203.

49. Slingo *v.* Steele-Wedeles Co., 82 Ill. App. 139. *Contra,* Southwick *v.* Hapgood, 10 Cush. (Mass.) 119, holding further that parol evidence was not admissible to show that the mortgage note was given as collateral security to indemnify the mortgagee against certain liabilities which had not matured when notice to foreclose was given.

50. Goodrich *v.* Willard, 2 Gray (Mass.) 203.

Demand not equivalent to entry.— A demand for interest with threats of foreclosure is not equivalent to an entry, where this is required by the power of sale. Silvo *v.* Lopez, 5 Hawaii 262.

51. Maddox *v.* Wyman, 92 Cal. 674, 28 Pac. 838; Willis *v.* Jefferson, 75 Ga. 743.

52. Budweiser Brewing Co. *v.* Capparelli, 16 Misc. (N. Y.) 502, 38 N. Y. Suppl. 972.

53. Huggans *v.* Fryer, 1 Lans. (N. Y.) 276.

54. Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786; Castner *v.* Darby, 128 Mich. 241, 87 N. W. 199; Robley *v.* Culwell, 69 Ill. App. 272, holding that section 2 of the act of June 21, 1895, directing the mortgagee to furnish the mortgagor a list of articles sold, the purchasers, and expenses, does not apply where the validity of the sale is attacked and the mortgagee sued as a trespasser.

The terms of power must be followed in every material particular, since otherwise a sale under such power is not valid; thus a sale by the mortgagee himself where the mortgage authorized a sale by the sheriff is invalid. Lynch *v.* Naylor, 63 Ill. App. 107.

55. *Illinois.*— Hinckley *v.* Cheney, 31 Ill. App. 527.

Iowa.— Schier *v.* Dankwardt, 88 Iowa 750, 56 N. W. 420, holding that a sale should be set aside for fraud and irregularity where the mortgagee acted as auctioneer and bought in most of the property.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305, which suggests that perhaps by sale to a *bona fide* purchaser without notice the mortgagor's equities may be cut off.

New Jersey.— Freeman *v.* Freeman, 17 N. J. Eq. 44, holding that for this reason a sale under judicial sanction is to be preferred.

United States.— Coulson *v.* Panhandle Nat. Bank, 54 Fed. 855, 13 U. S. App. 39, 4 C. C. A. 616.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 538 *et seq.*

An irregular sale does not extinguish the mortgage, but the purchaser succeeds to the rights of the mortgagee. Kelsey *v.* Ming, 118 Mich. 438, 76 N. W. 981.

56. Tackaberry *v.* Gilmore, 57 Nebr. 450, 78 N. W. 32. See Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822, holding that the fact that the mortgagee in foreclosing purchased other goods and sold them in connection with the mortgaged goods did not invalidate the sale.

Sale on credit.— As immaterial departures from the prescribed mode of conducting the sale are not fatal to its validity, it has been held that since the provision in a mortgage requiring the sale to be for cash is inserted for the benefit of the mortgagee, he may waive it and sell on credit but at his own risk (Williams *v.* Hatch, 38 Ala. 338); he may likewise barter the goods at the sale

to the manner of selling the property and in such case he may elect the method he will pursue.[57]

b. Necessity For Public Sale. If not absolutely necessary it is at least extremely desirable that the sale under the power should be by public auction, since by selling at private sale the mortgagee, while not losing his rights under the mortgage,[58] will render himself liable to the mortgagor for any damages the latter may have suffered by reason of the mortgagee's failure to sell publicly, to the extent of the difference between the price realized and the actual value of the property above the mortgage debt.[59]

c. Notice — (i) *GENERALLY.* It is almost universally held that the mortgagor is entitled to receive a reasonable notice of the mortgagee's intended sale,[60] unless such a requisite is waived by an express provision in the mortgage[61] or by the mortgagor subsequently to the execution of the mortgage.[62] A failure to give

provided he gives credit therefor at the full value (Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822). *Contra,* Edwards *v.* Cottrell, 43 Iowa 194, holding that the mortgagee must sell for cash.

57. Brock *v.* Headen, 13 Ala. 370; Bryant *v.* Carson River Lumbering Co., 3 Nev. 313, 93 Am. Dec. 403.

Such a discretion in the mortgagee, however, is not everywhere regarded with favor. Wallace *v.* Bagley, 6 Tex. Civ. App. 484, 26 S. W. 519, holding a mortgage containing such a provision void; but it is not clear that the mortgage was not held void because of the insolvency of the mortgagor at the time of its execution.

58. McConnell *v.* People, 84 Ill. 583; Seaton *v.* Ruff, 29 Ill. App. 235; Kelsey *v.* Ming, 118 Mich. 438, 76 N. W. 981; Chaffee *v.* Atlas Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753; Bryant *v.* Carson River Lumbering Co., 3 Nev. 313, 93 Am. Dec. 403, holding that the mortgagor has an absolute right upon due notice to sell either at public or private sale. *Contra,* Everett *v.* Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31, holding that under the Dakota statute one who sells at private sale is guilty of a conversion of the mortgaged goods and loses his lien thereon. See also Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786, holding that a sale by the mortgagee at private sale is a conversion.

59. *Illinois.*— McConnell *v.* People, 84 Ill. 583; Seaton *v.* Ruff, 29 Ill. App. 235.

Kansas.— Reynolds *v.* Thomas, 28 Kan. 810, holding, however, that the mortgagor might waive his right to call for a public sale.

Maryland.— Booth *v.* Baltimore Steam-Packet Co., 63 Md. 39, holding a mortgagee who sold at private sale liable to account for full value of chattel irrespective of the price actually received.

Michigan.— Botsford *v.* Murphy, 47 Mich. 537, 11 N. W. 375, 376.

Missouri.— Tobener *v.* Hassinbusch, 56 Mo. App. 591.

Nebraska.— Callen *v.* Rose, 47 Nebr. 638, 66 N. W. 639.

New Jersey.— Warwick *v.* Hutchinson, 45 N. J. L. 61; Bird *v.* Davis, 14 N. J. Eq. 467, holding that even the honest efforts of the mortgagees to obtain good prices at the private sale would not necessarily protect them from liability to the mortgagor.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 539.

60. *Alabama.*— Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369.

California.— Wilson *v.* Brannan, 27 Cal. 258.

Idaho.—Blumauer-Frank Drug Co. *v.* Branstetter, (Ida. 1895) 43 Pac. 575.

Minnesota.— Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148.

New Jersey.— Bird *v.* Davis, 14 N. J. Eq. 467.

South Dakota.— Felker *v.* Grant, 10 S. D. 141, 72 N. W. 81.

See also Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289, holding that the mortgagor's right to redeem may be barred by public or private sale without notice.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 536.

Power of adjournment.— It has been held that the mortgagee may in the exercise of a reasonable discretion adjourn the sale under the power from time to time without giving new notice thereof to the mortgagor. Hosmer *v.* Sargent, 8 Allen (Mass.) 97, 85 Am. Dec. 683, holding that the mortgagee may so adjourn the sale without doing so through the agency of a licensed auctioneer. *Contra,* Coad *v.* Home Cattle Co., 32 Nebr. 766, 49 N. W. 757, 29 Am. St. Rep. 465, under statutory provision.

61. Huggans *v.* Fryer, 1 Lans. (N. Y.) 276; Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Ballou *v.* Cunningham, 60 Barb. (N. Y.) 425; Chamberlain *v.* Martin, 43 Barb. (N. Y.) 607; Budweiser Brewing Co. *v.* Capparelli, 16 Misc. (N. Y.) 502, 38 N. Y. Suppl. 972.

62. Harris *v.* Lynn, 25 Kan. 281, 37 Am. Rep. 253.

Waiver of notice.— As the mortgagor can waive the benefit of statutes relating to foreclosure (Marseilles Mfg. Co. *v.* Perry, 62 Nebr. 715, 87 N. W. 544; Welcome *v.* Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913) it follows that on the issue as to whether a mortgage sale was unauthorized it is competent to show a waiver of notice by the mortgagor — as by consent to the sale

proper notices of the sale may operate to give priority to an attachment in favor of a creditor of the mortgagor;[63] but it has been held that title passes to the purchaser notwithstanding the failure,[64] and that the mortgagor or his representative cannot for that reason demand that the sale be set aside.[65] In such case the remedy is against the mortgagee personally,[66] who would be liable to the extent of the damage caused by his neglect, not to exceed the value of the mortgaged property, less the amount of the mortgage lien thereon.[67]

(II) *Sufficiency*—(A) *In General.*[68] Although to be valid the notice of the sale must substantially conform to the requirements of the mortgage or statutes,[69] variations from the requirements as to matters not material are not fatal,[70] and actual knowledge of the sale by the mortgagor will aid in curing slight defects in the notice.[71] Where no particular time is specified the notice must be given a reasonable time in advance of the sale.[72]

(B) *Personal Service.* In some jurisdictions personal service of the notice of the mortgagee's intended sale is required to be made upon the mortgagor,[73]

(Penney *v.* Mutual Invest. Co., 54 Minn. 541, 56 N. W. 165). See also Darnall *v.* Darlington, 28 S. C. 255, 256, 5 S. E. 620, where a mortgage provided for a sale after fifteen days' advertisement by posting notice at A. On default the mortgagee took possession and the mortgagor telegraphed him: "Take stock to Savannah and sell there." It was held that the mortgagor waived notice at A, and that a sale fairly made on two days' notice at Savannah was valid.

Parol waiver.— A provision in a mortgage for notice to the debtor before a sale may be waived by the debtor by parol, in consideration of forbearance. Bourke *v.* Vanderlip, 22 Tex. 221.

63. E. C. Meacham Arms Co. *v.* Strong, 3 Wash. Terr. 61, 13 Pac. 245. *Compare* Blumauer-Frank Drug Co. *v.* Branstetter, (Ida. 1895) 43 Pac. 575, holding that upon receipt of the affidavit and notice for the foreclosure of a chattel mortgage under Ida. Rev. Stat. §§ 3390, 3391, the sheriff must proceed to execute the same, and having levied on the goods described therein must give notice and sell as required by statute, although an attachment or execution of a judgment creditor be subsequently placed in his hands for execution against the same property.

64. Campbell *v.* Wheeler, 69 Iowa 588, 29 N. W. 613. *Compare*, however, Whitehead *v.* Coyle, 1 Ind. App. 450, 27 N. E. 716, holding, where notice was given to the mortgagor but not to his vendee, that the sale was void and the mortgagee could not maintain replevin against such vendee of the mortgagor.

65. Whitaker *v.* Sigler, 44 Iowa 419.

66. Campbell *v.* Wheeler, 69 Iowa 588, 29 N. W. 613.

67. Callen *v.* Rose, 47 Nebr. 638, 66 N. W. 639.

68. Failure to record notice.— It has been held that the failure of the town-clerk to index a notice of intention to foreclose a chattel mortgage and affidavit of service filed in his office cannot affect the validity of the foreclosure. Burtis *v.* Bradford, 122 Mass. 129. See Taber *v.* Hamlin, 97 Mass. 489, 93 Am. Dec. 113, holding that when, under Mass. Gen. Stat. c. 151, a chattel mortgage is valid without record, the notice to foreclose is also valid even if not recorded.

69. Whitehead *v.* Coyle, 1 Ind. App. 450, 27 N. E. 716, holding that where the mortgage required a written notice a verbal notice was insufficient. See also Silva *v.* Lopez, 5 Hawaii 262, holding that where a mortgage required three weeks' notice of time and place of sale a sale on the twentieth day after first publication of notice was invalid.

70. What defects are immaterial.— The following notices, although defective, have been held sufficient on the ground that the defects were as to immaterial matter. Failure to state date and amount of mortgage (Manwaring *v.* Jenison, 61 Mich. 117, 27 N. W. 899) or the year in which the sale is to be held (Waite *v.* Dennison, 51 Ill. 319). So a notice describing the property as "sacks of wheat" when the mortgage describes it as "acres of wheat" is not fatally defective, if in all other respects like the description in the mortgage. Harker *v.* Woolery, 10 Wash. 484, 39 Pac. 100.

Signing of notice.— It has been held that where a sheriff or constable conducts a sale under a chattel mortgage it is not necessary that he sign the notice of sale (Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148); and where the mortgage has not been formally assigned a notice signed by the original mortgagee is sufficient, even though he is no longer the real holder of the mortgage (Carpenter *v.* Artisans' Sav. Bank, 44 Minn. 521, 47 N. W. 150).

71. O. S. Kelley Co. *v.* Chinn, (Iowa 1898) 75 N. W. 315.

72. What is a reasonable time depends upon the circumstances of each case; thus thirteen days' notice (Wilson *v.* Brannan, 27 Cal. 258) and twenty-one days' notice (Waite *v.* Dennison, 51 Ill. 319) have been held sufficient; while in a case where the mortgage provided for the "usual" notice, it was held that two days' notice was insufficient where the usual notice was not less than five days (Bendel *v.* Crystal Ice Co., 82 Cal. 199, 22 Pac. 1112).

73. Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148.

and in such case the same effort should be made to obtain personal service as is required in an action at law.[74]

(c) *Place of Notice.* If the mortgage or statutes prescribe a certain place for giving notice the notice must be given at such place. The most common requirements are publication in some newspaper[75] or by posting notices in some conspicuous place.[76]

d. Obligation to Secure Fair Price. The mortgagee is held at his peril to deal fairly and justly with the property in the exercise of his power of sale,[77] and should refrain from any step which would be likely to prevent the goods from bringing an adequate price.[78]

e. Person Conducting Sale. The sale should be conducted by the mortgagee in person or by his duly authorized agent.[79]

74. Jacobson *v.* Aberdeen Packing Co., 26 Wash. 175, 66 Pac. 419; Pickle *v.* Smalley, 21 Wash. 473, 58 Pac. 581, both cases holding that a constable had no authority to serve such notice. See also Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148, holding that to go to a mortgagor's residence, and, on being informed that he is absent and will not return till night, to leave and make no further effort to find him will not justify omission to make personal service.

75. Felker *v.* Grant, 10 S. D. 141, 72 N. W. 81, holding that a statutory requirement that notice be published in a newspaper printed "nearest the place of sale" is satisfied by publication in any paper in the nearest town, without regard to the relative distances of the places of publication of the several newspapers from the particular premises upon which the sale is to occur.

76. O. S. Kelley Co. *v.* Chinn, (Iowa 1898) 75 N. W. 315. See also Campbell *v.* Wheeler, 69 Iowa 588, 29 N. W. 613, holding that a requirement that notices be posted in a public place is complied with by posting on the court-house, although not on the front of it.

77. Stromberg *v.* Lindberg, 25 Minn. 513; Bird *v.* Davis, 14 N. J. Eq. 467; Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253.

An agreement as to bidding will not invalidate the sale unless it tends to stifle bidding and prevent competition at a public sale. Gross *v.* Jancsok, 16 Daly (N. Y.) 346, 10 N. Y. Suppl. 541, holding a sale valid in spite of a secret agreement between purchaser and mortgagee by which the purchaser was to get the property for three hundred and twenty-five dollars, no matter what any one else bid, but where as events turned out the purchaser's bid of three hundred and twenty-five dollars was the highest made. See also Bradley *v.* Kingsley, 43 N. Y. 534, holding that an agreement between the creditors that the trustees under the mortgage shall assume their bids, hold all the property so purchased, and apply it to the payment of the debts is not contrary to public policy as tending to prevent competition at a public sale.

78. The fact that the mortgaged property brought less at the foreclosure sale than its value does not necessarily tend to prove such fraud as will render the sale voidable (Tootle *v.* Taylor, 64 Iowa 629, 21 N. W. 115; Kingman *v.* Hill, 71 Mo. App. 666); and in arriving at a conclusion as to reasonable value of the property the jury must consider the circumstances under which it was sold, the fact that it was forced upon the market, whether there was a demand for it, its condition, and whether it was out of style or season (Raymond *v.* Miller, 34 Nebr. 576, 52 N. W. 573), and a sale by a mortgagee, authorized upon default to sell to the highest bidder, if *bona fide*, is not invalid because of smallness of bid, for the authority to sell to such bidder is a stipulation that his offer shall fix the value of the property (Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179).

Mortgaged property not at place of sale.— A failure to have the mortgaged property in the possession of the mortgagee at the place of sale and open to inspection may render the sale void (Castner *v.* Darby, 128 Mich. 241, 87 N. W. 199) or voidable (Silva *v.* Lopez, 5 Hawaii 262; Schier *v.* Dankwardt, 88 Iowa 750, 56 N. W. 420; Coulson *v.* Panhandle Nat. Bank, 54 Fed. 855, 13 U. S. App. 39, 4 C. C. A. 616), for it is the duty of the mortgagee in selling to give reasonable opportunity for intending purchasers to inspect the goods offered for sale (Langdon *v.* Wintersteen, 58 Nebr. 278, 78 N. W. 501). *Contra,* Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88, 38 S. W. 247, where, however, the mortgage authorized the mortgagee to sell with or without taking possession.

But the mortgagor may waive this requirement (Lexington Bank *v.* Wirges, 52 Nebr. 649, 72 N. W. 1049), and he will be held to do so if he refuses to produce the property on demand (Foster *v.* Goree, 5 Ala. 424).

Sale of goods in closed boxes, although evidence of fraud, will not necessarily invalidate the sale. Brock *v.* Headen, 13 Ala. 370.

Sale of goods in bulk has been held to be invalid. Hannah *v.* Carrington, 18 Ark. 85; Hungate *v.* Reynolds, 72 Ill. 425; Orcutt *v.* Williams, 63 Ill. App. 407; Barbee *v.* Scoggins, 121 N. C. 135, 28 S. E. 259.

Sale not invalid because goods sold as a lump see Keating *v.* Hannenkamp, 100 Mo. 161, 13 S. W. 89.

Sale not invalid because goods sold at retail see Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822; Johnston *v.* Robuck, 104 Iowa 523, 73 N. W. 1062, where, however, the mortgage authorized foreclosure by private sale either in bulk or by single article.

79. A sheriff or constable in foreclosing a mortgage by direction of the mortgagee acts

f. Time and Place of Sale. The time and place of the sale made under a power of sale in a chattel mortgage are generally regulated either by the mortgage deed[80] or by statute.[81] If, however, there is a general power of sale, with no restriction as to the place where the sale shall be held, the sale may be held at any accessible place upon or near the premises upon which the mortgaged property is situated.[82]

4. Effect of Sale[83] — a. On Equity of Redemption. After default a sale extinguishes the equity of redemption of the mortgagor[84] and also all rights of junior

not in his official capacity but as the private agent of the mortgagee (Mann *v.* Reed, 49 Ill. App. 406; Pittock *v.* Jordan, 19 Oreg. 7, 13 Pac. 510; Robins *v.* Ruff, 2 Hill (S. C.) 406), except where so authorized by statute (Oswald *v.* O'Brien, 48 Minn. 333, 51 N. W. 220; Pittock *v.* Jordan, 19 Oreg. 7, 13 Pac. 510); but a person nominated by the mortgagor to conduct the sale is not the agent of the mortgagee, and the latter is not liable for his improper conduct of the sale (Bentley *v.* Vette, 61 Mo. App. 281, 1 Mo. App. Rep. 379).

80. Buffalo County Nat. Bank *v.* Sharpe, 40 Nebr. 123, 58 N. W. 734.

Sale in another county.— Mortgaged chattels may be sold under the mortgage in a county other than that in which they were at the time the mortgage was executed when the mortgage so provides, if the mortgage is filed in the county where the sale is made (Buffalo County Nat. Bank *v.* Sharpe, 40 Nebr. 123, 58 N. W. 734); the proper filing of the mortgage in such other county is a condition precedent to the validity of the sale (Loeb *v.* Milner, 21 Nebr. 392, 32 N. W. 205); and even where the mortgage itself does not expressly authorize it the mortgagor may authorize a sale in another county, and if such a course is reasonable, attaching creditors of the mortgagor have no grounds for complaint (Tootle *v.* Taylor, 64 Iowa 629, 21 N. W. 115).

81. **Statutory regulations of place of sale.** — Under S. D. Laws (1889), c. 26, § 3, providing that the county commissioners shall designate every year not less than three public places in each county for sale of chattels under mortgage, it has been held that subsequent designations need not be made at regular quarterly meetings. Felkner *v.* Grant, 10 S. D. 141, 72 N. W. 81.

Statutory regulations of time of sale.— In Wisconsin (Laws (1887), c. 294; Sanborn & B. Anno. Stat. § 2316*a*) the sale of property without consent of the mortgagor, before the expiration of five days from actual seizure thereof, is prohibited. This provision, however, may be waived by the mortgagor if he expressly consents to a sale before the expiration of five days. Stevens *v.* Breen, 75 Wis. 595, 44 N. W. 645. See also Loeb *v.* Milner, 21 Nebr. 392, 32 N. W. 205, holding that a provision in a mortgage authorizing a sale in a county other than that in which the mortgagor resides does not waive the statutory requirement that the mortgage be filed in the county where the sale is to take place.

82. Wormell *v.* Nason, 83 N. C. 32, where the mortgaged goods — printing presses — being sold at auction at the door of the court-house, about fifty yards from the premises upon which the presses were located and in use, it was held that such sale passed a title impeachable, if at all, only by the mortgagor and those claiming under him. *Contra*, Barbee *v.* Scoggins, 121 N. C. 135, 28 S. E. 259, holding a sale invalid where the mortgaged goods were sold at the court-house door about one hundred to one hundred and fifty yards from the building in which the property was situated.

83. **Effect on prior irregularities.**— A foreclosure sale operates to set at rest and protect from collateral attack all questions as to the sufficiency of the mortgage deed in its description of the mortgaged property (Austin *v.* French, 36 Mich. 199), and as to the right of the mortgagee to apply payments by the mortgagor before foreclosure to debts other than that secured by the mortgage (Richards *v.* Spicer, 23 Minn. 212).

A parol agreement between the mortgagee, the mortgagor, and a purchaser from the mortgagor to the effect that the mortgagee will release the mortgage on payment of the mortgage debt by the purchaser is binding on the mortgagee, although made after foreclosure by sale. Phelps *v.* Hendrick, 105 Mass. 106.

84. *Alabama.*— Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369.

Illinois.— Wylder *v.* Crane, 53 Ill. 490.

Michigan.— Van Brunt *v.* Wakelee, 11 Mich. 177.

Nebraska.— Adams *v.* Nebraska City Nat. Bank, 4 Nebr. 370.

New York.— Ballou *v.* Cunningham, 60 Barb. (N. Y.) 425; Talman *v.* Smith, 39 Barb. (N. Y.) 390; Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289.

South Carolina.— McClendon *v.* Wells, 20 S. C. 514; Reese *v.* Lyon, 20 S. C. 17.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 551.

The equity is not extinguished by an unfair sale in which the mortgagee disregards the rights of the mortgagor, as by collusion with the purchaser (Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296; Vreeland *v.* Waddell, 93 Wis. 107, 67 N. Y. 51), or as where, by reason of war, the mortgagor becomes an alien enemy (Dean *v.* Nelson, 10 Wall. (U. S.) 158, 19 L. ed. 926); but even though the foreclosure sale be invalid, a subsequent sale by the purchaser from the mortgagee will extinguish the equity of redemp-

mortgagees,[85] and if the sale be lawfully made it passes title to the mortgaged property itself, so that the purchaser becomes the owner of it.[86] In an action against a third person to enforce his title, the purchaser must produce evidence that he has purchased property covered by a valid and existing mortgage.[87]

b. On Mortgage Debt. Where the proceeds of a sale of mortgaged chattels equal or exceed the amount of the debt and the expenses of the sale the mortgage is extinguished;[88] but if the proceeds are insufficient to pay the mortgage debt the mortgagor is personally liable for any deficiency.[89]

tion (Halstead *v.* Swartz, 1 Thomps. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289).

85. Wylder *v.* Crane, 53 Ill. 490; Faeth *v.* Leary, 23 Nebr. 267, 36 N. W. 513.

A purchase in behalf of the mortgagor by a third person at the sale under the first mortgage does not give the purchaser as against junior mortgagees the right to continue the lien of the first mortgage. Thompson *v.* Van Vechten, 27 N. Y. 568.

86. Foster *v.* Goree, 5 Ala. 424 (holding that the purchaser may maintain an action in his own name to recover the property); Garnett *v.* Chapman, (Miss. 1896) 20 So. 863 (holding that a bill of sale of the property made by the mortgagor after foreclosure sale was a nullity).

Title of purchaser.— The title acquired by the purchaser at a mortgage sale is superior to the title previously acquired by another person at an execution sale, based on a judgment rendered subsequently to the recording of the mortgage (Shattuck *v.* Hall, 3 Kan. App. 374, 42 Pac. 1101); and the purchaser at the mortgage sale may recover the property from the purchaser at such execution sale, even if he has transferred his interest in the property, since such transfer was void as against the purchaser at the execution sale (Rust *v.* Electric Lighting Co., 124 Ala. 202, 27 So. 263); the title of such purchaser is likewise superior to that of a receiver appointed subsequently to the sale in proceedings commenced before the sale, whose title by statute relates back to the commencement of the proceedings in which he was appointed (Merry *v.* Wilcox, 92 Hun (N. Y.) 210, 36 N. Y. Suppl. 1050, 72 N. Y. St. 273, where in addition to the above facts the mortgage was void as to creditors because not filed or followed by change of possession); and it is also superior to the title of a previous *bona fide* purchaser from the mortgagor in a state other than that in which the mortgage was recorded and into which the mortgaged property had been taken (Parr *v.* Brady, 37 N. J. L. 201).

87. Razey *v.* Whittick, 75 Hun (N. Y.) 306, 27 N. Y. Suppl. 55, 56 N. Y. St. 776.

Loss of mortgage note.— The purchaser's title is not affected by a loss of the mortgage note after the sale; and in such case the mortgage is admissible together with evidence as to the loss of the note. Howard *v.* Witters, 60 Vt. 578, 15 Atl. 303.

Mortgage without consideration.—The purchaser at a sale under a chattel mortgage for which no consideration was given, the sale, however, taking place with the knowledge of the mortgagor, gets a title good against the mortgagor and his creditors, unless the whole transaction was merely a device to defraud creditors. Allen *v.* Cowan, 23 N. Y. 502, 80 Am. Dec. 316 [*reversing* 28 Barb. (N. Y.) 99].

88. *Alabama.*— Askew *v.* Steiner, 76 Ala. 218, holding that where the mortgagee with the consent of one only of the mortgagors applied the proceeds to the payment of another debt, the mortgage was satisfied as to the non-consenting mortgagor.

Illinois.— Lynch *v.* Naylor, 63 Ill. App. 107.

Michigan.— Long *v.* Moore, 56 Mich. 23, 22 N. W. 97.

New York.— Sherman *v.* Slayback, 58 Hun (N. Y.) 255, 12 N. Y. Suppl. 291, 34 N. Y. St. 383, holding that if the value of the chattels exceeds the amount of the debt the latter is extinguished, despite a sale for a fractional part of their value.

North Carolina.— Weill *v.* Wilmington First Nat. Bank, 106 N. C. 1, 11 S. E. 277.

But see Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148, holding that the fact that under a void sale the mortgagee bid in and retained the property did not have the effect of satisfying the mortgage debt.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 552.

No presumption that the proceeds of sale equal debt.— The mere fact of foreclosure raises no presumption that the mortgaged property sold for enough to pay the debt and costs and that the debt is therefore extinguished. Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 N. Y. St. 776.

89. *Idaho.*— Rein *v.* Callaway, (Ida. 1901) 65 Pac. 63; Advance Thresher Co. *v.* Whiteside, 2 Ida. 806, 26 Pac. 660.

Indiana.— Lee *v.* Fox, 113 Ind. 98, 14 N. W. 889, holding that foreclosure of a chattel mortgage did not preclude the mortgagee from foreclosing a mortgage on real estate securing the same debt.

Kansas.— Mannen *v.* Bailey, 51 Kan. 442, 32 Pac. 1085.

New York.— Dinniny *v.* Gavin, 4 N. Y. App. Div. 298, 39 N. Y. Suppl. 485 [*affirmed* in 159 N. Y. 556, 54 N. E. 1090]; Case *v.* Boughton, 11 Wend. (N. Y.) 106. *Contra*, Hyer *v.* Sutton, 59 Hun (N. Y.) 40, 12 N. Y. Suppl. 378, 35 N. Y. St. 174, holding that foreclosure made maliciously and in bad faith by the mortgagee was a bar to an action against the mortgagor to recover a deficiency.

South Carolina.— National Exch. Bank *v.* Holman, 31 S. C. 161, 9 S. E. 824, holding that the mortgagor was liable for a deficiency

c. Warranty of Title. No warranty of title is implied from a sale of property made under and by virtue of a chattel mortgage.[90] The purchaser is put upon inquiry as to prior encumbrances.[91]

5. Irregular and Void Sales — a. In General. Where the sale is voidable the purchaser gets a defeasible title to the property sold, and when the sale is void no title at all is passed,[92] but until the sale has been set aside or declared void the purchaser remains bound for the purchase-price.[93] An irregular foreclosure sale does not destroy the mortgage lien upon the chattels,[94] for the deed to the purchaser at such sale operates as an assignment of the mortgage.[95]

b. Liability of Mortgagee.[96] A wrongful sale will render the mortgagee liable to the mortgagor for any damages which are caused thereby,[97] unless the mortgagor subsequently ratifies the acts of the mortgagee in selling.[98]

c. Waiver of Irregularities.[99] The parties to a chattel mortgage may agree for a different disposition of the mortgaged property upon breach of condition

notwithstanding the mortgagee had violated a statute in foreclosing.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 552.

90. Harris *v.* Lynn, 25 Kan. 281, 37 Am. Rep. 253; Cohn *v.* Ammidown, 120 N. Y. 398, 24 N. E. 944, 31 N. Y. St. 429; Sheppard *v.* Earles, 13 Hun (N. Y.) 651.

91. Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88, 38 S. W. 247.

The purchaser at a sale under a second mortgage simply steps into the place of the mortgagor and holds his title subject to the prior mortgage (Finkel *v.* Lepkin, 62 N. J. L. 580, 41 Atl. 718), but he is not precluded from denying the validity of an older mortgage simply because the sale was made subject to such older mortgage (White *v.* Graves, 68 Mo. 218).

92. Everett *v.* Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31, where the sale was in violation of a statute. See Collingsworth *v.* Bell, 56 Kan. 338, 43 Pac. 252, where, however, the purchaser was a party to the fraud which invalidated the sale.

Liability of purchaser at defective sale.— Where one who purchases at a mortgage sale which is for any reason defective is sued by the mortgagor for conversion of the mortgaged property, he is entitled, apparently, to set off against the judgment obtained against him the amount which the property he purchased has cut down the mortgage debt (Rogers *v.* Lawrence, 79 Ga. 185, 3 S. E. 559), and the purchaser is not liable to the mortgagor for the difference between the price paid and the price previously agreed upon at a prior attempted sale which was invalid (Potts *v.* McPherson, 21 Ill. App. 121). See Landon *v.* Emmons, 97 Mass. 37, holding that a second mortgagee cannot maintain an action for conversion against a person to whom the first mortgagee, being lawfully in possession, has sold the entire property.

93. Schneider *v.* Greenbaum, 20 Ky. L. Rep. 307, 46 S. W. 2.

After a purchaser has failed to make good his own bid he cannot question the validity of a subsequent sale which is rendered necessary by his neglect. Undeland *v.* Stanfield, 53 Nebr. 120, 73 N. W. 459.

94. Drayton *v.* Chandler, 93 Mich. 383, 53 N. W. 558; Park *v.* Parsons, 10 Utah 330, 37 Pac. 570. See also Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133, holding that an unauthorized foreclosure sale did not postpone the mortgagee to an attaching creditor of the mortgagor. *Contra*, Lovejoy *v.* Merchants' State Bank, 5 N. D. 623, 67 N. W. 956.

95. Walker *v.* Stone, 20 Md. 195. See also Sirrine *v.* Briggs, 31 Mich. 443, holding that a sale made under a power contained in a chattel mortgage always transfers all the right, title, and interest of the mortgagee.

96. Seizure of property not included in the mortgage will render the mortgagee liable to the mortgagor in an action of conversion. Clark *v.* Griffith, 24 N. Y. 595.

97. *Connecticut.*— Beckley *v.* Munson, 22 Conn. 299.

Illinois.— McConnell *v.* People, 84 Ill. 583.

Maryland.— Booth *v.* Baltimore Steam-Packet Co., 63 Md. 39.

Michigan.— Botsford *v.* Murphy, 47 Mich. 537, 11 N. W. 375, 376.

Missouri.— Tohener *v.* Hassinbusch, 56 Mo. App. 591.

Nebraska.— Callen *v.* Rose, 47 Nebr. 638, 66 N. W. 639; Loeb *v.* Milner, 21 Nebr. 392, 32 N. W. 205.

New Jersey.— Warwick *v.* Hutchinson, 45 N. J. L. 61; Bird *v.* Davis, 14 N. J. Eq. 467.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 538.

98. Beckley *v.* Munson, 22 Conn. 299; Reynolds *v.* Thomas, 28 Kan. 810.

If the mortgagor insists on a foreclosure as stipulated, he must himself comply with each condition thereof. See Jacobs *v.* McCalley, 8 Oreg. 124, holding that the mortgagor in such case must deliver the goods to the mortgagee to enable him to sell the same.

99. By accepting the proceeds of a sale under the mortgage, a mortgagor is not necessarily precluded from recovering damages from the mortgagee for misconducting the sale; and in such case evidence of the disposition of the property by the mortgagee after he took possession is admissible upon the issue of good faith in the conduct of the sale. Bennett *v.* Bailey, 150 Mass. 257, 22 N. E. 916.

than that provided by statute,[1] and if the mortgagor knowingly consents to or participates in a wrongful sale of the mortgaged property all irregularities are waived and the sale is equivalent to a foreclosure in proper form.[2]

6. Limitations as to Amount. It is not necessary that all the property covered by the mortgage be sold, for if the sale of a portion is sufficient to pay the whole debt and the expenses of the sale the mortgagee's right of possession is terminated[3] and his title extinguished.[4] There is an implied agreement that the balance unsold be returned to the mortgagor,[5] and a further sale is a conversion for which the mortgagee is liable to the mortgagor in damages.[6] Where the proceeds of the partial sale are insufficient to pay the mortgage debt and expenses the lien upon the remaining property is not discharged.[7]

7. Right of Mortgagee to Buy In — a. Generally. The mortgagee cannot

1. Reynolds *v.* Thomas, 28 Kan. 810; Denny *v.* Van Dusen, 27 Kan. 437; Patrick *v.* Meserve, 18 N. H. 300.

2. *Alabama.*— Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369; Foster *v.* Goree, 5 Ala. 424.

Illinois.— McConnell *v.* People, 71 Ill. 481.

Iowa.— Geiser Mfg. Co. *v.* Krogman, 111 Iowa 503, 82 N. W. 938; Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822.

Nebraska.— Lexington Bank *v.* Wirges, 52 Nebr. 649, 72 N. W. 1049.

New Hampshire.— Lucy *v.* Gray, 61 N. H. 151.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 541.

What constitutes consent or participation. —The terms of the mortgage itself may waive some of the ordinary requirements of a valid sale (Geiser Mfg. Co. *v.* Krogman, 111 Iowa 503, 82 N. W. 938; Lexington Bank *v.* Wirges, 52 Nebr. 649, 72 N. W. 1049), and the mortgagor by participation in the sale with knowledge of, and without objection to, any irregularities is estopped after the sale to take advantage of such irregularities (McConnell *v.* People, 71 Ill. 481; Lucy *v.* Gray, 61 N. H. 151); but no consent or participation is shown by the fact that the mortgagor was present at the sale without objection (Canning *v.* Harlan, 50 Mich. 320, 15 N. W. 492) and made a bid at the sale (Robert *v.* Larnarche, 18 Quebec Super. Ct. 101), or assented to being credited with the amount realized at such sale (Mumford *v.* Crouch, 8 N. Y. App. Div. 529, 40 N. Y. Suppl. 878, 75 N. Y. St. 271), or accepted the surplus proceeds of the sale from the mortgagee (Bennett *v.* Bailey, 150 Mass. 257, 22 N. E. 916). *Compare* McConnell *v.* People, 71 Ill. 481, where the mortgaged property was sold on execution and under the mortgage at the same sale, the execution sale being legally advertised, while the mortgage sale was not notified at all. The mortgagor, however, had actual knowledge in advance of both sales, was present at the sales, and asked for such balance as might remain after satisfying both claims. It was held that the mortgagor's conduct amounted to an acquiescence in the satisfaction of the mortgage debts out of the proceeds of the sale and that he could not later call it in question.

No consideration for the mortgagor's consent to a sale is necessary to make such consent valid and effective. Benedict *v.* Farlow, 1 Ind. App. 160, 27 N. E. 307.

3. Bellamy *v.* Doud, 11 Iowa 285. See also Mannen *v.* Bailey, 51 Kan. 442, 32 Pac. 1085, holding that where a part of the mortgaged property has been sold and the mortgagor claims that the proceeds thereof were sufficient to satisfy the mortgage debt it is a question for the jury whether the debt has been satisfied and how much, if anything, is due thereon. *Compare* Landon *v.* Emmons, 97 Mass. 37, querying whether a sale by the mortgagee of part only of the mortgaged property would amount to a conversion and give the mortgagor an immediate right of action.

4. Moore *v.* Ryan, 31 Mo. App. 474; Charter *v.* Stevens, 3 Den. (N. Y.) 33, 45 Am. Dec. 444.

5. Kohn *v.* Dravis, 94 Fed. 288, 36 C. C. A. 253. But see Campbell *v.* Wheeler, 69 Iowa 588, 29 N. W. 613, holding that although the mortgagee must surrender such surplus property on demand he is not obliged to return it to the mortgagor's premises.

6. *Michigan.*— Botsford *v.* Murphy, 47 Mich. 537, 11 N. W. 375, 376.

Minnesota.— Stromberg *v.* Lindberg, 25 Minn. 513.

Nebraska.— Omaha Auction, etc., Co. *v.* Rogers, 35 Nebr. 61, 52 N. W. 826.

New Hampshire.— Griswold *v.* Morse, 59 N. H. 211.

New York.— Montgomery *v.* Lee, 10 N. Y. St. 119.

Texas.— Rose *v.* Martin, (Tex. Civ. App. 1895) 33 S. W. 284, holding that the mortgagee could not sell part of the mortgaged property held by a purchaser at an execution sale, when the remainder of the mortgaged property was sufficient to satisfy the mortgage debt.

Contra, Keating *v.* Hannenkamp, 100 Mo. 161, 13 S. W. 89; Ingalls *v.* Vance, 61 Vt. 582, 18 Atl. 452.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 540.

7. Hopkins *v.* McCrillis, 158 Mass. 97, 32 N. E. 1026; Rose *v.* Page, 82 Mich. 105, 46 N. W. 227; De Smet First Nat. Bank *v.* Northwestern Elevator Co., 4 S. D. 409, 57 N. W. 77.

legally become a purchaser at his own sale either directly or through the medium of an agent, and if he does the sale, although fairly conducted, will be set aside[8] and the mortgagee must account for the actual value of the property mortgaged;[9] but the consent of the mortgagor will render such a purchase valid.[10] In certain states, however, a mortgagee is permitted to purchase at his own sale without an express assent on the part of the mortgagor.[11] But even in those jurisdictions

8. *Alabama.*— Cunningham *v.* Rogers, 14 Ala. 147.

Arkansas.— Imboden *v.* Hunter, 23 Ark. 622, 79 Am. Dec. 116.

Colorado.— Webber *v.* Emmerson, 3 Colo. 248, holding that a mortgagee who purchased at a mortgagee's sale must account for actual value of the property without reference to the amount bid.

Illinois.— Hungate *v.* Reynolds, 72 Ill. 425; Waite *v.* Dennison, 51 Ill. 319; Phares *v.* Barbour, 49 Ill. 370.

Iowa.—Alger *v.* Farley, 19 Iowa 518.

Kansas.— Wygal *v.* Bigelow, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495.

Maryland.— Korns *v.* Shaffer, 27 Md. 83.

Michigan.— Brown *v.* Mynard, 107 Mich. 401, 65 N. W. 293.

Minnesota.— Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148; Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249. But see Minn. Gen. Stat. (1891), § 4212, which authorizes a mortgagee of chattels to purchase at his own sale, provided he acts fairly, sells at public auction, and by a deputy sheriff or constable.

Missouri.— The Missouri cases seem to limit the mortgagee's right to purchase to cases where such right is expressly conferred upon him by the mortgagor. Parker *v.* Roberts, 116 Mo. 657, 22 S. W. 914; Jewell Pure Water Co. *v.* Kansas City Towel, etc., Co., 74 Mo. App. 150; Clarkson *v.* Mullin, 62 Mo. App. 622, 1 Mo. App. Rep. 575; Moore *v.* Thompson, 40 Mo. App. 195; Moore *v.* Ryan, 31 Mo. App. 474.

New Hampshire.— Griswold *v.* Morse, 59 N. H. 211.

New York.— Pulver *v.* Richardson, 3 Thomps. & C. (N. Y.) 436.

Pennsylvania.— Quick *v.* Van Auken, 3 Pennyp. (Pa.) 469.

Wisconsin.— Pettibone *v.* Perkins, 6 Wis. 616.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 544.

Where the mortgage takes the form of a deed of trust the *cestui que trust* cannot purchase at a foreclosure sale. Hannah *v.* Carrington, 18 Ark. 85.

9. Lynch *v.* Naylor, 63 Ill. App. 107.

10. Where the mortgagor consents to purchase by mortgagee such purchase is permissible, and the consent may be given either in the mortgage deed or otherwise.

Illinois.— Goodell *v.* Dewey, 100 Ill. 308.

Indiana.— Syfers *v.* Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619; Lee *v.* Fox, 113 Ind. 98, 14 N. E. 889.

Iowa.— Gear *v.* Schrei, 57 Iowa 666, 11 N. W. 625.

Missouri.— Byrne *v.* Carson, 70 Mo. App. 126; Clarkson *v.* Mullin, 62 Mo. App. 622, 1 Mo. App. Rep. 575; Moore *v.* Thompson, 40 Mo. App. 195.

Texas.—Goodgame *v.* Rushing, 35 Tex. 722.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 544.

The consent of the mortgagor is not to be inferred from the fact that he attended the sale and himself bid (Pulver *v.* Richardson, 3 Thomps. & C. (N. Y.) 436); nor will the consent of the mortgagor that the first mortgagee purchase at the sale under his mortgage preclude the right of a second mortgagee to redeem or sell to satisfy his own debt (Moore *v.* Thompson, 40 Mo. App. 195).

11. *Illinois.*— Goodell *v.* Dewey, 100 Ill. 308, where sale and purchase was made with consent of mortgagor.

Indiana.— Nichols *v.* Burch, 128 Ind. 324, 27 N. E. 737; Syfers *v.* Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619; Lee *v.* Fox, 113 Ind. 98, 14 N. E. 889; Emmons *v.* Hawn, 75 Ind. 356; Koehring *v.* Altman, 7 Ind. App. 475, 35 N. E. 30.

Iowa.— Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356; Bean *v.* Barney, 10 Iowa 498.

Kansas.— Wygal *v.* Bigelow, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495.

New York.— French *v.* Powers, 120 N. Y. 128, 24 N. E. 296, 30 N. Y. St. 860; Casserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000, 30 N. Y. St. 92; Elliott *v.* Wood, 45 N. Y. 71; Sherman *v.* Slayback, 58 Hun (N. Y.) 255, 12 N. Y. Suppl. 291, 34 N. Y. St. 383; King *v.* Walbridge, 48 Hun (N. Y.) 470, 1 N. Y. Suppl. 11, 16 N. Y. St. 314; Edmiston *v.* Brucker, 40 Hun (N. Y.) 256; Hall *v.* Ditson, 5 Abb. N. Cas. (N. Y.) 198, 55 How. Pr. (N. Y.) 19; Charter *v.* Stevens, 3 Den. (N. Y.) 33, 45 Am. Dec. 444; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61. See also Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298 [*affirming* 40 Barb. (N. Y.) 179], holding such purchase good at law and voidable in equity only at election of parties interested.

South Carolina.— Mills *v.* Williams, 16 S. C. 593; Black *v.* Hair, 2 Hill Eq. (S. C.) 622, 30 Am. Dec. 389.

Tennessee.— Lyon *v.* Jones, 6 Humphr. (Tenn.) 533.

Texas.— Goodgame *v.* Rushing, 35 Tex. 722, where the mortgage authorized the mortgagee to purchase.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 544.

Purchase by one of several co-mortgagees. — If one of several co-mortgagees purchases the mortgaged property at the mortgage sale he must account for the value of the same to his co-mortgagees. Beard *v.* Westerman, 32 Ohio St. 29.

where a purchase by the mortgagee renders the sale invalid the taking of possession by the mortgagee under such sale is not a conversion.[12]

b. Burden of Proving Fairness. Where the mortgagee himself purchases at the sale the burden is upon him to show that the sale was regularly and fairly conducted in every particular and that an adequate price was paid for the goods sold;[13] and if he cannot sustain this burden the sale will be set aside at the election of the mortgagor.[14]

8. Right to Proceeds — a. In General. Although the proceeds of a sale under a chattel mortgage are in no sense to be regarded as a voluntary payment, the application of which the debtor has authority to direct,[15] after payment of the expenses, the net proceeds must be credited to the mortgagor as a payment on account of the mortgage debt.[16] They must be first applied in payment of the debt secured by the mortgage[17] and any prior encumbrances or liens on the mortgaged property.[18] It is also a well settled rule that a junior mortgagee of the

Purchase by second mortgagee.— If a junior mortgagee sells under his mortgage and himself becomes the purchaser he still holds the property subject to the lien of the senior mortgage. Koehring *v.* Altman, 7 Ind. App. 475, 35 N. E. 30.

12. Brown *v.* Mynard, 107 Mich. 401, 65 N. W. 293; Powell *v.* Gagnon, 52 Minn. 232, 53 N. W. 1148.

The right to make a second valid sale is not destroyed by a previous sale at which the mortgagee bids the property in himself. Cushing *v.* Seymour, 30 Minn. 301, 15 N. W. 249.

The mortgagor may purchase at a foreclosure sale (Hall *v.* Ditson, 5 Abb. N. Cas. (N. Y.) 198, 55 How. Pr. (N. Y.) 19; Bame *v.* Drew, 4 Den. (N. Y.) 287); and so may his wife (Houston *v.* Nord, 39 Minn. 490, 40 N. W. 568).

13. Nichols *v.* Burch, 128 Ind. 324, 27 N. E. 737; Black *v.* Hair, 2 Hill Eq. (S. C.) 622, 30 Am. Dec. 389; Lyon *v.* Jones, 6 Humphr. (Tenn.) 532. *Contra*, Geiser Mfg. Co. *v.* Krogman, 111 Iowa 503, 82 N. W. 938, holding that the burden is on the mortgagor to show that the sale was not made in good faith.

14. Sale to mortgagee set aside for fraud. — If the mortgagee purchases the mortgaged property at a grossly inadequate price (Wygal *v.* Bigelow, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495; Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521), as for one sixth of its cost (Alger *v.* Farley, 19 Iowa 518), sells without an appraisal of the property, where this is required (Webb *v.* Hunt, 2 Indian Terr. 612, 53 S. W. 437), induces others not to bid, whereby he is enabled to purchase the property for less than its value (Griswold *v.* Morse, 59 N. H. 211), or colludes with another whereby he unfairly obtains the property (Pettibone *v.* Perkins, 6 Wis. 616) the sale will be voidable at the election of the mortgagor.

To entitle the mortgagor to an accounting for the value of property sold under the mortgage and bought in by the mortgagee, on the ground that the sale was illegal, an offer to pay the amount due on the mortgage must be alleged. Casserly *v.* Witherbee, 28 N. Y. Wkly. Dig. 388. *Contra*, Wygal *v.* Bigelow, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495.

The mortgagor must act with reasonable promptness in objecting to the sale (Wylder *v.* Crane, 53 Ill. 490), and a delay of nine years is unreasonable (Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375).

Mortgagee cannot question sale.—The mortgagee himself, however, cannot call in question the regularity of a sale at which he is the purchaser (Williams *v.* Hatch, 38 Ala. 338; Massey *v.* Hardin, 81 Ill. 330), nor can a creditor of the mortgagor, where the mortgagor acquiesces in the sale (Brown *v.* Mynard, 107 Mich. 401, 65 N. W. 293).

15. Tolerton, etc., Co. *v.* Roberts, 115 Iowa 474, 88 N. W. 966; Nichols *v.* Knowles, 3 McCrary (U. S.) 477, 17 Fed. 494.

16. H. A. Pitts' Sons Mfg. Co. *v.* Lewis, 30 Kan. 541, 1 Pac. 812, holding that the mortgagor is entitled to a credit of the net proceeds only.

17. *Alabama.*— Schiffer *v.* Feagin, 51 Ala. 335, holding that the proceeds of the sale must be applied to the payment of the mortgage debt to the exclusion of debts subsequently contracted.

California.— McGarvey *v.* Hall, 23 Cal. 140.

Iowa.— Tolerton, etc., Co. *v.* Roberts, 115 Iowa 474, 88 N. W. 966; Citizens' Bank *v.* Whinery, 110 Iowa 390, 81 N. W. 694, holding that the statute regulating the disposition of the surplus proceeds did not prescribe the application of payments by the mortgagee to different debts secured by the mortgage.

Maine.— Low *v.* Allen, 41 Me. 248.

Massachusetts.— Saunders *v.* McCarthy, 8 Allen (Mass.) 42.

South Carolina.— Summer *v.* Kelly, 38 S. C. 507, 17 S. E. 364; Hartzog *v.* Goodwin, 37 S. C. 603, 15 S. E. 880; Hunter *v.* Wardlaw, 6 S. C. 74.

Tennessee.—Acuff *v.* Rice, 3 Head (Tenn.) 292.

Wisconsin.—Masten *v.* Cummings, 24 Wis. 623.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 547.

18. Dowie *v.* Christen, 115 Iowa 364, 88 N. W. 830.

property is entitled to any part of the proceeds remaining after satisfying prior encumbrances.[19]

b. Where Mortgagee Has Other Security. Where the mortgagee has security other than the mortgage for part of the debt, as the indorsement or guaranty of some of the mortgage notes by a third person, he may apply the proceeds of a foreclosure sale, first to satisfying the part of the debt secured only by the mortgage.[20]

c. Surplus — (1) *In General.* All sums realized on foreclosure in excess of the amount required to pay the mortgage debt and necessary expenses of foreclosure belong to the mortgagor,[21] but until the mortgage debt and all reason-

19. *Connecticut.*— Butler *v.* Elliot, 15 Conn. 187.

Mississippi.—Davis *v.* Marx, 55 Miss. 376, holding, where a chattel mortgage was given to A on a gray horse and all other live stock which the mortgagor might own during the year, and within the year the gray horse was exchanged for another horse for which a mortgage was given to B, with notice of the prior mortgage, that the new horse should be sold, and out of the proceeds the value of the gray horse should be applied on the first debt and the balance, if any, upon the last debt.

Nebraska.— Russell *v.* Lau, 30 Nebr. 805, 47 N. W. 193, holding first mortgagee liable to second mortgagee for turning over surplus to mortgagor, in whose hands it was attached by other creditors.

South Dakota.— Smith *v.* Donahoe, 13 S. D. 334, 83 N. W. 264, holding that junior mortgagee could maintain trover upon refusal to pay over surplus.

Washington.— Howard *v.* Gemming, 10 Wash. 1, 38 Pac. 748.

United States.— Butt *v.* Ellett, 19 Wall. (U. S.) 544, 22 L. ed. 183.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 545.

Debts not matured.— It has been held that the mortgagee has no right to apply the proceeds of the sale in payment of part of the mortgage debt not yet matured (Loeb *v.* Milner, 21 Nebr. 392, 32 N. W. 205), unless he is expressly authorized so to do by the mortgagor (Hogan *v.* Hudson, 110 Mich. 54, 67 N. W. 1081).

20. Citizens' Bank *v.* Whinery, 110 Iowa 390, 81 N. W. 694; Nichols *v.* Knowles, 3 McCrary (U. S.) 477, 17 Fed. 494. See also Tolerton, etc., Co. *v.* Roberts, 115 Iowa 474, 88 N. W. 966, holding that such right was not lost by the mortgagee's representation to the surety, as an inducement for him to sign one of the notes, that the proceeds would have to be applied first to paying the secured notes, as such representation was merely a statement of the mortgagee's interpretation of the law.

21. *Colorado.*— Colorado Springs First Nat. Bank *v.* Wilbur, 16 Colo. 316, 26 Pac. 777. See also Rhoads *v.* Gatlin, 2 Colo. App. 96, 29 Pac. 1019, holding that the mortgagor could recover the surplus in a replevin suit brought by the mortgagee to obtain possession of the mortgaged property, where the sale was before judgment.

Indiana.— Hartman *v.* Ringgenberg, 119 Ind. 72, 21 N. E. 464; Stewart *v.* Long, 16 Ind. App. 164, 44 N. E. 63 (holding a failure to account for the surplus a conversion).

Iowa.— Hoffman *v.* Wetherell, 42 Iowa 89. See also Keairnes *v.* Durst, 110 Iowa 114, 81 N. W. 238, holding that the mortgagee could retain a sufficient sum to cover necessary expenses incurred in foreclosure.

Kansas.— Denny *v.* Faulkner, 22 Kan. 89. See also Cooper *v.* Washington First Nat. Bank, 40 Kan. 5, 18 Pac. 937, holding that the mortgagee could not relieve himself of his obligation to account for the surplus by assigning the evidences of indebtedness to another.

Maryland.— Korns *v.* Shaffer, 27 Md. 83, holding that the mortgagor might invoke the aid of equity for an account.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.

Missouri.— White *v.* Quinlan, 30 Mo. App. 54.

Nebraska.— Lathrop *v.* Cheney, 29 Nebr. 454, 45 N. W. 617.

New Hampshire.— Osgood *v.* Pollard, 17 N. H. 271.

New York.— Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. (N. Y.) 211. See Davenport *v.* McChesney, 86 N. Y. 242, holding that the mortgagor might regard the surplus as unpaid purchase-money in the hands of the mortgagee.

North Carolina.— Vick *v.* Smith, 83 N. C. 80, holding the mortgagee to be a trustee of the surplus for the mortgagor.

Ohio.— Root *v.* Davis, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445.

South Carolina.— Martin *v.* Jenkins, 51 S. C. 42, 27 S. E. 947; National Exch. Bank *v.* Holman, 31 S. C. 161, 9 S. E. 824; Robins *v.* Ruff, 2 Hill (S. C.) 406, where the court refused to order that the surplus should be applied to executions levied subsequently to the mortgage.

Texas.— Ashworth *v.* Dark, 20 Tex. 825.

Virginia.— Moore *v.* Aylett, 1 Hen. & M. (Va.) 29.

Wisconsin.— Sanger *v.* Guenther, 73 Wis. 354, 41 N. W. 436; Moak *v.* Bourne, 13 Wis. 514; Flanders *v.* Thomas, 12 Wis. 410.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 545.

Conditional sales.— A chattel mortgage, given to secure the price of goods, payable in weekly or monthly instalments, which gives the mortgagee a right to take possession upon

able expenses of foreclosure have been fully satisfied and there is a surplus remaining he has no rights in any part of the property seized for sale or its proceeds.[22] The mortgagee is strictly accountable for the proceeds of the sale,[23] and an action will lie to compel him to render an account.[24] If the mortgagee retains possession of the mortgaged property after default instead of selling it, he is accountable in equity for its market value,[25] although no right of action exists against him which can be enforced at law.[26]

(II) *Rights of Third Parties.* The general creditors of the mortgagor,[27]

default as trustee and not as owner, is not within Ohio Rev. Stat. § 4155, the Conditional Sales Act, and hence the mortgagee is not bound to repay the mortgagor fifty per cent of former payments out of the proceeds of the sale. Goodman *v.* Manning, 9 Ohio S. & C. Pl. Dec. 373, 5 Ohio N. P. 94.

Garnishment of the mortgagee after default in an action against the mortgagor is permissible either for the surplus of the property or its proceeds after payment of the mortgage debt, as the property or credits of the mortgagor in the hands of the mortgagee. Doane *v.* Garretson, 24 Iowa 351.

Interest on surplus.— The mortgagee is liable for interest on any surplus unreasonably detained by him, but not for profits from the property unless received before the sale. Moore *v.* Aylett, 1 Hen. & M. (Va.) 29. *Compare* Osgood *v.* Pollard, 17 N. H. 271, holding that, where a mortgagee of personal property has been in possession, deriving an income therefrom, and subsequently forecloses by sale, the mortgagor cannot recover for the use by a suit in assumpsit.

Income from or earnings of the mortgaged property pending foreclosure should be applied by the mortgagee, to whom they belong, in satisfaction of the mortgage debt. McCann *v.* Letcher, 8 B. Mon. (Ky.) 320; Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64.

Subsequent increase in value.— The mortgagee is not liable for a subsequent rise in value of the property sold. Moore *v.* Aylett, 1 Hen. & M. (Va.) 29. *Contra,* Cunningham *v.* Rogers, 14 Ala. 147, holding, where the mortgagee bought the goods at the foreclosure sale and later resold at a profit, that he held the difference between the two sales in trust for the mortgagor.

22. Powers *v.* Elias, 53 N. Y. Super. Ct. 480; Strauh *v.* Screven, 19 S. C. 445. See Dreyfus *v.* Cage, 62 Miss. 733, holding that mortgagor had no claim where only part of the goods had been sold and only part of the debt paid with the proceeds realized.

The holder of an indemnity mortgage upon foreclosure is entitled to retain only so much of the proceeds of the sale of the property as will adequately secure the amount which it is ascertained he may become liable to pay. Sanders *v.* Davis, 13 B. Mon. (Ky.) 432.

23. Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.

24. McClendon *v.* Wells, 20 S. C. 514; Reese *v.* Lyon, 20 S. C. 17.

25. Craig *v.* Tappin, 2 Sandf. Ch. (N. Y.) 78; Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.

26. Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179. *Compare* Lathrop *v.* Cheney, 29 Nebr. 454, 45 N. W. 617, holding that a mortgagee who had recovered possession by replevin was liable to account for the value of the property over the mortgage debt.

Extent of mortgagee's accountability.— Where possession of the mortgaged chattels was not transferred upon the execution of the mortgage, the mortgagee was accountable only for such of the property as had come into his possession. Durkee *v.* Leland, 4 Vt. 612.

27. *Arkansas.*— Biscoe *v.* Royston, 18 Ark. 508, holding that general creditors could compel foreclosure of an overdue mortgage deed of trust, in order that the surplus should be applied to their claims.

Iowa.— Torbert *v.* Hayden, 11 Iowa 435, holding (*semble*) that a receiver may be appointed to take charge of the property, pay off the mortgage, and apply the surplus to the claims of other creditors.

Mississippi.— Humphries *v.* Bartee, 10 Sm. & M. (Miss.) 282.

Nebraska.— Rockford Watch Co. *v.* Manifold, 36 Nebr. 801, 55 N. W. 236; Lininger *v.* Herron, 23 Nebr. 197, 36 N. W. 481.

New York.— Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 36 N. Y. St. 338, 21 Am. St. Rep. 678 [*reversing* 57 Hun (N. Y.) 78, 10 N. Y. Suppl. 323, 32 N. Y. St. 267, which held that if the mortgage was originally void as against creditors such creditors could not compel the mortgagee to refund the proceeds of a sale under the mortgage]. *Compare* Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179, holding that evidence of the value of the mortgaged property is not admissible in an action by a creditor to compel the mortgagee to account for proceeds of the sale.

Ohio.— Carty *v.* Fenstemaker, 14 Ohio St. 457, holding that an attaching creditor of the mortgagor is entitled to the surplus of the proceeds of the sale, after satisfying the mortgage, notwithstanding that the mortgagor had assigned the surplus to the mortgagee. See also Bates *v.* Wiles, 1 Handy (Ohio) 532, 12 Ohio Dec. (Reprint) 274; Grinnel *v.* Brashears, 1 Handy (Ohio) 509, 12 Ohio Dec. (Reprint) 262, both cases holding that the value of such interest may be determined without a sale by reference to a master.

Wisconsin.— Salter *v.* Eau Claire Bank, 97 Wis. 84, 72 N. W. 352, holding that while a mortgage before foreclosure is valid as against the mortgagor's creditors merely for the amount of the recited consideration, yet that after foreclosure this question cannot be raised, and the mortgagee, even if the mort-

creditors who have garnished the mortgagee,[28] creditors holding executions against the mortgagor,[29] judgment creditors of the mortgagor whose judgments are subsequent to the mortgage,[30] a receiver of the property of the mortgagor,[31] and a purchaser of the mortgaged property from the mortgagor[32] have all been held to have a right in equity to any interest which the mortgagor may have in the mortgaged property or its proceeds after the mortgage debt is satisfied.

D. Statutory Modes of Foreclosure — 1. In General. Under a statute allowing foreclosure to be effected by means of an affidavit, the affidavit must show upon its face the jurisdiction of the court to which it is addressed,[33] by stating that defendant resides in the county where the mortgage is to be foreclosed,[34] and by stating the necessary facts to show the rights of the mortgagee and the object of the affidavit.[35] The affidavit must be verified by the oath of the mortgagee or his attorney,[36] and when so verified and properly filed,[37] execution thereon may be issued by a clerk of the superior court without a special order of court.[38] As a defense the mortgagor may avail himself of counter demands against the mortgagee by way of set-off;[39] but failure to set up defense

gage recites a nominal consideration only, is entitled to retain out of the proceeds the entire debt which the mortgage was given to secure.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 546.

28. Glass *v.* Doane, 15 Ill. App. 66; Jewell Pure Water Co. *v.* Harkness, 49 Mo. App. 357 (holding that such garnishing creditor was not entitled to the surplus where it had previously been assigned to the mortgagee to be applied on other indebtedness of the mortgagor); Boardman *v.* Cushing, 12 N. H. 105.

29. McConnell *v.* People, 84 Ill. 583; McCann *v.* Letcher, 8 B. Mon. (Ky.) 320. But see *contra*, Fahy *v.* Gordon, 133 Mo. 414, 34 S. W. 881; Robins *v.* Ruff, 2 Hill (S. C.) 406, both cases holding that where a sheriff attaches mortgaged property at the suit of an unsecured creditor he does not thereby acquire any right to the surplus proceeds of the sale after the mortgage debt is satisfied.

30. Rasin *v.* Swann, 79 Ga. 703, 4 S. E. 882; Janes *v.* Penny, 76 Ga. 796 (holding that, notwithstanding a failure to record the mortgage within the time prescribed by law, the proceeds of the sale could be retained by the mortgagee as against a subsequent creditor); McKeithen *v.* Butler, 2 Rich. Eq. (S. C.) 37.

31. Davenport *v.* McChesney, 86 N. Y. 242; Merry *v.* Wilcox, 92 Hun (N. Y.) 210, 36 N. Y. Suppl. 1050, 72 N. Y. St. 273.

32. Lee *v.* Buck, 13 S. C. 178, holding that out of the surplus proceeds of the sale the mortgagee must account to a purchaser of part of the mortgaged goods for the value of the part so purchased.

33. Lewis *v.* Frost, 69 Ga. 755.

The entire proceedings are void if the affidavit fails to show jurisdiction on its face. Hamilton *v.* Kerr, 84 Ga. 105, 10 S. E. 502.

34. Harper *v.* Grambling, 66 Ga. 236; Callaway *v.* Walls, 54 Ga. 167.

35. Lilly *v.* Willis, 73 Ga. 139, holding that an affidavit is sufficient provided the mortgagee states that he is the owner and holder of the mortgage, that the mortgagor is indebted to him in a specified sum, and that he makes the affidavit in order to foreclose. *Compare* Duke *v.* Culpepper, 72 Ga. 842, holding that an affidavit alleging that the mortgage was executed by C, trustee for E, E being indebted and C being her agent, was insufficient.

An error in stating the amount of the mortgage in the affidavit does not invalidate proceedings thereunder, but only the amount actually due can be retained by the mortgagee. Vance *v.* Roberts, 86 Ga. 457, 12 S. E. 653.

The mortgage may be annexed to the affidavit, and where this is done, and the affidavit identifies the mortgage by its date and amount, the affidavit is not void for failing to state that the mortgage is annexed to it. Bosworth *v.* Matthews, 74 Ga. 822.

Where the original mortgage is lost a certified copy may be annexed to the affidavit. Holt *v.* Holt, 23 Ga. 5.

36. Matthews *v.* Reid, 94 Ga. 461, 19 S. E. 247. See also Kirkpatrick *v.* Augusta Bank, 30 Ga. 465, holding that a foreclosure of a chattel mortgage to the Bank of Augusta was not invalid because the affidavit was in the name of "John Bones, President of the Bank of Augusta" instead of in the name of "John Bones, as President of the Corporation, viz: The President, Directors and Company of the Bank of Augusta."

The burden of proof in such case is on the mortgagor. Swanson *v.* Cravens, 105 Ga. 471, 30 S. E. 642; Smith *v.* Walker, 93 Ga. 252, 18 S. E. 830, holding that duress was properly pleaded.

Unless sworn to the affidavit is void and no execution can issue thereon (Matthews *v.* Reid, 94 Ga. 461, 19 S. E. 247), and a failure by the magistrate to subscribe the jurat is also fatal to its validity (Davidson *v.* Rogers, 80 Ga. 287, 7 S. E. 264).

37. Adams *v.* Goodwin, 99 Ga. 138, 25 S. E. 24, holding that the affidavit may be filed with a justice of the peace.

38. Chamberlin *v.* Beck, 68 Ga. 346, holding also that the affidavit may be sworn to before a clerk of the superior court.

39. Garner *v.* Cohen, 99 Ga. 78, 24 S. E. 851.

by counter-affidavit prevents the mortgagor from availing himself of the validity of the mortgage after the foreclosure has been completed.[40]

2. AMENDMENT OF AFFIDAVIT. Formerly affidavits to foreclose were not amendable and defects were fatal,[41] but this has been changed by statute and such affidavits are now amendable to the same extent as ordinary declarations.[42]

3. ISSUE AND LEVY OF EXECUTION. The making of the affidavit alone is not sufficient; the issuing of the execution thereunder is also necessary to effect a valid foreclosure,[43] but the execution need not be entered on the general docket.[44] The mortgagor need not point out the property sought by the sheriff under an execution to foreclose.[45] The dismissal of the levy as to some of the property with the consent of the mortgagee will not defeat the right of the mortgagee to sell the residue.[46]

E. Right to Restrain Foreclosure[47] — 1. RULE STATED. Where there is an adequate remedy at law for injury caused by a wrongful foreclosure, by means of replevin or garnishment,[48] or by virtue of some statutory provision,[49] equity will not interfere to enjoin the mortgagee from exercising his legal right to foreclose a chattel mortgage.[50]

40. Forsyth Bank *v.* Gammage, 109 Ga. 220, 34 S. E. 307.

41. Hamilton *v.* Kerr, 84 Ga. 105, 10 S. E. 502; Duke *v.* Culpepper, 72 Ga. 842; Lewis *v.* Frost, 69 Ga. 755.

42. Nicholson *v.* Whaley, 90 Ga. 257, 16 S. E. 84, holding that such affidavit could be amended by changing the name of plaintiff and by substituting another in his place.

Amendment of bond.— The bond which is required under certain circumstances may be amended to make it conform to the statutory requirements. Lytle *v.* De Vaughn, 81 Ga. 226, 7 S. E. 281.

43. De Vaughn *v.* Byrom, 110 Ga. 904, 36 S. E. 267.

Sufficiency of description in execution.— The execution and levy under a judgment of foreclosure will not be quashed as illegal because the descriptions of the property therein vary from the description in the mortgage, if both descriptions are equally applicable. Fisher *v.* Jones Co., 93 Ga. 717, 21 S. E. 152; Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539. *Compare* Harris *v.* Usry, 77 Ga. 426, holding that the levy will be quashed where the principal and interest are joined in one sum, since Ga. Code, § 3570, prohibits a judgment for interest from bearing interest.

44. Courson *v.* Walker, 94 Ga. 175, 21 S. E. 287.

45. Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449.

46. Lamar *v.* Coleman, 88 Ga. 417, 14 S. E. 608.

47. **Mode of resisting wrongful foreclosure.** — An action at law will lie to recover property wrongfully seized and sold under a chattel mortgage, for the provision of Iowa Code, § 3317, that, in contesting the right of the mortgagee to foreclose an injunction may issue if necessary, does not restrict the remedy to an action in equity. Black *v.* Howell, 56 Iowa 630, 10 N. W. 216.

48. McCormick Harvesting Mach. Co. *v.* De la Mater, 114 Iowa 382, 86 N. W. 365.

Effect of garnishment or replevin.— The pendency of replevin by a mortgagee against the mortgagor to recover possession of the mortgaged property for the purpose of foreclosure is a bar to a suit by the mortgagor against the mortgagee to enjoin such foreclosure. Treanor *v.* Sheldon Bank, 90 Iowa 575, 58 N. W. 914. See also Sweet *v.* Oliver, 56 Iowa 744, 10 N. W. 275, where it was held that Iowa Code (1873), § 3317, does not warrant an injunction in favor of a creditor of the mortgagor against the mortgagee where the mortgagee has been garnished in a pending action at law against the mortgagor.

49. Alston *v.* Wheatley, 47 Ga. 646, where a mortgagor who sought to enjoin foreclosure on the ground of usury in the debt was held to have a complete remedy at law under Ga. Rev. Code, §§ 3899, 3900, relating to defenses against usury, and hence not entitled to an injunction.

50. *Alabama.*— Marriott *v.* Givens, 8 Ala. 694.

Arkansas.— Lawson *v.* Barton, (Ark. 1888) 7 S. W. 387.

Georgia.— Alston *v.* Wheatley, 47 Ga. 646.

Iowa.— McCormick Harvesting Mach. Co. *v.* De la Mater, 114 Iowa 382, 86 N. W. 365; Treanor *v.* Sheldon Bank, 90 Iowa 575, 58 N. W. 914; Rankin *v.* Rankin, 67 Iowa 322, 25 N. W. 263; Sweet *v.* Oliver, 56 Iowa 744, 10 N. W. 275.

Massachusetts.— Bushnell *v.* Avery, 121 Mass. 148.

Minnesota.— Normandin *v.* Mackey, 38 Minn. 417, 37 N. W. 954; Minnesota Linseed Oil Co. *v.* Maginnis, 32 Minn. 193, 20 N. W. 85.

New Jersey.— Stratton *v.* Packer, (N. J. 1888) 14 Atl. 587, holding that the mortgagee had an adequate remedy at law against creditors of the mortgagor, who had wrongfully taken the mortgaged property from his possession, there being no allegation that the persons who had taken the property were insolvent.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 528.

2. GROUNDS FOR EQUITABLE ACTION.[51] An injunction will be granted restraining the foreclosure of a mortgage where there has been unfair or fraudulent conduct on the part of the mortgagee,[52] where the mortgage is tainted with illegality, even though the mortgagor has waived the illegality,[53] and where there is a complete[54] failure of consideration.[55] While it was held sufficient to justify equitable interference that there was a controversy as to the amount due on the mortgage debt,[56] or regarding the property covered by the mortgage,[57] an injunction was refused when asked for merely on the ground that the mortgagee was threatening foreclosure[58] or had advertised the mortgaged property for sale.[59] The mortgagee's refusal to account for a portion of the mortgaged property which has come into his hands is not ground for restraining foreclosure,[60] but it is no objection to granting an injunction that no sale has been attempted under the mortgage.[61]

3. TERMS ON WHICH RELIEF IS GIVEN. In restraining the mortgagee in the exercise of his ordinary right of foreclosure equity will see that justice is done; and if the case requires it will make the injunction conditional upon the mortgagor's doing such acts as equity may require, as for example to execute a new mortgage[62] or to pay over to the mortgagee such balance of the debt as might

By statute, however, an injunction in such case may be authorized. Silverman *v.* Kuhn, 53 Iowa 436, 5 N. W. 523.

51. A landlord's claim against mortgaged chattels situated on the demised premises is not sufficient to entitle him to an injunction against foreclosure. Bingham *v.* Vandegrift, 93 Ala. 283, 9 So. 280, holding further that any balance after satisfying the mortgage should be applied to the rent.

52. Parsons *v.* Hunkins, 87 Wis. 115, 58 N. W. 264, holding that where the mortgagor sold the property in reliance upon the mortgagee's agreement to cancel the mortgage and take an unsecured note an injunction would issue upon the mortgagee's repudiating the agreement and attempting to foreclose.

53. Carpenter *v.* Talbot, 33 Fed. 537. *Compare* Macpherson *v.* Morrill, 190 Ill. 194, 60 N. E. 86.

Usurious loans.— The foreclosure of chattel mortgages given to secure usurious loans will generally be enjoined in equity, although the mortgagor may have an adequate remedy at law (Winn *v.* Ham, R. M. Charlt. (Ga.) 70; Clover *v.* Silverman, 6 Misc. (N. Y.) 347, 26 N. Y. Suppl. 779, 58 N. Y. St. 137); but the usurious nature of the transaction must clearly appear on the face of the bill, and must not be denied by the answer; otherwise an injunction will not be granted (Barr *v.* Collier, 54 Ala. 39) and after foreclosure proceedings are completed the mortgagor can get no relief on the ground of usury, since he has no longer such an interest in the property as to entitle him to bring such a suit (James *v.* Oakley, 1 Abb. Pr. (N. Y.) 324).

54. There must be an entire failure of consideration and no injunction will issue when there is admittedly a balance due on the mortgage (Bayaud *v.* Fellows, 28 Barb. (N. Y.) 451, where, however, there was no allegation of danger to the rights of the mortgagor), even though the mortgagor has a claim in set-off against the mortgagee for unliquidated damages (Bayaud *v.* Fellows, 28 Barb. (N. Y.) 451). See also Davis *v.* Banks, 2 Sweeny (N. Y.) 184, holding that where a chattel mortgage was given by a tenant to his landlord as security for rent, foreclosure would not be enjoined on the ground that the premises after the commencement of the term became unfit for occupancy by reason of want of repairs.

55. Higbie *v.* Rogers, (N. J. 1901) 48 Atl. 554.

Satisfaction of the mortgage is not of itself a sufficient cause for enjoining foreclosure, even though the mortgagor is entitled to a discharge. Bushnell *v.* Avery, 121 Mass. 148; Normandin *v.* Mackey, 38 Minn. 417, 37 N. W. 954.

56. Purnell *v.* Vaughan, 77 N. C. 268.

57. Harrell *v.* Americus Refrigerating Co., 92 Ga. 443, 17 S. E. 623; Hutchinson *v.* Johnson, 7 N. J. Eq. 40, holding further that the mortgagor should be a party to such suit.

Depreciation in the value of the property has been held to justify an injunction against foreclosure. Shellman *v.* Scott, R. M. Charlt. (Ga.) 380, holding that a temporary injunction should be continued until a hearing on the merits, where it appeared that the property mortgaged (here slaves) was so diseased as to greatly impair its value.

58. Gushnell *v.* Avery, 121 Mass. 148; Normandin *v.* Mackey, 38 Minn. 417, 37 N. W. 954.

Threat by one of two mortgagees to foreclose is not ground for enjoining foreclosure. Harvey *v.* Smith, 179 Mass. 592, 61 N. E. 217.

59. York, etc., R. Co. *v.* Myers, 41 Me. 109.

60. Kramer *v.* Imhoff, 33 Ill. App. 250.

61. Daugherty *v.* Byles, 41 Mich. 61, 1 N. W. 919.

62. Grinlee *v.* Rockhill, (N. J. 1888) 13 Atl. 609, where mortgaged chattels were removed from the county in which the mortgage was recorded, and the mortgagee had lost by his laches the right to insist on a forfeiture for such removal, but the lien of the mortgage still subsisted. The mortgagor, as a condition of enjoining enforcement, was re-

still remain due.[63] But imposing a condition that further security be given will not justify an injunction against the exercise of the rights conferred by an insecurity clause in a mortgage.[64]

4. PARTIES ENTITLED TO EQUITABLE RELIEF — a. Creditors of Mortgagor. A bill to enjoin foreclosure of a chattel mortgage may be maintained by an attachment creditor of the mortgagor,[65] upon tendering the principal and interest due, and reasonable expenses incurred by the mortgagee.[66] And generally any creditors of a mortgagor can enjoin foreclosure of a chattel mortgage given while the mortgagor was insolvent.[67]

b. Junior Mortgagee. A junior mortgagee, even if his debt is not yet due, may enjoin a senior mortgagee or his representatives from selling the mortgaged property for less than its value.[68]

c. Mortgagor. The mortgagor himself may enjoin foreclosure if it appears that the mortgagee is not acting equitably in the matter;[69] but the mortgagor cannot enjoin foreclosure on the ground of fraud upon a third party.[70]

d. Purchaser. A purchaser of the mortgaged goods at an execution sale against the mortgagor cannot enjoin foreclosure of a mortgage given prior to the sale.[71]

F. Payment of Expenses. Out of the proceeds of the mortgage sale the mortgagee is entitled to retain a sufficient sum to repay all expenses reasonably and necessarily incurred by him in the foreclosure proceedings,[72] to compen-

quired to execute a new mortgage precisely like the old, to be recorded in the county into which the property had been removed, but was allowed to recover costs against the mortgagee.

63. Costigan *v.* Howard, 100 Mich. 335, 58 N. W. 1116.

Upon the dissolution of an injunction restraining foreclosure, no personal judgment against the mortgagor, it has been held, can be entered on the injunction bond for the value of the mortgaged property which the mortgagee had been prevented from seizing. Lawson *v.* Barton, (Ark. 1888) 7 S. W. 387.

64. Cline *v.* Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700.

65. E. C. Meacham Arms Co. *v.* Swarts, 2 Wash. Terr. 412, 7 Pac. 859.

66. Lambert *v.* Miller, 38 N. J. Eq. 117.

67. McCrea *v.* Darnell, 3 Ohio Dec. (Reprint) 348, L. & Bank Bul. 348. *Contra*, Metropolitan Rubber Co. *v.* Atlanta Rubber Co., 89 Ga. 28, 14 S. E. 896.

68. Ades *v.* Levi, 137 Ind. 506, 37 N. E. 388.

69. Frieze *v.* Chapin, 2 R. I. 429, holding, where the mortgagor was a corporation and the mortgagee was its treasurer, that foreclosure should be enjoined until the mortgagee had furnished the mortgagor with any information relative to its condition which he had derived by virtue of his office.

70. Randall *v.* Howard, 2 Black (U. S.) 585, 17 L. ed. 269, refusing to enjoin foreclosure on the application of the mortgagor on the ground that the sale was a sham made to defraud a third party.

71. Baird *v.* Warwick Mach. Co., 40 Fed. 386. See also Hamilton *v.* Carter, 12 Wash. 510, 41 Pac. 911, holding that a delay of five months in selling under a foreclosure decree did not entitle such purchaser to enjoin the sale.

72. *Alabama.*— Boyd *v.* Jones, 96 Ala. 305, 11 So. 405, 38 Am. St. Rep. 100.

California.—Horan *v.* Harrington, 130 Cal. 142, 62 Pac. 400.

Illinois.— Farwell *v.* Johnston, 57 Ill. App. 110.

Indiana.— Holmes *v.* Hinkle, 63 Ind. 518.

Iowa.— Dowie *v.* Christen, 115 Iowa 364, 88 N. W. 830; Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822; Myers *v.* Snyder, 96 Iowa 107, 64 N. W. 771; Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857; Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340.

Kansas.— Newborg *v.* Sproat, 10 Kan. App. 311, 62 Pac. 544.

Minnesota.— Ferguson *v.* Hogan, 25 Minn. 135.

Nebraska.— Raymond *v.* Miller, 34 Nebr. 576, 52 N. W. 573.

New Hampshire.— Aldrich *v.* Woodcock, 10 N. H. 99.

New York.— Leadbetter *v.* Leadbetter, 11 N. Y. Suppl. 228, 32 N. Y. St. 890.

Oklahoma.— Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627; Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 5 Okla. 32, 47 Pac. 484.

South Carolina.— Hughes *v.* Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2; Straub *v.* Screven, 19 S. C. 445.

South Dakota.— De Luce *v.* Root, 12 S. D. 141, 80 N. W. 181, holding that no costs and expenses incurred in foreclosure can be recovered except those specified in S. D. Laws (1889), c. 26.

Texas.— Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 1118; Missouri Glass Co. *v.* Marsh, (Tex. Civ. App. 1897) 43 S. W. 546.

Wisconsin.—Riemer *v.* Schlitz, 49 Wis. 273, 5 N. W. 493.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 548, 579.

sate him for costs necessarily incurred in legal proceedings growing out of the foreclosure,[73] and for his own services in foreclosing.[74] The mortgagee must pay expenses that are needlessly incurred or incurred in doing things which form no part of the foreclosure proceedings.[75]

CHATTELS. Every species of property, movable or immovable, which is less than a freehold.[1] Lord Coke says that the word is French and signifies "goods,"[2] but it is a more extensive term than "goods" or "effects"[3] and will include

An offer to pay the mortgage debt, in order to deprive the mortgagee of his right to costs and expenses of foreclosure, must be made in good faith; and it cannot be made in good faith unless the person making the offer has, at that time, the money wherewith to make the offer good. Horan *v.* Harrington, 130 Cal. 142, 62 Pac. 400.

73. Clagett *v.* Salmon, 5 Gill & J. (Md.) 314.

Costs chargeable to mortgagor.— The costs of an unsuccessful suit in equity to enjoin the mortgagee from foreclosing (Riemer *v.* Schlitz, 49 Wis. 273, 5 N. W. 493; Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 1118), the commission paid for collecting book-accounts, which were the subject-matter of the mortgage (Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822), the fees of a custodian of the property (Harris *v.* Hill, 11 B. Mon. (Ky.) 199), the costs of a replevin suit brought to recover possession of the property (Farwell *v.* Johnston, 57 Ill. App. 110), and the expense incident to a receiver (Newborg *v.* Sproat, 10 Kan. App. 311, 62 Pac. 544; Leadbetter *v.* Leadbetter, 11 N. Y. Suppl. 228, 32 N. Y. St. 890).

Excessive costs.— If the mortgagor acquiesces in foreclosure he cannot later have it set aside on the ground that the costs and charges were excessive. Dowie *v.* Christen, 115 Iowa 364, 88 N. W. 830.

A junior mortgagee in an action by the first mortgagee to enjoin foreclosure under the second mortgage cannot charge the first mortgagee with costs growing out of such foreclosure proceedings. Howard *v.* Gemming, 10 Wash. 1, 38 Pac. 748.

74. Goff *v.* Hedgecock, 144 Ind. 415, 43 N. E. 644. *Compare* H. E. Spencer Co. *v.* Papach, 103 Iowa 513, 70 N. W. 748, 72 N. W. 665, holding that where the mortgage authorized a sale at public auction the mortgagee could not charge for his services or for clerk hire in selling the goods at retail.

75. Ferguson *v.* Hogan, 25 Minn. 135. See also Hill *v.* Quest, 2 Tex. Unrep. Cas. 564, holding that where the statutory remedy by sequestration afforded a direct mode of protection to mortgaged property from sale on execution an application for an injunction was unnecessary.

What expenses cannot be charged to mortgagor.— A sheriff's or an appraiser's fees unnecessarily incurred (Myers *v.* Snyder, 96 Iowa 107, 64 N. W. 771), the expenses of a trip to foreclose the mortgage (Matter of Windhorst, 107 Iowa 58, 77 N. W. 513), the expenses of selling a part of the property in an irregular manner (Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636), and costs incurred through the mortgagee's negligence in selling property not covered by the mortgage (Wright *v.* Market Bank, (Tenn. Ch. 1900) 60 S. W. 623) must be borne by the mortgagee.

1. *Georgia.*— Pearce *v.* Augusta, 37 Ga. 597, 599 [*quoting* Bouvier L. Dict.].

Illinois.— Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584; Reed *v.* Johnson, 14 Ill. 257, 258.

Indiana.— Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486 [*quoting* 2 Bl. Comm. 385].

Kansas.— Blain *v.* Irby, 25 Kan. 499, 501 [*quoting* Webster Dict.].

Kentucky.—Com. *v.* Hazelwood, 84 Ky. 681, 683, 8 Ky. L. Rep. 586, 2 S. W. 489 [*quoting* Bouvier L. Dict.].

Maine.— State *v.* Bartlett, 55 Me. 200, 211.

Massachusetts.— Penniman *v.* French, 17 Pick. (Mass.) 404, 405, 28 Am. Dec. 309 [*citing* Termes de la Ley].

Missouri.— State *v.* Harvey, 131 Mo. 339, 347, 32 S. W. 1110.

New Hampshire.— Fling *v.* Goodall, 40 N. H. 208, 215 [*citing* 2 Bl. Comm. 386; 2 Kent Comm. 341].

New Jersey.— State *v.* Haight, 35 N. J. L. 279, 282 [*citing* 2 Kent Comm. 342].

New York.— People *v.* Holbrook, 13 Johns. (N. Y.) 90, 94 [*citing* 2 Bl. Comm. 285]; People *v.* Maloney, 1 Park. Crim. (N. Y.) 593, 595 [*quoting* Bouvier L. Dict.].

United States.— Gay *v.* U. S., 13 Wall. (U. S.) 358, 362, 20 L. ed. 606 [*citing* 2 Kent Comm. 342].

Canada.— Davidson *v.* Reynolds, 16 U. C. C. P. 140, 142.

2. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 583; Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486 [*citing* 2 Bl. Comm. 385]; People *v.* Holbrook, 13 Johns. (N. Y.) 90, 94 [*citing* 2 Bl. Comm. 285].

"**Blackstone says** the term is, in truth, derived from the technical Latin word *catalla*, which primarily signified only beasts of husbandry, or, as we still call them, cattle, but, in its secondary sense, was applied to all moveables in general. 2 Com. 385." Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584.

3. *Illinois.*—Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584.

Indiana.— Wilson *v.* Rybolt, 17 Ind. 391, 394, 79 Am. Dec. 486 [*quoting* Bouvier L. Dict.].

Kansas.— Blain *v.* Irby, 25 Kan. 499, 501 [*quoting* Webster Dict.].

animate as well as inanimate property.[4] (Chattels: Generally, see PROPERTY. Hiring, see BAILMENTS. Mortgage of, see CHATTEL MORTGAGES. Personal, see CHATTELS PERSONAL. Real, see CHATTELS REAL. Sale of, see SALES.)

CHATTELS PERSONAL. Things movable, which may be carried about by the owner, such as animals, household stuff, money, jewels, corn, garments and everything else that can be put in motion and transferred from one place to another.[5]

CHATTELS REAL. Such chattels as concern, are annexed to, or savor of the realty; as, terms for years of land.[6]

CHAUD-MEDLEY. The killing of a person in an affray in the heat of blood and while under the influence of passion.[7]

CHAUSSEE. See LEVEES.

CHEAT. At common law, the fraudulent obtaining of property of another, by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.[8] (See, generally, FALSE PERSONATION; FALSE PRETENSES; WEIGHTS AND MEASURES.)

CHECK. See COMMERCIAL PAPER.

CHEESE. See FOOD.

CHEMICAL. A substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use.[9]

CHEMICALLY PURE. Absolutely pure.[10]

CHEMISTS. See DRUGGISTS.

CHEQUE. See COMMERCIAL PAPER.

CHEROKEES.[11] See INDIANS.

CHEVISANCE. An unlawful or usurious bargain.[12] (See, generally, USURY.)

CHIEF. A principal thing, as distinguished from that which is incidental or subordinate.[13] (Chief: Baron, see CHIEF BARON; Justice, see JUDGES. Of Police, see MUNICIPAL CORPORATIONS. Tenants in, see TENANTS IN CHIEF.)

CHIEF BARON. The presiding judge in the court of exchequer and afterward in the exchequer division of the high court of justice.[14]

CHILDREN.[15] Irrespective of parentage, persons under lawful age, as distin-

Maine.— State *v.* Bartlett, 55 Me. 200, 211 [*citing* Bouvier L. Dict.].

Missouri.— State *v.* Harvey, 141 Mo. 343, 346, 42 S. W. 938 [*quoting* Webster Int. Dict.].

New York.— Smith *v.* Wilcox, 24 N. Y. 353, 358, 82 Am. Dec. 302.

Pennsylvania.— Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65.

4. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584; Smith *v.* Wilcox, 24 N. Y. 353, 358, 82 Am. Dec. 302; Hurdle *v.* Outlaw, 55 N. C. 75, 77; Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65.

5. Bouvier L. Dict. [*quoted* in Niles *v.* Mathusa, 162 N. Y. 546, 550, 57 N. E. 184]. See also Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578, 584 [*citing* 2 Bl. Comm. 387]; State *v.* Bartlett, 55 Me. 200, 211 [*citing* Holthouse L. Dict.]; State *v.* Harvey, 131 Mo. 339, 347, 32 S. W. 1110; Putnam *v.* Westcott, 19 Johns. (N. Y.) 73, 76.

6. Knapp *v.* Jones, 143 Ill. 375, 32 N. E. 382; People *v.* McComber, 7 N. Y. Suppl. 71, 72 [*quoting* Burrill L. Dict.]; Putnam *v.* Westcott, 19 Johns. (N. Y.) 73, 76; Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 5 S. Ct. 573, 28 L. ed. 1009 [*citing* 2 Bl. Comm. 386; 2 Kent Comm. 342]; Lycoming F. Ins. Co. *v.* Haven, 95 U. S. 242, 251, 24 L. ed. 473 [*citing* 2 Bl. Comm. 386].

7. 4 Bl. Comm. 184.

8. Middleton *v.* State, Dudley (S. C.) 275, 283 [*citing* 2 Russell Crimes, 139]. See also People *v.* Cummings, 114 Cal. 437, 439, 46 Pac. 284, where it is said: "Cheating at common law was a fraud perpetrated by means of a false symbol or token, such as selling goods by false weights or measures, or other like act or thing of a character calculated to deceive and defraud the public or the individual to their pecuniary injury, and against which ordinary prudence could not guard."

9. Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 58, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789 [*citing* Century Dict.; Webster Dict.]. See also Shreveport Gas, etc., Co. *v.* Caddo Parish, 47 La. Ann. 65, 66, 16 So. 650.

10. Matheson *v.* Campbell, 69 Fed. 597, 608.

11. **Certificate of chief of the Cherokee nation authenticating acknowledgment** see ACKNOWLEDGMENTS, 1 Cyc. 614, note 83.

12. Burrill L. Dict.

13. Burrill L. Dict.

14. The office was abolished in 1881 and merged in that of chief justice of England. Wharton L. Lex.

15. **Adherence to well-defined meaning is important.**—In law the word "children" has,

guished from adults;[16] infants;[17] minors;[18] persons of tender years;[19] young persons;[20] youths;[21] the young of the human species, generally under the age of puberty, without distinction of sex;[22] young persons of either sex, and hence persons who exhibit the character of a very young person.[23] With respect of parentage,[24] sons and daughters of whatever age;[25] children born in wedlock;[26] descendants of the first degree;[27] male or female descendants of the first degree;[28] immediate descendants;[29] immediate legitimate descend-

and has had, a well-defined meaning, which is found to run through the text-books and reports, and upon the proper adherence to which meaning the stability and very existence of many titles in this commonwealth depend. Defining it from a positive standpoint, it is a word of personal description, it points to individual acquisition, and, so far as designation goes, it differs in no way from a mention of individuals by name. Defining it negatively, it is not a word of limitation. Forest Oil Co. *v.* Crawford, 77 Fed. 106, 109, 23 C. C. A. 55. See also Schaefer *v.* Schaefer, 141 Ill. 337, 341, 31 N. E. 136, where it is said: "The word 'children,' in both its technical and its general sense, is used as a description of persons, and in its technical sense is a word of purchase and not a word of limitation."

16. Miller *v.* Finegan, 26 Fla. 29, 37, 38, 7 So. 140, 6 L. R. A. 813.

In the law of negligence, and in laws for the protection of children, etc., "child" is used as the opposite of "adult." Black L. Dict.

17. Anderson L. Dict. See, generally, INFANTS.

The word " is applied to infants from their birth, but that the time when they cease ordinarily to be so called is not defined by custom." Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513, 519, 92 Am. Dec. 269 [*quoting* Webster Dict.].

18. Flower *v.* Witkovsky, 69 Mich. 371, 375, 37 N. W. 364.

19. Anderson L. Dict. In Allen *v.* State, 7 Tex. App. 298, 301, is found this instruction: "The court instructs the jury that the term 'child' means one of tender years, not a minor or under twenty-one years of age, and that they must take the word in its common acceptation."

20. Anderson L. Dict.; State *v.* Gaston, 96 Iowa 505, 508, 65 N. W. 415, where it is said that the word is quite frequently applied to any young person at any age less than maturity.

21. Anderson L. Dict.

22. Black L. Dict. And see Blackburn *v.* State, 22 Ohio St. 102, 110, where it is said that in the popular and most common use of the words, the female ceases to be a "child," and becomes a "woman," at the age of puberty, and this seems to be in accordance with the primary or leading definitions of the terms by lexicographers.

23. Webster Dict. [*quoted* in Bell *v.* State, 18 Tex. App. 53, 56, 51 Am. Rep. 293, where it is said: "And this is its common acceptation. It means a young person as contradistinguished from one of age sufficient to be supposed to have settled habits and fixed discretion."].

24. **Parent and child,** mean either father or mother, and son or daughter, the immediate progeny of the parent. If another degree is meant, the appropriate term is used; thus, grandparent, and grandchildren. Wharton *v.* Silliman, 22 La. Ann. 343, 344.

25. Miller *v.* Finegan, 26 Fla. 29, 37, 7 So. 140, 6 L. R. A. 813 [*citing* Abbott L. Dict.; Bouvier L. Dict.]. See also Matter of Chapoton, 104 Mich. 11, 12, 61 N. W. 892, 53 Am. St. Rep. 454. And *compare* Taylor *v.* Carroll, 145 Mass. 95, 13 N. E. 348.

In the law of the domestic relations, and as to descent and distribution, it is used strictly as the correlative of "parent," and means a son or daughter considered as in relation with the father or mother. Black L. Dict.

Children by adoption may be included in the term "children." They are the legal children of their adoptive parents. Power *v.* Hafley, 85 Ky. 671, 675, 9 Ky. L. Rep. 369, 4 S. W. 683.

26. Black L. Dict.

It is well settled that at common law the word "children" means those born in lawful wedlock; and such, indeed, has been its legal meaning in every known system of law. Matter of Wardell, 57 Cal. 484, 491 (where it is said, however: "The legal meaning of the word 'children' has, therefore, been greatly enlarged from what it was at common law"); Power *v.* Hafley, 85 Ky. 671, 675, 9 Ky. L. Rep. 369, 4 S. W. 683; Kent *v.* Barker, 2 Gray (Mass.) 535, 537; Hill *v.* Crook, L. R. 6 H. L. 265, 280, 42 L. J. Ch. 702 (where it is said: "The term 'children' in itself means only children lawfully born, and must be so understood, unless there is in the will something sufficient to shew the contrary").

When used in statutes, however, the word "children" is not necessarily confined to children born in lawful wedlock. Power *v.* Hafley, 85 Ky. 671, 675, 9 Ky. L. Rep. 369, 4 S. W. 683; Drain *v.* Violett, 2 Bush (Ky.) 155, 157.

27. Matter of Curry, 39 Cal. 529, 531; Downing *v.* Birney, 112 Mich. 474, 478, 70 N. W. 1006; Sherman *v.* Sherman, 3 Barb. (N. Y.) 385, 387.

28. Webster Dict. [*quoted* in Matter of Chapoton, 104 Mich. 11, 12, 61 N. W. 892, 53 Am. St. Rep. 454].

29. *Georgia.*— Butler *v.* Ralston, 69 Ga. 485, 489, where it is said: "In the ordinary and proper sense of the word 'children,' it means the immediate descendants of a person, as contradistinguished from issue, but in its legal signification, as applied to testamentary instruments (unless the manifest intention requires a different construction) it is extended to all the descendants, whether

ants;[30] legitimate descendants of the first degree;[31] offspring;[32] immediate offspring;[33] legitimate offspring;[34] first generation of offspring;[35] persons who are descended from an ancestor, or *propositus*, in the first degree;[36] progeny;[37] and the term, therefore, will not include illegitimate offspring,[38] step-children,[39] children

mediate or immediate of the ancestor." But see *infra*, note 44.

Kentucky.— Mefford *v.* Dougherty, 89 Ky. 58, 59, 11 Ky. L. Rep. 157, 11 S. W. 716, 25 Am. St. Rep. 521.

Michigan.— Downing *v.* Birney, 112 Mich. 474, 478, 70 N. W. 1006.

New York.— Lytle *v.* Beveridge, 58 N. Y. 592, 605.

Rhode Island.— *Re* Reynolds, 20 R. I. 429, 431, 39 Atl. 896 [*citing* Williams *v.* Knight, 18 R. I. 333, 27 Atl. 210].

South Carolina.— Gadsden *v.* Poaug, 2 Bay (S. C.) 293, 305.

30. Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475; Lawrence *v.* Hebbard, 1 Bradf. Surr. (N. Y.) 252, 255 [*citing* Hone *v.* Van Schaick, 3 Barb. Ch. (N. Y.) 488; Mowatt *v.* Carow, 7 Paige (N. Y.) 328, 32 Am. Dec. 641].

31. Overseers of Poor *v.* Overseers of Poor, 176 Pa. St. 116, 121, 34 Atl. 351 [*quoting* Anderson L. Dict.].

32. State *v.* Gaston, 96 Iowa 505, 508, 65 N. W. 415; Stanley *v.* Chandler, 53 Vt. 619, 624; Black L. Dict.

The words, "the offspring of," do not enlarge the meaning of the word "children." They are synonymous with "born of," or "the fruit of"; and can have no other effect than to make more definite the persons who are described as "children." McGuire *v.* Westmoreland, 36 Ala. 594, 596.

33. *Alabama.*— Russell *v.* Russell, 64 Ala. 500.

California.— Matter of Curry, 39 Cal. 529, 531.

Florida.— McLeod *v.* Dell, 9 Fla. 427.

Illinois.— Arnold *v.* Alden, 173 Ill. 229, 50 N. E. 704.

Indiana.— Cummings *v.* Plummer, 94 Ind. 403, 406, 48 Am. Rep. 167.

Mississippi.—Gray *v.* Bridgeforth, 33 Miss. 312, 339.

New York.— Beebe *v.* Estabrook, 79 N. Y. 246, 249.

South Carolina.— Shanks *v.* Mills, 25 S. C. 358, 362; Bannister *v.* Bull, 16 S. C. 220, 227 [*citing* 2 Jarman Wills, (5th Am. ed.) 690].

Tennessee.—Turner *v.* Ivie, 5 Heisk. (Tenn.) 222, 230; Booker *v.* Booker, 5 Humphr. (Tenn.) 504, 510.

Virginia.— Vaughan *v.* Vaughan, 97 Va. 322, 328, 33 S. E. 603.

United States.— Adams *v.* Law, 17 How. (U. S.) 417, 15 L. ed. 149 [*citing* Jarman Wills, 51]; Cutting *v.* Cutting, 6 Sawy. (U. S.) 316, 6 Fed. 259, 264.

34. Gardner *v.* Heyer, 2 Paige (N. Y.) 11, 14; Overseers of Poor *v.* Overseers of Poor, 176 Pa. St. 116, 121, 34 Atl. 351 [*quoting* Anderson L. Dict.]; Black L. Dict.; Brown L. Dict.; Sweet L. Dict.

Prima facie the word "child" or "children" means legitimate child or children; bastards are not within the meaning of the term "child" or "children."

Illinois.— Blacklaws *v.* Milne, 82 Ill. 505, 507, 25 Am. Rep. 339.

Indiana.— McDonald *v.* Pittsburgh, etc., R. Co., 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L. R. A. 309 [*citing* Thornburg *v.* American Strawboard Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334; Marshall *v.* Wabash R. Co., 120 Mo. 275, 25 S. W. 179; Barnes *v.* Greenzebach, 1 Edw. (N. Y.) 41; Harkins *v.* Philadelphia, etc., R. Co., 15 Phila. (Pa.) 286, 39 Leg. Int. (Pa.) 4; Good *v.* Towns, 56 Vt. 410, 48 Am. Rep. 799; Marshall *v.* Wabash R. Co., 46 Fed. 269, 273; Gibson *v.* Midland R. Co., 2 Ont. 658].

Maine.— Bolton *v.* Bolton, 73 Me. 299, 309.

New York.— Gelston *v.* Shields, 16 Hun (N. Y.) 143, 151.

England.— Reg. *v.* Birmingham Parish, 8 Q. B. 410, 426, 55 E. C. L. 410; Dorin *v.* Dorin, L. R. 7 H. L. 568, 45 L. J. Ch. 652, 33 L. T. Rep. N. S. 281, 23 Wkly. Rep. 570; Hill *v.* Crook, L. R. 6 H. L. 265, 276, 282, 42 L. J. Ch. 702; Dickinson *v.* North Eastern R. Co., 2 H. & C. 735, 33 L. J. Exch. 91, 9 L. T. Rep. N. S. 299, 12 Wkly. Rep. 52 [*quoted* in McDonald *v.* Pittsburgh, etc., R. Co., 144 Ind. 459, 462, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L. R. A. 309, and *approved* in Gibson *v.* Midland R. Co., 2 Ont. 658].

At common law the words "child" and "children" mean only legitimate child and children. Kent *v.* Barker, 2 Gray (Mass.) 535, 536. See also Beachcroft *v.* Beachcroft, 1 Madd. 430; 1 Bl. Comm. 378, 379.

In statutes the term may (Dickinson's Appeal, 42 Conn. 491, 506, 19 Am. Rep. 553) **or may not** (Porter *v.* Porter, 7 How. (Miss.) 106, 112, 40 Am. Dec. 55) **include illegitimate children.**

Children made legitimate by marriage of their parents may be included in the term "children." Power *v.* Hafley, 85 Ky. 671, 675, 9 Ky. L. Rep. 369, 4 S. W. 683.

35. White *v.* Rowland, 67 Ga. 546, 554, 44 Am. Rep. 731; Willis *v.* Jenkins, 30 Ga. 167, 168; Matter of Robinson, 57 Hun (N. Y.) 395, 397, 10 N. Y. Suppl. 692, 32 N. Y. St. 720; *Re* Reynolds, 20 R. I. 429, 431, 39 Atl. 896 [*citing* Williams *v.* Knight, 18 R. I. 333, 27 Atl. 210].

36. McGuire *v.* Westmoreland, 36 Ala. 594, 595.

37. Stanley *v.* Chandler, 53 Vt. 619, 624; Black L. Dict.

38. Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475. See also Kent *v.* Barker, 2 Gray (Mass.) 535, 537.

39. Martin *v.* Ætna L. Ins. Co., 73 Me. 25, 27; Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475; Lawrence *v.* Hebbard, 1 Bradf. Surr. (N. Y.) 252, 255 [*citing* Hone *v.* Van Schaick, 3 Barb. Ch. (N. Y.) 488; Mowatt *v.* Carow, 7 Paige (N. Y.) 328, 32 Am. Dec. 641].

by marriage only,[40] descendants,[41] heirs,[42] heirs of the body,[43] issue,[44] grandchildren,[45] or more remote descendants,[46] unless such interpretation is imperative;[47] as

40. Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475.

41. Waddell *v.* Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575; Prowitt *v.* Rodman, 37 N. Y. 42, 54, 4 Transcr. App. (N. Y.) 412.

"Descendants" is ordinarily considered a more comprehensive word than "children." Matter of Chapoton, 104 Mich. 11, 12, 61 N. W. 892, 53 Am. St. Rep. 454.

42. Rosenau *v.* Childress, 111 Ala. 214, 220, 20 So. 95; Baskett *v.* Sellars, 93 Ky. 2, 5, 13 Ky. L. Rep. 909, 19 S. W. 9.

"Heirs" is not synonymous with "children." Clarkson *v.* Hatton, 143 Mo. 47, 56, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748.

43. Rosenau *v.* Childress, 111 Ala. 214, 220, 20 So. 95; Williams *v.* Duncan, 92 Ky. 125, 129, 13 Ky. L. Rep. 389, 17 S. W. 330.

The term "heir of the body" is a well-established technical term, with which the words "children" or "issue" or "lawful issue" are not synonymous. Sewall *v.* Roberts, 115 Mass. 262, 276.

44. *Georgia.*— Butler *v.* Ralston, 69 Ga. 485, 489. See *supra*, note 29.

Michigan.— Matter of Chapoton, 104 Mich. 11, 12, 61 N. W. 892, 53 Am. St. Rep. 454.

Missouri.— Clarkson *v.* Hatton, 143 Mo. 47, 56, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748; Waddell *v.* Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575.

New Jersey.— Brokaw *v.* Peterson, 15 N. J. Eq. 194, 198.

New York.— Prowitt *v.* Rodman, 37 N. Y. 42, 54, 4 Transcr. App. (N. Y.) 412.

Pennsylvania.— Hunt's Estate, 133 Pa. St. 260, 270, 19 Atl. 548, 19 Am. St. Rep. 640.

Virginia.— Merrymans *v.* Merryman, 5 Munf. (Va.) 440, 441.

"Issue" is not synonymous with "children." Clarkson *v.* Hatton, 143 Mo. 47, 56, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748.

The distinction between the words "children" and "issue" is carefully preserved throughout. "Issue" necessarily includes children; but "children" does not include more remote issue. Bigelow *v.* Morong, 103 Mass. 287, 289; Barney *v.* Arnold, 15 R. I. 78, 23 Atl. 45.

45. *Alabama.*— Rosenau *v.* Childress, 111 Ala. 214, 220, 20 So. 95.

California.— Matter of Curry, 39 Cal. 529, 531.

Georgia.— Willis *v.* Jenkins, 30 Ga. 167, 168.

Indiana.— West *v.* Rassman, 135 Ind. 278, 296, 34 N. E. 991; Pugh *v.* Pugh, 105 Ind. 552, 555, 5 N. E. 673.

Kentucky.— Chenault *v.* Chenault, 88 Ky. 83, 85, 10 Ky. L. Rep. 840, 9 S. W. 775, 11 S. W. 424; Duvall *v.* Goodson, 79 Ky. 224, 227 [*citing* Churchill *v.* Churchill, 2 Metc. (Ky.) 469]; Hughes *v.* Hughes, 12 B. Mon. (Ky.) 115, 121; Yeates *v.* Gill, 9 B. Mon. (Ky.) 203, 204; Phillips *v.* Beall, 9 Dana (Ky.) 1, 33 Am. Dec. 518.

Maine.—Martin *v.* Ætna L. Ins. Co., 73 Me. 25, 27; Osgood *v.* Lovering, 33 Me. 464, 469.

Michigan.— Downing *v.* Birney, 112 Mich. 474, 478, 70 N. W. 1006; Matter of Chapoton, 104 Mich. 11, 12, 61 N. W. 892, 53 Am. St. Rep. 454.

Minnesota.— Yates *v.* Shern, 84 Minn. 161, 167, 86 N. W. 1004.

Missouri.—Waddell *v.* Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575.

New Jersey.— Feit *v.* Vanatta, 21 N. J. Eq. 84; Brokaw *v.* Peterson, 15 N. J. Eq. 194, 198.

New York.— Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475; Tier *v.* Pennell, 1 Edw. (N. Y.) 354, 355.

Pennsylvania.— Hunt's Estate, 133 Pa. St. 260, 270, 19 Atl. 548, 19 Am. St. Rep. 640; *In re* Eichelberger, 5 Pa. St. 264.

Rhode Island.— *Re* Reynolds, 20 R. I. 429, 431, 39 Atl. 896; Tillinghast *v.* D'Wolf, 8 R. I. 69, 73.

South Carolina.— Shanks *v.* Mills, 25 S. C. 358, 362 [*citing* Bannister *v.* Bull, 16 S. C. 220]; Heyward *v.* Hasell, 2 S. C. 509, 511.

Tennessee.— Tipton *v.* Tipton, 1 Coldw. (Tenn.) 252, 255.

Texas.— Burgess *v.* Hargrove, 64 Tex. 110, 112.

Virginia.— Vaughan *v.* Vaughan, 97 Va. 322, 328, 33 S. E. 603.

United States.— Cutting *v.* Cutting, 6 Sawy. (U. S.) 396, 6 Fed. 259, 263 [*quoting* Bouvier L. Dict.]; Ingraham *v.* Meade, 3 Wall. Jr. (U. S.) 32, 13 Fed. Cas. No. 7,045, 13 Leg. Int. (Pa.) 372.

"Grandchildren" are rarely called "children." Matter of Chapoton, 104 Mich. 11, 12, 61 N. W. 892, 53 Am. St. Rep. 454.

46. *Michigan.*— Downing *v.* Birney, 112 Mich. 474, 478, 70 N. W. 1006.

New York.— Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475.

Rhode Island.— *Re* Reynolds, 20 R. I. 429, 431, 39 Atl. 896.

Tennessee.—Turner *v.* Ivie, 5 Heisk. (Tenn.) 222, 230.

Texas.— Burgess *v.* Hargrove, 64 Tex. 110, 112.

Virginia.— Vaughan *v.* Vaughan, 97 Va. 322, 328, 33 S. E. 603.

47. *Georgia.*— Houston *v.* Bryan, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252, applied to child of deceased husband by former marriage, the widow having no children.

Kentucky.— Chenault *v.* Chenault, 88 Ky. 83, 85, 10 Ky. L. Rep. 840, 9 S. W. 775, 11 S. W. 424; Yeates *v.* Gill, 9 B. Mon. (Ky.) 203, 204.

Michigan.— Matter of Chapoton, 104 Mich. 11, 12, 61 N. W. 892, 53 Am. St. Rep. 454 [*citing* Matter of Curry, 39 Cal. 529; Adams *v.* Law, 17 How. (U. S.) 417, 15 L. ed. 149].

New York.—Tier *v.* Pennell, 1 Edw. (N. Y.) 354, 355.

Pennsylvania.— Overseers of Poor *v.* Overseers of Poor, 176 Pa. St. 116, 121, 34 Atl. 351 [*quoting* Anderson L. Dict.].

where the intention to use the word in a broader sense and more extended signification appears from the context of the instrument in which it is employed,[48] where the word appears to have been employed as *nomen collectivum* or synonymous with a word of larger import such as "issue" or "descendants,"[49] where such interpretation is required by reason and justice,[50] where there can be no other construction[51] and the instrument would otherwise be inoperative,[52] or where the person using it must know that there neither is nor can afterward be any person to whom the term can be applied in its appropriate sense.[53] (Children: Abandonment of, see ADOPTION OF CHILDREN; PARENT AND CHILD.

Rhode Island.— Tillinghast *v.* D'Wolf, 8 R. I. 69, 73.

Tennessee.— Booker *v.* Booker, 5 Humphr. (Tenn.) 504 [*quoted* in Turner *v.* Ivie, 5 Heisk. (Tenn.) 222, 230].

United States.— Walton *v.* Cotton, 19 How. (U. S.) 355, 15 L. ed. 658, construing the pension acts of June 4, 1832, and of July 4, 1836.

England.— Voller *v.* Carter, 4 E. & B. 173, 179, 1 Jur. N. S. 278, 24 L. J. Q. B. 56, 3 Wkly. Rep. 22, 82 E. C. L. 173, construed to mean "issue."

See also Anderson L. Dict. 174; and cases cited *infra*, note 48 *et seq.*

48. *Alabama.*— Rosenau *v.* Childress, 111 Ala. 214, 220, 20 So. 95; Russell *v.* Russell, 64 Ala. 500.

Georgia.— White *v.* Rowland, 67 Ga. 546, 554, 44 Am. Rep. 731; Willis *v.* Jenkins, 30 Ga. 167, 168.

Kentucky.— Chenault *v.* Chenault, 88 Ky. 83, 85, 10 Ky. L. Rep. 840, 9 S. W. 775, 11 S. W. 424; Duvall *v.* Goodson, 79 Ky. 224; Hughes *v.* Hughes, 12 B. Mon. (Ky.) 115, 121; Yeates *v.* Gill, 9 B. Mon. (Ky.) 203, 204.

Maine.— Martin *v.* Ætna L. Ins. Co., 73 Me. 25, 27 [*citing* Abbott L. Dict.]; Osgood *v.* Lovering, 33 Me. 464, 469.

New Jersey.— Feit *v.* Vanatta, 21 N. J. Eq. 84.

New York.— Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466, 475 [*citing* Gardner *v.* Heyer, 2 Paige (N. Y.) 11; Izard *v.* Izard, 2 Desauss. (S. C.) 308; Hussey *v.* Berkeley, 2 Eden 194; Radcliffe *v.* Buckley, 10 Ves. Jr. 195, 7 Rev. Rep. 383; Orford *v.* Churchill, 3 Ves. & B. 69].

Pennsylvania.— Hunt's Estate, 133 Pa. St. 260, 271, 19 Atl. 548, 19 Am. St. Rep. 640 (where it is said: "All the authorities agree that such intention must clearly appear, and if it does not, the word 'children' must be confined to its ordinary meaning"); *In re* Eichelberger, 5 Pa. St. 264.

Rhode Island.— *Re* Reynolds, 20 R. I. 429, 431, 39 Atl. 896; Tillinghast *v.* D'Wolf, 8 R. I. 69, 73.

Tennessee.— Tipton *v.* Tipton, 1 Coldw. (Tenn.) 252, 255.

Virginia.— Vaughan *v.* Vaughan, 97 Va. 322, 328, 33 S. E. 603 [*citing* Moon *v.* Stone, 19 Gratt. (Va.) 130; Tebbs *v.* Duval, 17 Gratt. (Va.) 349; Doe *v.* Andersons, 4 Leigh (Va.) 118; James *v.* McWilliams, 6 Munf. (Va.) 301; Smith *v.* Chapman, 1 Hen. & M. (Va.) 240; Morris *v.* Owen, 2 Call (Va.) 520; Adams *v.* Law, 17 How. (U. S.) 417, 15 L. ed. 149; Radcliffe *v.* Buckley, 10 Ves. Jr. 195, 7 Rev. Rep. 383]; Merrymans *v.* Merryman, 5 Munf. (Va.) 440, 441.

United States.— Cutting *v.* Cutting, 6 Sawy. (U. S.) 396, 6 Fed. 259, 263 [*quoting* Bouvier L. Dict.].

England.— Doe *v.* Webber, 1 B. & Ald. 713, 720, 19 Rev. Rep. 438 [*citing* Wythe *v.* Thurlston, Ambl. 555, 556, 1 Ves. 196; Wild's Case, 6 Coke 16*b*; Doe *v.* Cavendish, 4 T. R. 741 note; Radcliffe *v.* Buckley, 10 Ves. Jr. 195, 7 Rev. Rep. 383; Royle *v.* Hamilton, 4 Ves. Jr. 437].

49. *Florida.*— McLeod *v.* Dell, 9 Fla. 427.

Illinois.—See Arnold *v.* Alden, 173 Ill. 229, 50 N. E. 704.

Indiana.— Cummings *v.* Plummer, 94 Ind. 403, 406, 48 Am. Rep. 167 [*citing* 2 Jarman Wills, 690].

Maine.— Osgood *v.* Lovering, 33 Me. 464, 469 [*citing* Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140; Cromer *v.* Pinckney, 3 Barb. Ch. (N. Y.) 466; Mowatt *v.* Carow, 7 Paige (N. Y.) 328, 32 Am. Dec. 641; Tier *v.* Pennell, 1 Edw. (N. Y.) 354; Izard *v.* Izard, 2 Desauss. (S. C.) 308; Radcliffe *v.* Buckley, 10 Ves. Jr. 195, 7 Rev. Rep. 383].

New York.— Prowitt *v.* Rodman, 37 N. Y. 42, 4 Transcr. App. (N. Y.) 412 [*citing* 4 Kent Comm. 419 note].

South Carolina.— Bannister *v.* Bull, 16 S. C. 220, 227 [*citing* 2 Jarman Wills, 690].

Virginia.— Merrymans *v.* Merryman, 5 Munf. (Va.) 440, 441.

50. Waddell *v.* Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575 [*citing* Haverstick's Appeal, 103 Pa. St. 394; Warn *v.* Brown, 102 Pa. St. 347]; Prowitt *v.* Rodman, 37 N. Y. 42, 4 Transcr. App. (N. Y.) 412.

51. Reeves *v.* Brymer, 4 Ves. Jr. 692, 698 [*cited* in Hussey *v.* Berkeley, 2 Eden 194, 196 note], where it was remarked that "children" might mean "grandchildren" where there could be no other construction, but not otherwise.

52. Chenault *v.* Chenault, 88 Ky. 83, 85, 10 Ky. L. Rep. 840, 9 S. W. 775, 11 S. W. 424 [*citing* Phillips *v.* Beall, 9 Dana (Ky.) 1, 33 Am. Dec. 518]; Duvall *v.* Goodson, 79 Ky. 224; Yeates *v.* Gill, 9 B. Mon. (Ky.) 203, 204; Feit *v.* Vanatta, 21 N. J. Eq. 84; *Re* Reynolds, 20 R. I. 429, 431, 39 Atl. 896 [*citing* Williams *v.* Knight, 18 R. I. 333, 27 Atl. 210].

53. White *v.* Rowland, 67 Ga. 546, 554, 44 Am. Rep. 731 [*citing* 1 Jarman Wills, 52]; Willis *v.* Jenkins, 30 Ga. 167, 168; West *v.* Rassman, 135 Ind. 278, 296, 34 N. E. 991 [*citing* Cummings *v.* Plummer, 94 Ind. 403, 48 Am. Rep. 167]; Pugh *v.* Pugh, 105 Ind.

Adoption of, see ADOPTION OF CHILDREN. Apprenticed, see APPRENTICES. As Witnesses, see WITNESSES. Bastard, see BASTARDS. Concealment of Birth of, see CONCEALMENT OF BIRTH OR DEATH. Contributory Negligence of, see CARRIERS; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILROADS; STREETS AND HIGHWAYS. Employment of, see INFANTS. Guardianship of, see GUARDIAN AND WARD. Imputed Negligence of, see NEGLIGENCE. In Ventre Sa Mere — Killing, see ABORTION; Rights Under Wills, see WILLS. Kidnapping, see KIDNAPPING. Meaning of Word — In Particular Instruments, see DEEDS; WILLS; In Particular Statutes, see ABDUCTION; ADOPTION OF CHILDREN; BASTARDS; DEATH; GUARDIAN AND WARD; INFANTS; PARENT AND CHILD. Of Aliens, see ALIENS. Status and Disabilities of Infant, see INFANTS.)

CHILD'S PART. As large a share as any child has.[54]

CHILLING BIDDING. See AUCTIONS AND AUCTIONEERS.

CHIMNEY. The flue which leads from the combustion chamber to conduct waste heat and smoke away.[55] (Chimney: Breaking and Entering Through, see BURGLARY.)

CHINESE. See ALIENS; CITIZENS.

CHIP HAT. A hat made of the ligneous strips of a tree.[56]

CHIROGRAPH. A deed or other public instrument in writing.[57]

CHIROGRAPHUM APUD DEBITOREM REPERTUM PRÆSUMITUR SOLUTUM. A maxim meaning "An evidence of debt found in the debtor's possession is presumed to be paid."[58]

CHIROPODIST. One who treats diseases or malformations of the hands or feet; especially a surgeon for the feet, hands and nails; a cutter or extractor of corns and callosities; a corn doctor.[59]

CHLOROFORM. An oily liquid of an aromatic ethereal odor, consisting of carbon, hydrogen, and chlorine.[60] (See, generally, POISONS.)

CHOICE. The power to determine between two or more.[61]

CHOKE. To prevent or interfere with the passage of air through the windpipe, either by internal obstruction or by external pressure.[62]

CHOKED. Rendered unable to breathe by filling, pressing upon or squeezing the windpipe; suffocated, stifled, strangled.[63]

CHOLERA. See HEALTH.

CHOSE. Personal property.[64] (Chose: In Action, see PROPERTY. In Possession, see PROPERTY.)

CHOSEN. Selected.[65] (Chosen: Freeholders, see COUNTIES.)

CHOUSE. To cheat, trick, defraud,—followed by "of" or "out of," as, to chouse one out of his money.[66]

CHRISTIAN. In the most general sense, an inhabitant of Christendom.[67] (Christian: Name, see NAMES. Science, see PHYSICIANS AND SURGEONS.)

552, 555, 5 N. E. 673 [*citing* 2 Redfield Wills, (2d ed.) 15; 2 Jarman Wills, 690]; Tillinghast *v.* D'Wolf, 8 R. I. 69, 73 [*citing* Williams Exec. 742]; Heyward *v.* Hasell, 2 S. C. 509, 511.

54. Davis *v.* Duke, 1 N. C. 439, 441.

55. Lloyd *v.* Miller, 19 Fed. 915, 918.

56. U. S. *v.* Goodwin, 4 Mason (U. S.) 128, 130, 25 Fed. Cas. No. 15,229.

57. Wharton L. Lex.

58. Burrill L. Dict.

59. Century Dict. [*quoted* in State *v.* Fisher, 119 Mo. 344, 353, 24 S. W. 167, 22 L. R. A. 799].

60. State *v.* Baldwin, 36 Kan. 1, 20, 12 Pac. 318 [*quoting* Webster Dict.], where it is said: "It evaporates speedily, and has a specific gravity of 1.5. It is an important anæsthetic agent, and is also used externally to alleviate pain. It is also a powerful solvent, dissolving easily wax, spermaceti, resins, etc."

61. People *v.* Mosher, 45 N. Y. App. Div. 68, 72, 61 N. Y. Suppl. 452, where it is said: "No choice or selection can be made when there is no alternative; 'Hobson's choice' was no selection."

62. Hicks *v.* State, 105 Ga. 627, 629, 31 S. E. 579.

63. U. S. *v.* Barber, 20 D. C. 79, 93 [*citing* Webster Int. Dict.].

64. Vawter *v.* Griffin, 40 Ind. 593, 601 [*quoting* Bouvier L. Dict.].

65. Kruget *v.* State, 1 Nebr. 365, 369.

66. Webster Dict. [*quoted* in Southern Kansas R. Co. *v.* Isaacs, 20 Tex. Civ. App. 466, 469, 49 S. W. 690].

67. Worcester Dict. [*quoted* in Hale *v.* Everett, 53 N. H. 9, 217, 16 Am. Rep. 82], where Webster Dict. is quoted to the effect that

CHRISTIANITY. The religion of those who believe that Jesus Christ is the true Messiah and the Saviour of men, and who receive the Holy Scriptures of the Old and New Testaments as the word of God.[68] (Christianity: As Part of Common Law, see BLASPHEMY; COMMON LAW. Blasphemous Language Against, see BLASPHEMY. Gifts For Promotion of, see CHARITIES.)

CHRISTMAS-DAY. A festival of the Christian church, observed on the twenty-fifth of December, in memory of the birth of Jesus Christ. It is one of the usual quarter-days for the payment of rent and salaries and is also a day on which the offices of the supreme court are closed.[69]

CHRONIC. Inveterate; slow of progress; of long standing.[70]

CHUCK-A-LUCK. See GAMING.

CHUNCKER. A sort of canal-boat.[71]

CHURCH.[72] A formally organized body of Christians believing and worshiping together; a body of Christian believers observing the same rites and acknowledging the same ecclesiastical authority;[73] a body of persons associated together for the purpose of maintaining Christian worship and ordinances;[74] a society of Christians meeting together in one place, under their proper pastors, for the performance of religious worship and the exercising of Christian discipline, united together by covenant;[75] an assembly of persons united by the profession of the same Christian faith, met together for religious worship;[76] congregation;[77] a society of persons who profess the Christian religion; the place where such persons regularly assemble for worship;[78] a building set apart for Christian worship;[79] a temple or building consecrated to the honor of God and religion;[80] the collective body

"in a general sense, the word Christians includes all who are born in a Christian country or of Christian parents."

68. Robbins Religions of All Nations, 11 [*quoted* in Hale *v.* Everett, 53 N. H. 9, 54, 16 Am. Rep. 82].

69. Wharton L. Lex.

70. Chicago *v.* Fitzgerald, 75 Ill. App. 174, 180 [*citing* Century Dict.; Webster Dict.].

Distinguished from "acute."—"As applied to diseases of the body, 'chronic' and 'acute' are the antithesis of each other. An 'acute' disease is one usually attended with violent symptoms, promising speedily to attain a crisis; while a 'chronic' disease is deep-rooted and obstinate, threatening a long continuance." Jones *v.* Yarborough, 2 Ala. 524, 525.

71. Winslow *v.* Floating Steam Pump, 30 Fed. Cas. No. 17,880, 2 N. J. L. J. 124.

Is within jurisdiction of admiralty see ADMIRALTY, 1 Cyc. 822, note 16.

72. **"This term is one of very comprehensive signification.** It anciently signified any public meeting convened to consult upon the common welfare of a State, was afterwards used to designate the place of sacred or religious meetings, and again it was applied to religious congregations, assemblies or associations, but at the present time and under our institutions and laws, it must be understood to express a spiritual or religious corporation." Amwell Baptist Soc. *v.* Fisher, 18 N. J. L. 254, 257.

Distinguished from "place of public worship" in State *v.* Midgett, 85 N. C. 538, 540.

Distinguished from "religious society."—"A religious society is a body of persons associated together for the purpose of maintaining religious worship only, omitting the sacraments." Silsby *v.* Barlow, 16 Gray (Mass.) 329, 330. But see Greenland Church, etc., Soc. *v.* Hatch, 48 N. H. 393, 396, where it is said: "And it is we think a matter of common observation that the terms 'church' and 'society' are popularly used to express the same thing, namely, a religious body organized to sustain public worship."

By the Book of Church Order of the Presbyterian Church in the United States the word "church" is defined: "A number of professing Christians with their offspring associated together for divine worship and Godly living agreeably to the scriptures and submitting to the lawful government of Christ's kingdom." Wilson *v.* Perry, 29 W. Va. 169, 185, 1 S. E. 202. See also Wilson *v.* John's Island Presb. Church Co., 2 Rich. Eq. (S. C.) 192, 211; Deoderick *v.* Lampson, 11 Heisk. (Tenn.) 523, 531.

73. Webster Dict. [*quoted* in Wilson *v.* Perry, 29 W. Va. 169, 185, 1 S. E. 302].

74. Silsby *v.* Barlow, 16 Gray (Mass.) 329, 330.

75. Baker *v.* Fales, 16 Mass. 488, 498.

76. Jacob L. Dict. [*quoted* in Josey *v.* Union L. & T. Co., 106 Ga. 608, 611, 32 S. E. 628; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 95].

77. Gaff *v.* Greer, 88 Ind. 122, 131, 45 Am. Rep. 449.

78. Bouvier L. Dict. [*quoted* in Matter of Zinzow, 18 Misc. (N. Y.) 653, 660, 43 N. Y. Suppl. 714].

79. People *v.* Watseka Camp Meeting Assoc., 160 Ill. 576, 579, 43 N. E. 716 [*citing* Webster Dict.].

80. Jacob L. Dict. [*quoted* in Josey *v.* Union L. & T. Co., 106 Ga. 608, 611, 32 S. E. 628; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 95]. See also Matter of Zinzow, 18 Misc. (N. Y.) 653, 660, 43 N. Y. Suppl. 714 [*quoting* Anderson L. Dict.].

of Christians or those who acknowledge Christ as the Saviour of mankind.[81] (Church: Burning, see Arson. Disturbing, see Disturbance of Public Meetings. Edifice, see Church Edifice. Exemption from Taxation, see Taxation. Generally, see Religious Societies. Gifts to, see Charities.)

CHURCH EDIFICE. A building in which people assemble for the worship of God, and for the administration of such offices and services as pertain to that worship.[82]

CHYMOSIN. A ferment found in the rennets or stomachs of calves and hogs.[83]

CIDER. An alcoholic beverage obtained by the fermentation of the juice of apples;[84] a fermented liquor made from the juice of apples,[85]—formerly used of all kinds of strong liquors except wine;[86] a drink made from the juice of apples.[87] (See, generally, Intoxicating Liquors.)

CIGAR. A bunch of tobacco rolled together and put into shape for smoking, and intended for that use.[88] (See, generally, Internal Revenue.)

CIGARETTE. A small cigar made of finely cut tobacco rolled up in an envelop of tobacco, corn-husk, or thin paper, generally rice-paper, so as to form a cylinder open at both ends.[89] (Cigarette: License For Sale of, see Licenses. Regulation of Sale of as Affecting Interstate Commerce, see Commerce. Taxation of, see Internal Revenue.)

CINQUE PORTS. The ports of Dover, Sandwich, Romney, Hastings, and Hythe, to which were afterward added Winchelsea and Rye.[90]

CIRCUIT. A civil division of a country, state, or kingdom, for the more convenient administration of justice.[91] (Circuit: Courts, see Courts. Courts of Appeals, see Courts. Judges, see Judges.)

CIRCUITUS EST EVITANDUS; ET BONI JUDICIS EST LITES DERIMERE, NE LIS EX LITE ORIATUR. A maxim meaning "Circuity is to be avoided; and it is the duty of a good judge to determine litigations, lest one lawsuit arise out of another."[92]

81. Webster Dict. [*quoted* in Wilson *v.* Perry, 29 W. Va. 169, 185, 1 S. E. 302].

82. *In re* St. Louis Christian Science Institute, 27 Mo. App. 633, 637.

83. Blumenthal *v.* Burrell, 43 Fed. 667.

84. Encycl. Britannica (9th ed.) tit. Cider [*quoted* in Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570, 571].

"The fermentation is the most delicate part of the process; slight fermentation leaves the liquor thick and unpalatable; rapid fermentation impairs its strength and durability; and excessive fermentation makes it sour, harsh, and thin; that cider contains in 100 volumes 9.87 of alcohol of 92 per cent.; the weakest, 5.21." Watts Dict. Chem. [*quoted* in State *v.* Schaefer, 44 Kan. 90, 93, 24 Pac. 92]. See also Johnson Cycl. [*quoted* in State *v.* Schaefer, 44 Kan. 90, 93, 24 Pac. 92], where it is said: "The apples are first reduced to pulp in a mill, and the pulp is afterward subjected to pressure. The apple-juice is placed in casks in a cool place, when fermentation begins; part of the sugar is converted into alcohol, and a clear liquid is obtained, which can easily be racked off from sedimentary matter. . . . It contains from 5¼ to 10 per cent. of alcohol, and is intoxicating when drunk in large quantities." *Compare* State *v.* Oliver, 26 W. Va. 422, 427, 53 Am. Rep. 79, where it is said: "Cider is neither produced by distillation nor by fermentation, and although liable to fermentation, and when subjected to distillation, it is capable of producing a spirituous liquor, yet the ultimate product is no more like cider, than rum is like the juice of sugar-cane from which it is manufactured, neither is cider the result of any process of fermentation whatever, nor is it in any proper sense a mixture of any liquor other than water, which is common to all spirituous liquor wines, ale, porter, beer and all drinks of like nature."

85. Brande Encycl. Science, Lit. & Art, tit. Cider [*quoted* in Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570, 571]; Worcester Dict. [*quoted* in State *v.* Schaefer, 44 Kan. 90, 92, 24 Pac. 92; Com. *v.* Reyburg, 122 Pa. St. 299, 304, 16 Atl. 351, 2 L. R. A. 415; Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570, 571].

86. Worcester Dict. [*quoted* in Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570, 571, where it is said: "Mr. Worcester, in his definition of cider, gives its supposed Greek equivalent, and translates it 'strong drink;' and in Wyckliffe's translation of the New Testament the passage in Luke i. 15, which in the authorized version reads, 'He shall drink neither wine nor strong drink,' is translated, 'He shall not drink wine nor cider.'"].

87. Webster Dict. [*quoted* in Com. *v.* Reyburg, 122 Pa. St. 299, 304, 16 Atl. 351, 2 L. R. A. 415].

88. D'Estrinoz *v.* Gerker, 43 Fed. 285, 286.

89. Century Dict.

90. Burrill L. Dict.

91. Burrill L. Dict.

92. Black L. Dict.

CIRCUITY OF ACTION. A longer course of proceeding to recover a thing sued for than is needful.[93] (Circuity of Action: Avoidance of — As Ground For Equity Jurisdiction, see EQUITY; By Set-Off and Cross-Demands, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.)

CIRCULATION. Currency; circulating notes or bills current for coin.[94]

CIRCUMSTANCE. An event; a particular incident;[95] a fact.[96]

CIRCUMSTANCES. Proof; evidence.[97]

CIRCUMSTANTIAL EVIDENCE. See CRIMINAL LAW; EVIDENCE.

CITATION. An official call or notice to appear in court;[98] the act of quoting authorities, and sometimes an authority quoted.[99] (Citation: In General, see NOTICE; PROCESS. In Proceedings by — Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Trustee, see TRUSTS. Of Absentees, see ABSENTEES. On Appeal or Error, see APPEAL AND ERROR.)

CITE. To call or summon, to notify a party of a proceeding against him, or call him to appear and defend; to quote or refer to authorities in support of a proposition.[1]

CITIES. See MUNICIPAL CORPORATIONS.

93. Burrill L. Dict.

94. Webster Dict. [*quoted* in U. S. *v.* White, 19 Fed. 723, 724].

95. Webster Int. Dict. [*quoted* in Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 251, 41 N. E. 530].

96. Clare *v.* People, 9 Colo. 122, 124, 10 Pac. 799; Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 251, 41 N. E. 530 [*quoting* Webster Int. Dict.].

97. Hogan *v.* Shuart, 11 Mont. 498, 508, 28 Pac. 969.

98. Arnold *v.* Sabin, 1 Cush. (Mass.) 525, 529, where it is said that in England the term "is applied particularly to process in the spiritual courts; as the ecclesiastical courts, there, proceed by libel and citation, according to the course of the civil and canon law."

99. Abbott L. Dict.

1. Abbott L. Dict.

CITIZENS

By H. Gerald Chapin
Editor of "The American Lawyer"

I. **Terminology**, 133
A. *Citizen*, 133
B. *Citizenship*, 136
II. **Double Citizenship**, 136
III. **Citizenship, How Acquired**, 137
A. *By Place of Birth*, 137
1. *Within Territorial Confines*, 137
a. *General Rule*, 137
b. *Exception to Rule*, 138
2. *Law of the Flag*, 138
B. *By Parentage*, 139
1. *Children of Citizens*, 139
a. *In General*, 139
b. *Illegitimate Children*, 140
2. *Children of Ambassadors and Consuls*, 140
3. *Children of Aliens*, 140
C. *By Marriage*, 141
D. *By Cession of Territory*, 142
E. *By Admission to Statehood in the Union*, 143
F. *By Naturalization*, 144
IV. **How Lost — Expatriation**, 144
A. *Right of Expatriation*, 144
B. *What Constitutes Expatriation*, 145
V. **Evidence of Citizenship**, 147
A. *Presumption and Burden of Proof*, 147
B. *Competency and Relevancy*, 147
1. *Direct Testimony*, 147
2. *Passports*, 147
3. *Declarations*, 147
C. *Weight and Sufficiency*, 148

CROSS-REFERENCES

For Matters Relating to:
Absentees, see Absentees.
Aliens:
Generally, see Aliens.
Alien Enemies, see War.
Citizenship, as Affecting:
Attachment Proceedings, see Attachment.
Captures and Prizes, see War.
Eligibility to Office, see Officers.
Jurisdiction of Courts, see Courts; Removal of Causes.
Right to Vote, see Elections.
Colored Citizens, see Civil Rights.
Constitutional Rights of Citizens, see Constitutional Law.
Domicile, see Domicile.
Extradition, see Extradition.

For Matters Relating to — (*continued*)
Indians, see INDIANS.
Naturalization, see ALIENS.
Treaties, see TREATIES.
War, see WAR.

I. TERMINOLOGY.

A. Citizen. A citizen is one who, as a member of a nation or of the body politic of a sovereign state, owes allegiance to and may claim reciprocal protection from its government.[1] While the word "citizen" is capable of more mean-

1. See Abbott L. Dict. [*quoted* in State *v.* Howard County Ct., 90 Mo. 593, 598, 2 S. W. 788]; Century Dict.; Walsh *v.* Lallande, 25 La. Ann. 188; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; 10 Op. Atty.-Gen. (U. S.) 382.

Other definitions are: "A constituent member of the sovereignty, synonymous with the people." Black L. Dict. [*citing* Scott *v.* Sandford, 19 How. (U. S.) 393, 404, 15 L. ed. 691]; White *v.* Clements, 39 Ga. 232, 261 [*quoting* Taney, C. J., in Scott *v.* Sandford, 19 How. (U. S.) 393, 404, 15 L. ed. 691]. See also Steketee *v.* Kimm, 48 Mich. 322, 325, 12 N. W. 177, where it is said: "In ordinary parlance all people are citizens."

"A freeman of a city." Johnson Dict. [*quoted* in White *v.* Clements, 39 Ga. 232, 260].

"A freeman of a city; not a foreigner; not a slave; a townsman, a man of trade; not a gentleman; an inhabitant; a dweller in any place." Johnson Dict. [*quoted* in U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 38, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22].

"A member of a nation or sovereign state, especially of a republic; one who owes allegiance to a government, and is entitled to protection from it." Standard Dict. [*quoted* in O'Connor *v.* State, (Tex. Civ. App. 1902) 71 S. W. 409, 410].

"A member of the civil state entitled to all its privileges." Black L. Dict. [*citing* Cooley Const. L. 77].

"An inhabitant in any city, town, or place." Webster Dict. [*quoted* in Skinner *v.* State, 120 Ind. 127, 131, 22 N. E. 115]. And see Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 35 Am. Rep. 536.

"One who enjoys the freedom and privileges of a city, as distinguished from a foreigner, or one not entitled to its franchises." Webster Dict. [*quoted* in Skinner *v.* State, 120 Ind. 127, 131, 22 N. E. 115].

"The native of a city, or an inhabitant who enjoys the freedom and privileges of a city in which he resides — a freeman of a city distinguished from a foreigner, or one not entitled to its franchises." Webster Dict. [*quoted* in White *v.* Clements, 39 Ga. 232, 260].

"**In its strict and rigorous sense,** an inhabitant of a city, who, by right, may vote in the public assembly, and is a part of the sovereign power." Dict. L'Acad. [*quoted* in White *v.* Clements, 39 Ga. 232, 260].

In the popular and appropriate sense, one who by birth, naturalization, or otherwise, is a member of an independent political society, called a state, kingdom, or empire, and as such is subject to its laws and entitled to its protection in all his rights incident to that relation. Blanck *v.* Pausch, 113 Ill. 60, 64.

The terms "citizen" or "subject" and "alien" and "alien born" are in their nature relative. See ALIENS, 2 Cyc. 84 note.

"**The term citizen, as understood in our law, is precisely analogous to the term subject,** in the common law; and the change of phrases has entirely resulted from the change of government. The sovereignty has been changed from one man to the collective body of the people, and he who before was a subject of the king is now a citizen of the State." State *v.* Manuel, 20 N. C. 122, 129 [*quoted* in U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 39, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22].

The word is never used of the people in a monarchy, since it involves an idea not enjoyed by subjects, to wit, the inherent right to partake in the government. White *v.* Clements, 39 Ga. 232, 260.

In English law: "A citizen is a freeman who has kept a family in a city." Roy *v.* Hanger, 1 Rolle 138, 149 [*quoted* in U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 39, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22].

"An inhabitant of a city." Black L. Dict. [*citing* Roy *v.* Hanger, 1 Rolle 138].

"The representative of a city, in parliament." Black L. Dict. [*citing* 1 Bl. Comm. 174].

"**Citizens (cives) of London** are either freemen or such as reside and keep a family in the city, etc.; and some are citizens and freemen, and some are not, who have not so great privileges as others." Jacob L. Dict. [*quoted* in U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 39, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22].

The word is derived from the Latin *civis,* — free inhabitant of a city (Black L. Dict.) and meant in Rome one vested with the freedom and privileges of the city (Rees Encycl. [*cited* in White *v.* Clements, 39 Ga. 232, 259]).

Use and origin of term.— The term appears "drawn from the political condition in ancient times when the city was the leading type of governmental organization; when the free inhabitant or corporate member of a

ings than one,[2] it is not a convertible term with "inhabitant" or "resident";[3]

powerful and wealthy municipality enjoyed a status at home to which power, influence, and privilege were attached; and received, when travelling abroad, a protection and respect which were accorded to him in view of his membership in the city of his birth or acquired residence, and were proportioned to the rank and power of that city among the cities of the world. Citizen was the natural expression in which to couch one's claim of immunity or favor abroad, or of authority or privilege at home, when it was founded upon membership in a city." Abbott L. Dict. To the same effect see Thomasson *v.* State, 15 Ind. 449, 451 [*citing* Adams Rom. Antiq. 44, 60 *et seq.*; Gilles Greece 163; 2 Kent Comm. 76 note; 1 Smith Thucydides 2 note]; Amy *v.* Smith, 1 Litt. (Ky.) 326, 332 [*citing* Butler Horæ Juridicæ 26, 27]. "There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the states upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more." Minor *v.* Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627. See also the following cases:

California.— Van Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136.

Georgia.— White *v.* Clements, 39 Ga. 232, 257.

Illinois.— Blanck *v.* Pausch, 113 Ill. 60.

North Carolina.— State *v.* Manuel, 20 N. C. 122.

United States.— Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; The Pizarro, 2 Wheat. (U. S.) 227, 4 L. ed. 226; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22.

See 10 Cent. Dig. tit. "Citizens," § 1 *et seq.*

2. U. S. *v.* Darnaud, 3 Wall. Jr. (U. S.) 143, 25 Fed. Cas. No. 14,918; Webster Dict. [*quoted* in Risewick *v.* Davis, 19 Md. 82, 93]; and cases cited *supra*, note 1.

That the term has various meanings according to the object in view is well illustrated by different statutes in which it appears. Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 461, 35 Am. Rep. 536.

3. *Alabama.*— State *v.* Primrose, 3 Ala. 546.

California.— People *v.* Riley, 15 Cal. 48.

Delaware.— Quinby *v.* Duncan, 4 Harr. (Del.) 383.

Florida.— Brock *v.* Doyle, 18 Fla. 172, 183 [*quoting* Brown *v.* Keene, 8 Pet. (U. S.) 112, 115, 8 L. ed. 885].

Illinois.— Cleveland, etc., R. Co. *v.* Monaghan, 140 Ill. 474, 485, 30 N. E. 869 [*citing* Brown *v.* Keene, 8 Pet. (U. S.) 112, 115, 8 L. ed. 885; Kelly *v.* Houghton, 23 Fed. 417]; Spragins *v.* Houghton, 3 Ill. 377, 402 [*quoting* Vattel, bk. I, c. 19, § 213].

Indiana.— State *v.* Kilroy, 86 Ind. 118, 121.

Kentucky.— Harris *v.* John, 6 J. J. Marsh. (Ky.) 257.

Massachusetts.— Opinion of Justices, 7 Mass. 523.

New York.— Matter of Wrigley, 4 Wend. (N. Y.) 602.

Texas.— *Ex p.* Blumer, 27 Tex. 734, 738 [*quoting* Vattel, who says: "The inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country]."

United States.— Parker *v.* Overman, 18 How. (U. S.) 137, 15 L. ed. 318; Evans *v.* Davenport, 4 McLean (U. S.) 574, 8 Fed. Cas. No. 4,558. See also U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 39, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22, where it is said: "The word *civis*, taken in the strictest sense, extends only to him that is entitled to the privileges of a city of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen."

See 10 Cent. Dig. tit. "Citizens," § 1 *et seq.*

A non-resident may be a citizen. Curd *v.* Letcher, 3 J. J. Marsh. (Ky.) 443, 445.

Sometimes used synonymously.— The word "citizen" is often used in common conversation and writing as meaning only an inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges (McKenzie *v.* Murphy, 24 Ark. 155, 159; Borland *v.* Boston, 132 Mass. 89, 93, 42 Am. Rep. 424); and "citizen" is often used synonymously with "inhabitant" or "resident" in statutes (Smith *v.* Birmingham Water Works Co., 104 Ala. 315, 325, 16 So. 123; Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617; Risewick *v.* Davis, 19 Md. 82, 83; State *v.* Delhi Tp., 11 Ohio 24; Morris *v.* Nashville, 6 Lea (Tenn.) 337, 341; Cobbs *v.* Coleman, 14 Tex. 594; Cooper *v.* Galbraith, 3 Wash. (U. S.) 546, 6 Fed. Cas. No. 3,193). Indeed one of Webster's definitions is "a per-

women[4] and minors[5] may be citizens;[6] hence "citizen" is not synonymous with "elector" or "voter,"[7] although as a rule one who has the right to vote for civil officers and himself is qualified to fill elective offices is a citizen.[8] Race or color do not seem to be involved in definition of the term.[9] Again one may be considered a citizen for some purposes and not a citizen for other purposes.[10]

manent resident." *In re* Wehlitz, 16 Wis. 443, 449, 84 Am. Dec. 700. See also Judd *v.* Lawrence, 1 Cush. (Mass.) 531, 535, where it is said: "An inhabitant may be termed a citizen."

4. Sex is not involved. Abbott L. Dict. [*quoted* in State *v.* Howard County Ct., 90 Mo. 593, 598, 2 S. W. 788]. A woman is a citizen within the meaning of the first section of the fourteenth amendment of the constitution of the United States. Ritchie *v.* People, 155 Ill. 98, 112, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79 [*citing* Minor *v.* Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627]. But "citizen" is sometimes used to include only male citizens. Bloomer *v.* Todd, 3 Wash. Terr. 599, 19 Pac. 135, 1 L. R. A. 111.

5. Age or majority is not involved. Abbott L. Dict. [*quoted* in State *v.* Howard County Ct., 90 Mo. 593, 598, 2 S. W. 788].

6. Blanck *v.* Pausch, 113 Ill. 60; State *v.* Fairlamb, 121 Mo. 137, 151, 25 S. W. 895; State *v.* Howard County Ct., 90 Mo. 593, 598, 2 S. W. 788; and cases cited *infra*, note 7.

7. *California.*— Lyons *v.* Cunningham, 66 Cal. 42, 4 Pac. 938; Van Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136; People *v.* De la Guerra, 40 Cal. 311.

Illinois.— Blanck *v.* Pausch, 113 Ill. 60.

Indiana.— Smith *v.* Moody, 26 Ind. 299.

Kansas.— Laurent *v.* State, 1 Kan. 313.

Massachusetts.—Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239; Opinion of Justices, 7 Mass. 523.

Missouri.— State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895.

Wisconsin.— *In re* Wehlitz, 16 Wis. 443, 448, 89 Am. Dec. 700 [*quoting* dissenting opinion, Curtis, J., in Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691].

United States.— U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; Minor *v.* Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22; Lanz *v.* Randall, 4 Dill. (U. S.) 425, 14 Fed. Cas. No. 8,080, 14 Alb. L. J. 363, 3 Centr. L. J. 688, 3 N. Y. Wkly. Dig. 307, 24 Pittsb. Leg. J. (Pa.) 68. See also, generally, ELECTIONS.

The right of suffrage and the right of citizenship are separate rights. People *v.* Board of Inspectors, 32 Misc. (N. Y.) 584, 67 N. Y. Suppl. 236.

In statutes, however, the word is sometimes synonymous with "elector." School Dist. No. 11 *v.* School Dist. No. 20, 63 Ark. 543, 39 S. W. 850; Scarborough *v.* Eubank, (Tex. Civ. App. 1899) 52 S. W. 569.

8. Black L. Dict. See also State *v.* Howard County Ct., 90 Mo. 593, 598, 2 S. W. 788 [*quoting* Bouvier L. Dict.; Webster Dict.]; *In re* Wehlitz, 16 Wis. 443, 449, 84 Am. Dec. 700 [*quoting* Bouvier L. Dict.; Webster Dict.]. See also, generally, ELECTIONS.

9. Abbott L. Dict.

Free colored persons born in a state are citizens of the state and of the United States. Opinion of Judges, 32 Conn. 565; Smith *v.* Moody, 26 Ind. 299; *In re* Turner, 1 Abb. (U. S.) 84, Chase (U. S.) 157, 24 Fed. Cas. No. 14,247, 1 Am. L. T. Rep. (U. S. Cts.) 7, 6 Int. Rev. Rec. 147. But see Crandall *v.* State, 10 Conn. 340, 345.

Since the adoption of the thirteenth and fourteenth amendments to the constitution negroes are citizens of the United States. Smith *v.* Moody, 26 Ind. 299; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; *In re* Turner, 1 Abb. (U. S.) 84, Chase (U. S.) 157, 24 Fed. Cas. No. 14,247, 1 Am. L. T. Rep. (U. S. Cts.) 7, 6 Int. Rev. Rec. 147; U. S. *v.* Canter, 2 Bond (U. S.) 389, 25 Fed. Cas. No. 14,719; *In re* Look Tin Sing, 10 Sawy. (U. S.) 353, 21 Fed. 905. See also, generally, CIVIL RIGHTS.

The common law has made no distinction on account of race or color. None is now made in England or in any other christian country of Europe. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 40, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22.

Mongolians.— Mongolians not born within the territorial confines of the United States are not made citizens of this country either by virtue of the amendments to the constitution or of the treaty between the United States and China. State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488.

Slaves were not citizens. See Crandall *v.* State, 10 Conn. 340, 345.

10. Partial citizenship, at Rome, included civil but not political rights. Thomasson *v.* State, 15 Ind. 449, 451.

Complete citizenship embraced both civil and political rights. Thomasson *v.* State, 15 Ind. 449, 451.

One may be a citizen for commercial or business purposes and not for political purposes. Risewick *v.* Davis, 19 Md. 82; Judd *v.* Lawrence, 1 Cush. (Mass.) 531, 535; The Friendschaft, 3 Wheat. (U. S.) 12, 4 L. ed. 322; Murray *v.* Schooner Charming Betsy, 2 Cranch (U. S.) 64, 2 L. ed. 208; U. S. *v.* Gillies, 1 Pet. C. C. (U. S.) 159, 25 Fed. Cas. No. 15,206, 3 Wheel. Crim. (N. Y.) 308; Wilson *v.* Marryat, 1 B. & P. 430, 8 T. R. 31. Hence an unnaturalized alien, residing and doing business in Maryland, is for commercial objects a citizen thereof, and liable to be proceeded against as an absconding debtor, although the attachment laws used the word "citizen" as defining those who might come within the purview of the latter term. Field

B. Citizenship. Citizenship is the status of being a citizen;[11] the relation of allegiance and protection between individuals and their country.[12] As distinguished from alienage the right of citizenship is a national right or condition.[13]

II. DOUBLE CITIZENSHIP.

In this country a double citizenship exists, for the term applies both to membership in the nation considered as a whole and to membership in the state in which the individual may reside.[14]

v. Adreon, 7 Md. 209; *In re* Wehlitz, 16 Wis. 443, 449, 84 Am. Dec. 700.

Corporations.—A corporation aggregate is not a citizen of the United States except for the purpose of conferring jurisdiction, when it is considered a citizen of the state by which it is incorporated.

Delaware.— State *v.* Delaware, etc., Tel., etc., Co., 7 Houst. (Del.) 269, 31 Atl. 714.

Indiana.— Farmers, etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Kentucky.— Phœnix Ins. Co. *v.* Com., 5 Bush (Ky.) 68, 96 Am. Dec. 331; Com. *v.* Milton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522; Woodward *v.* Com., 9 Ky. L. Rep. 670, 7 S. W. 613.

Michigan.— Home Ins. Co. *v.* Davis, 29 Mich. 238.

New Jersey.— Tatem *v.* Wright, 23 N. J. L. 429.

New York.— People *v.* Imlay, 20 Barb. (N. Y.) 68.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Pennsylvania.— Wheeden *v.* Camden, etc., R. Co., 1 Grant (Pa.) 420.

Rhode Island.— State *v.* Brown, etc., Mfg. Co., 18 R. I. 16, 26 Atl. 246, 17 L. R. A. 856.

South Carolina.— Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192.

Virginia.— Slaughter *v.* Com., 13 Gratt. (Va.) 767.

United States.— Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Ducat *v.* Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972 [*affirming* 48 Ill. 172, 95 Am. Dec. 529]; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Covington Drawbridge Co. *v.* Shepherd, 20 How. (U. S.) 227, 15 L. ed. 896; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 15 L. ed. 451; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353 [*reviewing* and *controlling* Vicksburg Commercial, etc., Bank *v.* Slocomb, 14 Pet. (U. S.) 60, 10 L. ed. 354; U. S. Bank *v.* Deveaux, 5 Cranch (U. S.) 61, 3 L. ed. 38; Strawbridge *v.* Curtiss, 3 Cranch (U. S.) 267, 2 L. ed. 435]; Zambrino *v.* Galveston, etc., R. Co., 38 Fed. 449; Pacific R. Co. *v.* Missouri Pac. R. Co., 23 Fed. 565; Insurance Co. *v.* New Orleans, 1 Woods (U. S.) 85, 13 Fed. Cas. No. 7,052.

See 10 Cent. Dig. tit. "Citizens," § 16; and CORPORATIONS; REMOVAL OF CAUSES.

11. Black L. Dict.; Rapalje & L. L. Dict. And see Abrigo *v.* State, 29 Tex. App. 143, 149, 15 S. W. 408 [*citing* Bouvier L. Dict.].

"Citizenship is a status or condition, and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become such citizen by mere residence. The residence and the intent must co-exist and correspond." Sharon *v.* Hill, 11 Sawy. (U. S.) 291, 26 Fed. 337. And to the same effect see Kemna *v.* Brockhaus, 10 Biss. (U. S.) 128, 5 Fed. 762.

12. Abbott L. Dict. 223.

Citizenship is distinguished from "citizenship of domicile" and "judicial citizenship" in U. S. *v.* Darnaud, 3 Wall. Jr. (U. S.) 143, 25 Fed. Cas. No. 14,918.

13. Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583.

Citizenship in the United States is distinguishable from citizenship in a state. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588. See also *infra*, II.

14. U. S. Const. Amendm. I, clause 1; and the following cases:

California.— People *v.* De la Guerra, 40 Cal. 311, 341.

Kentucky.— Hoskins *v.* Gentry, 2 Duv. (Ky.) 285.

Maryland.— Baldwin *v.* Neale, 10 Gill & J. (Md.) 274; Wever *v.* Baltzell, 6 Gill & J. (Md.) 335; Yerby *v.* Lackland, 6 Harr. & J. (Md.) 446; Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497.

Virginia.— Com. *v.* Towles, 5 Leigh (Va.) 743.

United States.— Scott *v.* Sandford, 19 How. (U. S.) 393, 405, 15 L. ed. 691; Gassies *v.* Ballon, 6 Pet. (U. S.) 761, 8 L. ed. 573; Talbot *v.* Jansen, 3 Dall. (U. S.) 133, 1 L. ed. 540; *Ex p.* Kinney, 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825, 7 Reporter 712, 3 Va. L. J. 370.

See 10 Cent. Dig. tit. "Citizens," § 18.

As to effect of admission of territory to statehood see *infra*, III, E.

The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only

III. CITIZENSHIP, HOW ACQUIRED.

A. By Place of Birth — 1. Within Territorial Confines — a. General Rule. Children born within a country, of parents who are subject to the jurisdiction thereof, are citizens of such country;[15] and this includes children born within

may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights within its jurisdiction it must protect. The same person may be at the same time a citizen of the United States and a citizen of the state, but his rights of citizenship under one of these governments will be different from those he has under the other. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588. See also Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86, construing Virginia act of 1779.

Citizenship in the United States without citizenship in the state.— "A person may be a citizen of the United States, and not a citizen of any particular State. This is the condition of citizens residing in the District of Columbia, and in the Territories of the United States, or who have taken up a residence abroad." Prentiss *v.* Brennan, 2 Blatchf. (U. S.) 162, 164, 19 Fed. Cas. No. 11,385. See also Hepburn *v.* Ellzey, 2 Cranch (U. S.) 445, 2 L. ed. 332.

Citizenship in the state without citizenship in the United States.— Although a state in virtue of its sovereignty may, within its own limits, confer citizenship, yet persons so admitted to citizenship do not thereby become citizens of the United States, where according to United States law they are disqualified, as formerly was the case of members of the African race, from receiving it. Mitchell *v.* Wells, 37 Miss. 235; Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Minneapolis *v.* Reum, 56 Fed. 576, 12 U. S. App. 446, 6 C. C. A. 31. A state cannot make an alien a citizen of the United States. This can be done only in the manner prescribed by the naturalization laws of congress. Hence the state of Minnesota did not confer United States citizenship on an alien who had declared his intention to become a citizen by permitting him to vote at state elections and to hold office. Lanz *v.* Randall, 4 Dill. (U. S.) 425, 14 Fed. Cas. No. 8,080, 14 Alb. L. J. 363, 3 Centr. L. J. 688, 3 N. Y. Wkly. Dig. 307, 24 Pittsb. Leg. J. (Pa.) 68. And to the same effect see *In re* Wehlitz, 16 Wis. 443, 84 Am. Dec. 700. "A person who is a citizen of the United States is necessarily a citizen of the particular State in which he resides. But a person may be a citizen of a particular State and not a citizen of the United States. To hold otherwise would be to deny to the State the highest exercise of its sovereignty, the right to declare who are its citizens." State *v.* Fowler, 41 La. Ann. 380, 381, 6 So. 602.

Citizenship a national right.— The right of citizenship as distinguished from alienage being a national right or condition (see *supra*, I, B), it pertains to the confederated sovereignty — the United States and not to the individual states. Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583. A citizen of the United States owes his primary and highest allegiance to the general government and not to his particular state. Hence a citizen of one of the Confederate states who adhered to the federal cause, retiring to loyal territory and remaining there during the war, continued to be a citizen of the United States, notwithstanding the secession of his own state and notwithstanding his intention to return thereto after the cessation of hostilities. Planters Bank *v.* St. John, 1 Woods (U. S.) 585, 19 Fed. Cas. No. 11,208.

15. *California.*— Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182.

Connecticut.— New Hartford *v.* Canaan, 54 Conn. 39, 5 Atl. 360.

Massachusetts.— Ainslie *v.* Martin, 9 Mass. 454; Kilham *v.* Ward, 2 Mass. 236, 265; Gardner *v.* Ward, 2 Mass. 244, note *a*.

Minnesota.— Stadtler *v.* School Dist. No. 40, 71 Minn. 311, 73 N. W. 956.

Nevada.— Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312, 325.

New Jersey.—Benny *v.* O'Brien, 58 N. J. L. 36, 32 Atl. 696; Coxe *v.* Gulick, 10 N. J. L. 390.

New York.— Munro *v.* Merchant, 28 N. Y. 9 [*affirming* 26 Barb. (N. Y.) 383]; Bell *v.* Chapman, 10 Johns. (N. Y.) 183; Clarke *v.* Morey, 10 Johns. (N. Y.) 69; Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583.

Texas.— *Ex p.* Blumer, 27 Tex. 734, 741 [*citing* 1 Bl. Comm. 366; Story Confl. L. § 48].

Virginia.— Barzizas *v.* Hopkins, 2 Rand. (Va.) 276.

United States.— U. S. *v.* Wong Kim Ark, 169 U. S. 649, 655, 18 S. Ct. 456, 42 L. ed. 890; Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666; Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 155, 7 L. ed. 617; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 41, 27 Fed. Cas. No. 16,151, 1 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22; *Ex p.* Chin King, 13 Sawy. (U. S.) 333, 35 Fed. 354; 10 Op. Atty.-Gen. (U. S.) 382, 329, 328, 321; 9 Op. Atty.-Gen. (U. S.) 373; U. S. Rev. Stat.

the limits of the United States of Chinese parents domiciled in this country,[16] but it does not necessarily include the children born in this country of Indian parents.[17]

b. Exception to Rule.[18] A child born of alien enemies in a state of active warfare against the nation within whose territorial limits the birth occurs is not considered as having been born within the national allegiance and hence is an alien.[19]

2. Law of the Flag. Children born on shipboard are considered as being born within the allegiance of the country whose flag covers the vessel.[20]

(1878), § 1992. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U. S. Const. Amendm. XIV.

England.— Calvin's Case, 7 Coke 1*a*, 18*a*; Dyer 224*a*; 1 Bl. Comm. 366.

See 10 Cent. Dig. tit. "Citizens," § 2; and Bouvier L. Dict. [*quoted* in State *v.* Fairlamb, 121 Mo. 137, 150, 25 S. W. 895; State *v.* Howard County Ct., 90 Mo. 593, 598, 2 S. W. 788]; Cockburn Nationality, 7; Rawle Const. United States, 86.

"The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith,' or 'power' of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual — as expressed in the maxim, *protectio trahit subjectionem subjectio protectionem* — and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the Kingdom. Children born in England of such aliens were therefore natural-born subjects." U. S. *v.* Wong Kim Ark, 169 U. S. 649, 655, 18 S. Ct. 456, 42 L. ed. 890. A somewhat curious case illustrative of the strictness of the common-law rule is that of Æneas McDonald. Although born in Scotland, he was removed while an infant to France, where he received his education and where he fixed his domicile. Being captured while engaged in warfare against Great Britain, acting as a French military officer, the English courts adjudged him guilty of high treason. Macdonald's Case, 18 How. St. Tr. 858.

16. *In re* Wong Kim Ark, 71 Fed. 382 [*affirmed* in 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890, construing U. S. Const. Amendm. XIV]; Lem Hing Dun *v.* U. S., 49 Fed. 148, 7 U. S. App. 31, 1 C. C. A. 210; Gee Fook Sing *v.* U. S., 49 Fed. 146, 7 U. S. App. 27, 1 C. C. A. 211; *In re* Wy Shing, 13 Sawy. (U. S.) 530, 36 Fed. 553; *In re* Yung Sing Hee, 13 Sawy. (U. S.) 482, 36 Fed. 437; *Ex p.* Chin King, 13 Sawy. (U. S.) 333, 35 Fed. 354; *In re* Look Tin Sing, 10 Sawy. (U. S.) 353, 21 Fed. 905.

17. See, generally, Indians.

A child of Indian parents who have not renounced tribal relations is not a citizen where he is not taxed or naturalized or otherwise recognized as a citizen of the state or by the United States. Elk *v.* Wilkins, 112 U. S. 94, 9 S. Ct. 41, 28 L. ed. 643; U. S. *v.* Crook, 5 Dill. (U. S.) 453, 25 Fed. Cas. No. 14,891; *Ex p.* Reynolds, 5 Dill. (U. S.) 394, 20 Fed. Cas. No. 11,719, 18 Alb. L. J. 8; *Ex p.* Kenyon, 5 Dill. (U. S.) 385, 14 Fed. Cas. No. 7,720; U. S. *v.* Osborn, 6 Sawy. (U. S.) 406, 2 Fed. 58; McKay *v.* Campbell, 2 Sawy. (U. S.) 118, 16 Fed. Cas. No. 8,840, 5 Am. L. T. Rep. (U. S. Cts.) 407; U. S. *v.* Elm, 25 Fed. Cas. No. 15,048, 2 Cinc. L. Bul. 307, 23 Int. Rev. Rec. 419; 7 Op. Atty.-Gen. (U. S.) 756.

The child of a free citizen and of an Indian who has not renounced tribal relations takes the status of the father and becomes citizen or Indian in accordance with such father's condition. U. S. *v.* Ward, 42 Fed. 320; *Ex p.* Reynolds, 5 Dill. (U. S.) 394, 20 Fed. Cas. No. 11,719, 18 Alb. L. J. 8. *Aliter*, however, where the mother was a slave, in which case the maxim "*partus sequitur ventrem*" applies. Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051.

18. "Birth within the dominions of a sovereign is not always sufficient to create citizenship, if the party at the time does not derive protection from its sovereign in virtue of his actual possession; and, on the other hand, birth within the allegiance of a foreign sovereign does not always constitute allegiance, if that allegiance be of a temporary nature within the dominions of another sovereign. Thus, the children of enemies, born in a place within the dominions of another sovereign then occupied by them by conquest, are still aliens; but the children of the natives born during such temporary occupation by conquest are, upon a reconquest or reoccupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy." Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 155, 7 L. ed. 617.

19. Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 155, 7 L. ed. 617; 10 Op. Atty.-Gen. (U. S.) 328; Calvin's Case, 7 Coke 1*a*, 18*a*; and, generally, Aliens.

20. Stadtler *v.* School Dist. No. 40, 71 Minn. 311, 73 N. W. 956. A person born on a vessel flying the United States flag, of parents who are citizens of that country and who have penetrated within foreign territorial limits, not with the design of permanently removing thither, but who have touched there solely in the course of a voyage, is a citizen

B. By Parentage — 1. Children of Citizens — a. In General. The foreign-born children of a citizen are themselves citizens,[21] and in the application of

of the United States. U. S. *v.* Gordon, 5 Blatchf. (U. S.) 18, 25 Fed. Cas. No. 15,231.

21. *Iowa.*— State *v.* Adams, 45 Iowa 99, 24 Am. Rep. 760.

Maine.— Oldtown *v.* Bangor, 58 Me. 353.

Massachusetts.— Charles *v.* Monson, etc., Mfg. Co., 17 Pick. (Mass.) 70.

New Hampshire.— Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219.

New York.— Ludlam *v.* Ludlam, 31 Barb. (N. Y.) 486 [*affirmed* in 26 N. Y. 356, 84 Am. Dec. 193].

South Carolina.— Davis *v.* Hall, 1 Nott & M. (S. C.) 292; Sasportas *v.* De la Motta, 10 Rich. Eq. (S. C.) 38; *Ex p.* Dupont, Harp. Eq. (S. C.) 5 [*reversed* on other grounds in 3 Pet. (U. S.) 242, 7 L. ed. 666].

Vermont.— Albany *v.* Derby, 30 Vt. 718; Lyndon *v.* Danville, 28 Vt. 809.

United States.— Ware *v.* Wisner, 50 Fed. 310; Wolff *v.* Archibald, 4 McCrary (U. S.) 581, 14 Fed. 369; McKay *v.* Campbell, 2 Sawy. (U. S.) 118, 16 Fed. Cas. No. 8,840, 5 Am. L. T. Rep. (U. S. Cts.) 407; 13 Op. Atty.-Gen. (U. S.) 89, 91; U. S. Rev. Stat. (1878), § 1993.

England.—*In re* Willoughby, 30 Ch. D. 324, 54 L. J. Ch. 1122, 53 L. T. Rep. N. S. 926, 33 Wkly. Rep. 850; De Geer *v.* Stone, 22 Ch. D. 243, 52 L. J. Ch. 57, 47 L. T. Rep. N. S. 434, 31 Wkly. Rep. 241; Doe *v.* Jones, 4 T. R. 301; Fitch *v.* Weber, 6 Hare, 51, 12 Jur. 76, 17 L. J. Ch. 73, 31 Eng. Ch. 51; Craw *v.* Ramsey, Vaugh. 281; 1 Bl. Comm. 373; Coke Litt. 8*a*; 1 Comyns Dig. 541, and note *b*.

See 10 Cent. Dig. tit. "Citizens," § 9; Cockburn Nationality, 7, 9; 2 Am. L. Reg. 193.

Application of rule in various countries.— "Among all ancient peoples we find membership in a given community to have descended in every instance as a birthright, and the status of the father to have been the status of the child. So it will be remembered that the children of Jewish parents born in Egypt were Jews and not Egyptians, and at Athens it was undoubtedly true that the term '*Μετοικιοι*,' included the children of such resident foreigners who, although permitted to live within the city upon the payment of a yearly tax, were allowed none of the political and but few of the civil rights of a citizen of that democracy. Indeed, so far was the rule carried that the children of a citizen and a stranger were deemed bastards. The civil law as to citizenship was the same, since it was only the children of parents, both of whom possessed the '*jus connubii*' (a right enjoyed by none but citizens), who were Roman subjects. Upon the rise of the feudal system, however, we find a new principle enunciated. Man being deemed a slave to the soil, it was only just that his status should be regulated accordingly. Therefore by the law of the feudalists we find the status of children governed exclusively by the place of birth. It is by reason of the fact that one nation may perhaps follow the civil law and another the feudal rule that so much confusion arises. We may, therefore, divide the European and American States into three groups: First — Those who follow the civil law. These are Germany, Austria, Sweden, Norway and Switzerland. Second — Those who observe in whole or in part the doctrines of feudalism. They are Portugal, Denmark and Holland. The majority of the South American States also takes this view. Third — Those states which follow a mixed rule, compounded of both systems. These are France, Spain, Belgium and Greece, who while regarding the child of an alien as an alien, give him the right on attaining majority of electing which nation he may choose to become a citizen of, and in Russia and Italy a rule substantially similar is in force. Yet in all civilized states, the principle is laid down with greater or less stringency, that children of citizens wherever born, are citizens themselves." 4 Am. Lawyer 348 [*citing* Exodus, c. I; Fustel de Coulanges, La Cité Antique, 230; Hall Int. L. § 68 *et seq.*; Mackenzie Rom. L. p. 86; Pennel Greece 111, note 1; Salkowski Rom. L. (Whitefield's ed.) 163 and notes; Westlake Priv. Int. L. p. 286]. A few years later, to settle the doubts which had arisen, 25 Edw. III, c. 2, bestowed upon foreign-born children the unrestricted power of succeeding by descent to the lands of their ancestors. The operation of this act has not been restricted to conferring the power of inheritance alone. Its scope has been broadened so as to permit it to confer citizenship itself. Doe *v.* Jones, 4 T. R. 301. As early, however, as 17 Edw. III the matter was brought to the attention of parliament, who determined that the children of the king and the children of those in the king's service, although foreign-born, were capable of taking by inheritance, but as to the inheritability of all others so born they declined to decide. See De Geer *v.* Stone, 22 Ch. D. 243, 245 note, 4 Am. Lawyer 348, 52 L. J. Ch. 57, 47 L. T. Rep. N. S. 434, 31 Wkly. Rep. 24. Whether this enactment was merely declaratory of the common law or introduced a new rule was disputed. Independently of mere historical interest the point is of some importance in this country, since in the absence of any statutory provision regulating the matter, the citizenship of foreign-born children is to be determined by the common law anterior to the passage of the act. In Bacon *v.* Bacon, Cro. Car. 601, children so born were adjudged denizens, and a like rule was followed in the case of Colt's Case, Dyer 224*a*, note. Under the statute of 5 Rich. II, c. 2, prohibiting (*contra* to Magna Charta) the departure from the realm without license "of all manner of persons," the foreign-born children of subjects transgressing this rule were deemed to be aliens (Hyde *v.* Hill, Cro. Eliz. 3), but where par-

this rule it is wholly immaterial whether the parents are citizens by birth or naturalized citizens.[22]

b. Illegitimate Children. Illegitimate children, born abroad, of citizens being *nullius filii*, are not within the contemplation of section 1993 of the United States Revised Statutes, and hence are not themselves citizens.[23]

2. Children of Ambassadors and Consuls. Foreign-born children of ambassadors and consuls are in theory born within the allegiance of the sovereign power which their father represents and hence take the nationality of the father.[24]

3. Children of Aliens.[25] The child of a citizen father and of an alien mother is a citizen;[26] but one born of an alien father and of a citizen mother is not a citizen.[27]

ents had complied with the law a son so born was permitted to succeed to the inheritance (Roy *v.* Eaton, Lit. C. P. 23). And the inheritability of foreign-born children has been sustained in Collingwood *v.* Pace, 1 Vent. 413, 427. In Ludlam *v.* Ludlam, 26 N. Y. 356, 84 Am. Dec. 193, the view was taken that by the common law foreign-born children of citizens were themselves citizens, but this is contrary to the great weight of authority. In Calvin's Case, 7 Coke 1*a*, upon which their decision was almost exclusively based, and which decided that persons born in Scotland subsequent to the union of that kingdom with England were British subjects, the *ratio decidendi* appears to have been that, upon the accession of James I, the two countries became (so far as the theory of allegiance was concerned) one kingdom, so that being born in one of them was equivalent to being born in the other, and not in a foreign country. 4 Am. Lawyer 348. See also 33 & 34 Vict. c. 14; 7 & 8 Vict. c. 66; 13 Geo. III, c. 21; 4 Geo. II, c. 21; 7 Anne, c. 5.

Foreign-born children of slave parents.— One born in Canada of slave parents fugitives from the United States does not by removal to the United States become a citizen either by virtue of the constitutional amendments or by the act of April 14, 1802 (2 U. S. Stat. at L. 155) making citizens of the children born abroad of parents "who now are or have been citizens." People *v.* Board of Registration, 26 Mich. 51, 12 Am. Rep. 297.

22. Sasportas *v.* De la Motta, 10 Rich. Eq. (S. C.) 38.

Child of naturalized citizen.— The parents of a foreign-born offspring need not themselves be native-born in order to confer citizenship, since the child of a naturalized citizen born in a foreign country is himself a citizen. Oldtown *v.* Bangor, 58 Me. 353. See also, generally, Aliens.

23. Guyer *v.* Smith, 22 Md. 239, 85 Am. Dec. 650.

Similarly in England, the children of natural-born subjects who under 4 Geo. II, c. 21, are to be considered natural-born subjects of the kingdom must have been legitimate from birth and not rendered so by the subsequent marriage of their parents. Shedden *v.* Patrick, L. R. 1 H. L. Sc. 470, 535.

24. Stadtler *v.* School Dist. No. 40, 71 Minn. 311, 73 N. W. 956; Benny *v.* O'Brien, 58 N. J. L. 36, 32 Atl. 696; U. S. *v.* Wong Kim Ark, 169 U. S. 649, 655, 18 S. Ct. 456, 42 L. ed. 890; Slaughter-House Cases, 16 Wall. (U. S.) 36, 73, 21 L. ed. 394; Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 155, 7 L. ed. 617; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22; *In re* Look Tin Sing, 10 Sawy. (U. S.) 353, 21 Fed. 905; McKay *v.* Campbell, 2 Sawy. (U. S.) 118, 16 Fed. Cas. No. 8,840, 5 Am. L. T. Rep. (U. S. Cts.) 407; Calvin's Case, 7 Coke 1*a*, 18*a*; 1 Bl. Comm. 373; Cockburn Nationality 7; 2 Kent Comm. 39.

Children of military officers.— The rule that the children born abroad of ambassadors in the crown of England's service are treated as natural-born British subjects rests upon the principle that an ambassador's house is part of his sovereign's realm. Hence it has no application to children born abroad of officers in the military service of the crown. Such children are not subjects when neither their father nor grandfather were natural-born. De Geer *v.* Stone, 22 Ch. D. 243, 52 L. J. Ch. 57, 47 L. T. Rep. N. S. 434, 31 Wkly. Rep. 241.

25. See also, generally, *supra*, III, A, 1.

26. Davis *v.* Hall, 1 Nott & M. (S. C.) 292.

Marriage of alien mother to citizen.— Minor children of foreign parents whose mother, after the death of the father, marries a citizen become citizens themselves. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. See also *infra*, III, C; and Brooke Abr. tit. Denizen, where it is said: "If an Englishman pass the sea and marry an alien woman, by this the wife is of the King's allegiance and the issue will inherit."

27. Davis *v.* Hall, 1 Nott & M. (S. C.) 292; Doe *v.* Jones, 4 T. R. 300. See also Browne *v.* Dexter, 66 Cal. 39, 4 Pac. 913 (holding that a person born in a foreign state whose father was once a citizen of the United States but has renounced his allegiance before the birth of his son is not a citizen of this country); Manchester *v.* Boston, 16 Mass. 230 (holding that the statute of the United States directing that children of such as are or have been citizens of the United States shall be citizens, etc., does not extend to children of those who left the country be-

C. By Marriage. Any woman who may now or hereafter be married to a citizen of the United States and who might herself be lawfully naturalized [28] shall be deemed a citizen,[29] and in the application of this rule it is wholly immaterial whether the husband is a citizen by birth or a naturalized citizen.[30] Nor is it

fore the Declaration of Independence). See also, generally, ALIENS, 2 Cyc. 85.

28. Qualifications of residence, good character, etc., not required.— Under U. S. Rev. Stat. (1878), § 1994, an alien woman marrying a citizen becomes herself a citizen and the clause "might herself be lawfully naturalized" does not require that she shall have the qualifications of residence, good character, etc., as in case of admission to citizenship in a judicial proceeding, but it is sufficient that she is of the class or race of persons who may be naturalized under existing laws. Leonard *v.* Grant, 6 Sawy. (U. S.) 603, 5 Fed. 11. And to same effect see Burton *v.* Burton, 1 Abb. Dec. (N. Y.) 271, 1 Keyes (N. Y.) 359; Goodrich *v.* Russell, 42 N. Y. 177.

Consent on the part of the state to which new allegiance is pledged.— Plaintiff alleged her birth in the state of Washington, her marriage to a British subject and subsequent removal to British Columbia, and averred that by such marriage and removal she had become a subject of Great Britain. It was held that it was necessary to confer jurisdiction, that she should aver both that Canada had power to naturalize citizens and the particular statute, Hanford, J., saying: "A change of allegiance from one government to another can only be effected by the voluntary action of the subject complying fully with the conditions of naturalization laws, so that there is concurrent action and assent on the part of both the subject and the government to which the new allegiance attaches." Jennes *v.* Landes, 84 Fed. 73, 74.

29. U. S. Rev. Stat. (1878), § 1994. See also the following cases:

Illinois.— Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Missouri.— Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

New York.— Luhrs *v.* Eimer, 80 N. Y. 171; Halsey *v.* Beer, 52 Hun (N. Y.) 366, 5 N. Y. Suppl. 334, 24 N. Y. St. 713; People *v.* Newell, 38 Hun (N. Y.) 78.

North Carolina.— Kane *v.* McCarthy, 63 N. C. 299.

United States.— Kelly *v.* Owen, 7 Wall. (U. S.) 496, 19 L. ed. 283; Broadis *v.* Broadis, 86 Fed. 951; Ware *v.* Wisner, 50 Fed. 310; U. S. *v.* Kellar, 11 Biss. (U. S.) 314, 13 Fed. 82; 14 Op. Atty.-Gen. (U. S.) 402.

England.— The same rule is applied in England. Reg. *v.* Manning, 2 C. & K. 887, 61 E. C. L. 887; Bacon *v.* Bacon, Cro. Car. 601; Collingwood *v.* Pace, Vent. 413, 422; 7 & 8 Vict. c. 66, § 16; Brooke Abr. tit. Denizen.

See 10 Cent. Dig. tit. "Citizens."

Citizenship of wife follows that of her husband, even though she resides in a foreign country. Kircher *v.* Murray, 54 Fed. 617; Ware *v.* Wisner, 50 Fed. 310.

Marriage of citizen woman with alien.— U. S. Rev. Stat. (1878), § 1994, does not authorize any inference that congress intended to declare the converse proposition, viz., that a citizen woman by marriage with an alien should become an alien, nor will the principle that the domicile of the wife is controlled by that of the husband obviate the necessity of an actual removal from the country of a citizen woman married to an alien, in order to effect her expatriation, that statute not being a declaration of the general consequences of marriage, but being in furtherance of the uniform policy of the government of the United States to increase immigration by encouraging the naturalization of citizens. Comitis *v.* Parkerson, 56 Fed. 556, 22 L. R. A. 148. In Beck *v.* McGillis, 9 Barb. (N. Y.) 35, however, it is held that marriage with an alien, even though coupled with the fact of removal, will not deprive the wife of citizenship. A native of Charleston who married a British officer in 1781 during a temporary and hostile occupation of the city by the British and subsequently went to England with him and remained there until her death did not by such marriage cease to be a citizen of South Carolina. Her withdrawal to England, however, and her permanent allegiance to the side of the enemies of the state down to the time of the treaty of peace in 1783 operated as a virtual dissolution of the native allegiance. The marriage alone did not produce that effect, for marriage to an alien produces no dissolution of the native allegiance of the wife, although marriage coupled with removal from the country is competent to effectuate this result. Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666. "By the several statutes of America, France, and Great Britain, the marriage of a citizen of such country with an alien wife confers upon the latter the citizenship of the husband; and this policy of three great powers, in connection with section 1999 of the Revised Statutes which proclaims that expatriation is an inherent right, establishes that the political status of the wife follows that of her husband with the modification that there must be withdrawal from her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage." Ruckgaber *v.* Moore, 104 Fed. 947, 948. See also 15 Op. Atty.-Gen. (U. S.) 599; 10 Opp. Atty.-Gen. (U. S.) 321.

30. An alien woman whose husband became a naturalized citizen of the United States, thereby herself became a citizen, although she may have been living at a distance from her husband for years and may never have come into the United States until after his death. Headman *v.* Rose, 63 Ga. 458. See also Kelly *v.* Owen, 7 Wall. (U. S.) 496, 19 L. ed. 283.

essential in applying this rule that the citizenship of the husband exist at the time of the marriage.[31]

D. By Cession of Territory. Upon the transfer of territorial sovereignty from one nation to another the allegiance of the inhabitants of the ceded districts who continue to dwell there is transferred to the government to which the cession has been made.[32] Their status as citizens[33] is governed by the terms

31. Headman *v.* Rose, 63 Ga. 458; Renner *v.* Müller, 44 N. Y. Super. Ct. 535; Kelly *v.* Owen, 7 Wall. (U. S.) 496, 19 L. ed. 283, where it is said that whenever a woman is in a state of marriage to a citizen, whether his citizenship existed before or after his marriage, she becomes by that fact a citizen also.

Resumption of foreign allegiance on remarriage to an alien.— An alien woman who had once become a citizen of the United States by marriage to a citizen, which marriage is subsequently dissolved, may resume her allegiance by marriage to an unnaturalized native of her own country, and this even though her second husband continues to reside within the limits of the United States. Pequignot *v.* Detroit, 16 Fed. 211.

32. *Alabama.*— Tannis *v.* St. Cyre, 21 Ala. 449.

California.— People *v.* De la Guerra, 40 Cal. 311; People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Louisiana.— U. S. *v.* Laverty, 3 Mart. (La.) 733; Desbois' Case, 2 Mart. (La.) 184.

Maine.— Opinion of Justices, 68 Me. 589, 591, where it is said: "The inhabitants of territory ceded from one government to another are collectively naturalized, and have all the rights of natural born subjects by mere force of the cession of the soil without the necessity of anything being expressed to that effect."

Massachusetts.—Ainslie *v.* Martin, 9 Mass. 454.

Michigan.— Crane *v.* Reeder, 25 Mich. 303.

New York.—Munro *v.* Merchant, 28 N. Y. 9.

Pennsylvania.— Harrold's Case, 2 Pa. L. J. Rep. 119.

Texas.— Barrett *v.* Kelly, 31 Tex. 476.

United States.— The Diamond Rings, 183 U. S. 176, 22 S. Ct. 59, 46 L. ed. 138; Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103; U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604; Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 155, 7 L. ed. 617; American Ins. Co. *v.* Three Hundred and Fifty-Six Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242; McIlvaine *v.* Coxe, 4 Cranch (U. S.) 209, 2 L. ed. 598; Bahuaud *v.* Bize, 105 Fed. 485; Tobin *v.* Walkinshaw, McAll. (U. S.) 186, 23 Fed. Cas. No. 14,070.

See 10 Cent. Dig. tit. "Citizens," § 4.

Inhabitants of the District of Columbia upon its separation from the states of Virginia and Maryland, *ipso facto* ceased to be citizens of those states respectively. Reily *v.* Lamar, 2 Cranch (U. S.) 344, 2 L. ed. 300.

In the case of one not a citizen of a territory ceded at the time of cession a transfer of allegiance will not result. Contzen *v.* U. S., 179 U. S. 191, 21 S. Ct. 98, 45 L. ed. 148 [*affirming* 33 Ct. Cl. 475, and *distinguishing* Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103].

Where a citizen is domiciled in a foreign country at the time of the acquisition of the territory of his country by conquest, it has been held that his allegiance was transferred to the conqueror. Brown's Case, 5 Ct. Cl. 571, where it was unsuccessfully urged that the citizen became "a man without a country."

33. See cases cited *supra*, note 32. "The territory in question being acquired by treaty, the government transferring it, ceases to have any jurisdiction over it. It no longer owes protection to those residing upon it and they no longer owe it allegiance. The inhabitants residing upon the territory transferred have the right of election. They may remove from the territory ceded if they prefer the government ceding the territory. If they elect to remain, their allegiance is at once due to the government to which the cession has been made and they are entitled to the corresponding right of protection from such government." Opinion of Justices, 68 Me. 589, 591.

Inhabitants of Porto Rico.— Under a provision of the treaty by which Spain ceded to the United States Porto Rico and other islands, that the "civil rights and political status of the native inhabitants . . . shall be determined by the congress," Porto Rico did not become an integral portion of the United States nor did the inhabitants of the islands become citizens. "The treaty vests the sovereignty over the island in the United States, but postpones changes in the relations of its people, and in its relations to the body politic, until congress shall determine what relations shall be best suited to the conditions of its inhabitants and to the welfare of the United States." After reviewing previous treaties by which territory was ceded to the United States, in each of which there exists a provision regulating the status of the inhabitants, it is held that mere cession does not have the effect of making the inhabitants of the ceded territory citizens, in the absence of a special provision in the treaty and supplementary congressional legislation. Whether citizenship could be conferred by the former alone without the latter is left undecided, the court merely holding that in the absence of both the mere fact of acquiring title to the soil and dominion over it cannot alter the status of the inhabitants. Goetze *v.* U. S., 103 Fed. 72 [*affirmed* in 182 U. S. 221, 21 S. Ct. 742, 45 L. ed. 1065]. And see People *v.* Board of Inspectors, 32 Misc. (N. Y.) 584, 67 N. Y. Suppl. 236.

Persons born in the United States prior to

of the treaty between the respective countries and by supplementary congressional legislation.

E. By Admission to Statehood in the Union. The admission of a territory on an equal footing with the original states involves the adoption as citizens of the United States of those whom congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of congress.[34]

the independence thereof.— "The rule as to the point of time at which the American *antenati* ceased to be British subjects, differs in this country and in England, as established hy the courts of justice in the respective countries. The English rule is to take the date of the Treaty of Peace in 1783. Our rule is to take the date of the Declaration of Independence. And in the application of the rule to different cases, some difference in opinion may arise. The settled doctrine of this country is, that a person born here, who left the country before the Declaration of Independence and never returned here became thereby an alien, and incapable of taking lands subsequently by descent in this country. . . . *Prima facie*, and as a general rule, the character in which the American *antenati* are to be considered will depend upon, and be determined by, the situation of the party and the election made at the date of the Declaration of Independence, according to our rule, or the Treaty of Peace according to the British rule. But this general rule must necessarily he controlled by special circumstances attending particular cases. And if the right of election is at all admitted, it must be determined in most cases by what took place during the struggle, and between the Declaration of Independence and the Treaty of Peace." Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 121, 7 L. ed. 617. See also Calais *v.* Marshfield, 30 Me. 511; Munro *v.* Merchant, 28 N. Y. 9; Young *v.* Peck, 21 Wend. (N. Y.) 389; Chanet *v.* Villeponteaux, 3 McCord (S. C.) 29; Doe *v.* Acklam, 2 B. & C. 779, 9 E. C. L. 337; and, generally, ALIENS, 2 Cyc. 86, note 10. But see as apparently laying down the rule that the period of choice was the date of the treaty of peace. Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666; Manchester *v.* Boston, 16 Mass. 230; Den *v.* Brown, 7 N. J. L. 305; Orser *v.* Hoag, 3 Hill (N. Y.) 79. *Contra*, that one born in Massachusetts before the Declaration of Independence does not become an alien merely by removal to British domains prior to 1776. Ainslie *v.* Martin, 9 Mass. 454. But mere absence from the country begun after the Revolutionary war and terminating prior to the treaty of peace will not be sufficient to constitute alienage when there was a constant intention to return. Kilham *v.* Ward, 2 Mass. 236. See also ALIENS, 2 Cyc. 86, note 10.

One who arrived in the United States subsequent to the Declaration of Independence but prior to the treaty of peace and continued to reside here after the last named event is a citizen. Moore *v.* Wilson, 10 Yerg. (Tenn.) 406. See also Cummington *v.* Springfield, 2 Pick. (Mass.) 394; and ALIENS, 2 Cyc. 86, note 10.

Residents in Texas at the time of the Declaration of Independence of the republic thereby became citizens of the new republic. Kilpatrick *v.* Sisneros, 23 Tex. 113; Hardy *v.* De Leon, 5 Tex. 211. *Compare* Kircher *v.* Murray, 54 Fed. 617.

Naturalized citizens resume their former allegiance.— While the transfer of territory from one nation to another results in a corresponding transfer of allegiance on the part of the inhabitants from the old to the new sovereignty, a naturalized citizen (who owes an allegiance purely voluntary or statutory) when released by the ceding power, resumes his original status. Hence a British subject residing in California who had become a naturalized citizen of Mexico, upon the cession of California did not thereby become a citizen of the United States, but was remitted to his original allegiance to Great Britain. Tobin *v.* Walkinshaw, McAll. (U. S.) 186, 23 Fed. Cas. No. 14,070.

Treaty of Guadaloupe Hidalgo.— The convention with Mexico concluded Feb. 2, 1848 (9 Stat. at L. 922, 929), by which the territory of New Mexico was ceded to the United States, gave the right to citizens of the territory to elect within one year whether they would continue to be Mexican citizens. If no election were made they were considered to have elected to be United States citizens. The character of Mexican citizenship was not changed during the year. A Mexican who did nothing and remained in the territory at the end of that time became an American, but his naturalization dated only from the end of the year. Vallejos *v.* U. S., 35 Ct. Cl. 489. The declaration of intention to retain Mexican citizenship could not be made privately. It was necessary to be made before some court, officer, tribunal, or public authority who should preserve the evidence of it. Carter *v.* Territory, 1 N. M. 317; Quintana *v.* Tompkins, 1 N. M. 29. The eighth section of the treaty giving the right to Mexicans "now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States" of continuing their Mexican citizenship or becoming citizens of the United States did not refer to Texas which had for many years existed and been acknowledged as a separate republic and as a separate state had been admitted into the Union. McKinney *v.* Saviego, 18 How. (U. S.) 235, 15 L. ed. 365.

34. Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* 31 Nebr.

F. By Naturalization. Aliens may become citizens by process of naturalization under statutes enacted for that purpose.[35]

IV. HOW LOST — EXPATRIATION.[36]

A. Right of Expatriation. At common law it was firmly established that no citizen or subject possessed the power of throwing off his allegiance without the sovereign's consent.[37] The courts of this country, however, began at an early date to question this doctrine,[38] and now expatriation is recognized as a natural

682, 48 N. W. 739, 51 N. W. 602], where it was held that the admission of the state had the effect of naturalization. See opinion of Catron, J., in Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691, also the statement of Brown, J., in Bolln *v.* Nebraska, 176 U. S. 83, 20 S. Ct. 287, 44 L. ed. 382, and of Sanborn, J., in Minneapolis *v.* Reum, 56 Fed. 576, 580, 12 U. S. App. 446, 6 C. C. A. 31. But *compare* Contzen *v.* U. S., 179 U. S. 191, 195, 21 S. Ct. 98, 45 L. ed. 148 [*affirming* 33 Ct. Cl. 475, *distinguishing* Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103], holding that an alien who became a resident of the republic of Texas in 1845, a short time prior to its annexation, did not become a citizen of the United States, Fuller, C. J., remarking: "The case before us, however, is not one of a treaty of cession, or relating to a territory of the United States, and involving the construction of acts of Congress for its government, or of enabling acts for its admission. Contzen, as we have said, was a minor at the time Texas was admitted. If he had elected, when he attained his majority, to become a citizen of the United States, the way was open to him."

This was the effect of the admission of Louisiana into the Union. U. S. *v.* Laverty, 3 Mart. (La.) 733; Desbois' Case, 2 Mart. (La.) 184. *Contra*, State *v.* Primrose, 3 Ala. 546, holding that one who removed to the territory of Louisiana after the treaty of Paris in 1803, but before the admission of that territory as a state, did not by such admission become a citizen of the United States.

All of the inhabitants of the territory of Nebraska, who had theretofore declared their intention to become citizens, were, by the act of admission of that state into the Union, naturalized as citizens of the United States. Bahuaud *v.* Bize, 105 Fed. 485.

By the admission of the republic of Texas on an equal footing with the original states all citizens of the United States residing in Texas became citizens of the new state and their alienage to the republic was determined. Barrett *v.* Kelly, 31 Tex. 476; Cryer *v.* Andrews, 11 Tex. 170; Osterman *v.* Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730. And see Wardrup *v.* Jones, 23 Tex. 489.

35. Bouvier L. Dict. [*quoting* State *v.* Howard County Ct., 90 Mo. 593, 598, 2 S. W. 788]; 1 Kent Comm. 292 note [*quoted* in U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 41, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22]; and, generally, ALIENS, 2 Cyc. 110 *et seq.* See also Newcomb *v.* Newcomb, 22 Ky. L. Rep. 286, 57 S. W. 2, 51 L. R. A. 419; McCarty *v.* Terry, 7 Lans. (N. Y.) 236; North Noonday Min. Co. *v.* Orient Min. Co., 6 Sawy. (U. S.) 299, 1 Fed. 522.

For naturalization proceedings see ALIENS, 2 Cyc. 110 *et seq.*

36. "To expatriate" is to leave one's country and renounce allegiance to it with the purpose of making a home and becoming a citizen in another country. It includes more than a change of domicile, and it is hardly an accurate use of terms to say that a man has expatriated himself with the design of changing his residence. He might more correctly be said in a given case to change his domicile with a view to expatriation. Ludlam *v.* Ludlam, 31 Barb. (N. Y.) 486, 489.

37. Ainslie *v.* Martin, 9 Mass. 454; Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 246, 7 L. ed. 666, 668; Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 156, 7 L. ed. 617; 12 Op. Atty.-Gen. (U. S.) 319; Case of Gillingham, Chalmers Colonial Op. 645; Fitch *v.* Weber, 6 Hare 51, 31 Eng. Ch. 51; Macdonald's Case, 18 How. St. Tr. 858; 1 Bl. Comm. 370; 1 Hale P. C. 68; 2 Kent Comm. 42.

The common-law maxim is "*Nemo potest exuere patriam nec debitum ligeantiæ ejurare*," — no one may throw off his country or abjure his allegiance. Story's Case, Dyer 298*b*.

Operation of common-law rule.—As there exists no right of expatriation, a native American who has become naturalized under the laws of France still remains subject to indictment in the United States courts for serving on a French privateer engaged in committing hostilities against a power at peace with the United States. Williams' Case, 2 Cranch C. C. (U. S.) 82 note, 29 Fed. Cas. No. 17,708, 4 Am. L. J. 461, Whart. St. Tr. 652. On the trial of one born in Ireland but naturalized in the United States, for levying war against the queen, the crown has a right to waive trying him as a subject for treason and may proceed against him for violation of the neutrality laws as a citizen of a foreign state at peace with her majesty, thus waiving the question of allegiance. Reg. *v.* McMahon, 26 U. C. Q. B. 195; Reg. *v.* Lynch, 26 U. C. Q. B. 208.

38. *Alabama.*— Beavers *v.* Smith, 11 Ala. 20.

Kentucky.— Burkett *v.* McCarty, 10 Bush (Ky.) 758; Alsberry *v.* Hawkins, 9 Dana (Ky.) 177, 33 Am. Dec. 546; Brooks *v.* Clay, 3 A. K. Marsh. (Ky.) 545.

and inherent right, at least in so far as renunciation of foreign allegiance in favor of the United States is concerned.[39]

B. What Constitutes Expatriation.[40] In order that expatriation may be considered to have taken place there must be an actual removal from the country of which the individual is then a citizen or subject,[41] made volun-

New York.— Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583, 657.

Pennsylvania.— Caignet *v.* Pettit, 2 Dall. (Pa.) 234, 1 L. ed. 362. See also Jackson *v.* Burns, 3 Binn. (Pa.) 75.

Virginia.— Murray *v.* McCarty, 2 Munf. (Va.) 393, construing statute.

United States.— The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. ed. 454; Murray *v.* Schooner Charming Betsy, 2 Cranch (U. S.) 64, 2 L. ed. 208; Talbot *v.* Jansen, 3 Dall. (U. S.) 133, 1 L. ed. 540 [*affirming* Jansen *v.* Vrow Christina Magdalena, Bee Adm. 11, 13 Fed. Cas. No. 7,216], construing Virginia statute; Chacon *v.* Eighty-nine Bales of Cochineal, 1 Brock. (U. S.) 478, 5 Fed. Cas. No. 2,568; Juando *v.* Taylor, 2 Paine (U. S.) 652, 13 Fed. Cas. No. 7,558, 3 Wheel. Crim. (N. Y.) 382. See also U. S. *v.* Gillies, Pet. C. C. (U. S.) 159, 25 Fed. Cas. No. 15,206, 3 Wheel. Crim. (N. Y.) 308.

See 10 Cent. Dig. tit. "Citizens," § 20.

39. Jennes *v.* Landes, 84 Fed. 73; U. S. *v.* Crook, 5 Dill. (U. S.) 453, 25 Fed. Cas. No. 14,891; U. S. Rev. Stat. (1878), § 1999.

A citizen of the United States may renounce his allegiance and become a citizen of a foreign state or kingdom. Browne *v.* Dexter, 66 Cal. 39, 4 Pac. 913. Thus he may become a British subject by naturalization. Newcomb *v.* Newcomb, 22 Ky. L. Rep. 286, 57 S. W. 2, 51 L. R. A. 419; Green *v.* Salas, 31 Fed. 106.

An Indian by severing his tribal relations commits a rightful act of expatriation as to the tribe and becomes a citizen of the United States. U. S. *v.* Crook, 5 Dill. (U. S.) 453, 25 Fed. Cas. No. 14,891, construing U. S. Rev. Stat. (1878), § 1999.

U. S. Rev. Stat. (1878), § 1999 [*quoted* in *In re* Look Tin Sing, 10 Sawy. (U. S.) 353, 21 Fed. 905], in part reads: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle this government has freely received emigrants from all nations and invested them with the rights of citizenship; and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas, it is necessary, to the maintenance of public peace, that this claim of foreign allegiance should be promptly and finally disavowed; therefore . . . any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this government." See also Comitis *v.* Parkerson, 56 Fed. 556, 559, 22 L. R. A. 148, where it is said: "It is to be observed that the act itself, as does its title, deals only with the protection of aliens by birth who have become citizens by naturalization. As to them, it declares it to be the determination of the United States to accord to them, when in foreign states, the same protection as is accorded to native-born citizens similarly situated. The whole scope and force of the act, when most liberally construed, even when expanded by the more general terms of the preamble, declares that naturalized citizens, having, according to the principles of our government, the same rights as native-born citizens, shall have by law the same protection abroad. As to whether allegiance can be acquired or lost by any other means than statutory naturalization is left by congress in precisely the same situation as it was before the passage of this act."

The right of expatriation has constantly been recognized by the federal department of state, and those citizens of the United States who have taken upon themselves a foreign allegiance are denied the protection due American citizens. Stein Kauler's Case, 15 Op. Atty.-Gen. 15; 9 Op. Atty.-Gen. (U. S.) 356, 62; 8 Op. Atty.-Gen. (U. S.) 139.

English statutes.— See 35 & 36 Vict. c. 39; 33 & 34 Vict. c. 14, § 4.

40. Expatriation can be effected only in accordance with law. Under our government congress must be the source of that law. Comitis *v.* Parkerson, 56 Fed. 556, 569, 22 L. R. A. 148.

41. Sabriego *v.* White, 30 Tex. 576; Mills *v.* Alexander, 21 Tex. 154; McKinney *v.* Saviego, 18 How. (U. S.) 235, 15 L. ed. 365; Talbot *v.* Jansen, 3 Dall. (U. S.) 133, 1 L. ed. 540 [*affirming* Jansen *v.* Vrow Christina Magdalena, Bee Adm. 11, 13 Fed. Cas. No. 7,216]; Kemna *v.* Brockhaus, 10 Biss. (U. S.) 128, 5 Fed. 762; Chacon *v.* Eighty-nine Bales of Cochineal, 1 Brock. (U. S.) 478, 5 Fed. Cas. No. 2,568; U. S. *v.* Gillies, Pet. C. C. (U. S.) 159, 25 Fed. Cas. No. 15,206, 3 Wheel. Crim. (N. Y.) 308; Henfield's Case, 1 Fed. Cas. No. 6,360, Whart. St. Tr. 49; 9 Op. Atty.-Gen. (U. S.) 62. See also Fish *v.* Stoughton, 2 Johns. Cas. (N. Y.) 407.

A bona fide change of domicile under circumstances of good faith is essential. Expatriation can never be asserted as a cover for fraud or as a justification for the commission of a crime against the country or for a violation of its laws, when this appears to be the intention of the act. The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. ed. 454.

Taking the oath of allegiance to a foreign

tarily [42] by a person of full age [43] and under no disability,[44] as the result of a fixed determination to change the domicile and permanently reside elsewhere,[45] as well as to throw off the former allegiance and become the citizen or subject of a foreign power.[46]

state will, when coupled with removal, be sufficient to constitute expatriation. Browne *v.* Dexter, 66 Cal. 39, 4 Pac. 913. A British subject who became a naturalized citizen of the United States and took the oaths of abjuration and allegiance in 1784, in 1795 took an oath of allegiance to the king of Spain and was appointed Spanish consul in New York, where he continued to reside. It was held that he was still an American citizen, there having been no change of domicile. Fish *v.* Stoughton, 2 Johns. Cas. (N. Y.) 407.

42. A citizen who is forced to remove from his country and reside in another does not thereby lose his citizenship. There must exist a voluntary intention to remove. Hardy *v.* De Leon, 5 Tex. 211.

Involuntary expatriation.— While a citizen may expatriate himself with the consent of his state express or presumed, no act of legislature can denationalize a citizen without his concurrence. Hence a legislative act cannot punish voluntary rebellion with involuntary expatriation, without at least a full and fair trial by the judiciary on indictment or presentment. Burkett *v.* McCarty, 10 Bush (Ky.) 758.

Loss of citizenship as punishment for crime.— The act of congress approved March 3, 1865, providing additional penalties for the crime of desertion from military and naval service, including loss of citizenship, is not unconstitutional. It is not *ex post facto* nor a bill of attainder. But before inspectors of election can refuse to receive a vote on this ground it must be shown that the prospective voter has been duly convicted by a court of competent jurisdiction. Gotcheus *v.* Matheson, 58 Barb. (N. Y.) 152, 40 How. Pr. (N. Y.) 97. And to same effect see State *v.* Symonds, 57 Me. 148; Severance *v.* Healey, 50 N. H. 448; Huber *v.* Reily, 53 Pa. St. 112.

43. Steinkanler's Case, 15 Op. Atty.-Gen. (U. S.) 15. A divestment of citizenship cannot take place until the individual attains full age. Ludlam *v.* Ludlam, 26 N. Y. 356, 84 Am. Dec. 193 [*affirming* 31 Barb. (N. Y.) 486].

44. Beavers *v.* Smith, 11 Ala. 20.

Wife.— "If expatriation be a matter of election, a wife who as in duty bound, has shared the lot of her husband, and abides by his choice during the coverture, ought to be allowed upon its termination, to have the privilege of electing for herself, and of fixing, by her election, not only her future, but her past character. In contemplation of law, the domicile of the husband is, and should be, the domicile of the wife. He has the right to choose, not only for himself, but also for her. And her acquiescence, however willing, should not be considered as her own free and independent act, but as the effect of that dependence and constraint which by law as well as by nature, belong to her condition." Moore *v.* Tisdale, 5 B. Mon. (Ky.) 352, 354.

45. Gorham *v.* Shepherd, 6 Mackey (D. C.) 596; Mills *v.* Alexander, 21 Tex. 154; The Friendschaft, 3 Wheat. (U. S.) 12, 4 L. ed. 322; The Venus, 8 Cranch (U. S.) 253, 3 L. ed. 553; Kemna *v.* Brockhaus, 10 Biss. (U. S.) 128, 5 Fed. 762.

Even if U. S. Rev. Stat. (1878), § 1999, in its preamble be held to imply a recognition of the right of a citizen of the United States to expatriate himself, actual removal from the country and the acquisition of a domicile elsewhere are conditions precedent to such expatriation. Comitis *v.* Parkerson, 56 Fed. 556, 22 L. R. A. 148.

Must be no animus revertendi.— "The presumption of Patrick's having had any *animum manendi*, arising from his residing here for three or four years, is very much weakened, if not overcome, by his speedy return to Ireland, his constant wish to return during his stay, and the absence of any proof of his expressing an intention, or even expectation of remaining here, or of his taking any step towards acquiring the character of a citizen of the country." Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583, 638.

46. *Delaware.*— Quinby *v.* Duncan, 4 Harr. (Del.) 383.

District of Columbia.— Gorham *v.* Shepherd, 6 Mackey (D. C.) 596.

Iowa.— State *v.* Adams, 45 Iowa 99, 24 Am. Rep. 760, holding that mere removal from the United States and residence in a foreign country for a period of years does not operate as a withdrawal of citizenship where it is not shown that the individual intended to or did become a foreign citizen.

Mississippi.— In Wooldridge *v.* Wilkins, 3 How. (Miss.) 360, it was held that expatriation was not shown where a consul to the republic of Texas stated at the time of leaving the United States that he intended to resign his consulate and settle in the republic with a view to practice law, but there was no evidence of his having carried this into effect.

New York.— Ludlam *v.* Ludlam, 26 N. Y. 356, 84 Am. Dec. 193 [*affirming* 31 Barb. (N. Y.) 486].

United States.—Murray *v.* Schooner Charming Betsy, 2 Cranch (U. S.) 64, 2 L. ed. 208; Green *v.* Salas, 31 Fed. 106; Evans *v.* Davenport, 4 McLean (U. S.) 574, 8 Fed. Cas. No. 4,558.

"A temporary absence will not devest a man of the character of citizen, or subject of the state, or nation to which he may belong. There must be a removal with an intention to lay aside that character, and he must actually join himself to some other community." Murray *v.* McCarty, 2 Munf. (Va.) 393, 397.

V. EVIDENCE OF CITIZENSHIP.

A. Presumption and Burden of Proof. In the absence of proof to the contrary every man is considered a citizen of the country in which he may reside.[47] A man is, however, to be regarded as a citizen of his native state until it can be shown that he has acquired citizenship elsewhere.[48] Hence proof of foreign birth casts the burden of proving citizenship in the nation wherein the individual may reside.[49]

B. Competency and Relevancy — 1. DIRECT TESTIMONY. Direct testimony that a certain person is a citizen is incompetent as calling for a conclusion on the part of the witness.[50]

2. PASSPORTS. A passport granted by the secretary of state of the United States, reciting that a certain individual is a citizen, is not admissible to prove such citizenship.[51]

3. DECLARATIONS. The declarations of the alleged citizen as to his intention in remaining in or removing from a country are receivable in evidence for the purpose of fixing his status, if made *ante litem motam*.[52]

47. *Arizona.*— Jantzen *v.* Arizona Copper Co., (Ariz. 1889) 20 Pac. 93.

Indiana.— State *v.* Beackmo, 6 Blackf. (Ind.) 488.

Mississippi.— Trotter *v.* Dobbs, 38 Miss. 198.

Montana.— Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

New Jersey.— Coxe *v.* Gulick, 10 N. J. L. 328.

United States.— Sharon *v.* Hill, 11 Sawy. (U. S.) 291, 26 Fed. 337.

See 10 Cent. Dig. tit. "Citizens," § 17; and compare ALIENS, 2 Cyc. 87.

Law of nations.— "I think it may be assumed as a principle, that the law of nations, without regarding the municipal regulations prescribed for his admission, views every man as a member of the society in which he is found. Residence is *prima facie* evidence of national character; susceptible, however, at all times, of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national character. But if it be taken up *animus manendi*, with the intention of remaining, then it becomes a domicil, superadding to the original or prior character, the rights and privileges, as well as the disabilities and penalties of a citizen or subject of the country in which the residence is established." Johnson *v.* Twenty-one Bales, etc., 2 Paine (U. S.) 601, 13 Fed. Cas. No. 7,417, 6 Am. L. J. 68, 3 Wheel. Crim. (N. Y.) 433, Van Ness Prize Cas. 5.

48. Quinby *v.* Duncan, 4 Harr. (Del.) 383; State *v.* Salge, 1 Nev. 455; Coxe *v.* Gulick, 10 N. J. L. 328; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628; Minneapolis *v.* Reum, 56 Fed. 576, 12 U. S. App. 446, 6 C. C. A. 31.

49. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; Fay *v.* Taylor, 31 Misc. (N. Y.) 32, 63 N. Y. Suppl. 572; Nalle *v.* Fenwick, 4 Rand. (Va.) 585. But one whose father appears to have been a resident of the United States and to have married and had children born here is presumed to be a citizen, although he himself was born subsequent to his father's removal to a foreign country, there being nothing else to show that his father was an alien. Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219.

50. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182, but if no objection is taken thereto, it is sufficient in itself to prevent a nonsuit on that ground. In Rucker *v.* Bolles, 80 Fed. 504, 49 U. S. App. 358, 25 C. C. A. 600, however, the circuit court of appeals for the eighth circuit took the view that for the purpose of proving that a plaintiff was a citizen of a certain state, when his suit was filed, he may be asked the direct question, of what state he was a resident at such date; but such question is improper when propounded to a third party, since such third party can only form an opinion as to the plaintiff's intentions as to citizenship from his actions and declarations.

51. Urtetiqui *v.* D'Arcy, 9 Pet. (U. S.) 692, 9 L. ed. 276; *In re* Gee Hop, 71 Fed. 274.

52. Baptiste *v.* De Volunbrun, 5 Harr. & J. (Md.) 86; Rucker *v.* Bolles, 80 Fed. 504, 49 U. S. App. 358, 25 C. C. A. 600; Sharon *v.* Hill, 11 Sawy. (U. S.) 291, 26 Fed. 337; Tobin *v.* Walkinshaw, McAll. (U. S.) 186, 23 Fed. Cas. No. 14,070; Reg. *v.* McMahon, 26 U. C. Q. B. 195.

Declaration of intention under treaty of Guadaloupe Hidalgo.— Where a Mexican residing in the territory of New Mexico at the date of the treaty of Gaudaloupe Hidalgo filed a declaration of intention to become a citizen of the United States he is not considered for such reason alone to have previously elected to retain his Mexican citizenship under that treaty, where such evidence is offered under a plea in abatement to an indictment found by the grand jury of which said Mexican was foreman. Carter *v.* Territory, 1 N. M. 317.

C. Weight and Sufficiency. The question of citizenship is to be determined by the jury,[53] and what evidence is sufficient depends upon the facts shown in the particular case,[54] the weight and sufficiency of the evidence being within the exclusive province of the jury where citizenship is in dispute.

CITY.[1] In England, an incorporated town or borough which is or has been

53. Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312, 325; Rucker *v.* Bolles, 80 Fed. 504, 49 U. S. App. 358, 25 C. C. A. 600.

54. *California.*— Testimony of a father that his children were born in California puts the question of their citizenship beyond cavil. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182.

Kentucky.— See Newcomb *v.* Newcomb, 22 Ky. L. Rep. 286, 57 S. W. 2, 51 L. R. A. 419.

Maryland.—A slave-owner driven from San Domingo by the insurrection in that island removed to this country. He never became a naturalized citizen, but constantly declared his intention to return to his native land when the troubles had ceased. It was held that he should be regarded as an alien. Baptiste *v.* De Volunbrun, 5 Harr. & J. (Md.) 86.

Mississippi.— One who has resided in Mississippi for one year will be taken to be a citizen of that state in the absence of evidence showing that he was a mere sojourner. Trotter *v.* Dobbs, 38 Miss. 198.

Nevada.—Evidence that L was born in New York, was taken at a tender age to Ireland and then returned to this country, justifies the court in finding him to be a citizen despite the fact that, believing himself to be an alien, he had filed a declaration of intention to become a citizen. Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312. But where the only evidence was that a juror was born in Canada and lived there until he was twenty-one years of age, that he had been told that his father was a citizen of the United States prior to the time of removal to Canada, that he had no knowledge that his father became a citizen of Canada, and also that he did not know of what country his father claimed citizenship, that his residence and home were in Canada so long as he knew anything about the matter and that he had never been naturalized, it was held that citizenship in the United States had not been shown. State *v.* Salge, 1 Nev. 455.

New York.— Proof that decedent came in 1865 from Ireland to New York state, lived there until his death in 1889, participated in state and national elections and held a liquor tax certificate when he died, which only a citizen can do, is sufficient to create a presumption and to show *prima facie* that he was a citizen. Fay *v.* Taylor, 31 Misc. (N. Y.) 32, 63 N. Y. Suppl. 572.

Texas.— Citizenship is deemed to have been established by showing that an alien on his emigration to Texas in 1831 was admitted as a colonist and received on his application a grant of land, the grant reciting that he had taken the oath of allegiance to the republic of Mexico and to the state. Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554. And see Ferguson *v.* Johnson, 11 Tex. Civ. App. 413, 33 S. W. 138.

Virginia.—Nalle *v.* Fenwick, 4 Rand. (Va.) 585, where the facts sufficiently established citizenship.

Wisconsin.— See Schuster *v.* State, 80 Wis. 107, 49 N. W. 30.

United States.— Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such a state unless the contrary appear, and this presumption is strengthened where the individual lives on a plantation and cultivates it with a large force, claiming and improving the property as his own. Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387.

See 10 Cent. Dig. tit. "Citizens," § 17.

Voting and holding office.— While it has been held that citizenship will not be presumed merely from the fact of having owned real estate, voted, or held an elective office (Dryden *v.* Swinburne, 20 W. Va. 89), it seems that having participated in elections and having held elective offices are facts strongly tending to establish at least a *prima facie* case of citizenship (Fay *v.* Taylor, 31 Misc. (N. Y.) 32, 63 N. Y. Suppl. 572; Nalle *v.* Fenwick, 4 Rand. (Va.) 585); and it has been held that where the state confers the right of state citizenship on aliens who have declared their intentions to become citizens of the United States, the act of voting is conclusive proof of an acceptance of such state citizenship by them (Matter of Conway, 17 Wis. 526).

1. **"City and county" is sometimes used as the equivalent of "city."** Kahn *v.* Sutro, 114 Cal. 316, 323, 46 Pac. 87, 33 L. R. A. 620.

Distinguished from "town."— While the word "city" is sometimes held to include "town" (People *v.* Stephens, 62 Cal. 209, 236; Tomlyn L. Dict. [*quoted* in Van Riper *v.* Parsons, 40 N. J. L. 1, 4]) and while under the system for the creation of municipal corporations existing in most of the states of the union, there was no well defined line of demarcation as between cities as such and towns (State *v.* Bd. of Harbor Line Com'rs, 4 Wash. 6, 10, 29 Pac. 938), by the lexicographers, an essential difference exists between them. This difference consists in size and population, and it can be readily perceived that such difference may demand for one a code of laws and municipal regulations not required by the other (Wight, etc., Co. *v.* Wolff, 112 Ga. 169, 170, 37 S. E. 395). See also Day *v.* Morristown, 62 N. J. L. 571, 573, 41 Atl. 964, where it is said: "It is

the see of a bishop.[2] In the United States,[3] a large town;[4] a place inhabited by a permanent, organized community, more important than a town;[5] an incorporated town;[6] a town incorporated by that name;[7] a corporate town,[8] governed by particular officers;[9] a town or collective body of inhabitants, incorporated and governed by particular officers, as a mayor and aldermen;[10] a municipal corporation of the larger class, with powers of government confided in officers who are usually elected by a popular vote;[11] a political subdivision of the state, made for

apparent that the legislature of 1880 did not use the words 'cities' and 'towns' interchangeably, but that each of those terms was employed with a distinct and definite meaning." The New American Cyclopædia says that in the United States a city "is largely distinguished from a town by having a corporate government." Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 114.

Distinguished from "county." — "One feature by which a city is distinguished from a county, . . . is the source from which its authority is derived. The powers to be exercised under a county government are conferred by the legislature, irrespective of the will of the inhabitants of the county, whereas the inhabitants of a city are authorized to determine whether they will accept the corporate powers offered them, to be exercised by officers of their own selection." Kahn *v.* Sutro, 114 Cal. 316, 319, 46 Pac. 87, 33 L. R. A. 620.

2. Bouvier L. Dict. [*quoted* in Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 113, where it is said: "This definition has no value here, as there can be no such city as it defines"].

Necessity of incorporation.—"The Britannica says that while Coke and Blackstone define as Bouvier does, the word is used in England with considerable laxity, and notes that 'Westminster is called a city, though it has no corporation; and Thetford, Sherbourne and Dorchester are never so designated, though they are regularly incorporated, and were once episcopal sees.'" Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 113.

Necessity of having bishop.— "In England the term 'city' does not depend upon the number of its inhabitants, but upon its being the seat of a Bishop; for instance Chester, with a few thousand inhabitants, has been for centuries a city, while the neighboring Liverpool, with many times the population, was only the 'town of Liverpool' till comparatively recently, when it became a 'city' by being given a Bishop." State *v.* Green, 126 N. C. 1032, 1034, 35 S. E. 462. See also 1 Pollock & M. Hist. Eng. L. 625, where it is said that "a habit, which seems to have its roots in the remote history of Gaul, will give the name city to none but a cathedral town." But, although the bishopric be dissolved, as at Westminster, yet still it remaineth a city. 1 Bl. Comm. 114.

3. **Imports oneness, community, etc.**—"The legal as well as the popular idea of a town or city in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; collective body of inhabitants,— that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places; hence, locality, not localities; vicinity, vicinage, near, adjacent, not remote. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation." Denver *v.* Coulehan, 20 Colo. 471, 479, 39 Pac. 425, 27 L. R. A. 751. See also Smith *v.* Sherry, 50 Wis. 210, 217, 6 N. W. 561 [*quoted* in Enterprise *v.* State, 29 Fla. 128, 144, 10 So. 740], where it is said: "The idea of a city or village implies an assemblage of inhabitants living in the vicinity of each other and not separated by any other intervening civil division of the state."

4. Johnson Cyc. [*quoted* in Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 114]; Webster Dict. [*quoted* in Denver *v.* Coulehan, 20 Colo. 471, 479, 39 Pac. 425, 27 L. R. A. 751; Harvey *v.* Osborn, 55 Ind. 535, 542; Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 114].

5. Standard Dict. [*quoted* in Wight, etc., Co. *v.* Wolff, 112 Ga. 169, 170, 37 S. E. 395]. See also Fitz *v.* Boston, 4 Cush. (Mass.) 365, 368, where the term "city" was used as intended to designate a thickly-settled place, with houses and stores contiguous or near to each other, with a great amount and variety of travel, as contradistinguished from places thinly settled, and houses remotely scattered, through which there is little amount and variety of traveling.

6. Odegaard *v.* Albert Lea, 33 Minn. 351, 352, 23 N. W. 526; Borders *v.* State, (Tex. Crim. 1902) 66 S. W. 1102, 1103; 1 Bl. Comm. 114 [*quoted* in Klauber *v.* Higgins, 117 Cal. 451, 460, 49 Pac. 466]; Johnson Cyc. [*quoted* in Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 144]; Webster Dict. [*quoted* in Harvey *v.* Osborn, 55 Ind. 535, 542].

7. Bouvier L. Dict. [*quoted* in Klauber *v.* Higgins, 117 Cal. 451, 462, 49 Pac. 466; Burke *v.* Monroe County, 77 Ill. 610, 615; Van Riper *v.* Parsons, 40 N. J. L. 1, 4].

8. Webster Dict. [*quoted* in Denver *v.* Coulehan, 20 Colo. 471, 479, 39 Pac. 425, 27 L. R. A. 751; Burke *v.* Monroe County, 77 Ill. 610, 615; Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 114].

9. Webster Dict. [*quoted* in Higgins *v.* Crab Orchard, 8 Ky. L. Rep. 112, 114].

10. Webster Dict. [*quoted* in Denver *v.* Coulehan, 20 Colo. 471, 479, 39 Pac. 425, 27 L. R. A. 751; Burke *v.* Monroe County, 77 Ill. 610, 615].

11. Anderson L. Dict. [*quoted* in Wight, etc., Co. *v.* Wolff, 112 Ga. 169, 170, 37 S. E. 395]. See also Black L. Dict. [*quoted* in Wight, etc., Co. *v.* Wolff, 112 Ga. 169, 170, 37

the convenient administration of the government;[12] a political subdivision of the state, charged with certain specified duties of government within its territorial limits;[13] a public corporation designed for local government;[14] the collective body of citizens, or inhabitants of a city.[15] In Spanish jurisprudence, a place surrounded by walls.[16] (See, generally, MUNICIPAL CORPORATIONS.)

CITY COUNCIL.[17] The legislative body in the government of cities or boroughs;[18] a part of the legislative power of the state within a limited district;[19] the agents of the inhabitants of a municipality so long as they act within the scope of the authority conferred upon them by law;[20] trustees of the corporation clothed with local and limited powers of sovereignty;[21] a public board for municipal governmental purposes, with just such powers (not forbidden by the constitution) as the legislature have thought, or may hereafter think, proper to confer.[22] (See, generally, MUNICIPAL CORPORATIONS.)

CITY COURTS. See COURTS.

CITY OF LONDON COURT. A court having local jurisdiction within the city of London. It is to all intents and purposes a county court, having the same jurisdiction and procedure.[23]

CITY PURPOSE.[24] Improvements for the common and general benefit of all the citizens, and within the scope of municipal government.[25] The purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character and authorized by the legislature.[26]

S. E. 395], to the effect that "the term is used in America to denote a municipal corporation of a larger class, the distinctive feature of whose organization is its government by a chief executive and a legislative body."

12. Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 654, 24 L. ed. 521 [*quoted* in Johnson *v.* San Diego, 109 Cal. 468, 474, 42 Pac. 249, 30 L. R. A. 178; Mount *v.* State, 90 Ind. 29, 32, 46 Am. Rep. 192; Wooster *v.* Plymouth, 62 N. H. 193, 208]. See also Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. (U. S.) 667, 21 L. ed. 375.

13. Ford *v.* Delta, etc., Land Co., 164 U. S. 662, 672, 17 S. Ct. 230, 41 L. ed. 590.

14. Brooks *v.* Wichita, 114 Fed. 297, 298, 52 C. C. A. 209.

15. Webster Dict. [*quoted* in Denver *v.* Coulehan, 20 Colo. 471, 479, 39 Pac. 425, 27 L. R. A. 751].

16. Villars *v.* Kennedy, 5 La. Ann. 724, 725, where the court said: "It will be seen by the 35th chapter of the book of Numbers, and the 21st of the book of Joshua, that the children of Israel were commanded with great particularity in founding cities for emigrating tribes, to lay off extensive suburbs outside of the walls, for the common use of the inhabitants. The christian sovereigns of Europe, either from the reverence for the example or the intrinsic utility of the custom, incorporated it into their laws for the government of their Colonies in the Indies."

17. "The word 'council' is derived from the Latin word '*consilium*,' the definition of which is 'an assembly.'" Bouvier L. Dict. [*quoted* in State *v.* Weeks, 38 Mo. App. 566, 573].

18. Bouvier L. Dict. [*quoted* in State *v.* Weeks, 38 Mo. App. 566, 574].

19. Huron *v.* Campbell, 3 S. D. 309, 316, 53 N. W. 182.

20. Strosser *v.* Ft. Wayne, 100 Ind. 443, 451.

21. Citizens' Gas, etc., Co. *v.* Elwood, 114 Ind. 332, 337, 16 N. E. 624.

22. People *v.* Hurlbut, 24 Mich. 44, 69, 9 Am. Rep. 103.

23. Black L. Dict.

24. "It is impossible to define in a general way . . . what a city purpose is, within the meaning of the constitution. Each case must largely depend upon its own facts, and the meaning of these words must be evolved by a process of exclusion and inclusion in judicial construction." People *v.* Kelly, 76 N. Y. 475, 487.

25. People *v.* Kelly, 76 N. Y. 475, 488.

26. Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 265, 46 N. E. 499, 37 L. R. A. 788. See also *In re* New York, 99 N. Y. 569, 585, 2 N. E. 642, where it is said: "The acquisition and maintenance of public parks, securing pure air and healthful rest and recreation to the people, is a 'city purpose,' when executed within the corporate limits."

What is a "city purpose."— In Comstock *v.* Syracuse, 5 N. Y. Suppl. 874, it is held that a supply of water for municipal use, as well as for that of the inhabitants, is a city purpose to a marked degree. So it has been held that the construction and operation of an electric light system by a city for its own and its inhabitants' benefit, is for a "city purpose" within section 11 of article 8 of the constitution of New York. Hequembourg *v.* Dunkirk, 49 Hun (N. Y.) 550, 551, 2 N. Y. Suppl. 447, 18 N. Y. St. 570.

What is not a "city purpose."— But it has been held that bonds issued under a municipal ordinance "for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes," are not for a "city purpose." Mather *v.* Ottawa, 114 Ill. 659, 3 N. E. 659.

CIUDADES. In Spanish-American law, towns.[27]

CIVIL. In its original sense, pertaining or appropriate to a member of a *civitas*, *q. v.*, or free political community; natural or proper to a citizen; also, relating to the community, or to the policy and government of the citizens and subjects of a state.[28] In the language of the law, the word has various significations:[29] In contradistinction to "barbarous" or "savage" the term may be used to indicate a state of society reduced to order and regular government;[30] so, in contradistinction to "criminal," it indicates the private rights and remedies of men as members of the community, in contrast to those which are public and relate to the government;[31] it also relates to rights and remedies sought by action or suit distinct from criminal proceedings,[32] and concerns the rights of and wrongs to individuals considered as private persons, in contradistinction to criminal or that which concerns the whole political society, the community, state, government: as, civil — action, case, code, court, damage, injury, proceeding, procedure, process, remedy.[33] Again, the term is often used in contradistinction to "military" or "ecclesiastical," to "natural" or "foreign."[34] (Civil: Action, see CIVIL ACTION. Case, see CIVIL ACTION. Commotion, see CIVIL COMMOTION. Damage Acts, see INTOXICATING LIQUORS. Death, see CIVIL DEATH; CONVICTS. Law, see CIVIL LAW. Liberty, see CIVIL LIBERTY. Office, see CIVIL OFFICE. Officer, see CIVIL OFFICER. Process, see PROCESS. Remedy, see CIVIL REMEDY. Rights, see CIVIL RIGHTS. Service, see MUNICIPAL CORPORATIONS; OFFICERS. Suit, see CIVIL SUIT. War, see INSURRECTION; WAR.)

CIVIL ACTION.[35] In civil law, a personal action which is instituted to compel

27. Hart *v.* Burnett, 15 Cal. 530, 537.

28. Black L. Dict.

The civil state includes all orders of men from the highest nobleman to the meanest peasant, that are not included under . . . clergy, or under . . . the military and maritime states: and it may sometimes include individuals of the other . . . orders." 1 Bl. Comm. 396.

29. Black L. Dict.

30. Thus, we speak of civil rights, civil society, civil government, and civil liberty. Black L. Dict.

Civil subjection is defined as a situation "whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest." 4 Bl. Comm. 28.

31. Thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction. Black L. Dict.; Bouvier L. Dict. [*quoted* in Hockemeyer *v.* Thompson, 150 Ind. 176, 182, 48 N. E. 1029, 49 N. E. 1059].

32. Webster Dict. [*quoted* in Hockemeyer *v.* Thompson, 150 Ind. 176, 182, 48 N. E. 1029, 49 N. E. 1059].

The terms "civil" and "criminal," when used, whether in reference to jurisdiction or judicial proceedings generally, have respect to the nature and form of the remedy, and the cause of action or occasion for instituting legal proceedings. Civil stands for the opposite of criminal, and hence we have courts known as courts of civil jurisdiction and of criminal jurisdiction, distinguished by the character of the prosecutions in each. Bacon Abr. Actions [*quoted* in Landers *v.* Staten Island R. Co., 53 N. Y. 450, 456]; Bouvier Inst. pl. 2642–2643. And see Rapalje & L. L. Dict. [*quoted* in State *v.* Union Trust Co., 70 Mo. App. 311, 317; Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 3 L. R. A. 554].

33. Anderson L. Dict. [*quoted* in Hockemeyer *v.* Thompson, 150 Ind. 176, 182, 48 N. E. 1029, 49 N. E. 1059; State *v.* Frost, 113 Wis. 623, 641, 88 N. W. 912, 89 N. W. 915].

34. Thus, we speak of a civil station, as opposed to a military or an ecclesiastical station; a civil death as opposed to a natural death; a civil war as opposed to a foreign war. Black L. Dict. [*citing* Story, Const. § 791].

The opposite of criminal, of ecclesiastical, of military, or political see Wharton L. Lex. [*citing* 1 Mill Logic].

The word "civil" as used in "Brown Civil Township" has been held to correctly describe the township, although it created an inaccuracy in the name of the political corporation, where it appeared that no one could have been misled or prejudiced by its use. Vogel *v.* Brown Tp., 112 Ind. 299, 300, 14 N. E. 77, 2 Am. St. Rep. 187.

35. The precise meaning of the descriptive term "civil actions" must be judged by its connections and the manner in which it is used in the particular case. It is in all cases dangerous to take particular expressions applicable to the subject under consideration and to treat them as general words affording rules and definitions applicable to all cases. Howard *v.* Merrimac River Locks, etc., 12 Cush. (Mass.) 259. See also, generally, ACTIONS, 1 Cyc. 732.

Attributes of civil action.—"It is an action wherein an issue is presented for trial, formed by the averments of the complaint, and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegations of the pleadings, and a judgment

payment, or the doing of some other thing which is purely civil.[36] At common law, an action which has for its object the recovery of private or civil rights or compensation for their infraction;[37] the legal demand of one's right;[38] the rightful method of obtaining in court what is due to any one; the lawful demand of one's right in a court of justice; the lawful demand of one's rights in the form given by law; the form of a suit given by law for the recovery of that which is one's due; a remedial instrument of justice, whereby redress is obtained for any wrong committed or right withheld; any judicial proceeding which, conducted to a termination, will result in a judgment.[39] Again, at common law, a civil action, as distinguished from a criminal action, is one which seeks the establishment, recovery, or redress of private and civil rights;[40] an action brought to recover some civil right, or to obtain redress for some wrong, not being a crime or misdemeanor, and is thus distinguished from a criminal action or prosecution.[41] Under

in such an action is conclusive upon the rights of the parties, and could be plead in bar." Evans *v.* Evans, 105 Ind. 204, 210, 5 N. E. 24, 768 [*citing* Deer Lodge County *v.* Kohrs, 2 Mont. 66, 70].

36. Black L. Dict.; Bouvier L. Dict. [*citing* Pothier Introd. Gen. aux Cont. 110].

37. Bouvier L. Dict. [*quoted* in State *v.* Union Trust Co., 70 Mo. App. 311, 315; *In re* Farnum, 51 N. H. 376, 383; State *v.* Frost, 113 Wis. 623, 641, 88 N. W. 912, 89 N. W. 915; Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 3 L. R. A. 554]. See also the following cases:

Alabama.— Withers *v.* State, 36 Ala. 252, 262, where it is said: "The civil causes here spoken of are those which deal with private wrongs; that is, with acts which constitute an infringement or privation of the private or civil rights belonging to individuals. These terms, therefore, include only those legal proceedings which seek redress for civil injuries."

Illinois.— McPike *v.* McPike, 10 Ill. App. 332, 333 [*quoting* 1 Wait Act. & Def. 10: "A civil action is one prosecuted for the establishment or recovery of a right, or the prevention of a wrong, or the redress of an injury"].

Maine.— Bryant *v.* Glidden, 36 Me. 36, 44, where civil actions are defined to be: "All legal proceedings partaking of the nature of a suit and designed to determine the rights of private parties."

Missouri.—State *v.* Union Trust Co., 70 Mo. App. 311, 317 [*quoting* Rapalje & L. L. Dict.: "An action to enforce a private or civil right or to redress a private wrong;" and Stroud Jud. Dec. 130].

New York.— Roe *v.* Boyle, 81 N. Y. 305, 306, where a civil action is defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, or for the redress or prevention of a wrong,— every other civil remedy being defined to be a special proceeding. See also Matter of Rafferty, 14 N. Y. App. Div. 56, 57, 43 N. Y. Suppl. 760.

United States.— *Ex p.* Tom Tong, 108 U. S. 556, 2 S. Ct. 871, 27 L. ed. 826 (proceedings to enforce civil rights); Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 3 L. R. A. 554 [*quoting* Rapalje & L. L. Dict.].

The term civil may be applied to the nature of litigation as growing out of the relation of citizens *inter sese* rather than to their relation to the state. Koch *v.* Vanderhoof, 49 N. J. L. 619, 623, 9 Atl. 771.

38. Pettis *v.* Pomfret, 28 Conn. 566, 569; Winfield Adj. Words, 16 [*quoted* in Jefferson County *v.* Philpot, 66 Ark. 243, 245, 50 S. W. 453].

39. Winfield Adj. Words, 16 [*quoted* in Jefferson County *v.* Philpot, 66 Ark. 243, 245, 50 S. W. 453].

40. Koch *v.* Vanderhoof, 49 N. J. L. 619, 9 Atl. 771; Black L. Dict. In *In re* Fenstermacher *v.* State, 19 Oreg. 504, 506, 25 Pac. 142, it was said that a civil action is instituted for the purpose of enforcing a private or civil right, or to redress a private wrong, as distinguished from actions instituted to punish crimes which are known as criminal actions. See also Dow *v.* Norris, 4 N. H. 16, 19, 17 Am. Dec. 400 [*citing* 3 Bl. Comm. 2].

The term from its natural import would embrace every species of suits which is not of a criminal kind. Wiscart *v.* Dauchy, 3 Dall. (U. S.) 321, 328, 1 L. ed. 619 [*quoted* in Curry *v.* Marvin, 2 Fla. 411, 417].

41. Landers *v.* Staten Island R. Co., 53 N. Y. 450, 456; Burrill L. Dict. [*quoted* in Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 3 L. R. A. 554]. In Lake Erie, etc., R. Co. *v.* Heath, 9 Ind. 558, 559 [*quoted* in Norristown, etc., Turnpike Co. *v.* Burket, 26 Ind. 53, 62], it is said: "Not every case which is not a criminal, is a civil one. 'Civil case' had a definition, a meaning at common law, when the early constitutions of this country were formed; and it has been held that the term was used in those constitutions in the common-law sense." In U. S. *v.* Three Tons of Coal, 6 Biss. (U. S.) 379, 392, 28 Fed. Cas. No. 16,515, 21 Int. Rev. Rec. 251, it is said: "The true test, I think, lies here. When the judgment of forfeiture necessarily carries with it and as part of it a conviction and judgment against the person for the crime, the case is of criminal character. But when the forfeiture does not necessarily involve personal conviction and judgment for the offense, and such conviction and judgment must be obtained, if at all, in another and independent proceeding, there the remedy by way of forfeiture is of civil and not criminal nature. Understanding the words 'criminal case,' in the Constitution in the sense in

the code a civil action comprehends a suit in equity under the old practice.[42] (See, generally, ACTIONS; CAUSE; CAUSE OF ACTION.)

CIVIL ARCHITECTURE. The art or science of building various structures for the purposes of civil life.[43]

CIVIL BILL COURT. A court in Ireland whose jurisdiction is similar to that exercised by the county courts in England.[44]

CIVIL BUSINESS. A fact or facts that constitute the cause of action.[45]

CIVIL CASE. A suit at law to redress the violation of some contract, or to repair some injury to property or to the person or personal rights of individuals.[46] (See also ACTIONS; CIVIL ACTION; CIVIL CAUSE; CIVIL SUIT.)

CIVIL CAUSE. A judicial proceeding designed to enforce the rights and

which they are generally used, and upon the views already indicated, I must construe them as meaning a case in which punishment for crime is sought to be visited upon the person of the offender, in the ordinary course of criminal prosecution, in contradistinction to a proceeding *in rem* to effect a forfeiture of the thing to which the offense primarily attaches."

The phrase "civil actions" is used as opposed to criminal actions. Rison *v.* Cribbs, 1 Dill. (U. S.) 181, 184, 20 Fed. Cas. No. 11,860, where it is said: The phrase "civil actions" includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime. See also Smith *v.* Burnet, 35 N. J. Eq. 314, 320; U. S. *v.* Ten Thousand Cigars, Woolw. (U. S.) 123, 124, 28 Fed. Cas. No. 16,451 [*quoted* in Fenstermacher *v.* State, 19 Oreg. 504, 507, 25 Pac. 142], construing 13 U. S. Stat. at L. p. 351, § 3. In Livingston *v.* Story, 9 Pet. (U. S.) 632, 656, 9 L. ed. 255 (construing the act of congress of 1824, relative to the practice of the courts of the United States in Louisiana), it is said: "The descriptive terms here used, civil actions, are broad enough to embrace cases at law and in equity; and may fairly be construed, as used in contradistinction to criminal causes." In Atcheson *v.* Everitt, Cowp. 382, it was determined that actions strictly popular and not compensatory are not criminal prosecutions, but civil suits. This case was followed in Spicer *v.* Rees, 5 Rawle (Pa.) 119, 122, 28 Am. Dec. 648. See also Cancemi *v.* People, 18 N. Y. 128, 135, where the court declares that there is "a wide and important distinction, between civil suits and criminal prosecutions," and that "this distinction arises . . . in respect to the interests involved and the objects to be accomplished."

A suit may be criminal in form and yet civil in its nature or *vice versa*. Illinois *v.* Illinois Cent. R. Co., 33 Fed. 721, 726 [*cited* in Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 499, 3 L. R. A. 554], construing the act of congress of May 3, 1887, relating to removal of causes from the state to the federal courts.

It is apparent that anciently in England many proceedings by information were classed not as civil but rather as criminal, although their purpose was not strictly punishment, but the recovery of moneys or property of which the sovereign claimed to be wrongfully deprived. 6 Bacon Abr. Prerogative, p. 467 [*cited* in State *v.* Frost, 113 Wis. 623, 641, 88 N. W. 912, 89 N. W. 915].

42. See ACTIONS, 1 Cyc. 732.

Under the Arkansas code (Sandel & H. Dig. Ark. § 5602) the court, in Jefferson County *v.* Philpot, 66 Ark. 243, 245, 50 S. W. 453, construes the phrase "civil action."

Under the New York Code (N. Y. Code Civ. Proc. § 2337) the court in Prentice *v.* Weston, 47 Hun (N. Y.) 121, 124, interprets the phrase "civil action."

As enabling acts the federal courts have included within the term "civil action," as used in the act, all proceedings which are not criminal, and includes suits in chancery as well as actions at law. Smith *v.* Burnet, 35 N. J. Eq. 314, 320 [*citing* Green *v.* U. S., 9 Wall. (U. S.) 655, 19 L. ed. 806; Rison *v.* Cribbs, 1 Dill. (U. S.) 181, 20 Fed. Cas. No. 11,860; U. S. *v.* Ten Thousand Cigars, Woolw. (U. S.) 123, 28 Fed. Cas. No. 16,451].

43. See BUILDERS AND ARCHITECTS, 6 Cyc. 6, note 2.

44. Black L. Dict.

The judge of it is also chairman of quarter sessions (where the jurisdiction is more extensive than in England), and performs the duty of revising barrister. The procedure of the civil bill courts is regulated by 27 & 28 Vict. c. 99; 28 & 29 Vict. c. 1; and 37 & 38 Vict. c. 66. Wharton L. Lex.

45. Condon *v.* Leipsiger, 17 Utah 498, 501, 55 Pac. 82, construing Utah Const. art. 8, § 5.

"Of course, the intent attending an act usually characterizes it as criminal or otherwise." Condon *v.* Leipsiger, 17 Utah 498, 501, 55 Pac. 82.

46. Schultz *v.* Moore, Wright (Ohio) 280, 281, distinguishing a civil case from a criminal case, the latter being a public prosecution for a crime or a misdemeanor. See also Grimball *v.* Ross, 1 T. U. P. Charlt. (Ga.) 175, 181 (where it is said: "Civil cases are those which involve disputes or contests between man and man, and which only terminate in the adjustment of the rights of plaintiffs and defendants"); State *v.* Judge, 15 La. 124, 126 (where it is said: "Civil cases are essentially those in which the defendant, or party against whom relief is sought, is a natural person, or corporation, other than the State").

"Civil cases" must be held to mean "civil actions," which in common parlance do not

redress the wrongs of individuals, as between themselves in distinction from criminal proceedings.[47] (See also Actions; Civil Action; Civil Case; Civil Suit.)

CIVIL COMMOTION. An uprising among a mass of people which occasions a serious and prolonged disturbance and an infraction of civil order,[48] not attaining the status of war or an armed insurrection.[49]

CIVIL CORPORATION. A term sometimes used in England to indicate a class of lay corporations, organized for the execution of municipal or business functions, as distinguished from another class termed eleemosynary or charitable corporations.[50]

CIVIL DAMAGE ACTS. See Intoxicating Liquors.

CIVIL DAY. A day which, in civil transactions, begins and ends at midnight.[51]

CIVIL DEATH.[52] The legal privation or extinction of a person's rights and capacities among his fellow members of society;[53] extinction of civil rights;[54] the state of a person who, though possessing natural life, has lost all his civil rights and as to them is considered dead.[55] (Civil Death: As Ground For Abatement, see Abatement and Revival. Generally, see Convicts.)

CIVIL DISABILITIES. Disqualification created by law.[56]

comprehend writs of mandamus, certiorari, or habeas corpus. Com. *v.* Lancaster County, 6 Binn. (Pa.) 5, 8. A mandamus is a civil proceeding, within the meaning of the Pennsylvania act of March 30, 1875, providing, "that changes of venue shall be made in any civil cause in law or equity depending in any of the courts of this Commonwealth," in the particular cases specified in said act. Williamsport *v.* Com., 90 Pa. St. 498.

47. Abbott L. Dict.

"The civil causes . . . are those which deal with private wrongs; that is, with acts which constitute an infringement or privation of the private or civil rights belonging to individuals. These terms, therefore, include only those legal proceedings which seek redress for civil injuries." Withers *v.* State, 36 Ala. 252, 262, construing the bill of rights.

"The word 'civil' is used in this article of the bill of rights to denote causes in which private rights are involved, and to distinguish such cases from criminal causes, in which the public alone is concerned." Dow *v.* Norris, 4 N. H. 16, 19, 17 Am. Dec. 400 [*citing* 3 Bl. Comm. 2].

48. 4 Bl. Comm. 147.

49. Abbott L. Dict. See Insurrection.

50. 1 Bl. Comm. 467, 471.

Examples of civil corporations are municipal corporations (as counties, cities, towns, and villages), incorporated manufacturing, banking, insurance, and trading companies, and the like. 2 Kent Comm. 275.

51. State *v.* Padgett, 18 S. C. 317, 323 [*citing* Webster Dict.]; Pedersen *v.* Eugster, 14 Fed. 422.

According to the calendar adopted by Pope Gregory XIII, "the civil, as distinguished from the artificial 'day,' is defined to be 'the whole time or period of one revolution of the earth on its axis, or twenty-four hours,' called the 'natural day.' 'And the evening and the morning were the first day.' Genesis, ch. 1. In this sense the day may commence at any period of the revolution. The Babylonians began the day at sunrising, the Jews at sunsetting, the Egyptians at midnight, as do several nations in modern times, the British, Spanish, American, &c." State *v.* Padgett, 18 S. C. 317, 323.

52. "The term, 'civil death,' as used in the books, seemed to involve, first, a total extinction of the civil rights and relations of the party, so that he could neither take nor hold property, but his estate passed to his heirs as though he were really dead, or was forfeited to the crown; and of this kind were the cases of monks professed, and abjuration of the realm. But profession was a creature of the ecclesiastical law, and the relinquishment of the estate was voluntary. 1 Domat. 25, art. 13. This species of civil death terminated when popery was abolished in England, and the monasteries taken into the hands of the king. Abjuration of the realm was abolished by the Statute of James I, ch. 28. Second, an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate and corruption of blood; and the king took the property to the exclusion of the heirs. Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 262, 3 Am. Dec. 415; 1 Domat. 531, s. 14." Baltimore *v.* Chester, 53 Vt. 315, 318, 38 Am. Rep. 677. See also 1 Bl. Comm. 132.

A drunkard is not civilly dead. Steel *v.* Young, 4 Watts (Pa.) 459.

53. Abbott L. Dict. [*quoted* in *In re* Donnelly, 125 Cal. 417, 419, 58 Pac. 61, 73 Am. St. Rep. 62]. See also Com. *v.* Clemmer, 190 Pa. St. 202, 210, 42 Atl. 675.

54. Anderson L. Dict. [*quoted* in *In re* Donnelly, 125 Cal. 417, 419, 58 Pac. 61, 73 Am. St. Rep. 62].

55. Bouvier L. Dict. [*quoted* in *In re* Donnelly, 125 Cal. 417, 419, 58 Pac. 61, 73 Am. St. Rep. 62].

56. Anderson L. Dict. [*quoted* in Ingalls *v.* Campbell, 18 Oreg. 461, 466, 24 Pac. 904].

"To the wife it means some disqualification created by, or the result of law, which renders her incapable of doing certain acts or things." Ingalls *v.* Campbell, 18 Oreg. 461, 466, 24 Pac. 904.

CIVIL DUTY. An obligation which may be created by the state, through its legislature.[57]

CIVIL EFFECTS. The civil rights and liabilities resulting from a given status, such as marriage.[58]

CIVILIAN. A person engaged in civil pursuits as distinguished from those connected with the military and naval service, or (in England) in religious work;[59] a student or teacher of civil law; a person proficient in the sciences.[60]

CIVIL IMPOSITION. In legal contemplation, a tax authorized by the legislature under a constitutional grant of power.[61]

CIVIL INJURY. An injury sustained by the individual only, and not by society, and entitling him to a personal action for redress.[62]

CIVILITER. A term used to define the civil status of a person, and to distinguish civil from criminal process and civil from criminal prosecutions.[63]

CIVILITER MORTUUS. Civilly dead; dead in the view of the law. The condition of one who has lost his civil rights and capacities, and is accounted dead in law.[64] (See also CIVIL DEATH.)

CIVILIZATION. An improved and progressive condition of the people, living under organized government.[65]

57. Philadelphia, etc., R. Co. *v.* Ervin, 89 Pa. St. 71, 33 Am. Rep. 726. See also Flynn *v.* Canton Co., 40 Md. 312, 17 Am. Rep. 603; Jenks *v.* Williams, 115 Mass. 217; Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.) 249, 74 Am. Dec. 682; Vandyke *v.* Cincinnati, 1 Disn. (Ohio) 532, 12 Ohio Dec. (Reprint) 778.

The legislature alone has power to create a civil duty enforceable at common law; a municipal corporation cannot do so. Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74 [*cited* in Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 35]. A municipal ordinance required the removal of snow, etc., from sidewalks by the owner of adjoining premises, and prescribed a penalty for neglect. It was held that a person injured by a fall on a slippery sidewalk could not maintain an action against the owner of the premises for his failure to comply with the ordinance. Heeney *v.* Sprague, 11 R. I. 456, 461, 23 Am. Rep. 502, where it was said: "The defendant has not done anything injurious to others which she was forbidden to do; she has simply left undone something beneficial to others which she was required to do under a penalty in case of default. The thing required was not obligatory upon her at common law. It was a duty newly created by ordinance, which, but for the ordinance, she might have omitted with entire impunity. The question is, whether a person neglecting such a duty is subject not only to the penalty prescribed, but also to a civil action in favor of any person specially injured by the neglect."

58. Smith *v.* Smith, 43 La. Ann. 1140, 1149, 10 So. 248, where it was said: "The words 'civil effects' are used without restriction, and necessarily embrace all civil effects given to marriage by the law; or, in the language of Marcadé, in commenting on the identical article in the French Code, such a marriage, 'although actually null, has the same effects as if it were not null, the ordinary effects of a valid marriage. . . . Every marriage, though invalid, if contracted in good faith, produces the effects of a valid marriage in the interval between the celebration and the judicial declaration of nullity; when once such a declaration intervenes, the marriage produces no further effect; but, be it understood, the effects produced remain forever.' 1 Marcadé 525."

59. Black L. Dict.

Civilian employees and officers, see ARMY AND NAVY, 3 Cyc. 842.

60. Rapalje & L. L. Dict.

61. Harvard College *v.* Boston, 104 Mass. 470.

62. Abbott L. Dict.

Distinguished from "crime."—While the injury to the individual may also constitute a crime (Abbott L. Dict.), civil injuries are distinguishable from crimes or misdemeanors, which "are a breach and violation of public rights and duties, which affect the whole community, considered as a community" (3 Bl. Comm. 2).

Civil wrongs are "an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries." 3 Bl. Comm. 2.

Private wrongs are frequently termed civil injuries. Koch *v.* Vanderhoof, 49 N. J. L. 619, 9 Atl. 771.

63. Black L. Dict.

Origin of term.—This term, with its opposite *criminaliter*, occur in the civil law, from which source they were introduced (most probably by Bracton) into the law of England. Burrill L. Dict.

64. Black L. Dict. And see Com. *v.* Clemmer, 190 Pa. St. 202, 210, 42 Atl. 675.

65. Roche *v.* Washington, 19 Ind. 53, 56, 81 Am. Dec. 376, where it is said that it "is a term which covers several states of society; it is relative, and has not a fixed sense; but, in all its applications, it is limited to a state of society above that existing among the Indians of whom we are speaking. It implies an improved and progressive condition of the people, living under an organized government, with systematized labor, individual owner-

CIVIL JURISDICTION. That which exists when the subject-matter is not of a criminal nature.[66] (See, generally, COURTS.)

CIVIL LAW. In its general signification, the established law of every particular nation, commonwealth, or city, more properly distinguished by the term "municipal law";[67] that division of municipal law which is occupied with the exposition and enforcement of civil rights, as distinguished from criminal law.[68] In particular significance, it usually means the body of jurisprudence known as the Roman law.[69]

CIVIL LIBERTY. Natural liberty so far restrained by human laws[70] (and no further) as is necessary and expedient for the general advantage of the public;[71] the power of doing whatever the laws permit.[72] (See, generally, CIVIL RIGHTS; CONSTITUTIONAL LAW.)

CIVIL LIST. The designation of an appropriation made by the British parliament for the maintenance of the royal household and establishment, as distinguished from the exigencies of state. The appropriation is made in lieu of revenues, formerly derived by the crown from lands and other sources, converted to public uses.[73]

ship of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well-defined and respected domestic and social relations, institutions of learning, intellectual activity, etc. We know, historically, that the North American Indians are classed as savage and not as civilized people; and that, in fact, it is problematical whether they are susceptible of civilization."

Civilitas successit barbarum,— civilization succeeds barbarism. This was the motto of Minnesota when a territory. Adams Gloss.

66. Bouvier L. Dict. [*cited* in Landers *v.* Staten Island R. Co., 53 N. Y. 450, 457].

67. Wharton L. Lex. And see, generally, INTERNATIONAL LAW.

Distinguished from "law of nations."—The law which a people enacts is called the civil law of that people, but that law which natural reason appoints for all mankind is called the law of nations, because all nations use it. Bowyer Modern Civ. L. 19 [*quoted* in Black L. Dict.].

68. Burrill L. Dict. And see, generally, CRIMINAL LAW.

69. Wharton L. Lex.

"Roman law" and "civil law" are convertible terms, meaning the same system of jurisprudence; it is now frequently denominated the "Roman Civil Law." Black L. Dict. The term civil law being chiefly applied to that which the old Romans used, compiled from their laws of nature and of nations. Jacob L. Dict.

The term "civil" as applied in the laws in force in Louisiana anterior to the adoption of the civil code, must not be considered as used in contradistinction with the word criminal, but must be restricted to the Roman law. The term is employed in contradistinction to the law of England, and those of the respective states. Jennison *v.* Warmack, 5 La. 493.

Importance of civil law.— "The whole body of the Civil Law will excite never-failing curiosity, and receive the homage of scholars, as a singular monument of wisdom. It fills such a large space in the eye of human reason; it regulates so many interests of man as a social and civilised being; it embodies so much thought, reflection, experience, and labour; it leads us so far into the recesses of antiquity, and it has stood so long against the waves and weathers of time, that it is impossible, while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitudes of a majestic ruin." 1 Kent Comm. 548 [*quoted* in Wharton L. Lex.]. See also Gayle *v.* Cunningham, Harp. Eq. (S. C.) 124, 133 [*quoting* 1 Fonb. 255], where it is said: "The civil law, as a system of jurisprudence, framed by wise men and approved by the experience of ages, must, in every country and in every age, furnish principles which, modified and applied as circumstances may require, will greatly contribute to the real interests and welfare of society."

70. **"Civil government in itself implies an abridgment of natural liberty."** *In re* Ferrier, 103 Ill. 367, 372, 43 Am. Rep. 10.

Blackstone says: "Civil liberty . . . consists in protecting the rights of individuals by the united force of society." 1 Bl. Comm. 251.

"The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State shall not be justified." Chase *v.* Cheney, 58 Ill. 509, 537, 11 Am. Rep. 95.

71. 1 Bl. Comm. 125 [*quoted* in People *v.* Berberrich, 20 Barb. (N. Y.) 224, 231].

Natural liberty, shorn of the excesses, which invade and trench on the equal liberty of others, is civil liberty. Hayes *v.* Mitchell, 69 Ala. 452, 454.

72. 1 Bl. Comm. 6.

It is not natural but civil liberty of which a person may not be deprived without due process of law. There are restrictions imposed upon personal liberty which spring from the helpless or dependent condition of individuals in the various relations of life, among them being those of parent and child, guardian and ward, teacher and scholar. *In re* Ferrier, 103 Ill. 367, 373, 42 Am. Rep. 10.

73. 1 Bl. Comm. 332.

CIVIL OBLIGATION. A legal obligation enforceable in a judicial tribunal.[74]

CIVIL OFFICE.[75] A grant and possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office.[76] (See, generally, OFFICERS.)

CIVIL OFFICER. Any officer holding appointment under the United States government, except in the military or naval service,[77] whether the duties are executive or judicial, or in the highest or lowest departments.[78] (See, generally OFFICERS.)

CIVIL REMEDY. The remedy afforded by law to a private person in the civil courts in so far as his private and individual rights have been injured by a delict or crime; as distinguished from the remedy by criminal prosecution for the injury to the rights of the public.[79] (See, generally, ACTIONS.)

CIVIL RESPONSIBILITY. The liability to be called upon to respond to an action at law for an injury caused by a delict or crime, as opposed to criminal responsibility, or liability to be proceeded against in a criminal tribunal.[80]

The word civil list was formerly applied in England, to the list of all the expenses of the government, or of all the heads of public expenditure, excepting those of the army, the navy, and the other military departments. And this seems to be its present meaning, as applied to the expenditures of the government of the United States. Burrill L. Dict. [*citing* 1 Bl. Comm. 332].

74. Black L. Dict. [*citing* Pothier Obl. 191].

75. "The words 'office' and 'civil office' have several meanings. The sense in which they are used in any particular place can usually be determined by a reference to the context and the subject matter of the instrument. Sometimes they would include the president and trustees of a corporation, executors, deputies, etc. . . . They only refer to such officers as are connected with the civil administration of the government, and were doubtless intended to include all such, to the exclusion of military officers." State *v.* Clarke, 21 Nev. 333, 336, 31 Pac. 545, 37 Am. St. Rep. 517, 18 L. R. A. 313 [*citing* 1 Story Const. § 791].

The government is the fountain of office, and civil officers have a right to exercise a public employment and take the fees and emoluments thereunto belonging. 1 Bl. Comm. 272; 2 Bl. Comm. 36 [*cited* in State *v.* Valle, 41 Mo. 29, 31].

76. State *v.* Valle, 41 Mo. 29, 31.

The office of school superintendent of a county is a civil office within the meaning of Cal. Const. art. 4, § 21. Crawford *v.* Dunbar, 52 Cal. 36.

"Civil office in the state" may mean either civil office within the territory, or civil office in the frame of government, or political organization which it was the business of the convention to establish. State *v.* Wilmington, 3 Harr. (Del.) 294, 299.

77. Military and naval officers see ARMY AND NAVY, 3 Cyc. 818.

78. *In re* Notaries Public, 9 Colo. 628, 21 Pac. 473 [*quoting* Story Const. §§ 789–792]; Black L. Dict. [*citing* Story Const. § 792].

"The term 'civil officers' was intended to embrace such officers as in whom part of the sovereignty or municipal regulations, or general interests of society are vested; and that such has been the general understanding in the States, under their constitutions, is known to citizens of experience and observation." U. S. *v.* Hatch, 1 Pinn. (Wis.) 182, 190 [*citing* Com. *v.* Binns, 17 Serg. & R. (Pa.) 219, 243].

The term "civil officers" is said to embrace only those in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interest of society is confided. U. S. *v.* Hatch, 1 Pinn. (Wis.) 182 [*cited* in State *v.* Crawford, 17 R. I. 292, 293, 21 Atl. 546].

A civil officer has the characteristics of tenure, of definite term, of general duties as a part of the regular administration of the government, of right to emoluments, and of qualification by oath. State *v.* Crawford, 17 R. I. 292, 293, 21 Atl. 546.

A member of "the police of the Capitol" in the city of Washington was held to be a civil officer under a joint resolution of congress granting an additional compensation to certain officers. Mallory *v.* U. S., 3 Ct. Cl. 257, 258.

A sergeant or under-officer in the penitentiary service while in charge of a convict camp and engaged in duties incidental thereto is a "civil officer engaged in the discharge of official duty" within the meaning of Tex. Pen. Code, art. 319. Carmichael *v.* State, 11 Tex. App. 27.

Fire wardens are not civil officers within the meaning of R. I. Const. art. 9, § 1, providing that "no person shall be eligible to any civil office" unless he is a qualified elector for such office. State *v.* Crawford, 17 R. I. 292, 21 Atl. 546.

79. Black L. Dict.

80. Black L. Dict.

CIVIL RIGHTS

EDITED BY JAMES BECK CLARK

I. **DEFINITION**, 160

II. **CONSTITUTIONAL AND STATUTORY PROVISIONS**, 160

A. *Amendments to the Federal Constitution*, 160

1. *In General*, 160
2. *Object and Effect*, 161
3. *Rights Protected*, 162

B. *Federal Legislation*, 163

1. *Power of Congress*, 163
2. *Limitation of Authority*, 163
3. *Object and Effect*, 164

C. *State Legislation*, 165

1. *In General*, 165
2. *Power of State Legislature*, 166
3. *Limitation of Authority*, 166

III. **DISCRIMINATION**, 167

A. *As to Property Rights*, 167

B. *As to Employment*, 167

C. *As to Public Schools*, 167

1. *Powers and Duties of the State*, 167
   a. *Duty to Provide Equal School Facilities*, 167
   b. *Power to Establish Separate Schools*, 167
   c. *Necessity of Uniform Taxation For School Purposes*, 168
2. *Powers and Duties of Public Authorities*, 168
   a. *Duty to Afford Equal Facilities*, 168
   b. *Power to Establish Separate Schools*, 168

D. *As to Public Conveyances*, 169

1. *In General*, 169
2. *Separate Accommodations*, 169
   a. *Legislative Requirement*, 169
   b. *Right of Carriers to Provide*, 170

E. *As to Accommodations in Inns, Restaurants, and Barber Shops*, 171

F. *As to Places of Amusement*, 171

G. *As to Jury Service*, 172

H. *As to Punishment For Crime*, 173

IV. **REMEDIES FOR UNLAWFUL DISCRIMINATION**, 173

A. *Action For Penalty or Damages*, 173

1. *Right of Action*, 173
   a. *For Infraction of Statute Prescribing Penal Liability*, 173
   b. *Against "Any Person,"* 174
   c. *Recovery by One For Single Offense Against Several*, 174
2. *Form of Action Where Penalty Uncertain*, 174
3. *Declaration or Complaint*, 174
   a. *Reference to Statute*, 174
   b. *Alleging Nature of Right and Injury*, 174
4. *Evidence*, 174
   a. *Admissibility*, 174
   b. *Sufficiency*, 174
5. *Question For Jury*, 174

6. *Measure of Damages*, 175
a. *Amount Fixed by Statute*, 175
b. *Nominal Damages*, 175
c. *Exemplary Damages*, 175
B. *Mandamus to School Officials*, 175
1. *In General*, 175
2. *Parties*, 175
a. *The Relator*, 175
b. *The Defendant*, 176
3. *Petition*, 176
4. *Evidence*, 176
5. *Instructions*, 176
6. *Question For Jury*, 176
C. *Quo Warranto*, 177
D. *Injunction*, 177
E. *Criminal Proceedings*, 177
1. *Indictment or Information*, 177
a. *Necessary Allegations*, 177
(I) *Of Citizenship of Person Discriminated Against*, 177
(II) *Of Discrimination Under State Statute*, 177
(III) *Of Discrimination Because of Race or Color*, 177
(IV) *Of Non-Existence of Reason For Denial of Rights*, 177
b. *Sufficiency*, 177
(I) *Charging Offense in Statutory Language*, 177
(II) *Charging Distinct Violations Constituting One Offense*, 178
2. *Evidence*, 178

CROSS-REFERENCES

For Matters Relating to:
Aliens, see ALIENS.
Citizens, see CITIZENS.
Civil Damage Acts, see INTOXICATING LIQUORS.
Colored Persons as Witnesses, see WITNESSES.
Conspiracy to Prevent Exercise of Civil Rights, see CONSPIRACY.
Constitutional Guaranty of Rights, see CONSTITUTIONAL LAW.
Denial of Civil Rights as Ground For Removal of Cause, see REMOVAL OF CAUSES.
Disability of Convicts, see CONVICTS.
Discrimination in Admission to the Bar, see ATTORNEY AND CLIENT.
Elections, see ELECTIONS.
Expatriation, see CITIZENS.
Extradition, see EXTRADITION.
Indians, see INDIANS.
Miscegenation, see MISCEGENATION.
Qualification of:
Elector, see ELECTIONS.
Juror, see GRAND JURIES; JURIES.
Regulation of:
Inns, see INNKEEPERS.
Schools, see SCHOOLS AND SCHOOL DISTRICTS.
Theaters, see THEATERS AND SHOWS.
Violation of Neutrality Laws, see NEUTRALITY LAWS.

I. DEFINITION.

Civil rights are those which appertain to citizenship, and which may be enforced or redressed by a civil action.[1] They have no relation to the establishment, support, or management of government.[2] Also a term applied to certain rights secured to all citizens of the United States by the thirteenth and fourteenth amendments of the federal constitution and by congressional action thereunder,[3] and by state legislation. The scope of this article will be confined to the rights of the latter class.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS.

A. Amendments to the Federal Constitution — 1. IN GENERAL. Prior to the adoption of the thirteenth and fourteenth amendments to the constitution of the United States negroes, whether bond or free, had generally[4] no civil, social, or political rights or capacity.[5] By these amendments and the fifteenth, which

1. Black L. Dict.; Burrill L. Dict.; Rapalje & L. L. Dict.

Civile jus, either in a broader sense opposite to *jus naturali*, political rights, or in a narrower signification opposite to *jus publicum*, civil and private rights. Sweet L. Dict.

Distinguished from natural rights.— "By civil rights, I understand those rights which the municipal law will enforce, at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. They are distinguishable from natural rights, which would exist if there were no municipal law, some of which are abrogated by municipal law, while others lie outside of its scope, and still others are enforceable under it as civil rights." Percey *v.* Powers, 51 N. J. L. 432, 433, 17 Atl. 969, 14 Am. St. Rep. 693.

2. Bouvier L. Dict. "These consist in the power of acquiring and enjoying property, of exercising the parental and marital power, and the like. They are the absolute rights of persons, the right of personal security, the right of personal liberty, and the right to acquire and enjoy property, as regulated and protected by law." People *v.* Washington, 36 Cal. 658, 662 [*citing* Bouvier L. Dict.]; Ward *v.* Broadwell, 1 N. M. 75, 84 [*citing* Bouvier L. Dict.].

As to civil rights of this class see, generally, ALIENS; CITIZENS; CONVICTS; ELECTIONS; INDIANS; NEUTRALITY LAWS.

Distinguished from political rights.— "As defined by Anderson, a civil right is, 'a right accorded to every member of a distinct community or nation,' while a political right is a 'right exercisable in the administration of government.' Says Bouvier: 'Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of his civil rights,— which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of his civil rights.'" Fletcher *v.* Tuttle, 151 Ill. 41, 53, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143 [*quoting* Anderson L. Dict.; Bouvier L. Dict.]; Percey *v.* Powers, 51 N. J. L. 432, 17 Atl. 969, 14 Am. St. Rep. 693.

3. Bouvier L. Dict.

4. With the exception of the few express prohibitions and restrictions in the federal constitution, and prior to the thirteenth and fourteenth amendments thereto, the power of the several states to establish and regulate the civil rights of their own citizens was unquestionable. Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.

5. *Connecticut.*— Crandall *v.* State, 10 Conn. 340.

Georgia.— Bryan *v.* Walton, 20 Ga. 480, 14 Ga. 185.

Kentucky.— Marshall *v.* Donovan, 10 Bush (Ky.) 681; Amy *v.* Smith, 1 Litt. (Ky.) 326.

Louisiana.— African M. E. Church *v.* New Orleans, 15 La. Ann. 441.

Mississippi.— Heirn *v.* Bridault, 37 Miss. 209.

United States.— Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691. But see U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22.

See 10 Cent. Dig. tit. "Civil Rights," § 1.

The common law made no distinction on account of race or color. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22. See also, generally, CITIZENS, *ante*, p. 132.

Citizenship.— In Smith *v.* Moody, 26 Ind. 299, it was held that a free man of color born within the United States was a citizen of the

was subsequently adopted, the status of the negro was greatly changed. The thirteenth amendment abolished slavery within the jurisdiction of the United States.[6] The fourteenth conferred national and state citizenship on all persons born or naturalized in the United States and subject to its jurisdiction, and inhibited the states from abridging the privileges or immunities of citizens of the United States, or denying to any person the equal protection of the laws.[7] The fifteenth inhibited the denial or abridgment by the United States or by any state of the right to vote, on account of race, color, or previous condition of servitude.[8]

2. OBJECT AND EFFECT. The first of these amendments conferred citizenship on the native-born slave,[9] but did not otherwise remove his former disabilities.[10] The fourteenth amendment, however, secured to all citizens without distinction of race or color equality of rights of a civil or political kind[11] as distinguished

United States, and became a citizen of the state by becoming a resident thereof. See also, generally, CITIZENS, *ante*, p. 132.

Right to hold and transfer property.— Before the amendments to the federal constitution as a rule free negroes were permitted to hold and transfer any real or personal estate except slaves. Ewell *v.* Tidwell, 20 Ark. 136; Shaw *v.* Brown, 35 Miss. 246; Bowers *v.* Newman, 2 McMull. (S. C.) 472; Porcher *v.* Hardcastle, Harp. (S. C.) 495; Winnard *v.* Robbins, 3 Humphr. (Tenn.) 613. In Georgia the third section of the act of 1819 repealed the eighth section of the act of 1818, prohibiting the purchase or acquisition of real or personal estate by free persons of color, so far as it respected real estate, except in certain cities. Beall *v.* Drane, 25 Ga. 430. Under the eighth section of the Georgia act of 1818, where a free person of color paid the purchase-money for land, and title was made to a third party upon an agreement to hold it in trust for such person of color the trust was void. Swoll *v.* Oliver, 61 Ga. 248. But in Mississippi alien free negroes and mulattoes were held to be incapable of taking or holding any species of property, and a devise or legacy to a person of that class was absolutely void. Heirn *v.* Bridault, 37 Miss. 209.

Right to vote.— In U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22, it is said that when the constitution was adopted free men of color could vote in at least five states.

Trial by jury was accorded to free negroes in Louisiana. Bore *v.* Bush, 6 Mart. N. S. (La.) 1.

Action by slave in foreign jurisdiction.— In Polydore *v.* Prince, 1 Ware (U. S.) 411, 19 Fed. Cas. No. 11,257, it was held that a slave by the law of his domicile might maintain an action in a foreign jurisdiction wherein slavery did not exist for a personal tort committed therein.

6. This amendment was proclaimed by the secretary of state Dec. 18, 1865, and provides by the first section that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U. S. Const. Amendm. XIII.

7. This amendment was proclaimed July 28, 1868, and provides so far as is important at present: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amendm. XIV.

Chinese or Mongolians residing within the jurisdiction of California are "persons" within the meaning of that term as used in the fourteenth amendment to the constitution of the United States. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 482.

8. Proclaimed by the secretary of state, March 30, 1870. U. S. Const. Amendm. XV. See also, generally, ELECTIONS.

9. Marshall *v.* Donovan, 10 Bush (Ky.) 681; Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22; Civil Rights Act, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173.

10. Marshall *v.* Donovan, 10 Bush (Ky.) 681. Although a citizen of the United States he was subject to any lawful restriction imposed upon his right to vote or other powers or privileges. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22. The amendment gave to the freedman no right of protection from the federal government superior to that of white citizens, and no exemption from the power of state control which might be exercised against others. Civil Rights Act, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173.

11. Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739; Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375; Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527, 16 L. R. A. 558; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; *In re* Turner, 1 Abb. (U. S.) 84, Chase (U. S.) 157, 24 Fed. Cas. No. 14,247, 1 Am. L. T. Rep. (U. S. Cts.) 7, 6 Int. Rev. Rec. 147; U. S. *v.* Petersburg Judges, 1 Hughes (U. S.) 493, 27 Fed. Cas. No. 16,036, 14 Am. L. Reg. N. S. 105, 9 Am. L. Reg. 238, 370.

The fourteenth amendment was designed

from rights of a purely social or domestic nature, the regulation of which belongs to the states.[12] This amendment does not confer new rights or regulate old rights, but only extends the operations of those already existing, and furnishes an additional guaranty against encroachment upon them by the states;[13] its inhibitions are directed to state action and apply to all the instrumentalities and agencies employed in the administration of state government and not to the action of private individuals.

3. RIGHTS PROTECTED. The privileges and immunities guaranteed by these amendments to the constitution and which the states are forbidden to deny or abridge are those which depend immediately upon the constitution of the United States, which belong to citizens of the United States in that relation and character,[14]

to assure to the colored race the enjoyment of all the civil rights that under the law were enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by the states. Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664.

Its purpose was to confer the status of citizenship on negroes who could not become naturalized because native born, but who had no status of citizenship. Van Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136.

12. Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739; State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42; Coger *v.* Northwestern Union Packet Co., 37 Iowa 145.

13. *Alabama.*— Green *v.* State, 73 Ala. 26.

California.— Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405; Van Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136.

Indiana.— State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42.

Kentucky.— Marshall *v.* Donovan, 10 Bush (Ky.) 681. And see Bowlin *v.* Com., 2 Bush (Ky.) 5, 92 Am. Dec. 468.

Louisiana.— *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

Mississippi.— Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375.

Missouri.— Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527, 16 L. R. A. 558.

Ohio.— State *v.* McCann, 21 Ohio St. 198.

United States.— Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567; *Ex p.* Virginia, 100 U. S. 339, 25 L. ed. 676; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588 [*affirming* 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897, 13 Am. L. Reg. N. S. 630]; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Green *v.* Elbert, 63 Fed. 308, 27 U. S. App. 325, 11 C. C. A. 207; Smoot *v.* Kentucky Cent. R. Co., 13 Fed. 337; Le Grand *v.* U. S., 12 Fed. 577; Illinois *v.* Chicago, etc., R. Co., 6 Biss. (U. S.) 107, 12 Fed. Cas. No. 7,006, 10 Alb. L. J. 36, 9 Am. L. Rev. 151, 1 Centr. L. J. 340, 6 Chic. Leg. N. 316, 6 Leg. Gaz. (Pa.) 252; Miller *v.* New York, 13 Blatchf. (U. S.) 469, 17 Fed. Cas. No. 9,585; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481; Ho Ah Kow *v.* Numan, 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546, 20 Alb. L. J. 250, 8 Am. L. Rec. 72, 18 Am. L. Reg. N. S. 676, 4 Cinc. L. Bul. 545, 25 Int. Rev. Rec. 312, 3 Pac. Coast L. J. 415, 27 Pittsb. Leg. J. (Pa.) 40, 8 Reporter 195, 13 West. Jur. 409; U. S. *v.* Washington, 4 Woods (U. S.) 349, 20 Fed. 630; Texas *v.* Gaines, 2 Woods (U. S.) 342, 23 Fed. Cas. No. 13,847.

See 10 Cent. Dig. tit. "Civil Rights," § 1.

The inhibition extends to the subordinate legislative bodies of counties and cities. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 482.

Where no hostile legislation by the states exists the amendment imposes no duty and confers no power upon congress. U. S. *v.* Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L. ed. 290.

The amendments were primarily designed to give freedom to all persons of the African race within the United States, to prevent their future enslavement, to make them citizens, to prevent discrimination against their rights as freemen, and to secure to them the privileges of the ballot. The language used necessarily extends some of the provisions to all persons of every race and color; but their general purpose is so clearly in favor of the African race that it would require a very strong case to make them applicable to any other. State *v.* Ah Chew, 16 Nev. 50, 58, 40 Am. Rep. 488 [*citing Ex p.* Virginia, 100 U. S. 339, 25 L. ed. 676; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394].

Section one of the fourteenth amendment applies to whites as well as to colored people as citizens of the United States, and is intended to protect them in their privileges and immunities as such, against the action, as well of their own state as of other states in which they may happen to be. Live Stock Dealers', etc., Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 1 Abb. (U. S.) 388, 1 Woods (U. S.) 21, 15 Fed. Cas. No. 8,408, 5 Am. L. Rev. 171, 3 Chic. Leg. N. 17, 13 Int. Rev. Rec. 20.

14. Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442; Civil Rights Act, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173.

The rights established by the laws of a state are the measure of the rights of the

and which the federal courts have jurisdiction to protect,[15] and not such rights as accrue from state citizenship.[16]

B. Federal Legislation — **1. Power of Congress.** The rights secured by the amendments under consideration are objects of legitimate protection by the law-making power of the federal government, and the power is expressly conferred[17] upon congress to enforce the provisions conferring these rights by appropriate legislation.[18] The legislation authorized under the fourteenth amendment is not general legislation upon the rights of the citizen, but such as may be necessary and proper to counteract such laws as the states may adopt or enforce, and which they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which they are prohibited from committing or taking.[19]

2. Limitation of Authority. While congress may probably pass laws directly enforcing the provisions of the thirteenth amendment, yet such legislative power

citizens of other states within its jurisdiction (Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258); such as the right to pass from state to state and to the national capital, to protection on the high seas and in foreign countries, and the like (Civil Rights Act, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173).

15. Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442.

Privileges and immunities within the protection of the amendments and civil rights acts.— The privileges and immunities under the laws have been defined as being such as are fundamental and belong of right to citizens of all free governments and which have at all times been enjoyed by the citizens of the several states, and comprehend the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. Per Krekel, J., in U. S. *v.* Blackburn, 24 Fed. Cas. No. 14,603, 8 Chic. Leg. N. 26, 1 N. Y. Wkly. Dig. 276 [*quoting* from Washington, J., in Corfield *v.* Coryell, 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230]. In U. S. *v.* Petersburg Judges, 1 Hughes (U. S.) 493, 507, 27 Fed. Cas. No. 16,036, 14 Am. L. Reg. N. S. 105, 238, 9 Am. L. Rev. 370, Hughes, J., after setting out the above definition of privileges and immunities as given by Washington, J., said: "On the other hand, the rights which we have as citizens of the United States are such as are implied in the language of Judge Taney, when he declared that 'we are citizens of the United States for all the great purposes for which the Federal government was established.'"

National and state rights distinguished.— A person may be at the same time a citizen of the United States and a citizen of a state (see, generally, Citizens, *ante*, p. 132), but his rights of citizenship under one of these governments will be different from those he has under the other. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588.

16. U. S. *v.* Petersburg Judges, 1 Hughes (U. S.) 493, 27 Fed. Cas. No. 16,036, 14 Am. L. Reg. N. S. 105, 238, 9 Am. L. Rev. 370.

Extent of federal supervision.— The fourteenth amendment to the constitution was not intended to authorize the federal government to supervise the state in the exercise of its undoubted powers. People *v.* Brady, 40 Cal. 198, 6 Am. Rep. 604.

The privilege of using for local travel any public conveyance is in general a right which belongs to a person as a citizen of a state and not as a citizen of the United States. Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466.

17. **The power is conferred** by section 2 of the thirteenth and fifteenth amendments, and section 3 of the fourteenth. U. S. Const. Amendms. XIII, XIV, XV.

18. U. S. *v.* Newcomer, 27 Fed. Cas. No. 15,868, 13 Alb. L. J. 221, 1 Cinc. L. Bul. 69, 22 Int. Rev. Rec. 115, 11 Phila. (Pa.) 519, 33 Leg. Int. (Pa.) 94, 23 Pittsb. L. J. 221; U. S. *v.* Given, 25 Fed. Cas. No. 15,210, 17 Int. Rev. Rec. 189.

The method of enforcement depends upon the character of the right conferred. It may be by the establishment of regulations for attaining the object of the right, the imposition of penalties for its violation, or the institution of judicial procedure for its vindication when ignored by the state courts, or it may be by all of these together. One method of enforcement may be applicable to one fundamental right and not applicable to another. U. S. *v.* Cruikshank, 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897, 13 Am. L. Reg. N. S. 630. And see *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

Earlier prohibitions to the states were left without any express power of interference by congress, but the amendments contemplated and expressly authorized intervention. U. S. *v.* Given, 25 Fed. Cas. No. 15,210, 17 Int. Rev. Rec. 189.

19. Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835; Smoot *v.* Kentucky Cent. R. Co., 13 Fed. 337.

This amendment empowers congress to protect the citizen in all the franchises, rights, and privileges which belong to him either as a citizen of the United States or of a state. Per Bond, Circ. J., in U. S. *v.* Petersburg Judges, 1 Hughes (U. S.) 493, 27 Fed. Cas. No. 16,036, 14 Am. L. Reg. N. S. 105, 238, 9 Am. L. Rev. 370.

extends only to the subject of slavery and its incidents.[20] The amendments do not empower congress to legislate upon matters within the domain of state legislation,[21] or to legislate against the wrongs and personal action of citizens within the states or to regulate and control the conduct of private citizens.[22] Hence an enactment which exceeds the limits of corrective legislation and inflicts penalties for the violation of rights belonging to citizens of the state as distinguished from citizens of the United States[23] is unauthorized and necessarily void as to such excess, so far as its operation within the states is concerned.

3. OBJECT AND EFFECT. The acts of congress passed in pursuance of the

20. Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835.

The act of congress of April 9, 1866 (14 U. S. stat. at L. p. 27, c. 31), commonly known as the "civil rights bill" has been repeatedly held to be an appropriate method of exercising the power conferred on congress by the thirteenth amendment, and to be constitutional in all its provisions.

Arkansas.— Kelley *v.* State, 25 Ark. 392.

California.— People *v.* Washington, 36 Cal. 658.

Louisiana.— Hart *v.* Hoss, 26 La. Ann. 90.

Texas.— Garner *v.* State, 39 Tex. 606.

United States.— Matter of Turner, 1 Abb. (U. S). 84, Chase (U. S.) 157, 24 Fed. Cas. No. 14,247, 1 Am. L. T. Rep. (U. S. Cts.) 7, 6 Int. Rev. Rec. 147; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22.

21. Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835; U. S. *v.* Washington, 4 Woods (U. S.) 349, 20 Fed. 630.

22. Smoot *v.* Kentucky Cent. R. Co., 13 Fed. 337, 343; Le Grand *v.* U. S., 12 Fed. 577; U. S. *v.* Washington, 4 Woods (U. S.) 349, 20 Fed. 630; Civil Rights Act, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173.

23. Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835; Le Grand *v.* U. S., 12 Fed. 577; Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466; U. S. *v.* Washington, 4 Woods (U. S.) 349, 20 Fed. 630; Civil Rights Act, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173.

The act of congress of March 1, 1875 (18 U. S. Stat. at L. 335), has by a number of decisions been expressly declared unconstitutional so far as it provides modes of redress for individual wrongs, and is not corrective of any constitutional wrong committed by the states. Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835; Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466; U. S. *v.* Washington, 4 Woods (U. S.) 349, 20 Fed. 630; Civil Rights Act, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173. And see Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146; Cooper *v.* New Haven Steam Boat Co., 18 Fed. 588. *Contra*, U. S. *v.* Newcomer, 27 Fed. Cas. No. 15,868, 13 Alb. L. J. 221, 1 Cinc. L. Bul. 69, 22 Int. Rev. Rec. 115, 11 Phila. (Pa.) 519, 33 Leg. Int. (Pa.) 94, 23 Pittsb. L. J. 221.

The supreme court of the United States in condemning the act of March 1, 1875, said, in the Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835: "An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the 14th Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the Amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities."

Civil rights bill of March 1, 1875, distinguished from act of April 9, 1866.— Sections 1 and 2 of the civil rights bill of March 1, 1875, in their objectionable feature are different from the law ordinarily called the civil rights bill originally passed in April 9, 1866, and reënacted with some modification in sections 16, 17, and 18 of the enforcement act passed May 31, 1870, in that the latter law makes the penalty for violation apply only to those subjecting parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any state or territory, thus preserving the corrective character of the legislation. Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835.

The fourth section of the enforcement act of May 31, 1870, providing "that if any person by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, or prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at an election," etc., is not founded on the fifteenth amendment and is unconstitutional. U. S. *v.* Petersburg Judges, 1 Hughes (U. S.) 493, 27 Fed. Cas. No. 16,036, 14 Am. L. Reg. N. S. 105, 238, 9 Am. L. Rev. 370.

Where a state has been guilty of no violation of the provisions of the amendments no power is conferred on congress to punish private individuals who, acting without any

amendments, and to give them effect,[24] have been declared to be remedial,[25] to apply to all conditions prohibited by them whether originating in transactions before or since their enactment,[26] and to place all citizens on an equality before the law.[27] They do not, however, confer equality of social rights or privileges or enforce social intercourse.[28]

C. State Legislation — 1. In General. In a number of the states there are "civil rights acts" or statutes for the protection of all citizens in their civil and legal rights, the general purport of which is to entitle all persons within the jurisdiction of the state, regardless of color or race, to the full and equal enjoyment of all the accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber shops, public conveyances on land or water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens,[29] and giving a right of action for the violation of any of the provisions

authority from the state, and it may be in defiance of law, invade the rights of the citizen which are protected by such amendments. Le Grand *v.* U. S., 12 Fed. 577.

24. The several acts of congress bearing on the subject of Civil Rights as herein treated are: The Acts of Congress of April 9, 1866 (14 U. S. Stat. at L. 27); of May 31, 1870 (16 U. S. Stat. at L. 14); of April 20, 1871 (17 U. S. Stat. at L. 13); of March 1, 1875 (18 U. S. Stat. at L. 335); and U. S. Rev. Stat. (1878), §§ 1977, 1978; U. S. Comp. Stat. (1901), § 1977 *et seq.*

25. The civil rights bill of 1866 is not a penal statute.— It is remedial and should be liberally construed. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22.

26. The civil rights bill of 1866.— *In re* Turner, 1 Abb. (U. S.) 84, Chase (U. S.) 157, 24 Fed. Cas. No. 14,247, 1 Am. L. T. Rep. (U. S. Cts.) 7, 6 Int. Rev. Rec. 147.

27. See Ganaway *v.* Salt Lake Dramatic Assoc., 17 Utah 37, 53 Pac. 830.

28. People *v.* Washington, 36 Cal. 658; Coger *v.* Northwestern Union Packet Co., 37 Iowa 145; Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258; U. S. *v.* Cruikshank, 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897, 13 Am. L. Reg. N. S. 630; Louisiana *v.* Dubuclet, 15 Fed. Cas. No. 8,538, 10 Chic. Leg. N. 132, 5 Reporter 201 [*affirmed* in 103 U. S. 550, 26 L. ed. 504]. See also Hart *v.* Hoss, 26 La. Ann. 90, in which it is said that the civil rights act of 1866 authorized a negro to enter into the marriage relation with a white person of the opposite sex.

The act of 1875 recognizes the equality of all men before the law, and holds that it is the duty of the government in its dealings with the people to mete out equal and exact justice to all of whatever nativity, race, color, or persuasion, religious or political. Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.

The object of U. S. Rev. Stat. (1878), §§ 1977, 1978, and of the constitutional provision which authorized them, was to place negroes in respect of civil rights on a level with whites, and to make their responsibilities civil and criminal the same. *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

29. See the following cases:

Illinois.— Baylies *v.* Curry, 128 Ill. 287, 21 N. E. 595; Cecil *v.* Green, 60 Ill. App. 61.

Indiana.— Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

Iowa.— State *v.* Hall, 72 Iowa 525, 34 N. W. 315.

Massachusetts.— Com. *v.* Sylvester, 13 Allen (Mass.) 247.

Michigan.— Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589.

Minnesota.— Rhone *v.* Loomis, 74 Minn. 200, 77 N. W. 31.

Mississippi.— Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375.

Nebraska.— Messenger *v.* State, 25 Nebr. 674, 41 N. W. 638.

New York.— People *v.* King, 110 N. Y. 418, 18 N. E. 245, 18 N. Y. St. 353, 6 Am. St. Rep. 389, 1 L. R. A. 293 [*affirming* 42 Hun (N. Y.) 186]. And see Grannan *v.* Westchester Racing Assoc., 153 N. Y. 449, 47 N. E. 896.

Ohio.— Kellar *v.* Koerber, 61 Ohio St. 388, 55 N. E. 1002; Deveaux *v.* Clemens, 17 Ohio Cir. Ct. 33; Hargo *v.* Meyers, 4 Ohio Cir. Ct. 275.

Pennsylvania.— Russ' Application, 20 Pa. Co. Ct. 510.

Tennessee.— Wells *v.* State, 3 Lea (Tenn.) 70.

Wisconsin.— Bryan *v.* Adler, 97 Wis. 124, 72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R. A. 658.

United States.— Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.

See 10 Cent. Dig. tit. "Civil Rights," § 6 *et seq.*

See the following statutes passed to secure particular rights and privileges:

Arkansas.— Sandel & H. Dig. Ark. (1894), § 555.

California.— Cal. Gen. Laws (1899), tit. 41.

Colorado.— Mills' Anno. Stat. Suppl. Colo. (1891–1896), p. 27.

Illinois.— Ill. Rev. Stat. (1899), § 421.

Indiana.— Ind. Rev. Stat. (1897), c. 17.

of such act by denying to any citizen, except for reasons applicable alike to all citizens of every race or color, and regardless of color or race, the full enjoyment of any of the accommodations enumerated,[30] or for aiding or inciting such denial.[31]

2. POWER OF STATE LEGISLATURE. The power of the legislature of a state to enact such laws as to all kinds of business of a public or quasi-public character, conducted for the accommodation, refreshment, amusement, or instruction of the public, which the state, under its police power, has the right to regulate, so that all classes of citizens may enjoy the benefit thereof without unjust discrimination, is no longer open to discussion.[32]

3. LIMITATION OF AUTHORITY. A state cannot deny to any person or citizen of the United States within its jurisdiction the equal protection of the law,[33] make or enforce any law abridging the privileges and immunities of citizens of the

Iowa.— Iowa Code (1897), § 5008.
Kansas.— Kan. Gen. Stat. (1899), § 2295.
Massachusetts.— Mass. Pub. Stat. (1882), c. 207.
Michigan.— Mich. Comp. Laws (1897), § 11759.
Nebraska.— Comp. Stat. (1901), c. 15.
Nevada.— Nev. Gen. Stat. (1901), § 1673 *et seq.*
New Jersey.— N. J. Gen. Stat. (1709–1895), p. 804.
New York.— Pen. Code, § 383.
Ohio.— Bates' Anno. Stat. Ohio (1787–1902), c. 18*a*, § 4426.
Rhode Island.— R. I. Gen. Laws (1896), tit. 30.

In Louisiana section thirteen of the state constitution declares "that all persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or public resort, or for which a license is required by either state, parish or municipal authority, shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons without distinction or discrimination on account of race or color." Joseph *v.* Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102; Decuir *v.* Benson, 27 La. Ann. 1.

Missouri has no civil rights statute. Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527, 16 L. R. A. 558.

Repeal of inconsistent acts.— In Tennessee the equal rights of persons of color is recognized in its broadest extent by the act of 1865, all acts or parts of acts inconsistent therewith being thereby expressly repealed. Wells *v.* State, 3 Lea (Tenn.) 70, in which case it was held that Tenn. Code, § 4888, making it a misdemeanor for a white man to play cards with any slave or free negro was obsolete, since the evil intended to be remedied has passed away with the emancipation of slavery.

30. Cecil *v.* Green, 60 Ill. App. 61. And see cases cited *supra*, note 29.

31. Cecil *v.* Green, 60 Ill. App. 61.

Construction of civil rights acts — General terms controlled by specific enumeration.— "It is a clearly established rule of construction, that if, after enumerating certain places of business on which a duty is imposed or a license required, the same statute then employs some general term to embrace other cases, no other cases will be included within the general term except those of the same general character or kind so specifically enumerated." Cecil *v.* Green, 161 Ill. 265, 268, 43 N. E. 1105, 32 L. R. A. 566 [*affirming* 60 Ill. App. 61], in which it was held that the general expression in the Illinois civil rights act of June 10, 1885 (Ill. Laws (1885), p. 64) "and all other places of public accommodation and amusement," embraces only places of the same general character or kind as inns, restaurants, eating-houses, barber shops, etc., before specifically enumerated. See also as applying the rule of *ejusdem generis* to the interpretation of civil rights acts. Rhone *v.* Loomis, 74 Minn. 200, 77 N. W. 31; Kellar *v.* Koerber, 61 Ohio St. 388, 55 N. E. 1002.

Where the act is broader than its title that portion in excess of the title will be declared void; as where the title of the act relates to "all citizens," and the body to "all persons." In such case, in order to entitle a party to the benefits of the act, it must be alleged and proved that he is a citizen. Messenger *v.* State, 25 Nebr. 674, 41 N. W. 638.

32. *Illinois.*— Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.
Minnesota.— Rhone *v.* Loomis, 74 Minn. 200, 77 N. W. 31.
Mississippi.— Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375.
Nebraska.— Messenger *v.* State, 25 Nebr. 674, 41 N. W. 638.
New York.— People *v.* King, 110 N. Y. 418, 18 N. E. 245, 18 N. Y. St. 353, 6 Am. St. Rep. 389, 1 L. R. A. 293.
United States.—Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.
See 10 Cent. Dig. tit. "Civil Rights," § 1.

33. Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481.

Cal. Const. art. 19, § 2, prohibiting the employment of Chinese or Mongolians by corporations, and the act of Feb. 13, 1880, denouncing such employment as an offense, are in conflict with that portion of the fourteenth amendment to the constitution of the United States which prohibits the states from

United States,[34] or deprive any person of life, liberty, or property, without due process of law.[35] Hence legislation which discriminates against any particular race or class of persons is in violation of the constitution of the United States.[36]

III. DISCRIMINATION.

A. As to Property Rights. An act respecting homesteads which discriminates against negroes by excluding them from its benefits is to that extent invalid.[37] So it has been held that an agreement not to convey or lease land to persons of a specified race is inoperative and void.[38]

B. As to Employment. A statute prohibiting the employment of persons of a designated race is a denial of the equal protection of the laws within the meaning of the fourteenth amendment to the federal constitution.[39]

C. As to Public Schools[40]**—1. Powers and Duties of the State — a. Duty to Provide Equal School Facilities.** Since the adoption of the fourteenth amendment to the federal constitution any public school system devised by the states must make equal provision for the education of all children of school age, irrespective of race or color.[41]

b. Power to Establish Separate Schools. The classification of scholars on the basis of race or color and their education in separate schools involve questions of domestic policy which are within the discretion and control of state legislation, and do not amount to an exclusion of either class, so long as the facilities and accommodations provided are substantially equal.[42]

depriving any person within their jurisdiction of the equal protection of the laws. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481.

34. Lonas *v.* State, 3 Heisk. (Tenn.) 287.

35. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481.

36. Dawson *v.* Lee, 83 Ky. 49; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; Gandolfo *v.* Hartman, 49 Fed. 181, 16 L. R. A. 277; Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481.

37. Custard *v.* Posten, 8 Ky. L. Rep. 260, 1 S. W. 434; Eubank *v.* Eubank, 7 Ky. L. Rep. 295.

38. Gandolfo *v.* Hartman, 49 Fed. 181, 16 L. R. A. 277, in which it was held that the covenant in a deed not to convey or lease land to a Chinaman was void, because contrary to public policy, in contravention of the treaty with China, and in violation of the fourteenth amendment of the federal constitution, and that it was not enforceable in equity.

39. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481.

Discrimination against Chinese.— When the policy of the legislation of a state under its reserved power does not have in view a legitimate object to be effected, but seeks to exclude Chinese from a large field of labor, with the ultimate object of driving them from the state, the end sought is a violation of constitutional and treaty rights, and the legislation is to that extent void. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481.

40. See also, generally, Schools and School Districts.

41. Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738; State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713.

Before the adoption of the fourteenth amendment the states had power to provide for the education of white children to the exclusion of colored. Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738.

42. *Arkansas.*—Union County *v.* Robinson, 27 Ark. 116.

California.— Wysinger *v.* Crookshank, 82 Cal. 588, 23 Pac. 54; Ward *v.* Flood, 48 Cal. 36, 14 Am. Rep. 40.

Indiana.—State *v.* Gray, 93 Ind. 303; State *v.* Gruhb, 85 Ind. 213; Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

Louisiana.— *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

Michigan.— Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589.

Missouri.— Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527, 16 L. R. A. 558; Lehew *v.* Brummell, 103 Mo. 546, 15 S. W. 765, 23 Am. St. Rep. 895, 11 L. R. A. 828.

Nevada.— State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713.

New York.—People *v.* Queens School Board, 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 113 [*affirming* 44 N. Y. App. Div. 469, 6 N. Y. Suppl. 330]; People *v.* Gallagher, 93 N. Y. 438, 45 Am. Rep. 232 [*affirming* 11 Abb. N. Cas. (N. Y.) 187]; People *v.* Easton, 13 Abb. Pr. N. S. (N. Y.) 159; Dallas *v.* Fosdick, 40 How. Pr. (N. Y.) 249.

North Carolina.— McMillan *v.* School Committee Dist. No. 4, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823; Puitt *v.* Gaston County, 94 N. C. 709, 55 Am. Rep. 638.

Ohio.— State *v.* McCann, 21 Ohio St. 198; Van Camp *v.* Board of Education, 9 Ohio St. 406; State *v.* Cincinnati, 19 Ohio 178; State

c. Necessity of Uniform Taxation For School Purposes. Any system of taxation for school purposes which discriminates, with respect to race or color, as to the class upon or the purpose for which the tax is to be imposed, or as to the application of the fund thereby raised, is unconstitutional and void.[43]

2. Powers and Duties of Public Authorities — a. Duty to Afford Equal Facilities. Where a state establishes a free school system and makes no distinction in regard to the race or color of the children of the state who are entitled to its benefits, equal school facilities must be provided, and no school officer or public authority can legally discriminate against or exclude from such benefits, directly or indirectly, because of race or color, any child who is otherwise entitled to attend a school established under such system.[44]

b. Power to Establish Separate Schools. The right to separate the races and establish different schools for white and colored children must be derived from the state. In the absence of legislation to that effect it is the general rule that the public authorities have no power to compel such separation.[45]

v. Board of Education, 7 Ohio Dec. (Reprint) 129, 1 Cinc. L. Bul. 139.

Virginia.— Eubank *v.* Boughton, 98 Va. 499, 36 S. E. 529.

United States.— U. S. *v.* Buntin, 10 Fed. 730; Bertonneau *v.* Board of Directors, 3 Woods (U. S.) 177, 3 Fed. Cas. No. 1,361.

See 10 Cent. Dig. tit. "Civil Rights," § 6.

But see Board of Education *v.* Tinnon, 26 Kan. 1, where the power of the legislature in this regard is doubted.

A state may confer power on school authorities to establish separate schools.— State *v.* McCann, 21 Ohio St. 198. And see Roberts *v.* Boston, 5 Cush. (Mass.) 198; State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713; People *v.* Easton, 13 Abb. Pr. N. S. (N. Y.) 159.

Right to exchange buildings.— Under the Kentucky school system the board of education of a school district has discretion to exchange buildings between white and colored schools. Roberts *v.* Louisville School Bd., 16 Ky. L. Rep. 181, 26 S. W. 814.

43. Marshall *v.* Donovan, 10 Bush (Ky.) 681; Markham *v.* Manning, 96 N. C. 132, 2 S. E. 40; Puitt *v.* Gaston County, 94 N. C. 709, 55 Am. Rep. 638; Davenport *v.* Cloverport, 72 Fed. 689; Claybrook *v.* Owensboro, 16 Fed. 297.

A statute imposing a tax on white persons only, to be applied to the maintaining of schools for white children, and from which colored children are excluded (Davenport *v.* Cloverport, 72 Fed. 689), or imposing a tax on colored persons to be applied exclusively to the education of their children (Riggsbee *v.* Durham, 94 N. C. 800), and in addition excluding such children from the benefit of a "common school fund," is violative of the inhibition of the federal constitution (Dawson *v.* Lee, 83 Ky. 49). So a statute which directs that the tax collected from white people shall be used to sustain schools for white children only and the tax collected from colored people shall be used for schools for colored children only is invalid, where the effect is to give the white children excellent schools and a session of nine months, and the colored children inferior schools and a session of three months. Claybrook *v.* Owensboro, 23 Fed. 634.

44. *Arkansas.*— Maddoux *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

California.— Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405.

Illinois.— People *v.* Alton, 179 Ill. 615, 54 N. E. 421, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; People *v.* Board of Education, 127 Ill. 613, 21 N. E. 187; People *v.* Board of Education, 101 Ill. 308, 40 Am. Rep. 196; Chase *v.* Stephenson, 71 Ill. 383.

Indiana.— Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738.

Iowa.— Clark *v.* Board of Directors, 24 Iowa 266.

Nevada.— State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713.

New Jersey.— Pierce *v.* Union Dist. School Trustees, 46 N. J. L. 76.

See 10 Cent. Dig. tit. "Civil Rights," § 6.

Chinese children who were born and have always lived in the city and county of San Francisco are entitled to admission into the public school of the district in which they reside, and teachers are not justified in excluding them, notwithstanding a resolution of the board of education which purports to command them so to do. Tape *v.* Hurley, 66 Cal. 473, 6 Pac. 129.

45. *California.*— Wysinger *v.* Crookshank, 82 Cal. 588, 23 Pac. 54; Tape *v.* Hurley, 66 Cal. 473, 6 Pac. 129.

Illinois.— People *v.* Alton, 179 Ill. 615, 54 N. E. 421; People *v.* Board of Education, 127 Ill. 613, 21 N. E. 187; People *v.* Board of Education, 101 Ill. 308, 40 Am. Rep. 196; Chase *v.* Stephenson, 71 Ill. 383.

Iowa.— Dove *v.* Independent School Dist., 41 Iowa 689; Smith *v.* Indiana School Dist., 40 Iowa 518.

Kansas.— Knox *v.* Board of Education, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830.

New Jersey.— State *v.* Union Dist. School Trustees, 46 N. J. L. 76.

Ohio.— Board of Education *v.* State, 45 Ohio St. 555, 16 N. E. 373 [*affirming* 2 Ohio Cir. Ct. 557].

See 10 Cent. Dig. tit. "Civil Rights," § 6.

In Pennsylvania since the passage of the

D. As to Public Conveyances — 1. In General. The denial of equal rights in public conveyances on account of race or color, or the discrimination against passengers for that reason, is not only a violation of the constitution of the United States,[46] but has been expressly forbidden by state legislation, and penalties have been provided therefor.[47]

2. Separate Accommodations — a. Legislative Requirement. In the reasonable exercise by a state of its police power it may require carriers of passengers within its limits to provide separate, but equal, accommodations for white and colored passengers.[48] The state has no authority, however, to invade the province

act of June 8, 1881, school directors cannot exclude a colored child from a common school established by them for the separate instruction of white children, and assign him to a branch of the school established by them in a neighboring building for colored children. Kaine *v.* Com., 101 Pa. St. 490.

46. Coger *v.* North Western Union Packet Co., 37 Iowa 145; *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639; State *v.* Kimber, 3 Ohio Dec. (Reprint) 197, 4 Wkly. L. Gaz. 359; U. S. *v.* Dodge, 25 Fed. Cas. No. 14,976, 1 Tex. L. J. 47; Thompson *v.* Baltimore City Pass. R. Co. [*cited* in Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466]; Field *v.* Baltimore City Pass. R. Co. [*cited* in Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466].

A colored passenger cannot be compelled to take inferior accommodations, although at reduced prices. Coger *v.* North Western Union Packet Co., 37 Iowa 145; *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

A regulation unjustly discriminating against passengers on account of color is contrary to the principles of the common law, as well as to the provisions of the constitution. Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

Exclusion of colored woman from ladies' car.— The mere fact that under the rules and regulations of the company a certain car in their passenger train has been designated for the exclusive use of ladies, and gentlemen accompanied by ladies, will not justify the exclusion of a colored woman from the privileges of such car, upon no other ground than that of her color. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

The same protection against drunken and violent men seeking to molest, outrage, and humiliate a passenger must be given to both white and colored passengers. Richmond, etc., R. Co. *v.* Jefferson, 89 Ga. 554, 16 S. E. 69, 32 Am. St. Rep. 87, 17 L. R. A. 571.

If the accommodations furnished to colored persons by interstate carriers are not equal to those furnished to white persons it is a violation of section 2 of the act of congress to regulate commerce. *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639; Heard *v.* Georgia R. Co., 2 Int. Com. Rep. 508; Council *v.* Western, etc., R. Co., 1 Int. Com. Rep. 638.

47. The Pennsylvania act of March 22, 1867, declares it to be an offense for railroad companies to make any distinction between passengers on account of race or color. New Jersey Cent. R. Co. *v.* Green, 86 Pa. St. 421; West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

Prior to such act the separation of black and white passengers in public conveyances was the subject of a sound regulation to secure order and promote comfort, preserve peace and maintain the rights of both carriers and passengers. West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

No regulation of the carrier will justify the ejection by its servant of a passenger on account of his color or exempt him from liability. Derry *v.* Lowry, 6 Phila. (Pa.) 30, 22 Leg. Int. (Pa.) 164.

48. *Illinois.*— Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

Kentucky.— Ohio Valley R. Co. *v.* Lander, 104 Ky. 431, 20 Ky. L. Rep. 913, 47 S. W. 344, 882, 48 S. W. 145; Louisville, etc., R. Co. *v.* Com., 99 Ky. 663, 37 S. W. 79; Chesapeake, etc., R. Co. *v.* Com., 21 Ky. L. Rep. 228, 51 S. W. 160.

Louisiana.— *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

Michigan.— Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

Mississippi.— Louisville, etc., R. Co. *v.* State, 66 Miss. 662, 6 So. 203, 14 Am. St. Rep. 599, 5 L. R. A. 132 [*affirmed* in 133 U. S. 587, 10 S. Ct. 348, 33 L. ed. 784].

Missouri.— Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

Pennsylvania.— West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

Tennessee.— Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. Rep. 771; Chesapeake, etc., R. Co. *v.* Wells, 85 Tenn. 613, 4 S. W. 5.

United States.— Chesapeake, etc., R. Co. *v.* Kentucky, 179 U. S. 388, 21 S. Ct. 101, 45 L. ed. 244; Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256; Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 L. ed. 784; Anderson *v.* Louisville, etc., R. Co., 62 Fed. 46; Houck *v.* Southern Pac. R. Co., 38 Fed. 226; McGuinn *v.* Forbes, 37 Fed. 639; Logwood *v.* Memphis, etc., R. Co., 23 Fed. 318; The Sue, 22 Fed. 843.

See 10 Cent. Dig. tit. "Civil Rights," § 7.

Effect of wrongful assignment.—A statute requiring the assignment of each passenger to the coach to which he belongs, authorizing conductors of railroad trains to refuse to carry any passenger who refuses to occupy

of congress with respect to the regulation of interstate commerce, and so far as it does so the legislation is void.[49]

b. Right of Carriers to Provide. It may be considered well established, both upon principle and authority, that in the absence of statutory inhibition[50] a carrier, in the management of its interests, and although not expressly so required, may make color a basis of classification, and establish reasonable regulations for the separation of white and colored passengers,[51] and such regulations will not offend constitutional provisions securing to all citizens equality of rights, privileges, and immunities.[52] But the accommodations and facilities provided must be

the coach assigned him, and exonerating the carrier from damages by reason of such refusal, does not bind a passenger to accept a wrongful assignment, nor exempt the carrier from liability in case of a wrongful assignment and refusal to carry. *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

49. *Kentucky.*— Ohio Valley R. Co. *v.* Lander, 104 Ky. 431, 20 Ky. L. Rep. 913, 47 S. W. 344, 882, 48 S. W. 145.

Louisiana.— *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639; State *v.* Judge, 44 La. Ann. 770, 11 So. 74.

Mississippi.— Louisville, etc., R. Co. *v.* State, 66 Miss. 662, 6 So. 203, 14 Am. St. Rep. 599, 5 L. R. A. 132 [*affirmed* in 133 U. S. 587, 10 S. Ct. 348, 33 L. ed. 784].

New York.— Carrey *v.* Spencer, 36 N. Y. Suppl. 886, 72 N. Y. St. 108.

United States.— Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256; Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547; Anderson *v.* Louisville, etc., R. Co., 62 Fed. 46; The Sue, 22 Fed. 843.

See 10 Cent. Dig. tit. "Civil Rights," § 7.

Applicability to interstate commerce.— In Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432, it was said that a statute requiring separate accommodation was applicable as well to interstate travel as to travel within the state.

The decision of the highest court of a state that a statute applies only to commerce within the state is conclusive on the supreme court of the United States. Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 L. ed. 784.

50. Bowie *v.* Birmingham R., etc., Co., 125 Ala. 397, 27 So. 1016, 82 Am. St. Rep. 247, 50 L. R. A. 632.

Right controlled by statute.— Where an act in regard to a railroad company provided that no person should be excluded from the cars of the company on account of color, it means that there should be no discrimination in the use of the cars on account of color. Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675.

51. *Alabama.*— Bowie *v.* Birmingham R., etc., Co., 125 Ala. 397, 27 So. 1016, 82 Am. St. Rep. 247, 50 L. R. A. 632.

Illinois.— Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

Kentucky.— Ohio Valley R. Co. *v.* Lander, 104 Ky. 431, 20 Ky. L. Rep. 913, 47 S. W. 344, 882, 48 S. W. 145.

Louisiana.— *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

Michigan.— Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

Mississippi.— Louisville, etc., R. Co. *v.* State, 66 Miss. 662, 6 So. 203, 14 Am. St. Rep. 599, 5 L. R. A. 132.

Missouri.— Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527, 16 L. R. A. 558.

North Carolina.— Britton *v.* Atlanta, etc., Air-Line R. Co., 88 N. C. 536, 43 Am. Rep. 749.

Pennsylvania.— West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

Tennessee.— Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. Rep. 771; Chesapeake, etc., R. Co. *v.* Wells, 85 Tenn. 613, 4 S. W. 5.

United States.— Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256; Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547; Houck *v.* Southern Pac. R. Co., 38 Fed. 226; McGuinn *v.* Forbes, 37 Fed. 639; Murphy *v.* Western, etc., R. Co., 23 Fed. 637; Logwood *v.* Memphis, etc., R. Co., 23 Fed. 318; The Sue, 22 Fed. 843; Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466; Heard *v.* Georgia R. Co., 1 Int. Com. Rep. 719; Council *v.* Western, etc., R. Co., 1 Int. Com. Rep. 638.

See 10 Cent. Dig. tit. "Civil Rights," § 7.

Carrier may exclude for refusal to comply with reasonable regulations. Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258; Green *v.* Bridgeton, 10 Fed. Cas. No. 5,754, 20 Alb. L. J. 257, 9 Centr. L. J. 206.

Where the facts are undisputed the reasonableness of such regulations is a matter of law. Bowie *v.* Birmingham R., etc., Co., 125 Ala. 397, 27 So. 1016, 82 Am. St. Rep. 247, 50 L. R. A. 632; Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

52. *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639; Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

The furnishing of separate accommodations for white and colored people, if they are equal in all respects, is not a denial of equal rights and privileges in violation of the fourteenth amendment. *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639; Britton *v.* Atlantic, etc., Air-Line R. Co., 88 N. C. 536, 43 Am. Rep. 749.

equally safe, commodious, and comfortable for all passengers who have paid the like sum therefor,[53] the test being equality and not identity or community of accommodation.[54]

E. As to Accommodations in Inns, Restaurants, and Barber Shops. Any discrimination by reason of race or color to the extent of denying equal privileges and accommodations at public inns, restaurants, and barber shops is within the prohibition of the civil rights acts.[55]

F. As to Places of Amusement. Many of the states have passed so-called civil rights acts which prohibit discrimination, or the denial of equal enjoyment of rights in public places of recreation or amusement, because of race or color,[56] which acts usually provide that for the violation of the provisions thereof the person aggrieved may recover of the proprietors of such places damages or a prescribed penalty. Such statutes contemplate only public places of amusement

53. *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639; Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; Texas, etc., R. Co. *v.* Johnson, 2 Tex. App. Civ. Cas. § 185 [*citing* Norwood *v.* Galveston, etc., R. Co., 12 Tex. Civ. App. 560, 34 S. W. 180]; Houck *v.* Southern Pac. R. Co., 38 Fed. 226; McGuinn *v.* Forbes, 37 Fed. 639; Logwood *v.* Memphis, etc., R. Co., 23 Fed. 318; The Sue, 22 Fed. 843; Murphy *v.* Western, etc., R. Co., 22 Fed. 637; Gray *v.* Cincinnati Southern R. Co., 11 Fed. 683; U. S. *v.* Dodge, 25 Fed. Cas. No. 14,976, 1 Tex. L. J. 47; Green *v.* Bridgeton, 10 Fed. Cas. No. 5,754, 20 Alb. L. J. 257, 9 Centr. L. J. 206.

54. *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

55. *Illinois.*— Cecil *v.* Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566.

Michigan.— Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589.

Pennsylvania.— Russ' Application, 20 Pa. Co. Ct. 510.

Wisconsin.— Bryan *v.* Adler, 97 Wis. 124, 72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R. A. 658.

United States.—Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.

See 10 Cent. Dig. tit. "Civil Rights," §§ 8, 10.

Place of public accommodation.—A place where intoxicating liquors are sold at retail is not within the phrase "all other places of public accommodation," as used in a statute providing for the equal accommodation of all persons at the places therein designated. Kellar *v.* Koerber, 61 Ohio St. 388, 55 N. E. 1002. An apartment where only refreshing drinks are sold at a single stand (a soda fountain), by the glass, does not come within the specific designation of a restaurant, eating-house, or place of public accommodation within the meaning of the act to protect all citizens in their civil and legal rights, "commonly known as the 'Civil Rights Act.'" Cecil *v.* Green, 60 Ill. App. 61.

Place of refreshment.—A saloon, or place where intoxicating liquors are sold as a beverage, is not an "other place of refreshment," within the provisions of Minn. Gen. Laws (1885), c. 224 (Minn. Gen. Stat. (1894), §§ 8002, 8003, as amended by Minn. Gen. Laws (1897), c. 349). Rhone *v.* Loomis, 74 Minn. 200, 77 N. W. 31.

Innkeepers may have separate rooms and accommodations for colored men, but they must be equal in quality and convenience to those furnished white men. Civil Rights Act, 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.

Liability of proprietor for discrimination by waiter.— The keeper of a public restaurant, whose waiter refuses to serve a customer because of his color, is liable under Wis. Laws (1895), c. 223, although the refusal was wilful, in direct violation of his command, and neither sanctioned at the time nor afterward ratified by him, the wrongful act being strictly within the scope of the waiter's employment. Bryan *v.* Adler, 97 Wis. 124, 72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R. A. 658.

Punishment by refusal to renew license.— For discrimination by the keeper of a hotel or restaurant on account of race or color the court may refuse to renew his license. Russ' Application, 20 Pa. Co. Ct. 510.

The proprietor of a barber shop cannot discriminate against a colored person and deny him any rights therein to which a white person requiring the services of a barber would be entitled, except for reasons applicable alike to all persons. Messenger *v.* State, 25 Nebr. 674, 41 N. W. 638.

56. Baylies *v.* Curry, 128 Ill. 287, 21 N. E. 595; Joseph *v.* Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102; Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375; People *v.* King, 42 Hun (N. Y.) 186 [*affirmed* in 110 N. Y. 418, 18 N. E. 245, 18 N. Y. St. 353, 6 Am. St. Rep. 389, 1 L. R. A. 293].

Requiring colored patrons of a theater to occupy a particular row of seats is a violation of such a statute. Baylies *v.* Curry, 30 Ill. App. 105 [*affirmed* in 128 Ill. 287, 21 N. E. 595].

The owners or lessees of a theater are not responsible for the act of a ticket seller acting without the scope of his authority in refusing to sell a ticket to a colored man who has applied to him therefor. Anderson *v.* Rawlings, 18 Ohio Cir. Ct. 381, 10 Ohio Cir. Dec. 112.

or places licensed by the state or the municipality.[57] In the absence of such a statute, however, a rule admitting negroes only to a certain portion of a place of amusement is not unlawful.[58]

G. As to Jury Service. Discrimination by law, or exclusion on account of race or color in the selection of jurors,[59] is the denial of the equal protection of the law to one accused of crime, who is of the same race or color as the persons discriminated against. A negro is not, however, entitled to a mixed jury to pass upon his life, liberty, or property.[60] And that there were no negroes on a grand jury by which a negro was indicted, or on the petit jury by which he was tried, is no violation of his constitutional rights,[61] unless there was intentional discrimination in the selection of the jurors.

57. Com. *v.* Sylvester, 13 Allen (Mass.) 247, holding that no indictment can be maintained against the keeper of an unlicensed billiard-room for refusing to allow a negro to play therein.

An unlicensed skating rink is not a place of public amusement. Nor is the business carried on therein of such a public character that the refusal to admit a colored person thereto would be a denial of a legal right for which he could recover damages from the owner. Bowlin *v.* Lyon, 67 Iowa 536, 25 N. W. 766, 56 Am. Rep. 355.

58. The rules of a theater reserving certain sections thereof for whites, while allowing persons of color to occupy others, are not a violation of the fourteenth constitutional amendment of the United States, prohibiting states from making or enforcing laws abridging the rights of citizens, or denying to any person the equal protection of the laws, and may, in the absence of any statute to the contrary, be enforced. Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527, 16 L. R. A. 558, in which it was said that if common carriers may make and enforce rules for the separation of white and colored persons there would seem to be no good reason why proprietors of theaters should not do the same.

59. *Kentucky.*— Com. *v.* Johnson, 78 Ky. 509.

Louisiana.— State *v.* Joseph, 45 La. Ann. 903, 12 So. 934.

Michigan.— Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589.

Missouri.— State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

New York.—People *v.* King, 42 Hun (N. Y.) 186 [*affirmed* in 110 N. Y. 418, 18 N. E. 245, 18 N. Y. St. 353, 6 Am. St. Rep. 389, 1 L. R. A. 293].

United States.— Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256; Gibson *v.* Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075; Bush *v.* Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. ed. 354; Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; *Ex p.* Murray, 66 Fed. 297; Civil Rights Act, 3 Hughes (U. S.) 576, 30 Fed. Cas. No. 18,259; *Ex p.* Reynolds, 3 Hughes (U. S.) 559, 20 Fed. Cas. No. 11,720.

See 10 Cent. Dig. tit. "Civil Rights," § 5.

Exclusion of Mongolian.— In State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488, it was held that the jury law of Nevada excluding Mongolians from jury service does not conflict with the fourteenth amendment of the federal constitution, or with U. S. Rev. Stat. (1878), §§ 1977, 1978.

Objection by white person to exclusion of negroes.— In accordance with the rule that only those who are prejudiced by an unconstitutional law can complain thereof, it has been held that a white person indicted by a grand jury composed wholly of persons of the white race cannot complain because negroes were excluded. Com. *v.* Wright, 79 Ky. 22, 42 Am. Rep. 203.

60. State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

Cannot demand jury of his own race.—A negro cannot demand that he be tried for a criminal offense by a jury of his own race. State *v.* Casey, 44 La. Ann. 969, 11 So. 583. The denial of a motion by a defendant to have a jury composed in part of persons of his own race and color is not the denial of a right secured to him by the fourteenth amendment, or by any statute providing for the equal civil rights of citizens. *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

61. *Kentucky.*— Haggard *v.* Com., 79 Ky. 366.

Louisiana.— State *v.* Murray, 47 La. Ann. 1424, 17 So. 832; State *v.* Joseph, 45 La. Ann. 903, 12 So. 934.

Missouri.— State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

Texas.— Parker *v.* State, (Tex. Crim. 1901) 65 S. W. 1066; Whitney *v.* State, 42 Tex. Crim. 984, 63 S. W. 879; Lewis *v.* State, 1 Tex. App. 323; Smith *v.* State, (Tex. Crim. App. 1900) 58 S. W. 97.

United States.— Carter *v.* Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. ed. 839; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

See 10 Cent. Dig. tit. "Civil Rights," § 5.

A grand jury selected and formed upon the basis of excluding therefrom, because of their color, all citizens of the African race is prohibited by the fourteenth amendment and the laws passed by congress for the enforcement of its provisions. Bush *v.* Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. ed. 354 [*citing* Com.

H. As to Punishment For Crime. A statute punishing a person of one race more severely than a person of another race for the commission of the same offense is invalid because of discrimination.[62] But statutes denouncing intermarriage between white persons and persons of negro blood[63] or providing a different punishment for the adultery or fornication of a man and woman of the different races than that prescribed when the offenders are of the same race[64] are not violative of the amendments or of enactments prohibiting discrimination on account of race or color. The discrimination is against the offense and not against persons of any particular race or color.[65]

IV. REMEDIES FOR UNLAWFUL DISCRIMINATION.

A. Action For Penalty or Damages — 1. RIGHT OF ACTION — a. For Infraction of Statute Prescribing Penal Liability. An action will lie by one aggrieved by the violation of a statute designed to secure equality of rights, although criminal liability for such violation is alone prescribed;[66] but where a statute

v. Johnson, 78 Ky. 509; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664].

In Michigan it was provided that there shall be no discrimination on account of race or color in the selection of grand or petit jurors. Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589.

Insufficient evidence of discrimination.— Notwithstanding the proof shows that the general venire from which both the grand and petit juries were drawn was exclusively composed of persons of the white race, or of Caucasian descent, and did not contain a single colored person or one of African descent, it does not furnish conclusive evidence of discrimination against the latter on account of race or color within the intendment of the fourteenth amendment of the constitution of the United States, it being shown that only eighty names had been added at the term by the jury commissioners to the general venire for the purpose of keeping the general venire box up to the required maximum of three hundred. State *v.* Joseph, 45 La. Ann. 903, 12 So. 934. Notwithstanding all the names which are drawn from the jury wheel were those of white persons, if proof be not administered that all the names therein were of white people, the theory of the defendant, a colored person, that discrimination against his race was resorted to on account of race, color, or previous condition of servitude cannot be of avail. And proof being made of the fact that persons of African descent were not excluded from the general venire, but on the contrary that some colored people were included therein, the charge that the accused has been deprived of due protection of the law is unfounded. State *v.* Murray, 47 La. Ann. 1424, 17 So. 832.

62. Banishment from state.— It is a violation of the civil rights bill of 1866 to inflict upon a negro the punishment of banishment from the state. See U. S. *v.* Horton, 26 Fed. Cas. No. 15,392.

Capital punishment.—A statute punishing a negro by death for an offense for which a white person is punishable by imprisonment only is not violative of a constitutional provision that "any slave who shall be convicted of a capital offense shall suffer the same degree of punishment as would be inflicted on a free white person, and no other." Such a provision has reference merely to the mode of inflicting capital punishment. Charles *v.* State, 11 Ark. 389, in which it was further held that where by the law a slave and a white man are both punished capitally they must be executed in the same manner.

An ordinance directed especially against a certain race and subjecting them to a degrading and cruel punishment is invalid because in violation of the constitutional right to the equal protection of the laws. Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546, 20 Alb. L. J. 250, 8 Am. L. Rec. 72, 18 Am. L. Reg. U. S. 676, 4 Cinc. L. Bul. 545, 25 Int. Rev. Rec. 312, 3 Pac. Coast L. J. 415, 27 Pittsb. Leg. J. (Pa.) 40, 8 Reporter 195, 13 West. Jur. 409. The ordinance in question, known as the "Queue Ordinance," provided that prisoners in the county jail should have their hair cut to a uniform length of one inch from the scalp.

63. State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42; Lonas *v.* State, 3 Heisk. (Tenn.) 287; *Ex p.* Kinney, 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825, 7 Reporter 712, 3 Va. L. J. 370; *Ex p.* Francois, 3 Woods (U. S.) 367, 9 Fed. Cas. No. 5,047; *In re* Hobbs, 1 Woods (U. S.) 537, 12 Fed. Cas. No. 6,550, 4 Am. L. T. Rep. (U. S. Cts.) 190. See also, generally, MARRIAGE; MISCEGENATION.

64. Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739 [*overruling* Burns *v.* State, 48 Ala. 195, 17 Am. Rep. 34]; Ford *v.* State, 53 Ala. 150; Ellis *v.* State, 42 Ala. 525; Pace *v.* Alabama, 106 U. S. 583, 27 L. ed. 207. See also ADULTERY, 1 Cyc. 966, note 10.

65. Pace *v.* Alabama, 106 U. S. 583, 27 L. ed. 207.

66. Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589, assigning as a reason, that "where a statute imposes upon any person a specific duty for the protection or benefit of others, . . . he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute

imposes a penalty for the failure to furnish equal accommodations and the state reserves to itself the right to punish its infraction a private person cannot recover unless he has sustained special damage.[67]

b. Against "Any Person." An action for a penalty will not lie against a partnership as such, under a statute authorizing a recovery against "any person" who shall deny certain enumerated rights.[68]

c. Recovery by One For Single Offense Against Several. Where the penalty prescribed for the exclusion of colored persons from a public conveyance is by way of punishment of the offender, rather than by way of compensation to the party aggrieved, and several persons are aggrieved by the commission of a single offense, a recovery by one is a bar to recovery by the rest.[69]

2. Form of Action Where Penalty Uncertain. An action on the case will lie to recover a penalty, uncertain in amount, which is imposed for discrimination.[70]

3. Declaration or Complaint[71] — a. Reference to Statute. Where a civil rights statute is held to be merely declaratory of the common-law prohibition of discrimination, in a suit to recover damages the party discriminated against need not declare upon or refer to the statute.[72]

b. Alleging Nature of Right and Injury. The nature of the right denied and the injury sustained must be appropriately averred.[73]

4. Evidence[74] — a. Admissibility. An action to recover a penalty imposed for the denial of equal rights is not criminal to the extent of requiring the presence of the witness, but is so far a civil action as to permit the reading of the evidence of a former witness whose presence cannot be procured.[75] And where a complaint to recover a statutory penalty for deprivation of the privileges of an inn alleges that the deprivation was because of plaintiff's color, under a general denial, the defendant may show that the privileges were refused for other reasons.[76]

b. Sufficiency. In an action to recover a penalty for the violation of an act according equal enjoyment of the accommodations of inns and restaurants a preponderance of the evidence is sufficient to authorize a recovery.[77]

5. Question For Jury. It is for a jury to decide whether or not a refusal to

was intended to prevent." Such injured party may bring an action of case for his injury.

67. Norwood *v.* Galveston, etc., R. Co., 12 Tex. Civ. App. 560, 34 S. W. 180.

68. Hargo *v.* Meyers, 4 Ohio Cir. Ct. 275.

69. New Jersey Cent. R. Co. *v.* Green, 86 Pa. St. 427, 27 Am. Rep. 718, where husband and wife, who were colored persons, were excluded from the car of a railroad company at the same time and by the same employee, and it was held that the exclusion of both was but a single offense, and that a recovery having been had by the husband in the right of his wife he could not thereafter recover in his own right.

70. Baylies *v.* Curry, 30 Ill. App. 105 [*affirmed* in 128 Ill. 287, 21 N. E. 595].

71. See, generally, Pleading.

Necessity of alleging citizenship.— In Lewis *v.* Hitchcock, 10 Fed. 4, which was an action to recover a penalty under the act of congress of March 1, 1875 (thereafter declared unconstitutional) it was held that the plaintiff must allege and prove citizenship.

72. Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589.

73. Redding *v.* Railroad Co., 5 S. C. 67, in which an allegation that defendant "injuriously and unlawfully made a distinction on account of the color and the supposed race of the above named Julia F. Redding, (one of the plaintiffs,) so as to damage, and actually damaging her standing, comfort and happiness," was held to state no cause of action.

Specification of accommodations denied.— A complaint which alleged that defendant was the proprietor of a certain inn, and denied plaintiff, a minor, "the full and equal privilege and enjoyment of the accommodation, advantages," etc., of said inn, and refused to allow him to take lodging or meals there because of his color, and that plaintiff was willing and able to comply with all lawful and reasonable rules of the inn, sufficiently specified the accommodation of which plaintiff was deprived, and was not insufficient because while showing plaintiff to be a minor it failed to allege that the lodging and meals applied for were necessaries. Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

74. See, generally, Evidence.

75. Deveaux *v.* Clemens, 17 Ohio Cir. Ct. 33.

76. Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

77. Deveaux *v.* Clemens, 17 Ohio Cir. Ct. 33.

plaintiff of privileges extended to white passengers by a carrier was based upon the fact of the plaintiff being a colored person.[78]

6. Measure of Damages[79] — a. Amount Fixed by Statute. Where the statute provides that any person violating it shall forfeit to the individual injured a sum not to exceed a certain amount, and on conviction a fine also, the amount to be forfeited to the individual is not affected or controlled by his actual pecuniary loss or damage.[80]

b. Nominal Damages. The party aggrieved is entitled to nominal damages, although no actual damages are proved.[81]

c. Exemplary Damages. Where the wrongful exclusion of the plaintiff from a public conveyance on account of color is wanton, or he is subjected to indignity, vexation, and disgrace, he is not confined to actual damages, but in addition may recover for the indignity, or the like, suffered.[82]

B. Mandamus to School Officials — 1. In General. Mandamus is the proper proceeding to compel those in charge of public schools to admit any child or pupil who has been directly or indirectly excluded therefrom on account of color or race,[83] or to compel them to provide equal school facilities for blacks and whites.[84]

2. Parties — a. The Relator. The parents of children of scholastic age may

78. Miller *v.* New Jersey Steamboat Co., 58 Hun (N. Y.) 424, 12 N. Y. Suppl. 301, 34 N. Y. St. 914. In this case plaintiff, having purchased tickets for passage and berths on a steamboat for himself and his family, persons of color, on finding the berths small and the accommodations inadequate, requested the officers of the boat to exchange the berths for state-rooms, the accommodations of which were better, but the officers refused to do so. Thereafter plaintiff demanded the return of the money paid, which was refunded, and he with his family left the boat. It was held that on these facts, in the absence of evidence of any demand for a state-room except in exchange for the berths, no cause of action was shown for damages for refusal to furnish plaintiff accommodations.

79. See, generally, Damages.

80. Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

81. Pleasants *v.* North Beach, etc., R. Co., 34 Cal. 586.

82. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641, in which case a colored woman was refused admittance to a ladies' car solely on account of her color and was directed to take a seat in another car which was set apart for, and mostly occupied by, men, but which she declined to do. The evidence justified the conclusion that the brakeman in excluding her from the ladies' car acted in a very rude manner in the presence of several persons, and it was held that a verdict of two hundred dollars was not excessive. In Pleasants *v.* North Beach, etc., R. Co., 34 Cal. 586, it appeared that the plaintiff, a person of color, hailed a street-car conductor and requested passage which was refused, that the conductor stated to a passenger, "We don't take colored people in the cars," that there was at the time ample room in the car to accommodate plaintiff, who was ready and willing to pay the fare, that there was no proof of any special damage, and that plaintiff had a verdict for five hundred dollars. It was held that in the absence of evidence of malice, ill-will, or wanton conduct toward plaintiff on the part of defendant exemplary damages could not be allowed, and that the verdict was excessive.

83. *California.*— Tape *v.* Hurley, 66 Cal. 473, 6 Pac. 129.

Illinois.— People *v.* Alton, 179 Ill. 615, 54 N. E. 421; People *v.* Board of Education, 127 Ill. 613, 21 N. E. 187.

Iowa.— Dove *v.* Independent School Dist., 41 Iowa 689.

Kansas.— Board of Education *v.* Tinnon, 26 Kan. 1.

Michigan.— People *v.* Board of Education, 18 Mich. 400.

Nevada.— State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713.

New Jersey.— State *v.* Union Dist. School Trustees, 46 N. J. L. 76.

Oklahoma.— Marion *v.* Territory, 1 Okla. 210, 32 Pac. 116.

See also, generally, Mandamus.

Compelling school facilities for remainder of term.— Where school directors fail to provide equal school facilities, claiming the right to apportion the school funds and limit the school terms according to population, they may be compelled to do so, although but three months of the scholastic year is left. Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

84. Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

Mandamus to control decision as to color. — Where a statute providing separate schools for white and colored children empowers school trustees to determine the color of a particular applicant, mandamus will not lie to control their determination, especially where there is a right of appeal to a county superintendent whose decision is final. Eubank *v.* Boughton, 98 Va. 499, 36 S. E. 529.

institute proceedings to compel the establishment of schools where their children may have equal educational advantages.[85] And where a child entitled to public school privileges has been excluded therefrom, directly or indirectly, on account of color, proceedings to compel admission may be instituted by the father[86] or by any citizen of the school district.[87]

b. The Defendant. While it has been held that the act of a subordinate in discriminating, under authority from a school-board, against a child on account of color is the act of the board, and that therefore it is a proper party defendant,[88] it has also been held that, although authorized, a public school-teacher who actually excludes a child for such a reason is alone a necessary party.[89]

3. Petition. The petition for the writ must appropriately aver sufficient facts to authorize its issue.[90]

4. Evidence. Where city authorities have made no public record of the authority for their action in carrying out their design to keep colored children out of "white schools," the existence of such illegal motive may be established by other competent evidence.[91]

5. Instructions. Questions of fact only should be submitted to the jury.[92] On an issue as to whether or not a board of education improperly excluded relator's children from a particular school, it is improper to give an instruction which will permit a finding for the relator only on proof that the children represented by him were excluded from all schools under control of the board.[93]

6. Question For Jury. The interrogatories submitted to the jury should be no broader than the issue certified.[94]

85. Maddoux *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

86. People *v.* Board of Education, 18 Mich. 400.

87. In such a case the object of the writ is the enforcement of a public right. The people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the law executed and the right in question enforced. People *v.* Board of Education, 127 Ill. 613, 21 N. E. 187.

88. People *v.* Board of Education, 127 Ill. 613, 21 N. E. 187.

89. Tape *v.* Hurley, 66 Cal. 473, 475, 6 Pac. 129, in which case the court said: "We think the superintendent of schools was improperly joined as a defendant in this action, and that the court properly dismissed the action as to the board of education. In Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405, the action was against the teacher alone. That it was properly brought seems to have been conceded. . . . Teachers cannot justify a violation of law, on the ground that a resolution of the board of education required them to do so."

90. **Sufficiency of petition.**—A petition against a school-board and city superintendent of schools, showing that during a regular term of said schools relator applied to have his children, who were eligible and qualified, admitted to a ward school, that the application was refused by the teacher and by defendants, for the reason that his children were colored, and that said school was established by the school-board exclusively for white pupils, states sufficient to entitle the relator to the writ. Marion *v.* Territory, 1 Okla. 210, 32 Pac. 116, further holding that a writ containing all the substantial averments of the petition was also sufficient.

91. Thus where it is alleged that children eligible to admission to a public school were excluded on account of their color, in pursuance of a general design by the respondents to separate white and colored children, the people are not confined to proof of the motive for excluding the children of the relator alone, but may show that all colored children were likewise excluded from "white schools." People *v.* Alton, 179 Ill. 615, 54 N. E. 421.

92. An instruction requiring the jury to find for defendant, if they believed that children were assigned to different schools by the proper authorities, "and that they had a legal right to make such assignment," is erroneous, because submitting a question of law. People *v.* Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95.

93. People *v.* Board of Education, 127 Ill. 613, 21 N. E. 187, where the jury were instructed that, unless they believed from the evidence that the board had excluded the children named in the petition from the public schools of the district by a resolution on account of color, they should find for the defendants, and the instruction was held erroneous, because ignoring the fact whether such children were excluded from any of the schools and because under such instruction the jury could find for the relator only on proof that his children were excluded from all the public schools of the district.

94. Where the issue of fact certified is whether or not children had been discriminated against and excluded because of their color from a certain school, or from the most

C. Quo Warranto. Where it is provided that an information in the nature of a quo warranto may be filed where any corporation exercises powers not conferred by law, an information may be filed to test the legality of a rule adopted by a board of education excluding colored children from admission to schools provided for white children.[95]

D. Injunction. A federal court may restrain a school-board from acting under a state law which has been declared to be unconstitutional because discriminating against colored citizens in the distribution of taxes levied for public school purposes.[96]

E. Criminal Proceedings — 1. Indictment or Information — a. Necessary Allegations — (I) *Of Citizenship of Person Discriminated Against.* On a prosecution for the violation of a statute denouncing as an offense the denial of equal rights to all citizens the citizenship of the person to whom such rights are charged to have been denied must be alleged and proved.[97]

(II) *Of Discrimination Under State Statute.* An indictment in the federal courts for depriving a person of, or denying to him, on account of race or color, the free exercise and enjoyment of the rights and privileges secured by the fourteenth amendment of the federal constitution and the subsequent congressional enactments should aver that such deprivation, denial, or discrimination was by or under color of some state law.[98] But the state statute need not be set out, as the court will take judicial cognizance of it.[99]

(III) *Of Discrimination Because of Race or Color.* The indictment should charge that the denial or discrimination constituting the alleged offense was because of race, color, or previous condition of servitude.[1]

(IV) *Of Non-Existence of Reason For Denial of Right.* An indictment for a violation of a statute denouncing the refusal or denial to any person of the equal enjoyment of the accommodations, advantages, facilities, and privileges provided for by such act, except for reasons applicable to all persons, should allege that no good reason existed for such refusal or denial.[2]

b. Sufficiency — (I) *Charging Offense in Statutory Language.* An indictment for excluding one from the enjoyment of all the accommodations and privileges of a place of amusement in violation of statute is sufficient if it sets out the facts constituting the offense in the words of the statute and contains suf-

convenient school, a special interrogatory as to whether equal and reasonable educational facilities were furnished children of school age, irrespective of color, is erroneous because broader than the issue certified, and apt to lead the jury to believe that if equal educational opportunities were elsewhere provided relator's children might be lawfully excluded from the school most convenient to their home. People *v.* Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95.

95. People *v.* Board of Education, 101 Ill. 308, 40 Am. Rep. 196. See also, generally, Quo Warranto.

96. Claybrook *v.* Owensboro, 16 Fed. 297. See also, generally, Injunctions.

97. Messenger *v.* State, 25 Nebr. 674, 41 N. W. 638.

98. U. S. *v.* Jackson, 3 Sawy. (U. S.) 59, 26 Fed. Cas. No. 14,459; U. S. *v.* Cruikshank, 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897, 13 Am. L. Reg. N. S. 630 [*affirmed* in 92 U. S. 542, 23 L. ed. 588].

Necessity of bringing case within provisions of state law.— Where an indictment avowed that one Ah Koo was deprived of a right secured to him by the sixteenth section of the act of congress of May 31, 1870, in that there was exacted from him under color of a certain law of the state of California which the indictment particularly set forth, the sum of four dollars by the defendant, who was then and there collector of taxes in Trinity county, but contained no averment that Ah Koo was a foreign miner and within the provisions of the state law, it was held bad on demurrer. U. S. *v.* Jackson, 3 Sawy. (U. S.) 59, 26 Fed. Cas. No. 15,459.

99. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22, a prosecution under the civil rights bill of April 9, 1866.

1. U. S. *v.* Cruikshank, 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897, 13 Am. L. Reg. N. S. 630 [*affirmed* in 92 U. S. 542, 23 L. ed. 588].

2. State *v.* Hall, 72 Iowa 525, 34 N. W. 315, where an indictment averring as the gist of the offense, that "the said Ben Hall [the proprietor of a barber shop] then and there knowingly, willfully and unlawfully refused to shave said Bennett [a colored man] and would give no reason therefor," was held in-

ficient averments as to time, place, persons, and other circumstances to identify the particular transaction.[3]

(II) *CHARGING DISTINCT VIOLATIONS CONSTITUTING ONE OFFENSE.* An indictment against a carrier for failure to furnish separate coaches for white and colored passengers, and to have each car bear appropriate words indicating the race for which such car was intended, states but a single offense.[4]

2. EVIDENCE. On a prosecution for excluding a citizen from equal privileges and accommodations in a place of public amusement on account of his color in violation of statute, proof of a refusal to sell to such person a ticket of admission is sufficient to support the allegation of exclusion.[5]

CIVIL SERVICE. This term properly includes all functions under the government except military functions. In general it is confined to functions in the great administrative departments of state.[1] Civil service, in its enlarged sense, means all service rendered to and paid for by the State, or nation, or by political subdivisions thereof, other than that pertaining to naval or military affairs.[2] (See, generally, MUNICIPAL CORPORATIONS; OFFICERS,)

CIVIL SERVICE REFORM. The substitution of business principles and methods for the spoils system in the conduct of the civil service, especially in the matter of appointments.[3]

CIVIL SIDE. When the same court has jurisdiction of both civil and criminal matters, proceedings of the first class are often said to be on the civil side; those of the second, on the criminal side[4]

CIVIL SUIT. A CIVIL ACTION,[5] *q. v.* The words have also been defined to

sufficient, because it failed to allege that no good reason existed for defendant's refusal to shave Bennett.

3. People *v.* King, 110 N. Y. 418, 18 N. E. 245, 18 N. Y. St. 353, 6 Am. St. Rep. 389, 1 L. R. A. 293, where the indictment, which was for the violation of N. Y. Pen. Code, § 383, alleged in substance that defendant, being one of the owners of a skating rink, a place of amusement, did on a day named "exclude from the equal enjoyment of any and all accommodation, facility and privilege of said skating rink" certain persons named, citizens of the state, "by reason of race and color."

4. Chesapeake, etc., R. Co. *v.* Com., 21 Ky. L. Rep. 228, 51 S. W. 160.

5. People *v.* King, 110 N. Y. 418, 18 N. E. 245, 18 N. Y. St. 353, 6 Am. St. Rep. 389, 1 L. R. A 293.

1. Black L. Dict. In People *v.* Cram, 29 Misc. (N. Y.) 359, 364, 61 N. Y. Suppl. 858, the court, in construing an act relating to the civil service of New York, says: "In the words 'civil service' are included 'all offices and positions of trust or employment in the service of the state or of such civil division or city, except such offices and positions in the militia and the military departments as are or may be created under the provisions of article eleven of the constitution.'"

2. Hope *v.* New Orleans, 106 La. 345, 348, 30 So. 842.

3. Hope *v.* New Orleans, 106 La. 345, 348, 30 So. 842.

4. Black L. Dict.

How court divided.— In the county hall or court in which the trials (in the English assizes) take place, it is very usual for one side or portion of the building to be appropriated to the hearing of cases of civil character, and the other side or portion to the hearing of those of criminal nature. And hence the phrase has become common, that the judge is either sitting "on the civil side" or on the "criminal side," meaning thereby that he is either presiding at *nisi prius*, or trying a prisoner, as the case may be. Brown L. Dict.

5. Abbott L. Dict.

"Civil suits relate to and affect, as to the parties against whom they are brought, only individual rights which are within their individual control and which they may part with at their pleasure. The design of such suits is the enforcement of merely private obligations and duties." Cancemi *v.* People, 18 N. Y. 128, 136.

Actions strictly popular, and not compensatory, are not criminal prosecutions, but civil suits. Atcheson *v.* Everitt, Cowp. 382 [*cited* in Hinman *v.* Taylor, 2 Conn. 357, 361; Spicer *v.* Rees, 5 Rawle (Pa.) 119, 122, 28 Am. Dec. 648].

A prosecution for bastardy, under the Massachusetts statute, is neither wholly civil nor wholly criminal; it has many of the features and incidents of each (Hill *v.* Wells, 6 Pick. (Mass.) 104, 107); though in some respects in the form of a criminal prosecution, the suit is in substance and effect a civil suit (Wilbur *v.* Crane, 13 Pick. (Mass.) 284, 289); "the object of the suit is the redress of a civil injury" (Marston *v.* Jenness, 11 N. H. 156, 160). And see Hinman *v.* Taylor, 2 Conn. 357, 361.

mean the lawful demand of one's right.[6] (See, generally, ACTIONS; CIVIL CASE; CIVIL CAUSE; CIVIL REMEDY; SUIT.)

CIVIL WAR. An internecine war; a war carried on between opposing masses of citizens of the same country or nation.[7]

CIVIS. In the Roman law, a citizen as distinguished from *incola* (an inhabitant), origin or birth constituting the former, domicile the latter.[8] (See, generally, CITIZENS; DOMICILE.)

CIVITAS. In Roman law, any body of people living under the same laws; a state.[9] In old English law, a CITY,[10] *q. v.*

A qui tam prosecution for the penalty of a statute, is not a civil suit for the purpose of notice. Leavenworth *v.* Tomlinson, 1 Root (Conn.) 436.

Ga. Const. (1793), art. 3, § 1, is interpreted in Gilbert *v.* Thomas, 3 Ga. 575, 579, and the court observed that the language used "is broad enough to include equity as well as common law cases, inasmuch as both branches of jurisdiction fall under the denomination of civil, in contradistinction from criminal cases."

The settlement of estates in courts having probate jurisdiction is essentially proceedings *in rem*, and not "civil suits commenced or prosecuted," within the meaning of the constitution in Wisconsin. State *v.* Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51.

Under the judiciary act of 1789, "civil suit" is defined in Weston *v.* Charleston, 2 Pet. (U. S.) 449, 464, 7 L. ed. 481 [*quoted* in McCullough *v.* Large, 20 Fed. 309, 311], as follows: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

"Suits of a civil nature," as mentioned in statutes "may aptly have been used to denote remedies" for private wrongs, or civil injuries. Koch *v.* Vanderhoof, 49 N. J. L. 619, 623, 9 Atl. 771.

6. 3 Bl. Comm. 116 [*quoted* in McPike *v.* McPike, 10 Ill. App. 332, 333]. Or as Bracton and Fleta express it in the words of Justinian, "*Jus prosequandi in judicia quod alicui debetur.*" Blackstone treats the terms "suits" and "actions" as synonymous. McPike *v.* McPike, 10 Ill. App. 332, 333.

7. Black L. Dict.

When status of civil war arises.— A civil war is when a party arises in a state which no longer obeys the sovereign, and is sufficiently strong to make head against him, or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms. Civil war breaks the bonds of society and of the government; it gives rise in a nation to two independent parties, who acknowledge no common judge. They are in the position of two nations who engage in disputes, and not being able to reconcile them have recourse to arms." Brown *v.* Hiatt, 1 Dill. (U. S.) 372, 379, 4 Fed. Cas. No. 2,011, 4 Am. L. T. Rep. (U. S. Cts.) 73, 3 Chic. Leg. N. 185 [*quoting* Vattel 54, 3, ch. 18, secs. 290–295]. And see Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44, 55, 2 Am. Rep. 678; Stoughton *v.* Taylor, 2 Paine (U. S.) 652, 655, 14 Fed. Cas. No. 7,558.

Defined as a mixed war.— "A civil war . . . between the different members of the same society is what Grotius calls a mixed war; it is according to him public on the side of the government, and private on the part of the people resisting its authority." Hubbard *v.* Harnden Express Co., 10 R. I. 244, 248 [*quoting* Wheaton, Part 4, chap. 1, § 7].

As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know. Prize Cases, 2 Black (U. S.) 635, 17 L. ed. 459.

Status of American civil conflict.—In Mayer *v.* Reed, 37 Ga. 482, 484, it was said that the war waged between the United States and the Confederate states was "not a civil war, in its legitimate sense; for that is a war between one portion of the citizens of a State with another portion, as was the case in the war begun in England in 1642, and during the continuance of which Charles I was beheaded, or like the rebellion in the eighteenth century in behalf of his descendants."

8. Black L. Dict.

The word "civis," taken in the strictest sense, extends only to him that is entitled to the privileges of a city of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22 [*citing* Scot *v.* Schawrtz, Comyns 677].

Citizens (cives) of London.— See CITIZENS, *ante*, p. 132, note 1.

9. Black L. Dict.

10. Burrill L. Dict.

By civitas is properly meant the inhabitants (*incolæ*); *urbs* includes the buildings. But one is commonly taken for the other. Coke Litt. 109*b*. *Civitas et urbs in hoc differunt, quod incolæ dicuntur civitas, urbs vero complectitur ædificia;* a city and town differ in this, that the inhabitants are called the city, but the town includes the buildings. Wharton L. Lex.

CIVITAS EA AUTEM IN LIBERTATE EST POSITA QUI DUIS STAT VIRIBUS, NON EX ALIENO ARBITRIO PENDET. A maxim meaning "That state only is free which depends upon its own strength, and not upon the arbitrary will of another." [11]

C. L. An abbreviation for CIVIL LAW,[12] *q. v.*, or COMMON LAW,[13] *q. v.*

CLADES. A wattle or hurdle.[14] (See CLAIA.)

CLAIA. In old English law, a hurdle.[15] (See CLADES.)

CLAIM.[16] As a noun, a word of very extensive signification, embracing every species of legal demand;[17] the largest word of law and includes "demand" and "debt";[18] in common parlance an assertion, a pretension;[19] in ordinary signification, a right or title, actual or supposed, to a debt, privilege, or other thing in possession of another;[20] occasion to pay;[21] a demand as of right;[22] a demand of a right,[23] or alleged right,[24] or supposed right;[25] the assertion of a right;[26] the assertion, demand, or challenge, of something as a right, or it means the thing thus demanded or challenged;[27] a calling on another for something due or supposed to be due;[28] a right to claim or demand;[29] the right to demand something of another;[30] a legal demand for money to be paid out of an estate;[31] something asked for or demanded on the one hand and not admitted or allowed on the

11. Morgan Leg. Max.

12. Black L. Dict.

13. Anderson L. Dict.

14. Wharton L. Lex.

Its use.— A hurdle for penning or folding sheep is still in some counties of England called a cley. Jacob L. Dict.

15. Burrill L. Dict.

16. From the Latin, *clamor*,— a call, a demand. Webster Dict.

"'Damage' and 'claim' are words having a well defined meaning in statutes and legal instruments." Coster *v.* Albany, 43 N. Y. 399, 413.

In practice, "the word 'claim,' and the phrase 'cause of action' relate to the same thing and have one meaning. The plaintiff before suit may have a 'claim' for damages; and this, when stated in a complaint, is technically 'a cause of action.'" Minick *v.* Troy, 83 N. Y. 514, 516. See, generally, CAUSE OF ACTION.

"The word 'claim' has been considered a 'word of art;' and long since was defined by c. j. Dyer to be 'a challenge, by a man, of the property or ownership of a thing which he has not in possession, but which is wrongfully detained from him.' And its popular signification and use would hardly include recoupment in every case." Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y.) 67, 72 [*citing* Stowel *v.* Zouch, Plowd. 353].

17. Western Union Tel. Co. *v.* Cobbs, 47 Ark. 344, 346, 1 S. W. 558, 58 Am. Rep. 756.

Claim as used in the statute is sometimes synonymous with demand (*In re* McCausland, 52 Cal. 568, 577 [*citing* Fallon *v.* Butler, 21 Cal. 24, 81 Am. Dec. 140]); or demand for money (Gray *v.* Palmer, 9 Cal. 616, 637).

18. Vedder *v.* Vedder, 1 Den. (N. Y.) 257.

"It is certainly a very broad term, when used in certain connections, and in reference to certain matters. Lord Coke truly says, that the word demand is the largest word known to the law, save, only, claim; and a release of all demands discharges all right of action." Gray *v.* Palmer, 9 Cal. 616, 636.

19. Orvis *v.* Jennings, 6 Daly (N. Y.) 434, 446.

20. Home Ins. Co. *v.* Watson, 59 N. Y. 390, 394 [*quoting* Lawrence *v.* Miller, 2 N. Y. 245].

21. Emerson's Appeal, 56 Conn. 98, 99, 14 Atl. 295.

22. McDowell *v.* Brantley, 80 Ala. 173, 177 [*quoting* Worcester Dict.]; Jones *v.* U. S., 13 Sawy. (U. S.) 341, 35 Fed. 561, 566.

23. Century Dict. [*quoted* in Allen *v.* Board of State Auditors, 122 Mich. 324, 325, 81 N. W. 113, 80 Am. St. Rep. 573, 47 L. R. A. 117]; Webster Dict. [*quoted* in McDowell *v.* Brantley, 80 Ala. 173, 177; Burlington, etc., R. Co. *v.* Abink, 14 Nebr. 95, 97, 15 N. W. 317].

24. Century Dict. [*quoted* in Allen *v.* Board of State Auditors, 122 Mich. 324, 325, 81 N. W. 113, 80 Am. St. Rep. 573, 47 L. R. A. 117].

25. Webster Dict. [*quoted* in McDowell *v.* Brantley, 80 Ala. 173, 177; Burlington, etc., R. Co. *v.* Abink, 14 Nebr. 95, 97, 15 N. W. 317].

26. Sweet L. Dict.

The term "claim" implies an active assertion of right — the demand for its recognition. This assertion and demand need not be made in words; the party may speak by his acts in their support, as by the payment of taxes, or erection of improvements. Grube *v.* Wells, 34 Iowa 148, 151 [*quoted* in Neale *v.* Lee, 19 D. C. 5, 21].

27. Fordyce *v.* Godman, 20 Ohio St. 1, 14.

28. Imperial Dict. [*quoted* in McDowell *v.* Brantley, 80 Ala. 173, 177]; Webster Dict. [*quoted* in Marsh *v.* Benton County, 75 Iowa 469, 470, 39 N. W. 713].

29. Webster Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

30. Great Western Ins. Co. *v.* Pierce, 1 Wyo. 45, 50.

31. Gray *v.* Palmer, 9 Cal. 616 [*quoted* in Weill *v.* Clark, 9 Oreg. 387, 391].

other;[32] a challenge of ownership to lay claim to anything;[33] a challenge of interest in anything that is in the possession of another;[34] a challenge by a man of the property or ownership of a thing which he has not in possession, but which is wrongfully detained from him;[35] a challenge of the ownership of property that one hath not in possession, but which is detained from him by wrong;[36] a challenging one another for something due or supposed to be due, as a claim of wages for services;[37] the means by or through which the claimant obtains the possession or enjoyment of the thing sought;[38] a title to any debt, or privilege, or other thing, in possession of another;[39] in a just, judicial sense, a demand of some matter as of right made by one person upon another, to do or forbear to do some act or thing as a matter of duty.[40] As a verb,[41] to demand as due;[42] to demand as one's own;[43] to assert a personal right to any property or any right;[44] to demand the possession or enjoyment of something rightfully one's own, and wrongfully withheld;[45] to ask or seek;[46] to obtain by virtue of authority, right, or supposed right;[47] to be entitled to anything as a matter of right.[48] The word "claim" as used in the statutes has been construed in various ways by the courts of the several states.[49] (Claim: Against — Assigned Estate, see ASSIGNMENTS FOR

32. Dowell *v.* Cardwell, 4 Sawy. (U. S.) 217, 229, 7 Fed. Cas. No. 4,039 [*citing* Bouvier L. Dict.; Worcester Dict.].

33. Jones *v.* U. S., 13 Sawy. (U. S.) 341, 35 Fed. 561.

34. Jacob L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 148].

35. Orvis *v.* Jennings, 6 Daly (N. Y.) 434, 446 [*citing* Burrill L. Dict.; Bouvier L. Dict.; Jacob L. Dict.]; Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y.) 67, 72; Cummings *v.* Lynn, 1 Dall. (U. S.) 444, 1 L. ed. 215; Stowel *v.* Zouch, Plowd. 353, 359 [*quoted* in Jones *v.* U. S., 13 Sawy. (U. S.) 341, 35 Fed. 561, 565 (*quoting* Bouvier L. Dict.)]; Bouvier L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147; Saddlesvene *v.* Arms, 32 How. Pr. (N. Y.) 280, 286]; Burrill L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

36. Jacob L. Dict. [*quoted* in Robinson *v.* Wiley, 15 N. Y. 489, 491].

37. Saddlesvene *v.* Arms, 32 How. Pr. (N. Y.) 280, 285 [*citing* Webster Dict.].

38. Lawrence *v.* Miller, 2 N. Y. 245, 254.

39. Black L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

40. Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 615, 10 L. ed. 1060 [*cited* in Fretwell *v.* McLemore, 52 Ala. 124, 140; Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; Buhl *v.* Fort St. Union Depot Co., 98 Mich. 596, 606, 57 N. W. 829, 23 L. R. A. 392 (*quoting* Coster *v.* Albany, 43 N. Y. 399); Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 568, 36 Pac. 22, 39 Pac. 403; Jones *v.* U. S., 13 Sawy. (U. S.) 341, 35 Fed. 561, 565]; Burrill L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

41. As an active transitive verb, the word "claims" has the force of "asks for," or "demands as his due," and is not equivalent to the phrase "has a right to" or "owns." John R. Davis Lumber Co. *v.* Milwaukee First Nat. Bank, 87 Wis. 435, 436, 58 N. W. 743.

When "claim" is used as a verb, many respectable writers seem to regard it as a synonym for state, urge, insist, or assert. Orvis *v.* Jennings, 6 Daly (N. Y.) 434, 446.

42. Webster Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

43. Black L. Dict.

44. Black L. Dict.

45. Black L. Dict.

46. Webster Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

47. Webster Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

48. Webster Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 147].

49. "Claim" arising under a fire-insurance policy.— Chandler *v.* St. Paul F. & M. Ins. Co., 21 Minn. 85, 86, 18 Am. Rep. 385. See, generally, FIRE INSURANCE.

"Claim" for labor under statute.— Weymouth *v.* Sanborn, 43 N. H. 171, 173, 80 Am. Dec. 144.

"Claim" in a covenant in a deed.— Johnson *v.* Hollensworth, 48 Mich. 140, 143, 11 N. W. 843. See, generally, COVENANTS; DEEDS.

"Claim" in an action in the nature of a creditors' bill.— Cincinnati *v.* Hafer, 49 Ohio St. 60, 67, 30 N. E. 197. See, generally, CREDITORS' SUITS.

"Claim" in attachment statute.— Saddlesvene *v.* Arms, 32 How. Pr. (N. Y.) 280, 285. See also Stringham *v.* Winnebago County, 24 Wis. 594; and, generally, ATTACHMENT.

"Claim" in federal statutes relating to land-grants to railroads.— Burlington, etc., R. Co. *v.* Abink, 14 Nebr. 95, 15 N. W. 317.

"Claim" in relation to a lease.— Schork *v.* Moritz, 6 N. Y. Suppl. 554, 24 N. Y. St. 898. See, generally, LANDLORD AND TENANT.

"Claim" in statute of limitations in reference to real estate.— Grube *v.* Wells, 34 Iowa 148, 151 [*quoted* in Neale *v.* Lee, 19 D. C. 5]. See, generally, LIMITATIONS OF ACTIONS.

"Claim" in statute regulating practice.— *Illinois.*— Nichols *v.* Ruckells, 4 Ill. 298, 300.

Kansas.— Irwin *v.* Paulett, 1 Kan. 418, 426.

Mississippi.— Lamar *v.* Williams, 39 Miss.

Benefit of Creditors; Bankruptcy; Insolvency; Carrier, see Carriers; Shipping; Corporation, see Corporations; County, see Counties; Estate of Bankrupt, see Bankruptcy; Estate of Decedent, see Executors and Administrators; Estate of Insolvent, see Insolvency; Municipality, see Municipal Corporations; School or School District, see Schools and School Districts; United States, see United States. And Delivery, see Replevin. Compromise and Settlement of, see Compromise and Settlement. Continual, see Claim Continual. Discharge of, see Accord and Satisfaction; Compromise and Settlement; Payment; Release. In Admiralty, see Admiralty. In Equity, see Claim in Equity. Mining, see Mines and Minerals. Of Conusance, see Claim of Conusance. Of Exemption, see Exemptions. Of Homestead, see Homesteads. Of Liberty, see Claim of Liberty. Of Lien, see Liens; Mechanics' Liens. Of Title, see Adverse Possession; Claim of Title. Patent, see Patents. Pension, see Pensions. Statement of, see Statement of Claim. To Property Levied On, see Attachment; Execution; Sequestration. To Public Land, see Public Lands.)

CLAIM AND DELIVERY. See Replevin.

CLAIMANT. A person who claims; one who demands anything as his right;[50] a person who makes a claim in an administrative proceeding;[51] one having some

342 [*cited* in Jacks *v.* Bridewell, 51 Miss. 881, 887].

Nebraska.— Nance *v.* Falls City, 16 Nebr. 85, 20 N. W. 109 [*cited* in Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365].

New York.— Dwight *v.* Germania L. Ins. Co., 84 N. Y. 493.

"Claim" in statute regulating proceedings in insolvency.— Emerson's Appeal, 56 Conn. 98, 101, 14 Atl. 295; Sperry's Appeal, 47 Conn. 87, 88; Lehigh, etc., Coal Co. *v.* Stevens, etc., Transp. Co., 63 N. J. Eq. 107, 51 Atl. 446. See, generally, Insolvency.

"Claim" in statute relating to arbitrations. — Olcott *v.* Wood, 14 N. Y. 32, 39. See, generally, Arbitration and Award.

"Claim" in statute relating to contingent claims.— Greene *v.* Dyer, 32 Me. 460, 463.

"Claim" in statute relating to decedent's estate.— McDowell *v.* Brantley, 80 Ala. 173, 177; Ellis *v.* Polhemus, 27 Cal. 350 [*followed* in Pitte *v.* Shipley, 46 Cal. 154, 161]; Fallon *v.* Butler, 21 Cal. 24, 32, 81 Am. Dec. 140; Gray *v.* Palmer, 9 Cal. 616, 637; Ellissen *v.* Halleck, 6 Cal. 386, 393; Camp *v.* Grant, 21 Conn. 54, 54 Am. Dec. 321; Dodson *v.* Nevitt, 5 Mont. 518, 520, 6 Pac. 358. See also Booth *v.* Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; Stuttmeister *v.* Superior Ct., 72 Cal. 487, 489, 14 Pac. 35; Swain's Estate, 67 Cal. 637, 641, 8 Pac. 497; *In re* McCausland, 52 Cal. 568, 577.

"Claim" in statute relating to municipal corporations.— Snyder *v.* Albion, 113 Mich. 275, 277, 71 N. W. 475; Springer *v.* Detroit, 102 Mich. 300, 60 N. W. 688; Lay *v.* Adrian, 75 Mich. 438, 42 N. W. 959; Carne *v.* Litchfield, 2 Mich. 340, 342; Harrigan *v.* Brooklyn, 119 N. Y. 156, 23 N. E. 741, 28 N. Y. St. 955, 24 Abb. N. Cas. (N. Y.) 279 [*affirming* 1 Silv. Supreme (N. Y.) 330, 5 N. Y. Suppl. 673, 24 N. Y. St. 352]; Taylor *v.* Cohoes, 105 N. Y. 54, 11 N. E. 282; Reining *v.* Buffalo, 102 N. Y. 308, 6 N. E. 792; Minick *v.* Troy, 83 N. Y. 514; McGaffin *v.* Cohoes, 74 N. Y. 387, 30 Am. Rep. 307; Howell *v.* Buffalo, 15 N. Y. 512; McClure *v.* Niagara, 3 Abb. Dec. (N. Y.) 83, 4 Transcr. App. (N. Y.) 275, 4 Abb. Pr. N. S. (N. Y.) 202; Pulitzer *v.* New York, 48 N. Y. App. Div. 6, 62 N. Y. Suppl. 587; Nagel *v.* Buffalo, 34 Hun (N. Y.) 1; Quinlan *v.* Utica, 11 Hun (N. Y.) 217, 221 [*affirmed* in 74 N. Y. 603]; Cavin *v.* Brooklyn, 5 N. Y. Suppl. 758 [*affirmed* in 119 N. Y. 156, 23 N. E. 741, 28 N. Y. St. 955, 24 Abb. N. Cas. (N. Y.) 279]; Warren *v.* Davis, 43 Ohio St. 447, 3 N. E. 301; Flieth *v.* Wausau, 93 Wis. 446, 67 N. W. 731; Sommers *v.* Marshfield, 90 Wis. 59, 62 N. W. 937; Van Frachen *v.* Ft. Howard, 88 Wis. 570, 60 N. W. 1062; Vogel *v.* Antigo, 81 Wis. 642, 51 N. W. 1008; Jung *v.* Stevens Point, 74 Wis. 547, 43 N. W. 513; Bradley *v.* Eau Claire, 56 Wis. 168, 14 N. W. 10; Ruggles *v.* Fond du Lac, 53 Wis. 436, 10 N. W. 565; Kelley *v.* Madison, 43 Wis. 638, 644, 28 Am. Rep. 576; Kellogg *v.* Winnebago County, 42 Wis. 97; Stringham *v.* Winnebago County, 24 Wis. 594. See, generally, Municipal Corporations.

"Claims" and "effects" not applicable to real estate.— De Cordova *v.* Knowles, 37 Tex. 19, 20.

50. Century Dict.

"Claimant" is sometimes used in a statute as synonymous with creditor. Gray *v.* Palmer, 9 Cal. 616, 637.

In the old action of ejectment, the plaintiff was called "the claimant." Rapalje & L. L. Dict.

"The word 'claimant,' used in the fifth section of the Act of October 13th, 1870, means one who has put in a 'claim' to property levied on under an execution, as provided by our claim laws. That is the technical meaning of the word in this State, when used in the connection in which it is used in the section referred to." Adams *v.* Worrill, 46 Ga. 295, 296.

51. Sweet L. Dict.

interest in the land which is recognized by the laws of the United States.[52] In admiralty practice, the name given to a person who lays claim to property, seized on a libel *in rem*, and who is authorized and admitted to defend the action.[53] (See, generally, CLAIM.)

CLAIM CONTINUAL. A mode through which a claimant of land by "continual claim," prevented the loss of his right of entry by the person in possession dying seized of the land.[54]

CLAIM IN EQUITY. In simple cases, in English practice where there is not any great conflict as to facts, and a discovery from a defendant was not sought, but a reference to chambers was nevertheless necessary before final decree, which would be as of course, all parties being before the court, the summary proceeding by claim was sometimes adopted, thus obviating the recourse to plenary and protracted pleadings.[55]

CLAIM OF CONUSANCE. In practice, an intervention by a third person in a suit, claiming that he has rightful jurisdiction of the cause which the plaintiff has commenced out of claimant's court. Now obsolete.[56]

CLAIM OF LIBERTY. A suit or petition to the queen, in the court of exchequer, to have liberties and franchises confirmed there by the attorney-general.[57]

CLAIM OF TITLE. A claim having some appearance of legality, not a mere bare claim without the appearance or pretense of anything to base it upon.[58] (See, generally, ADVERSE POSSESSION.)

CLAIMS, COURT OF. See COURTS.

CLAM. In civil law, covertly; secretly;[59] a name given in different localities to different bivalve mollusks.[60] (Clams: Catching and Taking, see FISH AND GAME.)

CLAMARE. In old English law, to CLAIM, *q. v.*; to demand or challenge; to assert a right to a thing.[61]

CLAM DELINQUENTES MAGIS PUNIUNTUR QUAM PALAM. A maxim meaning "Those sinning secretly are punished more severely than those sinning openly."[62]

CLAMEA. In old English law, a CLAIM,[63] *q. v.*

CLAMEA ADMITTENDA IN ITINERE PER ATTORNATUM. An ancient writ by which the king commanded the justices in eyre to admit the claim by attorney of a person who was in the royal service, and could not appear in person.[64]

CLAMOR. In old English law, a CLAIM, *q. v.*, or complaint; an outcry; clamor. In the civil law, a CLAIMANT, *q. v.*, a debt; anything claimed from another; a proclamation; an ACCUSATION, *q. v.*[65]

CLAM VI, AUT PRECARIO. A technical phrase of the Roman law, meaning by force, stealth, or importunity.[66]

CLARE CONSTAT. It clearly appears, a precept, in the Scotch law, by which seizin was given to the heir of a vassal, of the lands of his ancestor. It took its name from the initial words.[67]

CLAREMETHEN. In old Scotch law, the warranty of stolen cattle or goods; the law regulating such warranty.[68]

52. Western Pac. R. Co. *v.* Tevis, 41 Cal. 489, 494.

53. Black L. Dict.

54. A continual claim is of no avail at the present day to preserve a right of entry, or distress, or action, 3 & 4 Wm. IV, c. 27, § 11. Brown L. Dict.

55. Black L. Dict.

"This summary practice was created by orders 22nd April, 1850, which came into operation on the 22nd May following. By Consolid. Ord. 1860, viii. r. 4, claims were abolished." Wharton L. Lex.

56. Black L. Dict. [*citing* Villiers *v.* Mousley, 2 Wils. C. P. 403, 409].

57. Wharton L. Lex.

58. Towell *v.* Etter, 69 Ark. 34, 37, 59 S. W. 1096, 63 S. W. 53.

59. Black L. Dict.

60. Century Dict.

61. Burrill L. Dict.

Facias clamari et sciri, you shall cause to be proclaimed and known. Burrill L. Dict.

62. Black L. Dict.

63. Burrill L. Dict.

64. Wharton L. Lex.

65. Black L. Dict.

66. Black L. Dict.

67. Burrill L. Dict.

68. Black L. Dict.

CLARENDON, CONSTITUTIONS OF. The constitutions of Clarendon were certain statutes made in the reign of Henry II of England, at a parliament held at Clarendon, (A. D. 1164), by which the king checked the power of the pope and his clergy, and greatly narrowed the exemption they claimed from secular jurisdiction.[69]

CLARIFICATIO. In old Scotch law, a making clear; the purging or clearing (clenging) of an assise.[70]

CLARIGARIUS ARMORUM. A herald at arms.[71]

CLARIO. A trumpet.[72]

CLASH. Some trifling articles for trade, and also personal clothing, given by way of compensation to natives of Africa employed as laborers in loading and unloading foreign vessels.[73]

CLASS. The order or rank according to which persons or things are arranged as assorted.[74] Also a group of persons or things, taken collectively, having certain qualities in common and constituting a unit for certain purposes;[75] e. g., a certain class of legatees.[76] (See CLASSIFICATION.)

CLASSIARIUS. A seaman or soldier serving at sea.[77]

CLASSICI. In Roman law, persons employed in servile duties on board of vessels.[78]

CLASSIFICATION. In the practice of the English chancery division, where there are several parties to an administration action, including those who have been served with notice of the decree or judgment, and it appears to the judge (or chief clerk) that any of them form a class having the same interest (e. g., residuary legatees) he may require them to be represented by one solicitor, in order to prevent the expense of each of them attending by separate solicitors. This is termed "classifying the interests of the parties attending," or, shortly, "classifying," or "classification." In practice the term is also applied to the directions given by the chief clerk as to which of the parties are to attend on each of the accounts and inquiries directed by the judgment.[79] The term is also used to define the grouping together for purposes of legislation of communities or pub-

69. Black L. Dict. [*citing* 4 Bl. Comm. 422].

70. Black L. Dict.

71. Jacob L. Dict.

72. Jacob L. Dict.

73. Where natives of Africa are employed as laborers, in loading and unloading vessels in the harbor, or other work on board, or, when they accompanied the vessels from port to port, or to other places, they were compensated by a "clash," as it is called, being some trifling articles for trade, and also personal clothing. Sunday *v.* Gordon, 1 Blatchf. & H. Adm. 569, 23 Fed. Cas. No. 13,616.

74. "A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews.'" Dulany *v.* Middleton, 72 Md. 67, 77, 19 Atl. 146 [*quoting* 1 Jarman Wills, 534].

75. Black L. Dict.

As used in libel cases.— Where the publication of matter, alleged to be libellous, only affects a class of persons, no individual of that class is entitled to maintain an action for the publication. White *v.* Delavan, 17 Wend. (N. Y.) 49. See also Ellis *v.* Kimball, 16 Pick. (Mass.) 132, 135, where it is said: "The principle is undoubtedly correct, that where slanderous or libellous matter is published against a class or aggregate body of persons, an individual member, not specially included or designated, cannot maintain an action" thereon. See, generally, LIBEL AND SLANDER.

For the purpose of taxation, real estate may be classified. Thus, timber lands, arable lands, mineral lands, urban and rural, may be divided into distinct classes, and subjected to different rates. In like manner other subjects, trades, occupations, and professions, may be classified. And not only things but persons may be so divided. The *genus homo* is a subject within the meaning of the Constitution. Wheeler *v.* Philadelphia, 77 Pa. St. 338, 349. See also Davis *v.* Clark, 106 Pa. St. 377. See, generally, TAXATION.

Where the first section of a statute extends the word "person" to a class of persons as well as to individuals, the poor of a parish are a class of persons within the meaning of that statute. St. Mary Magdalen College *v.* Atty.-Gen., 6 H. L. Cas. 189.

As to cities of a definite class see Topeka *v.* Gillett, 32 Kan. 431, 4 Pac. 800; Rutherford *v.* Heddens, 82 Mo. 388; State *v.* Hudson, 44 Ohio St. 137, 5 N. E. 225; Kilgore *v.* Magee, 85 Pa. St. 401.

76. Ordinarily, a class is where several persons answering the same description sustain the same relation to the legacy. Farnam *v.* Farnam, 53 Conn. 261, 288, 2 Atl. 325, 5 Atl. 682.

77. Black L. Dict.

78. Burrill L. Dict.

79. Black L. Dict.

lic bodies which by reason of similarity of situation, circumstances, requirements, and convenience will have their public interests best subserved by similar regulations.[80]

CLASS LEGISLATION. Such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another in like case offending.[81] (See, generally, CONSTITUTIONAL LAW; STATUTES.)

CLAUD. A ditch.[82]

CLAUDERE. In old English law, to enclose; to turn open fields into closes and enclosures.[83]

CLAUSE. A single paragraph or subdivision of a legal document, such as contract, deed, will, constitution, or statute. Sometimes a sentence or part of a sentence.[84] In old English law, CLOSE, *q. v.*, as distinguished from patent.[85]

CLAUSE POTESTATIVE. In French law, the name given to the clause whereby one party to a contract reserves to himself the right to annul it.[86]

CLAUSE ROLLS. CLOSE ROLLS, *q. v.*

CLAUSE WRITS. CLOSE WRITS, *q. v.*

CLAUSULA. A CLAUSE, *q. v.*; a sentence or part of a sentence in a written instrument or law. So called, as enclosing or including certain words.[87]

CLAUSULÆ INCONSUETÆ SEMPER INDUCUNT SUSPICIONEM. A maxim meaning "Unusual clauses [in an instrument] always excite suspicion."[88]

80. Com. *v.* Gilligan, 195 Pa. St. 504, 509, 46 Atl. 124.

Province of the legislature.— Classification based on genuine and substantial distinctions is within the constitutional power of the legislature, and an act which applies to all the members of the class is general and not special. *In re* Sugar Notch Borough, 192 Pa. St. 349, 356, 43 Atl. 985 [*citing* Wheeler *v.* Philadelphia, 77 Pa. St. 338]. The legislature may determine what differences in situation, circumstances, and needs call for a difference in class, subject to the supervision of the courts as the final interpreters of the constitution, to see that it is actual classification, and not special legislation under that guise (Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199); and the test in this respect is not wisdom but good faith in the classification. Seabolt *v.* Northumberland County, 187 Pa. St. 318, 41 Atl. 22 [*quoted* in Com. *v.* Gilligan, 195 Pa. St. 504, 509, 46 Atl. 124].

To justify judicial interference, the classification adopted must be based upon an invidious and unreasonable distinction or difference with reference to similar kinds of property. People *v.* McCreery, 34 Cal. 432; People *v.* Henderson, 12 Colo. 369, 375, 21 Pac. 144; Singer Mfg. Co. *v.* Wright, 33 Fed. 121. And see *In re* Sugar Notch Borough, 192 Pa. St. 349, 43 Atl. 985.

Classification for purpose of taxation.— Numerous decisions have been made by courts of high authority, sanctioning the reasonable classifications of property for the purposes of taxation, and holding that the same were not in violation of the rule of uniformity. Among such cases are the following:

Colorado.— People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

Missouri.— St. Louis *v.* Freivogel, 95 Mo. 533, 8 S. W. 715.

New Jersey.—State *v.* Richards, 52 N. J. L. 156, 18 Atl. 582; State *v.* Under-Ground Cable Co., (N. J. 1889) 18 Atl. 581; State Bd. of Assessors *v.* Central R. Co., 48 N. J. L. 146, 4 Atl. 578.

Pennsylvania.— Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406, 410; Banger's Appeal, 109 Pa. St. 79.

Wisconsin.— State *v.* Mann, 76 Wis. 469, 477, 45 N. W. 526, 46 N. W. 51.

United States.— Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 123 U. S. 83, 8 S. Ct. 73, 31 L. ed. 94; Gibbons *v.* District of Columbia, 116 U. S. 404, 6 S. Ct. 427, 29 L. ed. 680; Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414.

See also, generally, TAXATION.

81. People *v.* Bellet, 99 Mich. 151, 153, 57 N. W. 1094, 41 Am. St. Rep. 589, 22 L. R. A. 696 [*quoting* Cooley Const. Lim. 390].

"Class legislation is of two kinds, namely, that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious." State *v.* Schlitz Brewing Co., 104 Tenn. 715, 731, 59 S. W. 1033, 78 Am. St. Rep. 941.

82. Jacob L. Dict.

83. Burrill L. Dict.

84. Black L. Dict.

85. Burrill L. Dict.

86. Black L. Dict.

87. Burrill L. Dict.

88. Wharton L. Lex. See Lightfoot *v.* Colgin, 5 Munf. (Va.) 42, 70.

Applied in State *v.* O'Neill, 151 Mo. 67, 84, 52 S. W. 240; Baldwin *v.* Whitcomb, 71 Mo. 651, 659. And see Hoge *v.* Hubb, 94 Mo. 489, 7 S. W. 443; Houts *v.* Sheperd, 79 Mo. 141.

An unusual provision in an instrument, whereby the draftsman of the instrument obtains an advantage over the other party, excites a suspicion of a fraudulent motive. This rule was applied in the case to a provision in the release of a cause of action, stating that the party making the release

CLAUSULA GENERALIS DE RESIDUO NON EA COMPLECTITUR QUÆ NON EJUSDEM SINT GENERIS CUM IIS QUÆ SPECIATIM DICTA FUERANT. A maxim meaning "A general clause of remainder does not embrace those things which are of the same kind with those which had been specially mentioned."[89]

CLAUSULA GENERALIS NON REFERTUR AD EXPRESSA. A maxim meaning "A general clause does not refer to things expressed."[90]

CLAUSULA QUÆ ABROGATIONEM EXCLUDIT AB INITIO NON VALET. A maxim meaning "A clause [in a law] which precludes its abrogation, is void from the beginning."[91]

CLAUSULA VEL DISPOSITIO INUTILIS PER PRESUMPTIONEM REMOTAM, CAUSAM EX POST FACTO NON FULCITUR. A maxim meaning "A useless clause or disposition [one which expresses no more than the law by intendment would have supplied,] is not supported by a remote presumption [or foreign intendment of some purpose, in regard whereof it might be material] or by a cause arising afterwards, [which may induce an operation of those idle words]."[92]

CLAUSUM. In old English law, a CLOSE, *q. v.*, also applied to writs.[93] The term also means closed up, sealed; inclosed as a parcel of land.[94]

CLAUSUM FREGIT. He broke the close. In pleading and practice, technical words formerly used in certain actions of trespass, and still retained in the phrase *quare clausum fregit*.[95] (See, generally, TRESPASS.)

CLAVES. Keys.[96]

CLAVES CURIÆ. The keys of the court. A term applied, in old Scotch law, to the officers of a court, such as the serjeant, clerk, and dempster or doomster.[97]

CLAVES INSULÆ. The keys of the island. A term applied, in the Isle of Man, to twelve persons to whom all doubtful and important cases were referred.[98]

CLAVIA. In old English law, a club or mace; tenure *per serjeantiam claviæ*, by the serjeanty of the club or mace.[99]

CLAVIGERATUS. A treasurer of a church.[1]

CLAWA. A close, or small inclosure.[2]

CLEAN BILL OF HEALTH. See SHIPPING.

CLEAN BILL OF LADING. See SHIPPING.

CLEAN HANDS. See EQUITY.

CLEAR. As an adjective, manifest to the mind; comprehensible; well defined or apprehended.[3] And in its adjective sense the term has also been defined to

agreed to release "deliberately, and of his own free will, and without any undue influence from anyone." Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79, 84.

In a deed of gift it was held a circumstance of grave suspicion that a clause in the conveyance recited that the deed was made "honestly, truly, and *bona fide*, without deceit and cunning," and the instrument was declared fraudulent and void. Twyne's Case, 3 Coke 80*b*, 81, 1 Smith Lead. Cas. 1.

89. Burrill L. Dict.
90. Burrill L. Dict.
91. Burrill L. Dict.
92. Burrill L. Dict.
93. Burrill L. Dict.
94. Black L. Dict.

The word "clausum" imports a possession. Burrill L. Dict.

95. Black L. Dict.
96. Burrill L. Dict.
97. Burrill L. Dict.
98. Burrill L. Dict.
99. Black L. Dict.
1. Black L. Dict.
2. Black L. Dict.

3. Century Dict. And see Ward *v.* Waterman, 85 Cal. 488, 503, 24 Pac. 930 ("clear and convincing"); Neyland *v.* Bendy, 69 Tex. 711, 713, 7 S. W. 497 ("clearest and most positive proof"); American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 249, 56 S. W. 377 (where it is said: "The expression 'clear and satisfactory,' in the sense in which it is here used, we think should be taken to mean that it should be clear in the sense that the evidence upon which reformation is based is not ambiguous, equivocal, or contradictory, and should be perspicuous and pointed to the issue under investigation; and satisfactory in the sense that the source from which it comes is of such a credible nature that the court and jury, as men of ordinary intelligence, discretion, and caution, may repose confidence in it"); Day *v.* Radcliffe, 3 Ch. D. 654, 658 ("clear and unequivocal").

"Clear notice" see Hine *v.* Dodd, 2 Atk. 275, 276.

By "perfectly clear," the authorities say, is meant, not perfectly clear in the view of the particular court or persons composing the

mean free from charges[4] or deductions;[5] free from encumbrances;[6] without diminution or deduction; absolute; net.[7] In a devise of money for the purchase of an annuity, this term means free from taxes.[8] As a verb, to free from obstructions; to free from any impediment or encumbrance.[9] (Clear: Days, see CLEAR DAYS; TIME. Title, see VENDOR AND PURCHASER. Yearly Value, see POOR PERSONS.)

CLEARANCE. See SHIPPING.

CLEARANCE CARD. A letter given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment.[10]

court which is reviewing the matter, but rather in the judgment of reasonable men of sound minds. Wall *v.* Helena St. R. Co., 12 Mont. 44, 61, 29 Pac. 721.

4. Tyrconnel *v.* Ancaster, Ambl. 237, 2 Ves. 500, 27 Eng. Reprint 159, where it is said: "Clear" means free from charges usually allowed between buyer and seller, and by course of the country borne by tenant, but subject to land tax and those borne by landlord.

A covenant to make a "clear deed," when the title is equally well known by the vendor and the vendee, is performed by the delivery of a deed conveying such title as the vendor hath, although it may be but a life estate. Rohr *v.* Kindt, 3 Watts & S. (Pa.) 563, 39 Am. Dec. 53.

"Clear of all assessments and charges" see Peart *v.* Phipps, 4 Yeates (Pa.) 386.

Clear yearly income.— In order to give a citizen of the United States, twenty-one years of age, a settlement under Stat. 1793, c. 34, § 2, clause 4, by having a freehold "of the clear yearly income of three pounds," (ten dollars) "and taking the rents and profits thereof three years successively," it is not necessary that he should have actually taken and received that sum yearly free of all charges. Pelham *v.* Middleborough, 4 Gray (Mass.) 57.

In the phrase "clear yearly value," clear means free from all outgoings like a rent charge, as losses by tenants and management, to which a rent charge is not liable. Tyrconnel *v.* Ancaster, Ambl. 237, 2 Ves. 500, 27 Eng. Reprint 159. Where a statute provided that "any person . . . having an estate of inheritance, or freehold . . . of the clear yearly value of ten dollars, and taking the rents and profits thereof . . . successively," the word "clear" was held to mean that the yearly income from the land be ten dollars at the least, free from all charges upon the estate. Groton *v.* Boxborough, 6 Mass. 50, 52.

5. Marsh *v.* Hammond, 103 Mass. 146, 149 [*citing* Pelham *v.* Middleborough, 4 Gray (Mass.) 57], where a statute provided "that the rents and profits for which the tenant is liable shall be 'the clear annual value of the premises for the time during which he was in possession thereof,' deducting taxes and assessments paid by him and the necessary expenses of cultivating the land or of collecting the rents and profits of the premises. This does not make the tenant liable for the gross rentable value of the premises, but for their annual value free from charges and deductions."

6. Roberts *v.* Bassett, 105 Mass. 409. And see Dresel *v.* Jordan, 104 Mass. 407.

7. Century Dict.

The words "clear profits," when used in a pleading may be equivalent to the expression "ascertained balance." Bean *v.* Gregg, 7 Colo. 499, 501, 4 Pac. 903.

The words "clear proceeds" in Wis. Const. art. 9, § 2 (providing that the clear proceeds of all fines collected shall be set apart as a school fund), mean the net proceeds, after making the deductions provided for by law. State *v.* De Lano, 80 Wis. 259, 49 N. W. 808 [*citing* 3 Bl. Comm. 160]. And see State *v.* Casey, 5 Wis. 318.

8. Black L. Dict.

A devise of an annuity clear for a person means free from taxes. Hodgworth *v.* Crawley, 2 Atk. 376.

The words "clear of all expenses attending the same," may mean either clear of all expenses attending the property tax, or clear of all expenses attending the legacies and annuities. Courtoy *v.* Vincent, 1 Turn. & R. 433, 12 Eng. Ch. 433.

9. Century Dict.

To "clear out" a highway, means nothing more than to clear it out for all the purposes to which it is dedicated. Winter *v.* Peterson, 24 N. J. L. 524, 528, 61 Am. Dec. 678.

Where a contract requires that a party shall "clear, grub and pile the brush, all to be done in good order, on all" of a described piece of land, through which was a ravine, the word "clear" in such a connection applies to brush too small to be grubbed, and not to large trees. Holmes *v.* Stummel, 15 Ill. 412, 413.

10. McDonald *v.* Illinois Cent. R. Co., 187 Ill. 529, 537, 58 N. E. 463.

Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. McDonald *v.* Illinois Cent. R. Co., 187 Ill. 529, 537, 58 N. E. 463. See also New York, etc., R. Co. *v.* Schaffer, 65 Ohio St. 414, 419, 62 N. E. 1036, 87 Am. St. Rep. 628.

The letter is purely personal in its character. Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 406, 51 N. E. 811, 66 Am. St. Rep. 296.

CLEAR DAYS. If a certain number of clear days be given for the doing of any act, the time is to be reckoned exclusively, as well of the first day as the last.[11] (See, generally, TIME.)

CLEARING.[12] The departure of a vessel from port, after complying with the customs and health laws and like local regnlations.[13] In mercantile law, a method of making exchanges and settling balances, adopted among banks and bankers.[14] (See, generally, BANKS AND BANKING; SHIPPING.)

CLEARING HOUSE. An institution organized by the banks of a city, where their messengers may meet daily, adjust balances of accounts, and receive and pay differences.[15] (See, generally, BANKS AND BANKING.)

CLEARING LAND. In the absence of words of limitation, means removing therefrom all the timber of every size, but does not include taking out the stumps.[16]

CLEARLY. In a clear manner; without obscurity; without obstruction; without entanglement or confusion; without uncertainty.[17] (See CLEAR; CLEARNESS.)

CLEARNESS. The state or quality of being CLEAR,[18] *q. v.*

CLEMENTINES. In canon law, the collection of decretals or constitutions of

11. Black L. Dict.

"Clear days" are days exclusive of the day the verdict was rendered and the day upon which judgment should be pronounced. State *v.* Marvin, 12 Iowa 499, 502.

"Three clear working days'" notice, required by a charter-party to be given by the master to the shipper before lay-days commence, does not begin to run until such notice reaches the shipper. The India *v.* Donald, 49 Fed. 76, 2 U. S. App. 83, 1 C. C. A. 174.

12. "'Clearing' means taking away."— Pettitt *v.* Mitchell, C. & M. 424, 428, 41 E. C. L. 233, 6 Jur. 1016, 4 M. & G. 819, 43 E. C. L. 423, 12 L. J. C. P. 9, 5 Scott N. R. 721.

13. Black L. Dict.

14. Black L. Dict.

15. Black L. Dict.

It is nothing more nor less than an agreement among banks to make their daily settlements at a fixed time and place each day (Philler *v.* Patterson, 168 Pa. St. 468, 480, 32 Atl. 26, 47 Am. St. Rep. 896); and to effect at one time and place the daily exchanges between the several banks, and the payment of the balances resulting from such exchanges. At the hour of ten in the morning the exchanges are made, and a later time in the day is appointed for the receipt and payment of balances by the creditor and debtor banks (National Exch. Bank *v.* National Bank of North America, 132 Mass. 147, 149).

16. Seavey *v.* Shurick, 110 Ind. 494, 496, 11 N. E. 597 [*citing* Harper *v.* Pound, 10 Ind. 32].

"Cleared land" distinguished from "unimproved land."— "To return a tract as having so many acres cleared or improved, or so many acres unimproved, describes seated land; 'cleared' and 'unimproved' express opposite conditions in the same tract. The former conveys the idea of cultivation, while the latter the absence of that; a state of nature. When the last term alone is employed in describing the entire tract, it has the same meaning of course as it has when describing the condition of a portion of a tract. It means uncultivated and unseated." Hathaway *v.* Elsbree, 54 Pa. St. 498, 505.

17. Webster Dict. [*quoted* in People *v.* Wreden, 59 Cal. 392, 395]. And see the following cases:

California.— People *v.* Hamilton, 62 Cal. 377, 385, "clearly established."

Colorado.— *In re* Breene, 14 Colo. 401, 406, 24 Pac. 3 (where it is said: "A matter is clearly indicated by the title when it is clearly germane to the subject mentioned therein"); Wall *v.* Garrison, 11 Colo. 515, 518, 19 Pac. 469 ("shall be clearly expressed in its title," etc.).

Connecticut.— Beach *v.* Clark, 51 Conn. 200, 202, "clearly prove."

Iowa.— Hall *v.* Wolff, 61 Iowa 559, 561, 16 N. W. 710 ("clearly and fairly proven"); State *v.* Stewart, 52 Iowa 284, 286, 3 N. W. 99 ("fully and clearly proven").

Massachusetts.— Willcut *v.* Calnan, 98 Mass. 75, 76, "Clearly appears by the will."

Nebraska.— McEvony *v.* Rowland, 43 Nebr. 97, 100, 61 N. W. 124.

Pennsylvania.— Coyle *v.* Com., 100 Pa. St. 573, 580, 45 Am. Rep. 397, "clearly preponderating."

Rhode Island.— Reynolds *v.* Blaisdell, 23 R. I. 16, 19, 49 Atl. 42 [*quoting* 1 Lewin Trusts, 231].

England.— Taylor *v.* Nesfield, 2 C. L. R. 1312, 3 E. & B. 724, 729, 18 Jur. 747, 23 L. J. M. C. 169, 2 Wkly. Rep. 474, 77 E. C. L. 724, "clearly and explicitly stated."

The word "clearly" means without uncertainty.— McEvony *v.* Rowland, 43 Nebr. 97, 100, 61 N. W. 124.

18. Century Dict.

"By 'clearness and certainty' is meant, generally, that there must be sufficient positive facts shown to take the matter without the realm of conjecture and presumption." Marshall *v.* Fleming, 11 Colo. App. 515, 53 Pac. 620, 621 [*citing* 1 Perry Trusts, § 137].

Pope Clement V, made by order of John XXII, his successor, who published it in 1317.[19]

CLEMENT'S INN. An inn of chancery.[20]

CLENGE. In old Scotch law, to clear or acquit of a criminal charge. Literally, to cleanse or clean.[21]

CLEP AND CALL. In old Scotch practice, a solemn form of words prescribed by law, and used in criminal cases, as in pleas of wrong and unlaw.[22]

CLEPTOR. A rogue or thief.[23]

CLER. A CLERK,[24] *q. v.*

CLERGY. In English law, that division of the people which comprehends all persons in holy orders, and in ecclesiastical offices, as distinguished from the laity.[25] The whole body of clergymen or ministers of religion. Also an abbreviation for "benefit of clergy."[26]

CLERGYABLE. In old English law, admitting of clergy, or benefit of clergy. A clergyable felony was one of that class in which clergy was allowable.[27] (See, generally, CRIMINAL LAW.)

CLERGYMAN. A member of the CLERGY,[28] *q. v.* (Clergyman: In General, see RELIGIOUS SOCIETIES. Privileged Communication to, see LIBEL AND SLANDER; WITNESSES.)

CLERICAL. Pertaining to clergymen; or pertaining to the office or labor of a CLERK,[29] *q. v.*; of or pertaining to a clerk, writer or copyist, as "clerical errors."[30] (See CLERICAL ERROR.)

CLERICALE PRIVILEGIUM. In old English law, the clerical privilege; the privilege or benefit of clergy.[31] (See, generally, CRIMINAL LAW.)

CLERICAL ERROR. A mistake in copying;[32] a mistake in copying or transcribing a written instrument;[33] a mistake in copying or writing; the mistake of a clerk in writing;[34] error made by a clerk or by a transcriber.[35] (Clerical Error: In Acknowledgment, see ACKNOWLEDGMENTS. In Appellate Proceeding, see APPEAL AND ERROR. In Judgment, see JUDGMENTS. In Pleading, see PLEADING. In Process, see PROCESS. In Taxation Proceeding, see TAXATION. See also, generally, AMENDMENT.)

CLERICAL TONSURE. The having the head shaven, which was formerly peculiar to clerks, or persons in orders, and which the coifs worn by serjeants at law are supposed to have been introduced to conceal.[36]

19. Black L. Dict.
20. Black L. Dict.
21. Black L. Dict.
22. Black L. Dict.
23. Jacob L. Dict.
24. Burrill L. Dict.
25. Burrill L. Dict. [*citing* 1 Bl. Comm. 376].
26. Black L. Dict.
27. Burrill L. Dict. [*citing* 4 Bl. Comm. 371, 373].
28. Century Dict.
29. Black L. Dict.

The word "clerical" as employed in the statute, to designate a kind of help, has no very definite meaning. Beam *v.* Jennings, 96 N. C. 82, 84, 2 S. E. 245.

By "clerical assistance" is meant, not official assistance, but such as aid in the exercise of official authority by the Secretary of State to himself such as writing letters, making entries of record, copying grants and the like service. Beam *v.* Jennings, 96 N. C. 82, 84, 2 S. E. 245.

30. Century Dict. [*quoted* in Matter of Stewart, 24 N. Y. App. Div. 201, 213, 48 N. Y. Suppl. 957].

The term "clerical service" strictly, means a service that involves writing. The Letter-Carrier Cases, 27 Ct. Cl. 244, 254.

31. Black L. Dict.
32. Wharton L. Dict. [*quoted* in Leonis *v.* Leffingwell, 126 Cal. 369, 372, 58 Pac. 940].
33. Rapalje & L. L. Dict. [*quoted* in Leonis *v.* Leffingwell, 126 Cal. 369, 372, 58 Pac. 940].
34. Black L. Dict. [*quoted* in Leonis *v.* Leffingwell, 126 Cal. 369, 372, 58 Pac. 940]; Standard Dict. [*quoted* in Matter of Stewart, 24 N. Y. App. Div. 201, 213, 48 N. Y. Suppl. 957].
35. Imperial Dict. [*quoted* in Matter of Stewart, 24 N. Y. App. Div. 201, 213, 48 N. Y. Suppl. 957].

"Clerical and other defects" under statute see Duanesburgh *v.* Jenkins, 40 Barb. (N. Y.) 574, 584.

For distinction between a clerical mistake and an erroneous judgment see Villers *v.* Parry, 1 Ld. Raym. 547. "Clerical errors are mentioned [in a statute] to distinguish them from, and exclude errors of substance, of judgment, or of law." Hermance *v.* Ulster County, 71 N. Y. 481, 486.

36. Burrill L. Dict. [*citing* 1 Bl. Comm. 24, note t; 4 Bl. Comm. 367].

CLERICK. An old form of clerk, closely following the Latin CLERICUS,[37] *q. v.*

CLERICO ADMITTENDO. A writ. More usually called ADMITTENDO CLERICO, *q. v.*

CLERICO CAPTO PER STATUTUM MERCATORUM. A writ for the delivery of a clerk out of prison, who was taken and incarcerated upon the breach of a statute merchant.[38]

CLERICO CONVICTO COMMISSO GAOLÆ IN DEFECTU ORDINARII DELIBERANDO. An ancient writ, that lay for the delivery to his ordinary of a clerk convicted of felony, where the ordinary did not challenge him according to the privilege of clerks.[39]

CLERICO INFRA SACROS ORDINES CONSTITUTO, NON ELIGENDO IN OFFICIUM. A writ directed to those who had thrust a bailiwick or other office upon one in holy orders, charging them to release him.[40]

CLERICUS. A CLERK, *q. v.*;[41] a CLERGYMAN,[42] *q. v.* In the Roman law, a minister of religion in the Christian church; an ecclesiastic or priest.[43]

CLERK. In ecclesiastical law, a person in holy orders; a CLERGYMAN, *q. v.*; an individual attached to the ecclesiastical state, and who has the CLERICAL TONSURE,[44] *q. v.* In practice, an officer of a court who keeps its minutes, or records its proceedings, and has the custody of its records and seal;[45] the clerk of the court;[46] one employed in the use of the pen in an office, public or private, for keeping records and accounts, as the clerk of a court.[47] In commercial law, one employed to keep records and accounts; a scribe, penman or accountant;[48] one employed to write orders, letters, despatches, public or private papers, records, and the like; an official scribe, amanuensis, or writer;[49] one employed in an office, public or private, for keeping records or accounts, whose business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs;[50] an assistant, a subordinate;[51] an assistant employed to aid in any business, mercan-

37. Burrill L. Dict.

38. Black L. Dict.

39. Black L. Dict.

40. Black L. Dict.

41. Burrill L. Dict.

42. Burrill L. Dict.

A general term, including bishops, priests, deacons, and others of inferior order. Burrill L. Dict.

43. Burrill L. Dict.

44. Black L. Dict. [*citing* 4 Bl. Comm. 366, 367].

The distinction is made between a lay and ecclesiastical clerk in U. S. *v.* McCormick, 1 Cranch C. C. (U. S.) 593, 26 Fed. Cas. No. 15,663, where it is said "that a clerk, in the technical language of the law, means an ordained minister of religion." In the dissenting opinion, "it has been held that the word 'clericus' shows sufficiently that the party was within holy orders, although the word 'clerk' is not used in the statute. The word 'clerk' then being equivalent to, and descriptive of, clergymen in England where there are various grades of clergy with various privileges and emoluments, some sinecures, others with cures."

45. Burrill L. Dict. [*quoted* in Peterson *v.* State, 45 Wis. 535, 540].

46. Webster Dict. [*quoted* in State *v.* Currie, 3 N. D. 310, 55 N. W. 858].

The word "clerk" added to the name of the officer means that he is the clerk of the court in which the proceeding is pending. Wetmore. *v.* Marsh, 81 Iowa 677, 680, 47 N. W. 1021 [*citing* Ewing *v.* Folsom, 67 Iowa 65, 24 N. W. 595; Finn *v.* Rose, 12 Iowa 565].

47. Union Dime Sav. Inst. *v.* Neppert, 3 N. Y. Suppl. 797, 800, 21 N. Y. St. 723, per Brady, J., in dissenting opinion [*quoting* Webster Dict., and *citing* Bouvier L. Dict.; Jacob L. Dict.; Stormouth Dict.; Worcester Dict.].

48. Webster Dict. [*quoted* in Griffin *v.* Corydon, 19 Ky. L. Rep. 1872, 44 S. W. 629; State *v.* Currie, 3 N. D. 310, 55 N. W. 858; *In re* Scanlan, 97 Fed. 26, 27, 3 Am. Bankr. Rep. 202].

49. Webster Dict. [*quoted* in State *v.* Currie, 3 N. D. 310, 55 N. W. 858].

The term is used, in its popular sense, as denoting one whose duties are clerical, and they may be very various. People *v.* Board of Fire Com'rs, 73 N. Y. 437, 442 [*citing* Bouvier L. Dict.].

50. Bouvier L. Dict. [*quoted* in *In re* Appropriations, 25 Nebr. 662, 669, 41 N. W. 643; People *v.* Board of Fire Com'rs, 73 N. Y. 437, 442 (*quoted* in People *v.* Board of Fire Com'rs, 23 Hun (N. Y.) 317, 320)].

Some clerks, however, have little or no writing to do in their offices, as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and it is also a very ancient signification; being derived, probably, from the office of the *clericus*, who attended, among other duties, to the provisioning the king's household. Bouvier L. dict. [*quoted* in *In re* Appropriations, 25 Nebr. 662, 669, 41 N. W. 643, 645].

51. Worcester Dict. [*quoted* in Demarest *v.* New York, 42 Barb. (N. Y.) 186, 192], construing the charter of the city of New York.

tile or otherwise, subject to the advice and direction of his employer;[52] an assistant in a shop or store who sells goods, keeps accounts;[53] a person in the employ of a merchant, who attends to any part of his business, while the merchant himself superintends the whole; or a person employed in an office to keep accounts or records;[54] one who hires his services to an employer at a fixed price, under a stipulation to do and perform some specific duty or labor, which requires the exercise of skill;[55] one who is employed in a shop or warehouse to keep records or accounts; one who is employed by another as a writer or amanuensis.[56] (Clerk: As Abstracter, see ABSTRACTS OF TITLE. Book Entries by, see EVIDENCE. Embezzlement by, see EMBEZZLEMENT. In Private Employment, see MASTER AND SERVANT; PRINCIPAL AND AGENT. In Public Service, see OFFICERS. Of Attorney, see ATTORNEY AND CLIENT. Of City, see MUNICIPAL CORPORATIONS. Of County, see COUNTIES. Of Court, see CLERKS OF COURTS. Service of Process On, see PROCESS.)

52. Rapalje & L. L. Dict. [*quoted* in Hand *v.* Cole, 88 Tenn. 400, 405, 12 S. W. 922, 7 L. R. A. 96].

The original meaning of the word "clerk" has become so enlarged that in modern usage it may include a salesman in a retail store. It cannot, however, be extended to include one whose business is to travel and secure customers, and whose compensation is by commissions on sales effected by or through him. Such a person is not an assistant in the store or business of his employer. He is not employed to keep accounts, or to assist in the store or elsewhere in the management of the business. Mulholland *v.* Wood, 166 Pa. St. 486, 31 Atl. 248 [*cited* in *In re* Greenewald, 99 Fed. 705, 3 Am. Bankr. Rep. 696]. And see State *v.* Chapman, 35 La. Ann. 75, 76; Weems *v.* Delta Moro Co., 33 La. Ann. 973, 975; Witmer *v.* Miller, 12 Pa. Co. Ct. 363; Hand *v.* Cole, 88 Tenn. 400, 405, 12 S. W. 922, 7 L. R. A. 96.

An employee who attends to sales no farther than merely delivering goods manufactured, and keeping a memorandum of the delivery for a temporary purpose, is not a clerk within the meaning of the rule, requiring proof of the original entries. Sickles *v.* Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521.

A person employed upon commission to travel for orders and to collect debts, is a clerk within the 30 Geo. III, c. 85, although he is employed by many different houses on each journey, and pays his own expenses out of his commission on each journey, and does not live with any of his employers, nor act in any of their counting houses. Rex *v.* Carr, R. & R. 148. See also Reg. *v.* Bowers, L. R. 1 C. C. 41, 44; Rex *v.* Squire, R. & R. 260. 2 Stark. 349, 3 E. C. L. 439.

53. Webster Dict. [*quoted* in Witmer *v.* Miller, 12 Pa. Co. Ct. 363, 364; Hand *v.* Cole, 88 Tenn. 400, 405, 12 S. W. 922, 7 L. R. A. 96].

54. Bouvier L. Dict. [*quoted* in Hand *v.* Cole, 88 Tenn. 400, 405, 12 S. W. 922, 7 L. R. A. 96].

The leading and essential difference between a clerk and a broker is that the former hires his services exclusively to one person, while the latter is employed to make bargains and contracts between other persons in matters of trade, commerce and navigation. Tete *v.* Lanaux, 45 La. Ann. 1343, 1346, 14 So. 241.

55. Tete *v.* Lanaux, 45 La. Ann. 1343, 1346, 14 So. 241.

56. Century Dict. [*quoted* in *In re* Scanlan, 97 Fed. 26, 27, 3 Am. Bankr. Rep. 202].

Sometimes synonymous with "secretary." — Griffin *v.* Corydon, 19 Ky. L. Rep. 1872, 44 S. W. 629; Jones *v.* Lucas County, 11 Ohio Cir. Ct. 136, 5 Ohio Cir. Dec. 152; Webster Dict. [*quoted* in State *v.* Currie, 3 N. D. 310, 55 N. W. 858].

Distinguished from "employee" (People *v.* Goss, etc., Mfg. Co., 99 Ill. 355, 361. But see Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278), "employe" and "workman" (*In re* Greenewald, 99 Fed. 705, 3 Am. Bankr. Rep. 696), "laborer" (Oliver *v.* Macon Hardware Co., 98 Ga. 249, 251, 25 S. E. 403, 58 Am. St. Rep. 300), "'secretary and superintendent' of a corporation" (The Short Cut, 6 Fed. 630), "stenographer" (*In re* Appropriations, 25 Nebr. 662, 663, 41 N. W. 643 [*quoting* Bouvier L. Dict.; Webster Dict.]), and "superintendent of a mine" (Cocking *v.* Ward, (Tenn. Ch. 1898) 48 S. W. 287).

Attorney at law is not a clerk. Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278 [*cited* in American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97].

Merchant appraiser is not a clerk. Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674.

One on force for extinguishing fires is not a clerk. People *v.* Ennis, 7 N. Y. Suppl. 630, 27 N. Y. St. 276.

Police surgeon is not a clerk. People *v.* Board of Police, 75 N. Y. 38, 41.

Traveller paid by commission and employed to get orders and to receive payments was held to be a clerk or servant, although he was at liberty to receive orders for other persons also. Reg. *v.* Tite, 8 Cox C. C. 458, 7 Jur. N. S. 556, L. & C. 29, 30 L. J. M. C. 142, 4 L. T. Rep. N. S. 259, 9 Wkly. Rep. 554 [*cited* in Reg. *v.* Hall, 13 Cox C. C. 49, 31 L. T. Rep. N. S. 883; Reg. *v.* Bailey, 12 Cox C. C. 56, 58, 24 L. T. Rep. N. S. 477; Reg. *v.* Mayle, 11 Cox C. C. 150].

CLERK OF ARRAIGNS. In old English law, an assistant to the CLERK OF ASSISE. His duties are in the crown court on circuit.[57]

CLERK OF ASSISE. In old English law, officers who officiate as associates on the circuits. They record all judicial proceedings done by the judges on the circuit.[58]

CLERK OF ENROLLMENTS. In English law, the former chief officer of the English enrollment office. He now forms part of the staff of the central office.[59]

CLERKSHIP. The period which must be spent by a law-student in the office of a practising attorney before admission to the bar. In old English practice, the art of drawing pleadings and entering them on record in Latin, in the ancient court hand; otherwise called "skill of pleading in actions at the common law."[60] (See, generally, ATTORNEY AND CLIENT.)

57. Black L. Dict.
58. Black L. Dict.
59. Black L. Dict.
60. Black L. Dict.

A clerkship to an attorney imports the office of an assistant to an attorney, an actual occupation in and about the attorney's business and under his control. The service is to be rendered, not solely and mainly by the study of law-books, but chiefly by attending to the work of the attorney under his direction. Matter of Dunn, 43 N. J. L. 359, 39 Am. Rep. 600.

CLERKS OF COURTS

By Edward A. Craighill, Jr.

I. Definition and Nature of Office, 196
II. Creation and Abolition of Office, 196
A. *Creation,* 196
B. *Abolition,* 196
III. Appointment or Election, 197
A. *In General,* 197
B. *Appointment by De Facto Court or Judge,* 198
C. *To Fill Vacancy,* 198
1. *In General,* 198
2. *Existence of Vacancy,* 199
D. *De Facto Clerks,* 200
E. *Title to and Possession of Office,* 200
IV. Eligibility and Qualification, 200
A. *Eligibility,* 200
B. *Qualification,* 201
1. *In General,* 201
2. *Official Bonds,* 201
a. *Necessity,* 201
b. *Form and Sufficiency,* 201
V. Term of Office, 202
A. *In General,* 202
B. *Of One Elected or Appointed to Fill Vacancy,* 202
C. *Holding Over Until Successor Qualifies,* 203
VI. Resignation, Suspension, or Removal, 203
A. *Resignation,* 203
B. *Suspension,* 204
C. *Removal,* 204
1. *Power to Remove,* 204
2. *Grounds of Removal,* 204
a. *In General,* 204
b. *Necessity For Corrupt Motive,* 205
3. *Procedure,* 205
a. *In General,* 205
b. *Review of Proceedings,* 206
VII. Compensation, 206
A. *Dependent Upon Statute,* 206
1. *In General,* 206
2. *Statutes Strictly Construed,* 208
3. *Fees For Particular Services,* 208
4. *Services Rendered Joint Parties or in Consolidated Causes,* 212
5. *Salary,* 213
B. *Who Liable,* 214
1. *The Public,* 214
2. *Private Individuals,* 215
C. *When Payable,* 215
1. *In General,* 215
2. *Right to Demand Prepayment,* 216

D. *Proceedings to Recover Fees or Salary*, 217
1. *Against the Public*, 217
2. *Against Parties For Whom Services Rendered*, 218
E. *Forfeiture of Fees*, 219
F. *Power to Alter Compensation During Term*, 219

VIII. POWERS AND DUTIES, 219

A. *General Principles Applicable*, 219
1. *Obligation to Perform Duties*, 219
2. *Time of Performance*, 220
3. *Place of Performance*, 220
4. *Effect of Interest in Proceeding*, 220
B. *Particular Powers and Duties*, 221
1. *In General*, 221
2. *To Make and Keep Records*, 222
a. *Duty to Record Court Proceedings*, 222
b. *Duty to Preserve Records*, 223
3. *To Certify Records, Etc.*, 223
4. *To Administer Oaths*, 224
5. *To Purchase Supplies*, 224
6. *To Receive and Keep Money*, 224
a. *Official Capacity to Receive Money*, 224
b. *Control and Disbursement of Funds*, 224
c. *Duty to Account*, 226
7. *Judicial Powers*, 227
a. *In the Absence of Statute*, 227
b. *Where Conferred by Statute*, 228
(I) *In General*, 228
(II) *Constitutionality of Statutes*, 228

IX. LIABILITIES, 228

A. *Civil Liability*, 228
1. *For Negligence or Misconduct*, 228
a. *In General*, 228
b. *Instances of Liability*, 229
(I) *In General*, 229
(II) *Approving Insufficient Bond*, 231
c. *Limitations of Liability*, 232
(I) *In General*, 232
(II) *Where No Duty Imposed by Law*, 232
(III) *Where No Injury Results*, 232
(IV) *Where Plaintiff Guilty of Contributory Negligence*, 233
d. *Extent and Duration of Sureties' Liability*, 233
(I) *In General*, 233
(II) *Effect of Giving New Bond*, 234
(III) *Duties Added After Execution of Bond*, 234
(IV) *Acts Done Before Giving of Bond*, 234
(V) *Acts Done After Expiration of Term*, 234
2. *Liability For Funds*, 235
a. *Nature of Liability*, 235
(I) *For Funds Held by Virtue of Office*, 235
(A) *In General*, 235
(B) *When Funds Held in Official Capacity*, 236
(II) *For Funds Held in Private Capacity*, 237
b. *Extent of Liability*, 238
(I) *In General*, 238
(II) *For Interest*, 238

3. *Proceedings to Enforce Liability*, 239
a. *Actions For Damages*, 239
(I) *Who May Sue*, 239
(A) *In General*, 239
(B) *In Whose Name Action Brought on Bond*, 240
(II) *Declaration, Petition, or Complaint*, 240
(III) *Plea or Answer*, 242
(IV) *Evidence*, 242
(V) *Trial*, 243
(VI) *Damages*, 243
(VII) *Judgment*, 243
b. *Summary Proceeding*, 244
c. *Penalties*, 244
B. *Criminal Liability*, 245
1. *In General*, 245
2. *Indictment*, 246

X. DEPUTY CLERKS, 247
A. *Appointment*, 247
1. *Power to Appoint*, 247
2. *Sufficiency of Appointment*, 247
a. *In General*, 247
b. *De Facto Deputies*, 247
B. *Eligibility and Qualification*, 248
1. *Eligibility*, 248
2. *Qualification*, 248
C. *Compensation*, 248
D. *Powers and Duties*, 248
1. *Ministerial Acts*, 248
2. *Judicial Functions*, 250
3. *In Whose Name Deputy Should Act*, 250
E. *Liabilities*, 251

CROSS-REFERENCES

For Matters Relating to:
Acknowledgment Before Clerk, see ACKNOWLEDGMENTS.
Admission to Bail by Clerk, see BAIL.
Affidavits Taken by Clerk, see AFFIDAVITS,
Allowance of Appeal by Clerk, see APPEAL AND ERROR.
Approval of Bond by Clerk, see APPEAL AND ERROR; ATTACHMENT; and the like.
Clerk as:
Abstracter, see ABSTRACTS OF TITLE.
Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Obligee or Surety on Bond, see APPEAL AND ERROR.
Probate Judge, see COURTS; EXECUTORS AND ADMINISTRATORS.
Register of Deeds, see REGISTERS OF DEEDS.
Delivery of Award to Clerk, see ARBITRATION AND AWARD.
Deposit With Clerk, see DEPOSITS IN COURT.
Duty of Clerk on Removal of Cause, see REMOVAL OF CAUSES; VENUE.
Entry of Appearance by Clerk, see APPEARANCES.
Entry of Judgment by Clerk, see JUDGMENTS.
Extortion, see EXTORTION.
Improper Issuance of License by Clerk, see MARRIAGE.
Issuance, by Clerk, of:
Attachment, see ATTACHMENT.
Certiorari, see CERTIORARI.
Execution, see EXECUTIONS.

For Matters Relating to — (*continued*)
Issuance, by Clerk, of — (*continued*)
Writ of Assistance, see ASSISTANCE, WRIT OF.
Writs Generally, see CRIMINAL LAW; PROCESS.
Payment to Clerk, see DEPOSITS IN COURT; JUDGMENT.
Taxation of Costs by Clerk, see ADMIRALTY; COSTS.

I. DEFINITION AND NATURE OF OFFICE.

A clerk of court is an officer of a court of justice who has charge of the clerical part of its business, who keeps its records and seal, issues process, enters judgments and orders, gives certified copies from the records, etc.[1] The office of clerk of court, although sometimes endowed with certain judicial attributes,[2] is essentially a ministerial office,[3] and it is in no way necessary to the existence of a court.[4]

II. CREATION AND ABOLITION OF OFFICE.

A. Creation. Authority to a legislature to establish a court necessarily includes the power to provide for a clerk and to define his duties;[5] and the fact that the clerk of another court has been for several years allowed to perform the duties and receive the emoluments incident to the clerkship of a newly established court will not deprive the legislature of power to establish a separate office of clerk of the latter court.[6] Matters regarding the creation of the office usually depend upon constitutional and statutory provisions.[7]

B. Abolition. Where a court is abolished the office of clerk falls with it.[8]

1. Black L. Dict.
2. See *infra*, VIII, B, 7.
3. *Georgia.*— Luther *v.* Banks, 111 Ga. 374, 36 S. E. 826.
Indiana.— Gregory *v.* State, 94 Ind. 384, 48 Am. Rep. 162.
Kansas.— *In re* Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327.
Minnesota.— Nelson Lumber Co. *v.* McKinnon, 61 Minn. 219, 63 N. W. 630.
Missouri.— State *v.* Bowen, 41 Mo. 217.
Origin of term.— Blackstone gives the origin of the term as follows: "The clergy, in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus* (No clergyman who is not a lawyer also), is the character given of them soon after the conquest by William of Malmesbury. The judges, therefore, were usually created out of the sacred order, as was likewise the case among the Normans; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated clerks to this day." 1 Bl. Comm. 17.
4. Mealing *v.* Pace, 14 Ga. 596.
5. *Ex p.* Kiburg, 10 Mo. App. 442.
6. White *v.* Murray, 126 N. C. 153, 35 S. E. 256.
As to title to and possession of office generally see *infra*, III, E.
7. **For constructions of particular statutes** see the following cases: People *v.* Durick, 20 Cal. 94 (under the California act of 1861 county recorder entitled to office of probate clerk); State *v.* Gilbert, 51 Ga. 224 (Georgia act of Feb. 5, 1873, operated to repeal section 7 of the Georgia act of Aug. 24, 1872); Edwards *v.* Dupuy, 21 La. Ann. 694; Hawley *v.* Barlow, 21 La. Ann. 563 (both holding the Louisiana act of 1869, No. 110, to be constitutional); French *v.* Com., 78 Pa. St. 339 (construing Pa. Const. (1874), art. 5, § 22).
As dependent on population of county.— Where, by statute, the existence of the office depends upon the population of the county, the fact that the county attains the required population does not authorize an immediate election. The office is to be filled at the next regular election. State *v.* Long, 17 Nebr. 502, 23 N. W. 337; State *v.* Whittemore, 11 Nebr. 175, 9 N. W. 93; State *v.* Stauffer, 11 Nebr. 173, 8 N. W. 432; State *v.* Steuffer, 10 Nebr. 506, 6 N. W. 604; Watkins *v.* Venable, 99 Va. 440, 3 Va. Supreme Ct. Rep. 329, 39 S. E. 147. But a county whose population has reached the required number more than thirty days before a general election can elect a clerk, notwithstanding it was less when the last census was taken. State *v.* Long, 17 Nebr. 502, 23 N. W. 337.
8. French *v.* Com., 78 Pa. St. 339.
As to removal from office see *infra*, VI, C.
Nevada — Clerk of supreme court.— Nev. Const. art. 4, § 32, as amended Jan. 17, 1889, did not abolish the office of clerk of the supreme court. State *v.* La Grave, 23 Nev. 373, 48 Pac. 674.
South Dakota — District court clerk.—The office of clerk of the district court being abolished by the adoption of the state constitution, and that of clerk of the circuit court being newly created thereby, the incumbent of the former office is not entitled to hold

And so, where by statute the jurisdiction of one court is transferred to another the clerk of the former ceases to have any official powers,[9] unless the constitution withholds from the legislature the power of depriving the clerk of his office.[10]

III. APPOINTMENT OR ELECTION.

A. In General. Upon particular constitutional and statutory provisions depend most questions relating to the election[11] or appointment of clerks of court.[12] In the absence of anything to the contrary in the constitution the subject may properly be regulated by the legislature,[13] but where the constitution

either that or the latter, under S. D. Const. art. 26, § 4, providing that certain officers shall continue to hold their offices until superseded under the constitution. Driscoll *v.* Jones, 1 S. D. 8, 44 N. W. 726.

9. Boyer *v.* Fowler, 1 Wash. Terr. 101.

Successor of superseded clerk.— The clerk of the court to which the jurisdiction is transferred usually succeeds to the powers, duties, emoluments, and liabilities of the clerk of the superseded court. Adams *v.* Cutright, 53 Ill. 361; Hague *v.* Porter, 45 Ill. 318; People *v.* Thurber, 13 Ill. 554.

10. Wilson *v.* Jordan, 124 N. C. 683, 33 S. E. 139, where it was held to be beyond the power of the legislature to deprive a clerk of his office, where the office itself continued to exist.

Constitution specifying grounds of removal. — Under a constitution providing that "each court shall appoint its own clerk, who shall hold his office during good behavior, but shall be removable therefrom for neglect of duty, or misdemeanor in office, by the supreme court"; and providing no other grounds of removal, an act of the legislature abolishing the office of clerk of the probate court, and directing the judge of that court to perform the duties required of the clerk, was held to be unconstitutional and void. Runnels *v.* State, Walk. (Miss.) 146.

The Pennsylvania act of Feb. 3, 1843, was held not to violate Pa. Const. art. 6, § 3. Com. *v.* Kline, 1 Pa. L. J. 336, 2 Pa. L. J. Rep. 323.

11. **For constructions of constitutional and statutory provisions** see the following cases:

California.— People *v.* Haskell, 5 Cal. 357, time of election for clerk of the superior court under the amended charter of San Francisco.

Georgia.— Bonner *v.* State, 7 Ga. 473, time of electing clerk of the court of ordinary under the Georgia act of 1819.

Massachusetts.—Com. *v.* Mather, 121 Mass. 65, holding that the amendment to article 19 of the Massachusetts constitution did not apply to district court clerks.

Missouri.— State *v.* Matthews, 94 Mo. 117, 7 S. W. 17, the Missouri act of April 28, 1878, superseded section 3 of the scheme and charter of 1876, separating the city and county of St. Louis.

Pennsylvania.— *In re* Barber, 86 Pa. St. 392, construing constitution and statutes in regard to contested elections.

South Carolina.— State *v.* Sims, 18 S. C. 460, as to time of holding election.

See 10 Cent. Dig. tit. "Clerks of Courts," § 7.

12. **For constructions of constitutional and statutory provisions** see the following cases: Com. *v.* Gilland, 9 Gray (Mass.) 3 (construing Mass. Stat. (1838), c. 147, § 2); People *v.* Flynn, 62 N. Y. 375 (appointment of clerk and assistant clerk of district court under N. Y. Laws (1872), c. 438, § 1); *In re* Clerkship, 90 Fed. 248; *In re* Mason, 85 Fed. 145 (both construing the acts of congress dividing the district of Iowa and providing for officers for the new district); Parks *v.* Davis, 10 U. C. C. P. 229 (power of county court judge to appoint division court clerk).

Under the Greater New York charter a justice of the peace who was continued in office had no power to appoint a clerk. Stuber *v.* Coler, 164 N. Y. 22, 58 N. E. 17 [*reversing* 49 N. Y. App. Div. 88, 63 N. Y. Suppl. 723].

Where the court is empowered by the constitution to make the appointment the act is deemed that of the court and not that of the individuals comprising the court; and after the appointment has been made the power cannot be resumed or again exercised until a vacancy shall regularly occur (People *v.* Mobley, 2 Ill. 215); and such appointment is not affected by any subsequent change in the number of persons composing that court (*In re* Supreme Ct. Clerkship, 40 Tex. 1).

Appointment in open court — Right to rescind.—A clerk of the court of common pleas must be appointed by the act of the court, in open court, and the appointment must be entered on the minutes; but an order appointing a clerk may be rescinded before his bond is accepted, the oath administered, etc. State *v.* Este, 7 Ohio 134.

Tennessee — Time of appointment.— Under the Tennessee constitution of 1870 providing that "officers appointed by the courts shall be filled by appointment, to be made, and to take effect, during the first term of the court held by judges elected under this Constitution," it was held that where the chancellor failed to appoint a clerk at the first term he could make a valid appointment at a succeeding term. Matter of Baldwin, 7 Heisk. (Tenn.) 414.

13. The Mississippi act of April 19, 1873, conferring on the governor power to appoint a chancery clerk for a newly created county to continue in office until the next general

itself provides a method, that governs, and a statute attempting to provide a different method is void.[14]

B. Appointment by De Facto Court or Judge. Since the acts of a *de facto* officer are valid, it follows that the appointment of a clerk by a court or judge *de facto*, acting under color of office, is valid and constitutes such clerk an officer *de jure*.[15]

C. To Fill Vacancy — 1. In General. A vacancy in the office of clerk of court must be filled in the manner prescribed by law.[16] Sometimes it is required to be filled by election[17] and sometimes by appointment;[18] and no matter what method be prescribed the court or judge usually has power to appoint a clerk *pro tem.* to perform the duties of the office until the vacancy can be regularly filled.[19]

election, was constitutional and valid. Brady *v.* West, 50 Miss. 68.

Missouri Rev. Stat. § 1179, authorizing a probate judge to appoint a clerk, is not unconstitutional. Young *v.* Boardman, 97 Mo. 181, 10 S. W. 48.

Manner of appointment left to legislature. — A constitutional provision that "each court shall appoint its own clerk, who may hold his office during good behavior," not particularizing the manner in which the appointment shall be made, leaves it in the power of the legislature to prescribe the method of appointment. State *v.* Turk, Mart. & Y. (Tenn.) 286.

14. Devoy *v.* New York, 36 N. Y. 449, 2 Transcr. App. (N. Y.) 377 [*affirming* 39 Barb. (N. Y.) 169, 35 Barb. (N. Y.) 264, 10 Bosw. (N. Y.) 366]; People *v.* Warner, 7 Hill (N. Y.) 81 [*affirmed* in 2 Den. (N. Y.) 272, 43 Am. Dec. 740].

Where election by the people is required by the constitution the power to appoint such officers cannot be conferred by the legislature on the governor. Opinion of Justices, 117 Mass. 603. See also Reister *v.* Hemphill, 2 S. C. 325.

15. People *v.* Staton, 73 N. C. 546, 21 Am. Rep. 479; State *v.* Alling, 12 Ohio 16; Turney *v.* Dibrell, 3 Baxt. (Tenn.) 235. *Contra*, People *v.* Anthony, 6 Hun (N. Y.) 142.

The validity of the appointment cannot be questioned collaterally.—Culver *v.* Eggers, 63 N. C. 630.

What not a de facto government.— The "Provisional Government of Kentucky" was not a *de facto* government, and the official acts of a person appointed thereby county court clerk are not valid for any purpose. Simpson *v.* Loving, 3 Bush (Ky.) 458, 96 Am. Dec. 252.

16. Brady *v.* Howe, 50 Miss. 607; Reister *v.* Hemphill, 2 S. C. 325.

17. Loran *v.* Webb, 82 Ky. 246, 6 Ky. L. Rep. 233; Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987; Reister *v.* Hemphill, 2 S. C. 325.

Power of legislature to provide for election.— Where under the state constitution a clerk must be elected by the voters of the county, if the constitution is silent as to elections to fill vacancies the legislature may provide by law for such election. Reister *v.* Hemphill, 2 S. C. 325.

18. Leeman *v.* Hinton, 1 Duv. (Ky.) 37 (appointment by county court); State *v.* Campbell, 8 Lea (Tenn.) 74 (by county justices); Carolan *v.* McDonald, 15 Tex. 327 (by district judge).

Nebraska — Vacancy caused by removal.— Under Comp. Stat. c. 26, providing that a vacancy in a civil office arises on the "removal" from office of an incumbent before expiration of his term (section 101), and vacancies in county and precinct offices shall be filled by the county board (section 103), a vacancy in the office of clerk of the district court caused by a removal must be filled by the county board. The appointment is not governed by c. 18, art. 2, § 9, allowing the court to supply by appointment during the term the place of an officer of the court who is "suspended." The word "suspended" is not used synonymously with "removed." State *v.* Meeker, 19 Nebr. 444, 27 N. W. 427.

An executive act — No appeal lies from appointment.— The appointment by a court of a clerk to fill a vacancy is an executive and not a judicial act; and neither writ of error nor appeal lies to review the order of appointment. Some judicial proceeding (such as a quo warranto or a mandamus) must first be taken to determine the right to the office, the order of appointment itself not being a judgment or decree. Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401.

Validity of prospective appointment.—A prospective appointment to fill a vacancy sure to occur in the office of clerk made by the person or body empowered to fill such vacancy is a valid appointment vesting the title to the office in the appointee, in the absence of any law declaring to the contrary. State *v.* O'Leary, 64 Minn. 207, 66 N. W. 264.

Necessity for commission from governor.— It is not requisite that the person appointed by the judge to fill a vacancy should be commissioned by the governor. State *v.* Morgan, 12 La. Ann. 712.

19. Brower *v.* O'Brien, 2 Ind. 423; Stevens *v.* Wyatt, 16 B. Mon. (Ky.) 542; Brady *v.* Howe, 50 Miss. 607; State *v.* Trull, 2 Treadw. (S. C.) 766, 3 Brev. (S. C.) 557. See also Reister *v.* Hemphill, 2 S. C. 325.

It was within the power of the legislature to authorize the judge of the criminal court of Madison county to fill vacancies existing in the clerkships of the court until an election by the people at the next general election. White *v.* Murray, 126 N. C. 153, 35 S. E. 256.

2. Existence of Vacancy. In order to justify a new election or appointment it is of course essential that a vacancy exist,[20] whether arising from the clerk's resignation[21] or removal,[22] from his accepting an incompatible office,[23] from his failure to give the required bond,[24] or from other cause.[25]

Deputy acting as clerk.— Under a statute providing that on a vacancy in the office of clerk, the deputy should serve until a new clerk should be elected or appointed, the deputy's authority terminated on the appointment by the governor of another person to the office. People *v.* Snedeker, 14 N. Y. 52; People *v.* Fisher, 24 Wend. (N. Y.) 215.

During absence or sickness of clerk.— In Mississippi the judge may appoint a clerk *pro tem.* in case of the sickness or unavoidable absence of the clerk, the latter being entitled to resume his office on his return. Lowry *v.* Tullis, 32 Miss. 147. But the fact that the clerk is under indictment for forgery will not justify the appointment of a clerk *pro tem.* *Ex p.* Lehman, 60 Miss. 967. For an appointment *pro tem.* held sufficient under the Mississippi laws see Cocke *v.* Halsey, 16 Pet. (U. S.) 71, 10 L. ed. 891.

Duration of powers.— Under W. Va. Acts (1870), c. 57, authorizing the judge of the municipal court of Wheeling to appoint a clerk *pro tem.* "when necessary," the power of a clerk *pro tem.* necessarily ceases when the clerk resumes his duty; and without a reappointment the clerk *pro tem.* cannot act as such in the absence of the clerk. Taney *v.* Woodmansee, 23 W. Va. 709.

Form of certificate.— Where a vacancy occurs in the office of the clerk of the circuit court the form of the certificate given to one appointed clerk *pro tem.* is immaterial, as it can confer no rights which the court is not authorized to confer. Brower *v.* O'Brien, 2 Ind. 423.

20. Effect of failure to exercise functions of office.— In Connecticut an appointment to the office of probate clerk once made continues the appointee in office until he resigns or is removed or superseded by the appointment of another person to the same place; and so where it appeared that A had been once appointed clerk of a court of probate, that he was still living within the same probate district in which he had been so appointed, that he had never formally resigned and had never been formally removed from office, and that no person had been appointed in his place, it was held that although for the period of six years last past he had never acted as clerk or claimed to be such, he was still clerk of that court. Dibble *v.* Morris, 26 Conn. 416.

21. As to resignation see *infra,* VI, A.

Resignation pending charges.— In Louisiana where, pending charges against him and after the appointment of a clerk *pro tem.* the clerk resigns, a vacancy exists. Ruddock *v.* Mallory, 14 La. Ann. 314. But the contrary has been held in Missouri. State *v.* Blakemore, 104 Mo. 340, 15 S. W. 960 [*reversing* 40 Mo. App. 406].

22. As to removal see *infra,* VI, C.

Pending an appeal from an order of removal no vacancy exists. *Ex p.* Thatcher, 7 Ill. 167.

23. As to holding incompatible offices generally see Officers.

Becoming clerk of new county.— On the division of a county of which A was clerk, A was appointed clerk of the new county and defendant of the original. Afterward the act of division of the county was declared void, and A, assuming that he had remained clerk of the original county, resigned his office of clerk and plaintiff was appointed to fill the vacancy. It was held that A, having first assumed the office of clerk of the new county, vacated the office as to the original county, so that defendant's appointment to fill the vacancy was valid and plaintiff's appointment void. Beazely *v.* Stinson, Dall. (Tex.) 537.

Federal courts — Offices not incompatible. — The clerk of a circuit court does not vacate his office, within the meaning of act June 20, 1874, § 2 (18 Stat. at L. 109), by merely accepting the position of clerk of the circuit court of appeals for the same circuit, and may hold both offices. U. S. *v.* Harsha, 56 Fed. 953, 16 U. S. App. 13, 6 C. C. A. 178.

24. Does not per se vacate office.— In the absence of a statutory provision to that effect the failure of a clerk to qualify by giving the required bond does not *per se* operate to vacate the office. State *v.* Peck, 30 La. Ann. 280; Buckman *v.* Beaufort, 80 N. C. 121; Hunter *v.* Routlege, 51 N. C. 216. But see State *v.* Person County Justices, 18 N. C. 406; Williams *v.* Somers, 18 N. C. 61, as to acts constituting an abandonment of the office.

Maryland — Unconstitutional statute.— Md. Acts (1856), c. 286, § 5, providing that a failure to give the bond vacated the office, was void because in conflict with Md. Const. art. 4, § 14, specifying the grounds on which a clerk might be removed. Dowling *v.* Smith, 9 Md. 242.

25. What not a forfeiture.—An agreement made by a clerk with his deputy stipulating that the deputy shall perform the duties of the office, turning over to the clerk a proportion of the official fees or a fixed monthly sum, is not such a transaction as will work a forfeiture of the clerk's right to office. State *v.* Peck, 30 La. Ann. 280.

Admission of territory to statehood.—S. D. Const. art. 5, § 32, having created the office of clerk of the circuit court, and having provided generally for the election of such officer, with other county officers, at the general election in November, 1890, and the state having been admitted on the 2d day of November, 1889, there was a vacancy in such office from the time of the admission of the state, which, under S. D. Const. art. 5, § 37,

D. De Facto Clerks. A person who, although not the lawful clerk, yet exercises the functions of the office under color of right is an officer *de facto*.[26] The acts of a clerk *de facto* are valid as to the public and third persons[27] and cannot be questioned collaterally.[28]

E. Title to and Possession of Office. Pending a contest for the office a *prima facie* title gives a right of possession.[29] The question of title must be determined by some appropriate proceeding,[30] the usual one being quo warranto.[31]

IV. ELIGIBILITY AND QUALIFICATION.

A. Eligibility. The question of eligibility to the office of clerk of court depends upon the same principles that apply to other public officers.[32] In Missouri it has been held that women are eligible to the office.[33]

the board of county commissioners could legally fill by appointment. Driscoll *v.* Jones, 1 S. D. 8, 44 N. W. 726.

Statute passed after issuance of commission.— The offices of clerks whose commissions were issued under Ga. Const. art. 3, § 10, previous to its amendment by the Georgia act of Dec. 16, 1808, were not vacated by the amending act. *Ex p.* Camden County, T. U. P. Charlt. (Ga.) 191.

26. As to de facto officers generally see OFFICERS.

Illustrations.— One is a *de facto* clerk who acts until his successor has been installed, notwithstanding he has resigned (Cook *v.* State, 91 Ala. 53, 8 So. 686) or his term has expired (Threadgill *v.* Carolina Cent. R. Co., 73 N. C. 178; Galbraith *v.* McFarland, 3 Coldw. (Tenn.) 267, 91 Am. Dec. 281); who was appointed by the court under the erroneous belief that the office was vacant (Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401); who fails to give a new bond or take the oath of office as required by statute (Douglas *v.* Neil, 7 Heisk. (Tenn.) 437); who claims the office pending a contest which is afterward decided against him (Anderson *v.* Likens, 20 Ky. L. Rep. 471, 46 S. W. 512; Harbaugh *v.* Winsor, 38 Mo. 327); who holds another and incompatible office (Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26); or who was elected and qualified under the Confederate government (Ward *v.* State, 2 Coldw. (Tenn.) 605, 91 Am. Dec, 270).

27. *Alabama.*— Cook *v.* State, 91 Ala. 53, 8 So. 686; Joseph *v.* Cawthorn, 74 Ala. 411.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

Kentucky.— Anderson *v.* Likens, 20 Ky. L. Rep. 471, 46 S. W. 512; Collins *v.* Brown, 12 Ky. L. Rep. 469.

New York.— People *v.* Anthony, 6 Hun (N. Y.) 142.

Tennessee.— Ward *v.* State, 2 Coldw. (Tenn.) 605, 91 Am. Dec. 270.

United States.— Cocke *v.* Halsey, 16 Pet. (U. S.) 71, 10 L. ed. 891.

See 10 Cent. Dig. tit. "Clerks of Courts," § 11.

28. Cook *v.* State, 91 Ala. 53, 8 So. 686; Johnson *v.* State, 14 Tex. App. 306.

29. Shannon *v.* Baker, 33 Ind. 390; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116.

30. As to methods of recovering possession of public offices see, generally, OFFICERS.

Motion to court.— Where a person claims to have been elected to the office of clerk of a court, and it is then in possession of another party claiming it, the appropriate mode of endeavoring to obtain possession of the office is by motion to the court whose clerk he claims to be. Newcum *v.* Kirtley, 13 B. Mon. (Ky.) 515.

Mandamus is the proper remedy to restore a clerk who has been ousted from his office by the illegal appointment of another person. Street *v.* Gallatin County, 1 Ill. 50; Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401; Ragsdale *v.* State, 2 Swan (Tenn.) 415; Sevier *v.* Washington County Justices, Peck (Tenn.) 334; Hardin County Ct. *v.* Hardin, Peck (Tenn.) 291; Dew *v.* Judges Sweet Springs Dist. Ct., 3 Hen. & M. (Va.) 1, 3 Am. Dec. 639. See, generally, MANDAMUS.

Injunction against interference.— Where the election of the clerk of the circuit court was contested, and the contestant declared elected, and assumed the functions of the office without judgment of ouster or proceedings by quo warranto, the issuance of an injunction restraining contestant from interfering with the possession of contestee was not a determination of the title to the office, but was within the province of equity. Rhodes *v.* Driver, 69 Ark. 606, 65 S. W. 106, 86 Am. St. Rep. 215.

31. Rhodes *v.* Driver, 69 Ark. 606, 65 S. W. 106, 86 Am. St. Rep. 215; Swain *v.* McRae, 80 N. C. 111; *Ex p.* Daughtry, 28 N. C. 155. But see Com. *v.* Green, 58 Pa. St. 226, where it was held that the title of a clerk under an act creating a new court could not be tried in a quo warranto proceeding against the judge.

32. See, generally, OFFICERS.

Indiana — Cannot hold more than eight years in twelve.— Under Ind. Const. art. 6, § 2, no person is eligible to hold the office of clerk more than eight years in any period of twelve years. Carson *v.* McPhetridge, 15 Ind. 327. And see Gosman *v.* State, 106 Ind. 203, 6 N. E. 349.

33. Crow *v.* Hostetter, 137 Mo. 636, 39 S. W. 270, 59 Am. St. Rep. 515, 38 L. R. A. 208.

B. Qualification — 1. In General. Matters relating to the qualification and induction into office of clerks of courts depend for the most part upon particular statutory provisions.[34]

2. Official Bonds — a. Necessity. It is usually provided by statute that before entering upon the discharge of his duties the clerk shall give an official bond.[35]

b. Form and Sufficiency. The statute generally prescribes the form of the bond which is required to be given before entering upon the duties of his office,[36]

34. Offer to qualify — Right of court to refuse.— Where a person claiming to have been elected clerk of the court of appeals presents the certificate of the board of examiners showing that he received a majority of the votes cast at the election and offers to execute his official bond, with good and sufficient sureties, and to take the oath prescribed by law, the court of appeals has no legal authority to refuse to permit him to do so, on the ground that a question as to his eligibility is pending before another tribunal. Matter of Jones, 6 Ky. L. Rep. 638.

Commission from governor.— Where the statute requiring a commission to be issued by the governor to the person elected to the office of clerk of a court had been repealed before the motion to qualify was made, it was held not to be necessary to produce such a commission. Newcum *v.* Kirtley, 13 B. Mon. (Ky.) 515.

Necessity to qualify on reëlection.— A clerk of the district court who was reëlected in December, 1879, took an oath as clerk under such election Jan. 21, 1880, and on March 6 following took an oath as jury commissioner. It was held that such officer was qualified to act as clerk and jury commissioner without again taking an oath, or being inducted into office in April, 1880. State *v.* Fahey, 35 La. Ann. 9.

35. Parks *v.* Davis, 10 U. C. C. P. 229.

As to liabilities on the bond see *infra*, IX, A.

Failure to give bond not an abandonment. — The mere failure of a clerk to qualify by giving bond within thirty days from the date of his commission, in accordance with the statute, cannot be construed into an abandonment of the office, where the statute does not declare that such failure shall have that effect. State *v.* Peck, 30 La. Ann. 280.

When additional bond not required.— The provision of the act of 1869 making county clerks *ex officio* clerks of the district courts does not require that they should give other and additional bonds for the discharge of their duties as clerks of such courts. People *v.* McCallum, 1 Nebr. 182.

Where appointed in vacation.— When the judges of the general court appoint a clerk of the district court, in vacation, he has the whole of the next term of the district court to give the bond, etc., required by law. Dew *v.* Judges Sweet Springs Dist. Ct., 3 Hen. & M. (Va.) 1, 3 Am. Dec. 639.

Death of surety — New bond filed without order of court.— Under Mills' Anno. Stat. Colo. § 3299, requiring the district court to examine into the sufficiency of the official bond of the clerk, and if any surety has died or become insolvent, etc., to order a new bond unless the pecuniary ability of the other sureties is sufficient, where a surety on a clerk's official bond dies, and the clerk, without any order of record by the district court, files a new bond, such bond is void. Sullivan *v.* People, (Colo. App. 1901) 64 Pac. 1049.

North Carolina — Approval of county commissioners.—A clerk of court is not deprived of his right to the office by the fact that his bond was not approved by the board of county commissioners at their next meeting after his election, he having offered a bond which was refused for insufficiency of the sureties, and being told to prepare and offer his bond at the next general session of the commissioners, which he did. Buckman *v.* Beaufort, 80 N. C. 121.

36. For sufficient bonds see Bagby *v.* McRae, 2 Ala. 708; Cooper *v.* People, 28 Colo. 87, 63 Pac. 314; People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523.

A mere irregularity, such as the fact that the bond of a clerk of the district court runs to "the people" of the county, does not render it void. Toncray *v.* Dodge County, 33 Nebr. 802, 51 N. W. 235. See also Cooper *v.* People, 28 Colo. 87, 63 Pac. 314, where the word "punctually" was omitted and the bond ran to the state instead of to the people of the state.

The omission of the word "court" after the word "circuit," in a condition in the bond of the clerk of such court, does not affect the validity of such bond or make it other than the statutory bond. People *v.* Barnwell, 41 Ill. App. 617.

Surplusage in condition.— The general condition of a bond that the clerk will faithfully perform the duties of his office covers the duty to account for money received by virtue of office; but the validity of the bond is not affected by the inclusion of a special condition for such accounting. U. S. *v.* Ambrose, 2 Fed. 552.

A failure to acknowledge the bond will not release the surety from liability if he in fact has executed it. Buford *v.* Cox, 3 Lea (Tenn.) 518.

Bond to people of the state.—An objection that a bond running to the people of the state is void because the county treasurer is the only person authorized by law to receive money collected by the clerk, and is consequently the only one injured by a failure to pay over the money, and should have been named as an obligee, is without merit. Cooper *v.* People, 28 Colo. 87, 63 Pac. 314.

but a bond valid as a common-law obligation is sufficient, although not in the statutory form.[37]

V. TERM OF OFFICE.

A. In General. The terms of clerks of courts, their commencement and duration, and other matters relating thereto are generally controlled by constitutional or statutory provisions.[38] Where the constitution fixes no limit to the duration of the term the appointee holds *ad libitum* until the legislature prescribes a limit to his tenure.[39] Where the term is fixed by constitutional provision the legislature has no power to alter it.[40]

B. Of One Elected or Appointed to Fill Vacancy. In the absence of any constitutional provision on the subject the legislature may prescribe the term of one appointed or elected to fill a vacancy in the office of clerk of court.[41] Under some statutes such person is entitled to serve a full term,[42]

Sufficient execution.—After the sureties on a clerk's bond had moved to be discharged the clerk procured another person to sign as a substitute surety on condition that other persons named should also sign. The new surety, on acknowledging the substitute bond before the chancellor, told him that others would sign, but did not state that his signature was void unless they should so sign. The bond being approved and the former sureties released, it was held that the substitute surety was liable as surety for all defalcations of the clerk after the date of his acknowledgment, although the others did not sign. Bramley *v.* Wilds, 9 Lea (Tenn.) 674.

37. State *v.* O'Gorman, 75 Mo. 370; Cumberland Justices *v.* Armstrong, 14 N. C. 252.

Where obligor one of the obligees.—A clerk's bond given to the justices of the county, he being one of them, and they not a corporate body, will not support an action, being wholly void. "If an individual give his bond to another individual and himself, it is void." Cumberland Justices *v.* Armstrong, 14 N. C. 252.

Condition less onerous than statutory requirement.— The fact that the condition expressed in the bond is less onerous than that required by statute will not relieve the sureties from liability for a breach of the condition actually expressed. Cooper *v.* People, 28 Colo. 87, 63 Pac. 314.

38. For constructions of various provisions see the following cases:

Louisiana.— State *v.* New Orleans, 52 La. Ann. 1639, 28 So. 163.

Mississippi.— Hughes *v.* Buckingham, 5 Sm. & M. (Miss.) 632.

Missouri.— State *v.* Jenkins, 43 Mo. 261.

New York.— People *v.* Leask, 67 N. Y. 521 [*affirming* 6 Daly (N. Y.) 517].

North Carolina.— Clarke *v.* Carpenter, 81 N. C. 309.

Ohio.— State *v.* Bader, 58 Ohio St. 384, 50 N. E. 813.

South Carolina.— Macoy *v.* Curtis, 14 S. C. 367; Wright *v.* Charles, 4 S. C. 178.

Texas.— Roman *v.* Moody, Dall. (Tex.) 512; Bradley *v.* McCrabb, Dall. (Tex.) 504.

See 10 Cent. Dig. tit. "Clerks of Courts," § 21.

Election under temporary government.— I was elected clerk of the county court of O at an election held under a military order of the military governor of the state in January, 1864. At a regular election held under the laws of the state in March, 1866, F was elected clerk. It was held that the term of office of I ceased on the election of F at the regular election in March, 1866, the government established by the conqueror having terminated. Isbell *v.* Farris, 5 Coldw. (Tenn.) 426.

39. People *v.* Mobley, 2 Ill. 215. And see Dibble *v.* Morris, 26 Conn. 416, in which the appointee was held to be still clerk, although he had not acted as such for six years.

"During good behavior" — Clerk pro tem. — Under a constitutional provision that "each court shall appoint its own clerk, who may hold his office during good behavior," the appointment of a clerk *pro tem.* to perform the duties of a deceased clerk until the office can be regularly filled in the manner prescribed by the legislature does not entitle the *pro tem.* appointee to hold office during good behavior. State *v.* Turk, Mart. & Y. (Tenn.) 286. But see Stonestreet *v.* Harrison, 5 Litt. (Ky.) 161, where it was held that the appointment of one who produced the required certificate of his qualification as clerk could only be "during good behavior."

New York — Assistant clerk.— N. Y. Laws (1872), c. 438, providing for clerks and assistant clerks of the district courts of the city of New York to be appointed by justices of said courts, not having provided for the duration of office of the assistant clerks, the Revised Statutes apply and govern the term, which is that such office "shall be held during the pleasure of the authority making the appointment." People *v.* Flynn, 49 How. Pr. (N. Y.) 280.

40. Brewer *v.* Davis, 9 Humphr. (Tenn.) 208, 49 Am. Dec. 706. And see O'Leary *v.* Steward, 46 Minn. 126, 48 N. W. 603.

41. State *v.* Neibling, 6 Ohio St. 40.

42. *Indiana.*— Governor *v.* Nelson, 6 Ind. 496.

while under others he is only entitled to serve out the unexpired term of his predecessor.[43]

C. Holding Over Until Successor Qualifies. Under some statutes the incumbent is entitled to hold over after the expiration of his term until his successor qualifies.[44] But under others their powers expire with their term of office.[45]

VI. RESIGNATION, SUSPENSION, OR REMOVAL.

A. Resignation. A clerk of court has the same right to resign as other public officers,[46] and this right is not affected by the fact that charges are pending

Maryland.— Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987; Sansbury *v.* Middleton, 11 Md. 296.

New York.— People *v.* Breen, 53 N. Y. Super. Ct. 167.

Ohio.— State *v.* Neibling, 6 Ohio St. 40.

South Carolina.— Wright *v.* Charles, 4 S. C. 178.

Texas.— Roman *v.* Moody, Dall. (Tex.) 512; Bradley *v.* McCrabb, Dall. (Tex.) 504.

Wisconsin.— State *v.* Lyon, 45 Wis. 246.

See 10 Cent. Dig. tit. "Clerks of Courts," § 24.

North Carolina — Where the superior court clerk becomes ex officio clerk of the inferior court, by reason of the justices of the county declining to elect a clerk of the latter court, and gives the bond required by law, he is entitled to the office for two years, notwithstanding the expiration of his term as superior court clerk within that period. Davis *v.* Moss, 80 N. C. 141.

43. Stuber *v.* Coler, 164 N. Y. 22, 58 N. E. 17 [*reversing* 49 N. Y. App. Div. 88, 63 N. Y. Suppl. 723]; State *v.* Harmon, Cheves (S. C.) 265; Royston *v.* Griffin, 42 Tex. 566.

Appointee holds until next general election.— Ruddock *v.* Mallory, 14 La. Ann. 314; State *v.* Morgan, 12 La. Ann. 712.

Until successor qualifies.— State *v.* Neibling, 6 Ohio St. 40.

The words "next general election" in a constitutional provision that a vacancy occurring in the clerkship shall be filled by a judge's appointment, the appointee to hold office until the next general election, means the next general election of clerks and not a general election of other officers. Ransdell *v.* Ariail, 13 La. Ann. 459.

The term "regular election" in a constitutional provision that "in case of vacancy the judge of the district shall have the power to appoint a clerk until a regular election can be held," means an election by the people at the time and in the mode prescribed by law. Banton *v.* Wilson, 4 Tex. 400.

Election occurring during term.—A clerk of the court of common pleas, appointed by the county commissioners upon the resignation of the regularly elected incumbent, is entitled to serve out the term of his predecessor, even though an election occurs during such term at which a county clerk is to be regularly elected. Harte *v.* Bode, 7 Ohio S. & C. Pl. Dec. 74, 4 Ohio N. P. 421.

44. State *v.* Jenkins, 43 Mo. 261; State *v.* McCracken, 51 Ohio St. 123, 36 N. E. 941; State *v.* Neibling, 6 Ohio St. 40.

Death after election but before qualification.— The death of the person elected to fill the office of clerk of the orphans' court, before he has qualified himself according to law, does not create a vacancy, but the incumbent, who is authorized to hold the office until his successor shall be qualified, holds over. Com. *v.* Hanley, 9 Pa. St. 513. But under the Indiana constitution, where the incumbent has already held the office for eight years, he cannot under such circumstances hold over. Gosman *v.* State, 106 Ind. 203, 6 N. E. 349.

45. State *v.* Derbes, 11 La. Ann. 50; State *v.* O'Leary, 64 Minn. 207, 66 N. W. 264; Gold *v.* Fite, 2 Baxt. (Tenn.) 237. And see Heart *v.* Judson, Minor (Ala.) 135, where the court without discussion quashed a writ of error issued by a clerk after the expiration of his term of office.

46. See, generally, OFFICERS.

No set form necessary.—A letter to the court from their clerk declaring his intention to resign his office at the next term and giving them notice to prepare to choose another at that time, as he should not continue in office after that day, is such a resignation as authorizes the court to appoint a clerk at that term, to execute his duties immediately after the term ends. It was contended that such letter was not a resignation but merely a declaration of intention to resign. Smith *v.* Dyer, 1 Call (Va.) 562.

What not a resignation.—A resignation of a prothonotary, not being accepted by the executive, and he continuing to perform the duties and receive the fees, is no resignation at all. Steel *v.* Com., 18 Pa. St. 451.

Right to withdraw.— Under Mo. Const. art. 5, § 8, providing that "when any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy," a resignation is not complete until the tender thereof has been accepted by the governor, with the knowledge and consent of the resigning incumbent. Thus, where the clerk of a county court filed in the office of the court his resignation, to take effect at a future date, but before that date forwarded to the court his written withdrawal of it, but the resignation, without his consent and against his express directions, had been forwarded to the governor and by

against him.[47] Where the judge of the court is empowered to fill the vacancy the clerk's resignation is properly tendered to him.[48]

B. Suspension. In some jurisdictions provision is made for the suspension of a clerk of court pending the trial of charges against him.[49]

C. Removal — 1. Power to Remove. Where there is no provision, either constitutional or statutory, as to a clerk's tenure of office, or as to removing him from office, it is held that the authority to remove is a necessary attribute, and within the discretion of the appointing power.[50] But usually the power of removal is regulated by constitution or statute,[51] and where such is the case can be exercised only within the prescribed limits.[52]

2. Grounds of Removal — a. In General. Where express provision is made for the removal of clerks the power of removal can be exercised for no other causes than those specified.[53] And it seems that where the statute authorizes removal for breach of good behavior the clerk may be removed for misbehavior which has no connection with his official duties,[54] but where the grounds of removal are limited to misconduct in office, the misconduct must be of a kind affecting the performance of his official duties,[55] such as the making of false entries[56]

him approved and another person had been appointed clerk, it was held that the office did not become vacant, and that, with the sanction of the court, he might at the same term legally withdraw his resignation, notwithstanding the governor's new appointment. State *v.* Boecker, 56 Mo. 17.

47. Ruddock *v.* Mallory, 14 La. Ann. 314; State *v.* Blakemore, 104 Mo. 340, 15 S. W. 960.

48. State *v.* Morgan, 12 La. Ann. 712.

49. Coit *v.* State, 28 Ark. 417 (discussing the practice under Gould's Dig. Ark. c. 30, § 15); State *v.* Schofield, 41 Mo. 38 (holding that mandamus would lie to compel the court to perform its duty to suspend the clerk). But in Mississippi the court has no authority to suspend its clerk except upon conviction "on an indictment for misconduct or misdemeanor in office." *Ex p.* Lehman, 60 Miss. 967.

50. *Ex p.* Hennen, 13 Pet. (U. S.) 230, 10 L. ed. 138. And see, generally, Officers.

51. For power of court to remove see Ledbetter *v.* State, 10 Ala. 241; Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401; State *v.* Dunlap, 5 Mart. (La.) 271; Evans *v.* Claibourne County Justices, 3 Hayw. (Tenn.) 26.

For power of judge to remove see People *v.* Flynn, 62 N. Y. 375; Parks *v.* Davis, 10 U. C. C. P. 229.

By impeachment the senate may remove a clerk from office. State *v.* O'Driscoll, 2 Treadw. (S. C.) 713.

Kentucky — The board for trying contested elections has no authority to declare the office of clerk of the courts vacant, the authority to decide as to the freedom and equality of elections forming part of the general jurisdiction of the circuit courts. Leeman *v.* Hinton, 1 Duv. (Ky.) 37.

52. Necessity for conviction.— Usually a clerk can be removed only after conviction in a court of law of the offense charged. Coit *v.* State, 28 Ark. 417; Dowling *v.* Smith, 9 Md. 242; *Ex p.* Lehman, 60 Miss. 967.

Where default apparent from admission.— By the Tennessee act of 1817 the county court may remove their clerk and appoint another for not paying over moneys collected by him for the use of the state for taxes on lawsuits, etc., where the clerk's default is apparent from his admission in court. Such default need not be proved by conviction on indictment. Sevier *v.* Washington County Justices, Peck (Tenn.) 334; Hardin County Ct. *v.* Hardin, Peck (Tenn.) 291.

53. People *v.* Mobley, 2 Ill. 215; Com. *v.* Barry, Hard. (Ky.) 229.

54. State *v.* Bell, 2 Mart. N. S. (La.) 683, where the clerk was removed for procuring the means of producing an abortion. But see Com. *v.* Barry, Hard. (Ky.) 229.

What not ground for removal.— To warrant a removal where there is no breach of official duty the facts must be such as to induce a conviction that it would be unsafe for the public that the clerk should continue to discharge his duties. Therefore a clerk will not be removed because of his participation in an affray which ended in the death of a citizen and for which the grand jury found a bill for manslaughter only against the principal. State *v.* Kellam, 4 La. 494.

55. Com. *v.* Barry, Hard. (Ky.) 229, holding that the erasing of the name of a person returned on a panel of grand jurors, and permitting an alteration in a replevin bond, was cause for removal.

The mere want of qualification to be appointed or to hold the office of clerk is not a ground of prosecution "for a breach of good behavior." Com. *v.* Lancaster, 5 Litt. (Ky.) 161.

Hiring predecessor to resign.— The clerk of a county court is not liable to prosecution for misbehavior in office on the ground that he procured his office by hiring his predecessor to resign. Com. *v.* Rodes, 1 Dana (Ky.) 595.

56. Com. *v.* Rodes, 6 B. Mon. (Ky.) 171, information against clerk of county court.

or certificates,[57] the exaction of illegal fees,[58] the misappropriation of funds,[59] or a wilful neglect or refusal to perform duties imposed upon him by law.[60]

b. Necessity For Corrupt Motive. If the act charged against a clerk be one which *per se* amounts to a breach of good behavior he will be removed without regard to the motive that actuated him;[61] but if the act be of a nature which, according to circumstances, may or may not constitute misconduct, the clerk will not be removed, where he appears to have acted in good faith and without any improper motive.[62]

3. Procedure — a. In General. Where the procedure for the removal of a clerk is pointed out by statute it must be followed.[63] Usually the proceeding is required to be prosecuted in the name of the state,[64] on due notice to

57. Com. *v.* Chambers, 1 J. J. Marsh. (Ky.) 108.

58. Com. *v.* Rodes, 6 B. Mon. (Ky.) 171.

Where done in good faith and from no corrupt motive the taking of illegal fees is not ground for removal. Com. *v.* Arnold, 3 Litt. (Ky.) 327; Com. *v.* Barry, Hard. (Ky.) 229.

59. Sevier *v.* Washington County Justices, Peck (Tenn.) 334; Hardin County Ct. *v.* Hardin, Peck (Tenn.) 291.

Habitual neglect to account for small sums authorizes a presumption that their retention arose from sinister motives or from a continued or gross negligence so great as to be inexcusable. Com. *v.* Rodes, 6 B. Mon. (Ky.) 171.

60. Com. *v.* Rodes, 6 B. Mon. (Ky.) 171; State *v.* Alcorn, 78 Tex. 387, 14 S. W. 663, the latter case defining "wilful neglect."

For failure to pay over money held in his official capacity, when ordered to do so by the court, the clerk may be removed from office. State *v.* Watson, 38 Ark. 96.

Failure to keep office open.— By the express terms of the North Carolina statute (Battle's N. C. Rev. c. 90, §§ 15, 16), a single failure on the part of a clerk of a superior court and probate judge to keep his office open on Monday from 9 A. M. to 4 P. M. for the transaction of probate business (unless such failure is caused by sickness) is a distinct and complete cause of forfeiture of his office. People *v.* Heaton, 77 N. C. 18.

Failure to make separate docket for judge. — The failure of a clerk of court to make out, for the judge, a separate docket of cases to be tried at a term of court, is insufficient to cause his removal from office, in the absence of an order from the judge directing him to make out such docket. There is no law requiring the clerk to make a separate docket in the absence of such order. Com. *v.* Arnold, 3 Litt. (Ky.) 327.

61. Com. *v.* Chambers, 1 J. J. Marsh. (Ky.) 108.

62. Com. *v.* Arnold, 3 Litt. (Ky.) 327; Com. *v.* Barry, Hard. (Ky.) 229; Com. *v.* Chinn, 22 Ky. L. Rep. 1921, 62 S. W. 7, 685; State *v.* Roll, 1 Ohio Dec. (Reprint) 284, 7 West. L. J. 121; State *v.* Alcorn, 78 Tex. 387, 14 S. W. 663.

Acting incautiously.—A clerk will not be removed for having acted incautiously, unless it be shown that the state or some individual has been thereby injured. State *v.* Winthrop, 2 Mart. N. S. (La.) 530.

63. Com. *v.* Barry, Hard. (Ky.) 229.

Alabama — Written charges — Jury trial. — Since the Alabama statute of 1819 a clerk cannot be removed, even for contumacy in the face of the court, unless charges are exhibited to the court in writing. Callahan *v.* State, 2 Stew. & P. (Ala.) 379. For a conviction held to be free from error see Ledbetter *v.* State, 10 Ala. 241.

Kentucky — Filing information.— To authorize the attorney-general to file information in the court of appeals for the removal of a clerk of court, he need not first obtain leave of court; the institution of the proceeding being in his discretion. Com. *v.* Chinn, 22 Ky. L. Rep. 1921, 62 S. W. 7, 685 [*distinguishing* Com. *v.* Barry, Hard. (Ky.) 229].

Supporting affidavit.— The charges against a clerk prosecuted for breach of good behavior must be supported by affidavit before they can be filed. Com. *v.* Rodes, 1 Dana (Ky.) 595.

Setting time for hearing.— Under the New York statutes, where the charges are denied by a sufficient answer, a time must be set for the hearing. Matter of De Mahaut, 43 N. Y. App. Div. 56, 59 N. Y. Suppl. 353.

A majority of the judges must concur, as to the cause for which the clerk is to be removed, as well as in the propriety of a sentence of removal. Com. *v.* Rodes, 1 Dana (Ky.) 595.

Enforcement of forfeiture by quo warranto.— The forfeiture of office incurred by the clerk of the superior court in failing to keep open his office as required by law can only be enforced by proceedings in the nature of quo warranto. State *v.* Norman, 82 N. C. 687.

Requiring clerk to produce books and papers.—A clerk prosecuted for breach of good behavior will be required to produce any books and papers belonging to his office which may be necessary as evidence. Com. *v.* Rodes, 1 Dana (Ky.) 595.

Compelling clerk to surrender books and papers.— Mandamus will be granted against a clerk of a court of requests to give up the books and papers of the court which he has refused to do on being removed from office. *In re* Lacroix, 4 U. C. Q. B. O. S. 339.

64. Callahan *v.* State, 2 Stew. & P. (Ala.)

defendant,[65] and the acts charged must be specifically alleged[66] and proved as charged.[67] Where the proceeding is summary in its nature the judgment must contain all the facts necessary to show jurisdiction in the court.[68]

b. Review of Proceedings. A judgment removing a clerk from office may usually be reviewed on writ of error.[69]

VII. COMPENSATION.

A. Dependent Upon Statute — 1. In General. A clerk of a court is entitled to such compensation only as is specifically provided by statute;[70] he takes his office *cum onere* and must perform gratuitously those official duties for which no compensation is provided by law. Sometimes provision is made by

379; Com. *v.* Barry, Hard. (Ky.) 229; People *v.* Heaton, 77 N. C. 18.

Louisiana — When private individual may prosecute.— La. Acts (1821), No. 60, prescribing the manner in which clerks may be removed from office, only permits prosecution by a private individual for malfeasance in the discharge of their duties. For a matter unconnected with official duty no one can prosecute except the district attorney. State *v.* Kellam, 4 La. 494.

65. Sevier *v.* Washington County Justices, Peck (Tenn.) 334.

The summons should recite the charges at length.— Com. *v.* Rodes, 1 Dana (Ky.) 595.

66. Ledbetter *v.* State, 10 Ala. 241; Com. *v.* Rodes, 1 Dana (Ky.) 595; Com. *v.* Arnold, 3 Litt. (Ky.) 309.

Charges too vague.— "Frequent intemperance" and "habitual indolence" are charges too vague and indeterminate against a clerk; there should be a specification of the nature, time, place, and manner, and the persons injured by the offense. State *v.* Winthrop, 2 Mart. N. S. (La.) 530.

Amendment of the information may be regulated by the court under Ky. Civ. Code Prac. § 134. Com. *v.* Chinn, 22 Ky. L. Rep. 1921, 62 S. W. 7, 685. But new charges cannot be added by amendment. Com. *v.* Rodes, 1 Dana (Ky.) 595.

Supplemental information.—A supplemental information charging the commission of an offense after the institution of the proceeding to remove a clerk will not be allowed, an agreement having previously been made for the taking of the proof by deposition instead of orally, as contemplated by the code of practice, and the charge made in the supplemental information not being covered by that agreement. Com. *v.* Chinn, 22 Ky. L. Rep. 1921, 62 S. W. 7, 685.

67. Com. *v.* Arnold, 3 Litt. (Ky.) 309.

Evidence of acts not charged may be received for the purpose of showing the intention of an act charged to have been done. Com. *v.* Arnold, 3 Litt. (Ky.) 309. But evidence of intoxication at other times, or of habit, cannot be admitted in proof of a specified charge of intoxication. Ledbetter *v.* State, 10 Ala. 241.

68. Ragsdale *v.* State, 2 Swan (Tenn.) 415, setting forth what the judgment must contain under the Tennessee statutes. See also Street *v.* Gallatin County, 1 Ill. 50. And see, generally, SUMMARY PROCEEDINGS.

69. Callahan *v.* State, 2 Stew. & P. (Ala.) 379; Ragsdale *v.* State, 2 Swan (Tenn.) 415; Sevier *v.* Washington County Justices, Peck (Tenn.) 334; Hardin County Ct. *v.* Hardin, Peck (Tenn.) 291.

Appeal in the nature of a writ of error will not lie under the Tennessee statute, as the proceeding is not a "suit" or "judgment" within the meaning of that act. Ragsdale *v.* State, 2 Swan (Tenn.) 415.

Impeachment by senate.— A clerk may be removed from office by the senate on impeachment, and the courts of law will not review the proceedings. State *v.* O'Driscoll, 2 Treadw. (S. C.) 713.

Mandamus lies to restore to office a clerk who has been improperly removed. See *supra*, III, E.

70. *Alabama.*— Troup *v.* Morgan County, 109 Ala. 162, 19 So. 503.

Arkansas.— Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164; Cole *v.* White County, 32 Ark. 45.

California.— Bicknell *v.* Amador County, 30 Cal. 237.

Indiana.— *Ex p.* Harrison, 112 Ind. 329, 14 N. E. 225; Taylor *v.* Washington County, 110 Ind. 462, 11 N. E. 436; Hill *v.* Shannon, 68 Ind. 470; Wabash County *v.* Sivey, 16 Ind. 425; Falkenburgh *v.* Jones, 5 Ind. 296; Huntington County *v.* Buchanan, 21 Ind. App. 178, 51 N. E. 939.

Iowa.— Packer *v.* Corlett, 71 Iowa 249, 32 N. W. 271; Palo Alto County *v.* Burlingame, 71 Iowa 201, 32 N. W. 259; Sprout *v.* Kelly, 37 Iowa 44. But see Ripley *v.* Gifford, 11 Iowa 367.

Kansas.— Heller *v.* Shawnee County, 23 Kan. 128.

Kentucky.— Wortham *v.* Grayson County Ct., 13 Bush (Ky.) 53; Rodes *v.* Reese, 4 B. Mon. (Ky.) 586.

Louisiana.— Burk *v.* New Orleans, 25 La. Ann. 301. See also Fitzpatrick *v.* New Orleans, 27 La. Ann. 457.

Maine.— White *v.* Fox, 22 Me. 341.

Minnesota.— Armstrong *v.* Ramsey County, 25 Minn. 344.

Mississippi.— Patty *v.* Sparkman, 58 Miss. 76.

Missouri.— Callaway County *v.* Henderson, 119 Mo. 32, 24 S. W. 437; Hubbard *v.* Texas County, 101 Mo. 210, 13 S. W. 1065; State *v.*

statute for compensation for services "not otherwise provided for," [71] and various

Livingston County, 51 Mo. 557; Sinclair *v.* Missouri, etc., R. Co., 74 Mo. App. 500. But see Boone County *v.* Todd, 3 Mo. 140.

Montana.— State *v.* Second Judicial Dist. Ct., 24 Mont. 425, 62 Pac. 688.

Nevada.— Washoe County *v.* Humboldt County, 14 Nev. 123; State *v.* Rover, 13 Nev. 17.

New York.— Cronkright *v.* Brooklyn, 25 Misc. (N. Y.) 386, 55 N. Y. Suppl. 513; Matter of Albany County, 5 How. Pr. (N. Y.) 11, 3 Code Rep. (N. Y.) 102; Doubleday *v.* Broome County, 2 Cow. (N. Y.) 533; Mallory *v.* Cortland County, 2 Cow. (N. Y.) 531. But see Bright *v.* Chenango County, 18 Johns. (N. Y.) 242.

North Carolina.— Guilford *v.* Beaufort County, 120 N. C. 23, 27 S. E. 94; State *v.* Johnson, 101 N. C. 711, 8 S. E. 360.

Ohio.— Clark *v.* Lucas County, 14 Ohio Cir. Ct. 349; Butler County *v.* Welliver, 12 Ohio Cir. Ct. 440, 5 Ohio Cir. Dec. 569.

Oregon.— Jackson *v.* Siglin, 10 Oreg. 93.

Pennsylvania.— Lyon *v.* Adams, 4 Serg. & R. (Pa.) 443; Sipler *v.* Clarion County, 8 Pa. Dist. 253; Close *v.* Berks County, 2 Woodw. (Pa.) 453; Trach *v.* County, 2 Lehigh Val. L. Rep. (Pa.) 253.

South Carolina.— Ostendorff *v.* Charleston County, 14 S. C. 403; Rowell *v.* Mulligan, 2 Strobh. (S. C.) 379.

Tennessee.—State *v.* Wilbur, 101 Tenn. 211, 47 S. W. 411.

Texas.— Hallman *v.* Campbell, 57 Tex. 54.

Virginia.— Allen *v.* Com., 6 Gratt. (Va.) 529.

Washington.—Denny *v.* Holloway, 17 Wash. 487, 49 Pac. 1073.

Wisconsin.— St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302; Hitchcock *v.* Merrick, 15 Wis. 522.

See 10 Cent. Dig. tit. "Clerks of Courts," § 33 *et seq.*

For a full discussion of the compensation of public officers see OFFICERS.

Compensation of deputy clerks see *infra*, X, C.

Compensation of clerks of admiralty courts see ADMIRALTY, 1 Cyc. 910, note 15. And as to the fees of clerks of territorial courts in admiralty suits see Waddell *v.* The Steamboat Daisy, 2 Wash. Terr. 76, 3 Pac. 616.

A constitutional provision that "no man's particular services shall be demanded without just compensation" is not violated by this rule. Falkenburgh *v.* Jones, 5 Ind. 296.

Increased or new duties appertaining to the office of clerk do not carry the right to additional compensation where no provision is made therefor by statute. Burk *v.* New Orleans, 25 La. Ann. 301; Cowan *v.* New York, 3 Hun (N. Y.) 632, 6 Thomps. & C. (N. Y.) 151; Cronkright *v.* Brooklyn, 25 Misc. (N. Y.) 386, 55 N. Y. Suppl. 513; Allen *v.* Com., 6 Gratt. (Va.) 529.

For services which he is not required to perform by law the clerk is not entitled to compensation. Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164; Cole *v.* White County, 32 Ark. 45; Denny *v.* Holloway, 17 Wash. 487, 49 Pac. 1073; Soules *v.* McLean, 7 Wash. 451, 35 Pac. 364, 1082.

Where no compensation provided except fees.— Where the statute makes no provision for the compensation of a clerk except the fees he is to receive, he can receive no other pay for official services except that which may be classed as "fees." Troup *v.* Morgan County, 109 Ala. 162, 19 So. 503. See also Palo Alto County *v.* Burlingame, 71 Iowa 201, 32 N. W. 259.

For simultaneous service in two courts.— As to the right of a federal clerk to compensation when both the circuit and district courts sit at the same time see U. S. *v.* King, 147 U. S. 676, 13 S. Ct. 439, 37 L. ed. 328; Clough *v.* U. S., 55 Fed. 921; Goodrich *v.* U. S., 42 Fed. 392, 35 Fed. 193; U. S. *v.* Bassett, 2 Story (U. S.) 389, 24 Fed. Cas. No. 14,539, 6 Law Rep. 201; Butler *v.* U. S., 23 Ct. Cl. 162. See also U. S. *v.* Harsha, 56 Fed. 953, 16 U. S. App. 13, 6 C. C. A. 178.

Sureties have no lien on fees.— The official fees of a clerk belong to his estate, like other property, and the sureties on his official hond have no lien on them for their indemnity, or right of priority over other creditors. Steger *v.* Frizzell, 2 Tenn. Ch. 369.

Performance of services by party or attorney.— A party has no right to perform services which the law imposes upon the clerk and thus deprive the latter of his lawful compensation. Where such services are performed by a party or his attorney the clerk is nevertheless entitled to compensation as if he had performed them himself. Morrison *v.* Rodes, 7 T. B. Mon. (Ky.) 19; McDonough *v.* Gorman, 2 La. 310; Flemming *v.* Hudson County, 30 N. J. L. 280; Hanrick *v.* Ake, 75 Tex. 142, 12 S. W. 818.

Power to assign emoluments of office.—A contract by a clerk transferring and assigning to a trustee for the benefit of a third party, in consideration of a debt due him from the clerk, all the future fees and emoluments of his office until the debt be paid, with conditions to pay deputies, etc., is void as against public policy. By statute the auditor has the right to look to the clerk for taxes on suits collected by him. The clerk will not be permitted to surrender such rights as are essential to the proper discharge of the duties of his office. Field *v.* Clipley, 79 Ky. 260, 2 Ky. L. Rep. 269, 42 Am. Rep. 215. See also ASSIGNMENTS, 4 Cyc. 19.

71. Troup *v.* Morgan County, 109 Ala. 162, 19 So. 503; Fitzpatrick *v.* New Orleans, 27 La. Ann. 457; Trach *v.* County, 2 Lehigh Val. L. Rep. (Pa.) 253.

In federal courts a clerk is entitled to a "reasonable" compensation where none is expressly provided by law. Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; Cavender *v.* Cavender, 3 McCrary (U. S.) 383, 10 Fed. 828; Anonymous, Taney (U. S.) 453, 1 Fed. Cas. No. 472.

provisions for special and extra compensation are to be met with,[72] but in the absence of any such provision a clerk is not entitled to any greater compensation than that provided by the statute,[73] and it is against public policy to allow a clerk to contract with parties for greater fees than those provided by law.[74]

2. STATUTES STRICTLY CONSTRUED. Statutes authorizing the clerk to collect fees for his services are strictly construed and will not be extended beyond their letter.[75]

3. FEES FOR PARTICULAR SERVICES. Questions regarding the specific fees to which a clerk is entitled depend so entirely upon the various statutory provisions[76]

When provision applies to state or county. — A general provision governing services not specially provided for will not embrace services for the state or county unless they are expressly named in the statute or necessarily implied from the language thereof. Cole *v.* White County, 32 Ark. 45.

72. For statutes authorizing extra compensation see the following cases: Hunter *v.* Ripley County, 48 Ind. 177; Nave *v.* Ritter, 41 Ind. 301; Falkenburgh *v.* Jones, 5 Ind. 296; *Ex p.* Patty, 56 Miss. 499; St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

Tennessee — When special allowance authorized. — The discretionary power of the court to make allowances to the clerk in the capacity of receiver or special commissioner extends only to services of an extraordinary nature for which the law has provided no specific fee or compensation. Woodward *v.* Williams, 11 Humphr. (Tenn.) 323.

73. McLennan County *v.* Graves, (Tex. Civ. App. 1901) 62 S. W. 122; St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302; U. S. *v.* Meigs, 95 U. S. 748, 24 L. ed. 578.

The judge of a superior court has no power to make to the clerk of one of the courts in his district an allowance for extra services. Brandon *v.* Caswell County, 71 N. C. 62.

Where a gross sum is provided as the compensation of a clerk for his services in a certain proceeding he is not entitled to charge other fees for specific services involved in such proceedings.

Georgia.— Macmurphy *v.* Dobbins, 53 Ga. 294.

Iowa.— Packer *v.* Corlett, 71 Iowa 249, 32 N. W. 271.

North Carolina.— Guilford *v.* Beauford, County, 120 N. C. 23, 27 S. E. 94.

Pennsylvania.— Trach *v.* County, 2 Lehigh Val. L. Rep. (Pa.) 253.

Wisconsin.— Hitchcock *v.* Merrick, 15 Wis. 522.

74. Bates *v.* Foree, 4 Bush (Ky.) 430; Hahn *v.* Derr, 1 Woodw. (Pa.) 178.

75. Troup *v.* Morgan County, 109 Ala. 162, 19 So. 503. But *compare* Com. *v.* Rodes, 6 B. Mon. (Ky.) 171, holding that under the Kentucky act of 1828 clerks of the county courts are entitled to the same fees as the clerks of the circuit court for like services, where none are fixed specifically by law.

For constructions of particular statutes see the following cases:

Iowa.— Poweshiek County *v.* Patten, 89 Iowa 308, 56 N. W. 444 (Iowa Code (1873), §§ 3781, 3783, 3784, and acts of the twenty-first general assembly of Iowa, c. 134).

Kansas.— Harrison *v.* Masonic Mut. Ben. Soc., 61 Kan. 134, 59 Pac. 266 (Kansas act of 1869 as affecting fees of supreme court clerk).

Louisiana.— Osthoff *v.* Flotte, 48 La. Ann. 1094, 20 So. 282 (La. Acts (1880), Nos. 123, 136).

Minnesota.— Armstrong *v.* Ramsey County, 25 Minn. 344 (Minn. Spec. Laws (1876), c. 207, repealing Minn. Spec. Laws (1872), c. 197).

Mississippi.— *Ex p.* Patty, 56 Miss. 499 (Mississippi act of July 31, 1875).

Missouri.— Callaway County *v.* Henderson, 119 Mo. 32, 24 S. W. 437 (Mo. Rev. Stat. (1889), § 5010); State *v.* Auditor, 32 Mo. 222 (Missouri acts of Dec. 5, 1855, Feb. 12, 1857, Nov. 23, 1857, Jan. 25, 1861, and March 28, 1861); Kretschmar *v.* St. Louis County, 29 Mo. 124 (right of clerk of St. Louis criminal court to the fees allowed by Missouri act, Feb. 12, 1857, § 3); Harris *v.* Buffington, 28 Mo. 53 (Missouri acts of 1855 and 1857).

New Jersey.— State *v.* Kelsey, 64 N. J. L. 1, 44 Atl. 884 (New Jersey acts of April 16, 1846, March 16, 1876, Feb. 16, 1881, and April 18, 1891).

New York.— Saffen *v.* New York, 53 N. Y. App. Div. 389, 66 N. Y. Suppl. 69 (N. Y. Laws (1895), c. 739).

North Carolina.— Supreme Ct. Clerk's Office *v.* Richmond County, 79 N. C. 598 (N. C. Laws (1874–1875), c. 247).

Pennsylvania.— Com. *v.* Fry, 183 Pa. St. 32, 38 Atl. 417 (Pennsylvania acts March 10, 1810, and April 2, 1868); McGunnegle *v.* Allegheny County, 163 Pa. St. 589, 30 Atl. 123 (Pennsylvania act of 1876); Cohen *v.* Com., 6 Pa. St. 111 (Pennsylvania act of 1810).

Texas.— State *v.* Norrell, 53 Tex. 427 (Texas act of April 22, 1879, amending Tex. Code, c. 1, tit. 16, and c. 2, tit. 15); Kabelmacher *v.* Kabelmacher, 21 Tex. Civ. App. 317, 50 S. W. 1118, 51 S. W. 353 (Texas Acts Called Sess. 25th Leg., p. 12, § 22).

Virginia.— Trehy *v.* Marye, 3 Va. Super. Ct. 604, 40 S. E. 126 (Virginia act March 1, 1898, and spec. act March 3, 1896).

United States.— Marsh *v.* U. S., 88 Fed. 879; Goodrich *v.* U. S., 47 Fed. 267; Davis *v.* U. S., 45 Fed. 162; Marvin *v.* U. S., 44 Fed. 405; Matthews *v.* U. S., 35 Ct. Cl. 595.

And see cases cited *infra*, note 76 *et seq.*; and 10 Cent. Dig. tit. "Clerks of Courts," § 34.

76. **Allowances against county.**—St. Fran-

in the different jurisdictions that a detailed discussion of the decisions would serve no useful purpose here. Consequently no more is attempted than to present a bare citation of the cases which deal with the compensation of the clerk for particular services, such as the issuing of writs, process, and notices;[77] attend-

cis County *v.* Folbre, 66 Ark. 91, 48 S. W. 1070.

Allowances for office expenses, clerk hire, etc.—*Alabama.*—Pike County *v.* Goldthwaite, 35 Ala. 704.

Arkansas.— Cole *v.* White County, 32 Ark. 45.

Colorado.— Arapahoe County *v.* Koons, 1 Colo. 160.

Illinois.— Daggett *v.* Ford County, 99 Ill. 334; Cullom *v.* Dolloff, 94 Ill. 330; De Kalb County *v.* Beveridge, 16 Ill. 312.

Indiana.— Hancock County *v.* Mitchell, 93 Ind. 307.

Iowa.— Gamble *v.* Marion County, 85 Iowa 675, 52 N. W. 556.

Missouri.— St. Louis County Ct. *v.* Ruland, 5 Mo. 268.

Pennsylvania.— Lyon *v.* Adams, 4 Serg. & R. (Pa.) 443; Close *v.* Berks County, 2 Woodw. (Pa.) 453.

United States.—U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361 [*affirming* 48 Fed. 643]; Selby *v.* U. S., 47 Fed. 800; U. S. *v.* Gorham, 6 Blatchf. (U. S.) 530, 25 Fed. Cas. No. 15,235.

See 10 Cent. Dig. tit. "Clerks of Courts," § 59.

Commissions or funds handled.— *Alabama.* —Hogue *v.* Matthews, 89 Ala. 308, 8 So. 241.

Illinois.— Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256.

Indiana.—Wabash County *v.* Sivey, 16 Ind. 425.

New York.— Matter of Post, 3 Edw. (N. Y.) 365.

Ohio.— State *v.* Cuyahoga County, 22 Ohio Cir. Ct. 57.

Oregon.— Jackson *v.* Siglin, 10 Oreg. 93.

Tennessee.— Louisville, etc., R. Co. *v.* Boswell, 104 Tenn. 529, 58 S. W. 117; Baxter *v.* State, 14 Lea (Tenn.) 122; State *v.* Harkreader, 12 Lea (Tenn.) 456.

United States.— U. S. *v.* Kurtz, 164 U. S. 49, 17 S. Ct. 15, 41 L. ed. 346; Johnson *v.* Southern Bldg., etc., Assoc., 95 Fed. 922; Farmers' L. & T. Co. *v.* Dart, 91 Fed. 451, 62 U. S. App. 617, 36 C. C. A. 572; Northwestern Mut. L. Ins. Co. *v.* Quinn, 69 Fed. 462; Bronsted *v.* The Advance, 60 Fed. 422; U. S. *v.* Wolters, 51 Fed. 896; Easton *v.* Houston, etc., R. Co., 44 Fed. 718; Marvin *v.* U. S., 44 Fed. 405; Smith *v.* The Morgan City, 39 Fed. 572; Thomas *v.* Chicago, etc., R. Co., 37 Fed. 548; Fagan *v.* Cullen, 28 Fed. 843; Blake *v.* Hawkins, 19 Fed. 204; *In re* Goodrich, 4 Dill. (U. S.) 230, 10 Fed. Cas. No. 5,541; Leech *v.* Kay, 2 Flipp. (U. S.) 590, 4 Fed. 72; The Avery, 2 Gall. (U. S.) 308, 2 Fed. Cas. No. 671; *Ex p.* Prescott, 2 Gall. (U. S.) 146, 19 Fed. Cas. No. 11,388; *Ex p.* Plitt, 2 Wall. Jr. (U. S.) 453, 19 Fed. Cas. No. 11,228.

See 10 Cent. Dig. tit. "Clerks of Courts," § 51.

Continuance of cause.— Trimble *v.* St. Louis, etc., R. Co., 56 Ark. 249, 19 S. W. 839; *Ex p.* Lee, 4 Cranch C. C. (U. S.) 197, 15 Fed. Cas. No. 8,177.

Issuing commission.— Marsh *v.* U. S., 88 Fed. 879.

Issuing fee bill.— Page *v.* Bettes, 19 Mo. App. 624.

Making settlements with county.— St. Francis County *v.* Folbre, 66 Ark. 91, 48 S. W. 1070.

Reference.— Huffman *v.* Stork, 25 S. C. 267.

Removal of causes.—Van Duzee *v.* U. S., 41 Fed. 571; *In re* Clerk's Charges, 5 Fed. 440.

Reporting testimony.— Marsh *v.* U. S., 88 Fed. 879.

Submissions.— Trimble *v.* St. Louis, etc., R. Co., 56 Ark. 249, 19 S. W. 839; Shed *v.* Kansas City, etc., R. Co., 67 Mo. 687.

Taxing costs.— Rodes *v.* Reese, 4 B. Mon. (Ky.) 586; Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430.

77. *Alabama.*— State Branch Bank *v.* Thompson, 9 Ala. 295.

Arkansas.— St. Francis County *v.* Folhre, 66 Ark. 91, 48 S. W. 1070.

Illinois.— Longwith *v.* Butler, 8 Ill. 74.

Louisiana.—Fitzpatrick *v.* New Orleans, 27 La. Ann. 457; Lynne *v.* New Orleans, 26 La. Ann. 48.

North Carolina.— McRae *v.* Guion, 58 N. C. 129; Stokes *v.* Brown, 42 N. C. 33.

Pennsylvania.— Payran *v.* McWilliams, 9 Watts & S. (Pa.) 154; Cash *v.* Baldwin, 7 Watts & S. (Pa.) 427; Baldwin *v.* Cash, 7 Watts & S. (Pa.) 427.

Tennessee.— Nunnelly *v.* Smith, 4 Baxt. (Tenn.) 310; Rice *v.* Turner, 1 Yerg. (Tenn.) 446.

Texas.— Hallman *v.* Campbell, 57 Tex. 54.

Washington.— Kelly *v.* Ryan, 8 Wash. 536, 36 Pac. 478.

Wisconsin.— Hitchcock *v.* Merrick, 15 Wis. 522.

United States.— U. S. *v.* McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. ed. 334; Gillum *v.* Stewart, 112 Fed. 30; Marsh *v.* U. S., 88 Fed. 879; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 935, 3 C. C. A. 361 [*affirming* 48 Fed. 643]; Taylor *v.* U. S., 45 Fed. 531; Jones *v.* U. S., 39 Fed. 410; The Siren, 9 Ben. (U. S.) 194, 22 Fed. Cas. No. 12,910; Durant *v.* Washington County, Woolw. (U. S.) 377, 8 Fed. Cas. No. 4,191; Martin *v.* U. S., 26 Ct. Cl. 160.

See 10 Cent. Dig. tit. "Clerks of Courts," § 42.

ance and services at trial;[78] filing papers;[79] entering judgments, decrees, or orders;[80] making other docket, journal, or record entries;[81] indexing

78. *Illinois.*— Kane County *v.* Pierce, 60 Ill. 481.

Indiana.— Taylor *v.* Washington County, 67 Ind. 383; Kerr *v.* Fountain County, 47 Ind. 63; Rudisill *v.* Edsall, 43 Ind. 377; *Ex p.* McKee, 28 Ind. 100.

Minnesota.—Davenport *v.* Hennepin County, 40 Minn. 335, 42 N. W. 20.

New York.— People *v.* Wilson, 34 Misc. (N. Y.) 273, 68 N. Y. Suppl. 850; People *v.* Monroe County, 15 How. Pr. (N. Y.) 225; *In re* Clerks' Fees, 5 How. Pr. (N. Y.) 11, 3 Code Rep. (N. Y.) 102; Benton *v.* Sheldon, 1 Code Rep. (N. Y.) 134.

United States.— U. S. *v.* McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. ed. 334; U. S. *v.* Pitman, 147 U. S. 669, 13 S. Ct. 425, 37 L. ed. 324 [*affirming* 45 Fed. 159]; Butler *v.* U. S., 87 Fed. 655; Marvin *v.* U. S., 44 Fed. 405; Goodrich *v.* U. S., 42 Fed. 392; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; Pleasants *v.* U. S., 35 Fed. 270; Goodrich *v.* U. S., 35 Fed. 193; Dart *v.* U. S., 32 Ct. Cl. 267; Ackiss *v.* U. S., 31 Ct. Cl. 283; Converse *v.* U. S., 26 Ct. Cl. 6; Bill *v.* U. S., 23 Ct. Cl. 142.

See 10 Cent. Dig. tit. "Clerks of Courts," § 45.

Services in connection with jury.—*Arkansas.*— Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164.

Kentucky.—Auditor *v.* Cain, 22 Ky. L. Rep. 1888, 61 S. W. 1016.

Pennsylvania.—Pairo *v.* American Ins. Co., 8 Watts & S. (Pa.) 374; Sipler *v.* Clarion County, 8 Pa. Dist. 253.

Wisconsin.— St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

United States.— U. S. *v.* Payne, 147 U. S. 687, 13 S. Ct. 442, 37 L. ed. 332; U. S. *v.* King, 147 U. S. 676, 13 S. Ct. 439, 37 L. ed. 328; Marsh *v.* U. S., 88 Fed. 879; U. S. *v.* Dundy, 76 Fed. 357, 40 U. S. App. 375, 22 C. C. A. 221; Van Duzee *v.* U. S., 73 Fed. 794; Fuller *v.* U. S., 58 Fed. 329; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361; Van Duzee *v.* U. S., 48 Fed. 643; Goodrich *v.* U. S., 47 Fed. 267; Marvin *v.* U. S., 44 Fed. 405; Goodrich *v.* U. S., 42 Fed. 392; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229.

79. *Arkansas.*— Cole *v.* White County, 32 Ark. 45.

North Carolina.— Guilford *v.* Beaufort County, 120 N. C. 23, 27 S. E. 94.

Pennsylvania.—*In re* Constables' Bonds, 16 Pa. Co. Ct. 93.

Tennessee.— Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430; Parkinson *v.* State, 16 Lea (Tenn.) 132.

Washington.— State *v.* Gordon, 8 Wash. 488, 36 Pac. 498.

United States.— U. S. *v.* Taylor, 147 U. S. 695, 13 S. Ct. 479, 37 L. ed. 335 [*reversing* 45 Fed. 531]; U. S. *v.* Payne, 147 U. S. 687, 13 S. Ct. 442, 37 L. ed. 332; U. S. *v.* King, 147 U. S. 676, 13 S. Ct. 439, 37 L. ed. 328; U. S. *v.* Jones, 147 U. S. 672, 13 S. Ct. 437, 37 L. ed. 325; U. S. *v.* Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. ed. 399; U. S. *v.* Marsh, 112 Fed. 929, 50 C. C. A. 621; Gillum *v.* Stewart, 112 Fed. 30; Marsh *v.* U. S., 88 Fed. 879; Butler *v.* U. S., 87 Fed. 655; Van Duzee *v.* U. S., 73 Fed. 794; U. S. *v.* Converse, 63 Fed. 423, 24 U. S. App. 89, 11 C. C. A. 274; Van Duzee *v.* U. S., 59 Fed. 440; Clough *v.* U. S., 55 Fed. 921; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361 [*affirming* 48 Fed. 643]; Taylor *v.* U. S., 45 Fed. 531; Marvin *v.* U. S., 44 Fed. 405; Goodrich *v.* U. S., 42 Fed. 392; Van Duzee *v.* U. S., 41 Fed. 571; Jones *v.* U. S., 39 Fed. 410; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; Goodrich *v.* U. S., 35 Fed. 193; *In re* Woodbury, 17 Blatchf. (U. S.) 517, 7 Fed. 705; Amy *v.* Shelby County, 1 Flipp. (U. S.) 104, 1 Fed. Cas. No. 345; Van Duzee *v.* U. S., 35 Ct. Cl. 214; Martin *v.* U. S., 26 Ct. Cl. 160.

See 10 Cent. Dig. tit. "Clerks of Courts," § 43.

80. *Arkansas.*— Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164.

Illinois.— Herod *v.* Lawler, 20 Ill. 610.

Indiana.— Taylor *v.* Washington County, 110 Ind. 462, 11 N. E. 436; Sutton *v.* Parker, 65 Ind. 536.

Louisiana.— McDonough *v.* Gorman, 2 La. 310.

Mississippi.— Patty *v.* Sparkman, 58 Miss. 76.

Nevada.— Washoe County *v.* Humboldt County, 14 Nev. 123.

New York.— Boyce *v.* Thompson, 20 Johns. (N. Y.) 274.

Pennsylvania.— Moyer *v.* Wren, 9 Pa. Co. Ct. 441.

South Carolina.— Padgett *v.* McAlhany, 53 S. C. 139, 31 S. E. 58.

Tennessee.— Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430; State *v.* Wilbur, 101 Tenn. 211, 47 S. W. 411; Perkins *v.* State, 9 Baxt. (Tenn.) 1; Williams *v.* State, 3 Heisk. (Tenn.) 313.

United States.— U. S. *v.* Payne, 147 U. S. 687, 13 S. Ct. 442, 37 L. ed. 332; U. S. *v.* Jones, 147 U. S. 672, 13 S. Ct. 437, 37 L. ed. 325; U. S. *v.* Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. ed. 399; U. S. *v.* Marsh, 106 Fed. 474, 45 C. C. A. 436; U. S. *v.* Converse, 63 Fed. 423, 24 U. S. App. 89, 11 C. C. A. 274; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361 [*affirming* 48 Fed. 643]; Goodrich *v.* U. S., 42 Fed. 392; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; Martin *v.* U. S., 26 Ct. Cl. 160.

See 10 Cent. Dig. tit. "Clerks of Courts," § 46.

81. *Illinois.*— Mason *v.* Holcomb, 73 Ill. 611; Kerp *v.* Fuchs, 43 Ill. 492.

Indiana.— Hill *v.* Shannon, 68 Ind. 470; Geisel *v.* Taylor, 37 Ind. 390.

New York.— Matter of Albany County, 5

records;[82] searching records;[83] drafting and furnishing papers;[84] furnishing copies of records and papers to persons entitled to such copies;[85] making certificates;[86]

How. Pr. (N. Y.) 11, 3 Code Rep. (N. Y.) 102.

North Carolina.— Guilford *v.* Beaufort County, 120 N. C. 23, 27 S. E. 94; State *v.* Johnson, 101 N. C. 711, 8 S. E. 360.

Pennsylvania.— Sipler *v.* Clarion County, 8 Pa. Dist. 253; Ernst *v.* Tombler, 1 Lehigh Val. L. Rep. (Pa.) 224; Sommers *v.* County, 2 L. T. N. S. (Pa.) 189.

Texas.— Morgan *v.* Haldeman, 20 Tex. 58; Stewart *v.* Crosby, 15 Tex. 513.

United States.— U. S. *v.* Kurtz, 164 U. S. 49, 17 S. Ct. 15, 41 L. ed. 346; U. S. *v.* Taylor, 147 U. S. 695, 13 S. Ct. 479, 37 L. ed. 335; U. S. *v.* McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. ed. 334; U. S. *v.* Payne, 147 U. S. 687, 13 S. Ct. 442, 37 L. ed. 332; U. S. *v.* King, 147 U. S. 676, 13 S. Ct. 439, 37 L. ed. 328; U. S. *v.* Jones, 147 U. S. 672, 13 S. Ct. 437, 37 L. ed. 325; U. S. *v.* Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. ed. 399 [*reversing* 41 Fed. 571]; U. S. *v.* Marsh, 112 Fed. 929, 50 C. C. A. 621; Marsh *v.* U. S., 109 Fed. 236; Mohrstadt *v.* New York Mut. L. Ins. Co., 107 Fed. 872; U. S. *v.* Marsh, 106 Fed. 474, 45 C. C. A. 436; Marsh *v.* U. S., 88 Fed. 879; Butler *v.* U. S., 87 Fed. 655; Van Duzee *v.* U. S., 73 Fed. 794; Van Duzee *v.* U. S., 59 Fed. 440; Fuller *v.* U. S., 58 Fed. 329; Clough *v.* U. S., 55 Fed. 921; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361 [*affirming* 48 Fed. 643]; Taylor *v.* U. S., 45 Fed. 531; Marvin *v.* U. S., 44 Fed. 405; Goodrich *v.* U. S., 42 Fed. 392; Van Duzee *v.* U. S., 41 Fed. 571; Jones *v.* U. S., 39 Fed. 410; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; Morrison *v.* Bernards Tp., 35 Fed. 400; Cavender *v.* Cavender, 3 McCrary (U. S.) 383, 10 Fed. 828; Martin *v.* U. S., 26 Ct. Cl. 160.

See 10 Cent. Dig. tit. "Clerks of Courts," § 44.

82. *Arkansas.*— Trimble *v.* St. Louis, etc., R. Co., 56 Ark. 249, 19 S. W. 839.

Illinois.— Whitney *v.* Ullman, 37 Ill. 423.

Indiana.— Geisel *v.* Taylor, 37 Ind. 390; Wabash County *v.* Sivey, 16 Ind. 425.

Ohio.— Clark *v.* Lucas County, 58 Ohio St. 107, 50 N. E. 356; Clark *v.* Lucas County, 14 Ohio Cir. Ct. 349; Clark *v.* Lucas County, 6 Ohio S. & C. Pl. Dec. 145, 4 Ohio N. P. 39.

Pennsylvania.— Trach *v.* County, 2 Lehigh Val. L. Rep. (Pa.) 253.

United States.— Van Duzee *v.* U. S., 41 Fed. 571.

See 10 Cent. Dig. tit. "Clerks of Courts," § 48.

83. *Maryland.*— Belt *v.* Prince George's County Abstract Co., 73 Md. 289, 20 Atl. 982, 10 L. R. A. 212.

Minnesota.— Church *v.* St. Paul, etc., R. Co., 33 Minn. 410, 23 N. W. 860.

New Jersey.— Lum *v.* McCarty, 39 N. J. L. 287; Flemming *v.* Hudson County, 30 N. J. L. 280.

Tennessee.— State *v.* Self, 6 Baxt. (Tenn.) 211.

United States.— Marvin *v.* U. S., 44 Fed. 405; *In re* Clerk's Charges, 5 Fed. 440; *In re* Vermeule, 10 Ben. (U. S.) 1, 28 Fed. Cas. No. 16,916; *In re* Woodbury, 17 Blatchf. (U. S.) 517, 7 Fed. 705.

See 10 Cent. Dig. tit. "Clerks of Courts," § 53.

84. U. S. *v.* Taylor, 147 U. S. 695, 13 S. Ct. 479, 37 L. ed. 335; U. S. *v.* King, 147 U. S. 676, 13 S. Ct. 439, 37 L. ed. 328; McIlwaine *v.* Ellington, 99 Fed. 133; Marsh *v.* U. S., 88 Fed. 879; Clough *v.* U. S., 55 Fed. 921; *In re* Conrad, 15 Fed. 641; Cavender *v.* Cavender, 3 McCrary (U. S.) 383, 10 Fed. 828.

85. *Arkansas.*— Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164.

Florida.— Proctor *v.* Hart, 5 Fla. 465.

Georgia.— Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830; Neisler *v.* Loudon, 83 Ga. 196, 9 S. E. 682.

Kentucky.— Morrison *v.* Rodes, 7 T. B. Mon. (Ky.) 19.

Louisiana.— McDonough *v.* Gorman, 2 La. 310.

Missouri.— Page *v.* Bettes, 19 Mo. App. 624.

Montana.— State *v.* Second Judicial Dist. Ct., 24 Mont. 425, 62 Pac. 688.

Nevada.— State *v.* Rover, 13 Nev. 17.

North Carolina.—McRae *v.* Guion, 58 N. C. 129.

Tennessee.— Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430; State *v.* Wilbur, 101 Tenn. 211, 47 S. W. 411; Western Union Tel. Co. *v.* Ordway, 8 Lea (Tenn.) 558.

Texas.—McLennan County *v.* Graves, (Tex. Civ. App. 1901) 62 S. W. 122; Kabelmacher *v.* Kabelmacher, 21 Tex. Civ. App. 317, 50 S. W. 1118, 51 S. W. 353.

Washington.— Soules *v.* McLean, 7 Wash. 451, 35 Pac. 364, 1082.

Wisconsin.— St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

United States.— U. S. *v.* Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. ed. 399; Marsh *v.* U. S., 88 Fed. 879; U. S. *v.* Dundy, 76 Fed. 357, 40 U. S. App. 375, 22 C. C. A. 221; Van Duzee *v.* U. S., 73 Fed. 794; Clough *v.* U. S., 55 Fed. 921; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361; Jones *v.* U. S., 39 Fed. 410; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; *In re* Woodbury, 17 Blatchf. (U. S.) 517, 7 Fed. 705; Amy *v.* Shelby County, 1 Flipp. (U. S.) 104, 1 Fed. Cas. No. 345; Cavender *v.* Cavender, 3 McCrary (U. S.) 383, 10 Fed. 828; Martin *v.* U. S., 26 Ct. Cl. 160.

See 10 Cent. Dig. tit. "Clerks of Courts," § 54.

86. *Arkansas.*— Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164.

Kentucky.— Rodes *v.* Reese, 4 B. Mon. (Ky.) 586.

Nevada.— Comstock Mill, etc., Co. *v.* Allen, 21 Nev. 325, 31 Pac. 434.

New York.— Matter of Albany County, 5

administering oaths;[87] taking acknowledgments;[88] services in criminal cases;[89] and services in connection with judicial sales,[90] election proceedings,[91] and tax proceedings.[92]

4. Services Rendered Joint Parties or in Consolidated Causes. For services rendered for joint parties or in consolidated causes the clerk is entitled ordinarily

How. Pr. (N. Y.) 11, 3 Code Rep. (N. Y.) 102.

Pennsylvania.— Sipler *v.* Clarion County, 8 Pa. Dist. 253; Trach *v.* County, 2 Lehigh Val. L. Rep. (Pa.) 253.

Tennessee.— Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430; Perkins *v.* State, 9 Baxt. (Tenn.) 1.

Wisconsin.— St. Croix County *v.* Webster, 11 Wis. 270, 87 N. W. 302.

United States.— U. S. *v.* McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. ed. 334; U. S. *v.* Jones, 147 U. S. 672, 13 S. Ct. 437, 37 L. ed. 325; U. S. *v.* Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. ed. 399; Marsh *v.* U. S., 88 Fed. 879; Van Duzee *v.* U. S., 73 Fed. 794; Van Duzee *v.* U. S., 59 Fed. 440; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361; Taylor *v.* U. S., 45 Fed. 531; Marvin *v.* U. S., 44 Fed. 405; Jones *v.* U. S., 39 Fed. 410; *In re* Woodbury, 17 Blatchf. (U. S.) 517, 7 Fed. 705; Martin *v.* U. S., 26 Ct. Cl. 160; Singleton *v.* U. S., 22 Ct. Cl. 118.

See 10 Cent. Dig. tit. "Clerks of Courts," § 55.

Certifying attendance of jurors and witnesses.— *Arkansas.*— Trimble *v.* St. Louis, etc., R. Co., 56 Ark. 249, 19 S. W. 839.

Colorado.— San Miguel County *v.* Long, 8 Colo. 438, 8 Pac. 923.

Iowa.— Palo Alto County *v.* Burlingame, 71 Iowa 201, 32 N. W. 259.

Kansas.— Heller *v.* Shawnee County, 23 Kan. 128.

Missouri.— Ford *v.* Kansas City, etc., R. Co., 29 Mo. App. 616.

Nevada.— Washoe County *v.* Humboldt County, 14 Nev. 123.

Pennsylvania.—Com. *v.* Philadelphia County, 8 Serg. & R. (Pa.) 64; Sipler *v.* Clarion County, 8 Pa. Dist. 253; Trach *v.* County, 2 Lehigh Val. L. Rep. (Pa.) 253.

Wisconsin.— St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

United States.— U. S. *v.* Taylor, 147 U. S. 695, 13 S. Ct. 479, 37 L. ed. 335; U. S. *v.* King, 147 U. S. 676, 13 S. Ct. 439, 37 L. ed. 328; U. S. *v.* Morgan, 66 Fed. 279, 32 U. S. App. 51, 13 C. C. A. 435; U. S. *v.* Converse, 63 Fed. 423, 24 U. S. App. 89, 11 C. C. A. 274; Van Duzee *v.* U. S., 59 Fed. 440; Fuller *v.* U. S., 58 Fed. 329; Clough *v.* U. S., 55 Fed. 921; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; Martin *v.* U. S., 26 Ct. Cl. 160.

See 10 Cent. Dig. tit. "Clerks of Courts," § 56.

87. Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164; Trimble *v.* St. Louis, etc., R. Co., 56 Ark. 249, 19 S. W. 839; Wilcox *v.* Sibley County, 34 Minn. 214, 25 N. W. 351; St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302; U. S. *v.* Taylor, 147 U. S. 695, 13 S. Ct. 479, 37 L. ed. 335; U. S. *v.* Marsh, 106 Fed. 474, 45 C. C. A. 436; Marsh *v.* U. S., 88 Fed. 879; Butler *v.* U. S., 87 Fed. 655; Fuller *v.* U. S., 58 Fed. 329; Clough *v.* U. S., 55 Fed. 921; U. S. *v.* Van Duzee, 52 Fed. 930, 10 U. S. App. 395, 3 C. C. A. 361; Taylor *v.* U. S., 45 Fed. 531; Marvin *v.* U. S., 44 Fed. 405; Hill *v.* U. S., 40 Fed. 441.

88. U. S. *v.* Taylor, 147 U. S. 695, 13 S. Ct. 479, 37 L. ed. 335; Taylor *v.* U. S., 45 Fed. 531; Martin *v.* U. S., 26 Ct. Cl. 160.

89. *Alabama.*— Burgin *v.* Hawkins, 101 Ala. 326, 14 So. 771.

Illinois.— Satterfield *v.* Jefferson County, 85 Ill. 347; Chicago *v.* O'Hara, 60 Ill. 413; Wells *v.* McCullock, 13 Ill. 606; Carpenter *v.* People, 8 Ill. 147; McLean *v.* Montgomery County, 32 Ill. App. 131.

Indiana.— *Ex p.* Harrison, 112 Ind. 329, 14 N. E. 225; Brown County *v.* Summerfield, 36 Ind. 543; Livengood *v.* Vermillion County, 32 Ind. 84; Morgan County *v.* Johnson, 31 Ind. 463.

Iowa.— Culbertson *v.* Jefferson County, 1 Greene (Iowa) 416.

Mississippi.— *Ex p.* Thomas, 59 Miss. 522; Myers *v.* Marshall County, 55 Miss. 344; Burt *v.* Harwood, 39 Miss. 756.

New York.— Fairlie *v.* Maxwell, 1 Wend. (N. Y.) 17.

Tennessee.— Perkins *v.* State, 9 Baxt. (Tenn.) 1; Avery *v.* State, 7 Baxt. (Tenn.) 328.

Texas.— Hogg *v.* State, 40 Tex. Crim. 109, 48 S. W. 580 [*reaffirming* (Tex. Crim. 1897) 43 S. W. 1101]; Bonn *v.* State, 12 Tex. App. 100.

United States.— U. S. *v.* Dundy, 76 Fed. 357, 40 U. S. App. 375, 22 C. C. A. 221.

See 10 Cent. Dig. tit. "Clerks of Courts," § 57.

90. Griel's Estate, 171 Pa. St. 412, 37 Wkly. Notes Cas. (Pa.) 85, 33 Atl. 375; Ramsey *v.* Alexander, 5 Serg. & R. (Pa.) 338; Harris *v.* Petigrew, 5 Lea (Tenn.) 596.

91. Lyon *v.* Adams, 4 Serg. & R. (Pa.) 443; U. S. *v.* Jones, 147 U. S. 672, 13 S. Ct. 437, 37 L. ed. 325; U. S. *v.* Fitch, 70 Fed. 578, 37 U. S. App. 103, 17 C. C. A. 233; Clough *v.* U. S., 55 Fed. 921; Goodrich *v.* U. S., 35 Fed. 193.

92. *Kentucky.*— Ford *v.* Stone, 102 Ky. 471, 19 Ky. L. Rep. 1537, 43 S. W. 721; Hammond *v.* Norman, 20 Ky. L. Rep. 101, 45 S. W. 459.

Louisiana.— State *v.* Clinton, 25 La. Ann. 342.

Minnesota.— O'Connor *v.* Ramsey County, 61 Minn. 370, 63 N. W. 1025.

Missouri.— Hubbard *v.* Texas County, 101 Mo. 210, 13 S. W. 1065.

to but one fee,[93] but where his services are required to be performed separately for each party, or in each cause, he is entitled to separate fees.[94]

5. SALARY. By statute[95] in some jurisdictions clerks of court receive their compensation in the form of a salary, which is usually payable out of the official fees received by them.[96] Where this is the case the clerk cannot receive more than the amount designated,[97] and any excess of fees earned by him above that

Tennessee.—Aldrich *v.* Pickard, 14 Lea (Tenn.) 456; State *v.* Gaines, 4 Lea (Tenn.) 352; State *v.* Gaines, 4 Lea (Tenn.) 306; Akers *v.* Burch, 12 Heisk. (Tenn.) 606.

See 10 Cent. Dig. tit. "Clerks of Courts," § 52.

93. Court Officers *v.* Wyatt, 62 Ga. 172; People *v.* Gary, 105 Ill. 332; People *v.* Gross, 101 Ill. 343; Kansas City, etc., R. Co. *v.* Erwin, 50 Mo. App. 552; Hanrick *v.* Ake, 75 Tex. 142, 12 S. W. 818.

94. Williams *v.* Court Officers, 61 Ga. 95; People *v.* Gross, 101 Ill. 343; Hanrick *v.* Ake, 75 Tex. 142, 12 S. W. 818; Van Duzee *v.* U. S., 73 Fed. 794; Fuller *v.* U. S., 58 Fed. 329; Clough *v.* U. S., 55 Fed. 921; Jones *v.* U. S., 39 Fed. 410; Martin *v.* U. S., 26 Ct. Cl. 160.

95. **The population of the county determines the amount of the clerk's salary under some statutes.** King *v.* Texas County, 146 Mo. 60, 47 S. W. 920; Monroe *v.* Luzerne County, 103 Pa. St. 278.

Pennsylvania — County court clerks.— The salary of clerks of county courts is governed by the act of 1876 and its supplements, fixing the amount of five thousand dollars annually. McGunnegle *v.* Allegheny County, 163 Pa. St. 589, 30 Atl. 123.

Cannot retain naturalization fees.—A clerk of court whose compensation for services is an annual salary, and who is to receive fees for services and pay the same into the county treasury, has no authority to retain in his hands the fees received by him for the naturalization of aliens. People *v.* Seabury, 23 How. Pr. (N. Y.) 121.

96. Hillard *v.* Shoshone County, 2 Ida. 843, 848, 27 Pac. 678, 680; Washington County *v.* Jones, 45 Iowa 260.

As to duty to pay over fees and other moneys received in official capacity see *infra*, VIII, B, 6, c.

What fees chargeable with clerk's salary. —See Wiegand *v.* Luzerne County, 7 Kulp (Pa.) 183; U. S. *v.* Wolters, 51 Fed. 896.

Fees charged with a trust.— Where the clerk's salary is payable out of the fees earned in each year, such fees are charged with a trust in the clerk's favor to the extent of his salary and are to be applied in payment thereof whenever collected, even though that be after he has gone out of office. Allen *v.* Cowan, 96 Mo. 193, 9 S. W. 587; Lycett *v.* Wolff, 45 Mo. App. 489; Pugh *v.* Evans, 31 Mo. App. 290. And see People *v.* Barnwell, 41 Ill. App. 617, where it was held to be the duty of the clerk's successor to collect and pay over fees earned but not collected by the former clerk.

When payment to predecessor may be restrained.— An injunction will not be allowed, restraining the clerk of the court from paying over to his predecessor fees accruing during the latter's term of office, even though his compensation for some particular year may have exceeded two thousand dollars, unless it be made to appear that the fees became due during that year, or that his compensation, if the fees were distributed over his entire term, would exceed the statutory limit. Peet *v.* White, 43 Iowa 400.

Applying to deficiency excess in former year.— Under a statute fixing a maximum for the clerk's salary to be paid out of his fees, if in any year of his term the aggregate of such fees, after deducting the salaries of his clerks and deputies, is insufficient to pay his salary for that year, he is entitled to have an excess standing to his credit in a preceding year of his term applied to meet the deficit. Wiegand *v.* Luzerne County, 7 Kulp (Pa.) 183. *Compare* Steel *v.* Com., 18 Pa. St. 451.

A reëlected clerk cannot apply the excess accruing in his second term to make up the deficiency in the first. Com. *v.* Steel, 8 Pa. St. 128.

Fees not payable in county warrants.— In Arkansas a circuit clerk of a county who receives a salary to be reserved out of the fees of his office, the residue of which are to be paid to the county treasurer "for county purposes" is not required to accept county warrants in payment of such fee. Powell *v.* Durden, 61 Ark. 21, 31 S. W. 740.

97. Hillard *v.* Shoshone County, 2 Ida. 843, 848, 27 Pac. 678, 680; Moore *v.* Mahaska County, 61 Iowa 177, 16 N. W. 79; Boone County *v.* Wilson, 38 Iowa 372 [*citing* Washington County *v.* Jones, 45 Iowa 260].

Additional compensation for such things as deputy hire and probate services is sometimes authorized by statute. Washington County *v.* Jones, 45 Iowa 260.

Clerk of circuit court of appeals.— Under the judiciary act of March 3, 1891, §§ 2, 9, a clerk of the circuit court of appeals is entitled to retain from the fees and emoluments of his office, after payment of all other expenses, a sum not exceeding five hundred dollars, in addition to his salary of three thousand dollars. Morton *v.* U. S., 59 Fed. 349 [*affirmed* in 65 Fed. 204, 24 U. S. App. 531, 13 C. C. A. 151].

Territorial courts.— The fees to be retained by the clerks of the district courts for the territory of Utah as compensation for their services were limited to three thousand five hundred dollars, the amount fixed by U. S. Rev. Stat. §§ 823, 839. U. S. *v.* Averill,

amount is generally required to be paid into the state or county treasury,[98] whether collected before or after his term of office expires.[99]

B. Who Liable — 1. The Public. The public is liable for the compensation of a clerk of court only where there is specific authority to the officer to make a charge for the service rendered and a positive statutory provision making the public liable therefor.[1] The fact that certain services were performed in pursuance of a court order will not render the municipality liable if the court had no

130 U. S. 335, 9 S. Ct. 546, 32 L. ed. 977 [*reversing* 4 Utah 416, 7 Pac. 527].

98. People *v.* Gaulter, 149 Ill. 39, 36 N. E. 576; Matter of Lewis, 52 Mo. 550; Steever *v.* Rickman, 109 U. S. 74, 3 S. Ct. 67, 27 L. ed. 861 (fees over and above expenses).

Successor's right to collect remaining fees. —After a clerk has received the amount allowed by Mo. Const. (1865), art. 6, § 24, for his compensation, he has no further interest in the fees, and his successor is entitled to collect the uncollected fees. Thornton *v.* Thomas, 65 Mo. 272.

Not an act taxing officers.— An act allowing clerks to retain a specified amount of their fees and requiring them to pay to the commonwealth fifty per cent of the excess is not a statute taxing such officers. Cohen *v.* Com., 6 Pa. St. 111.

When not obliged to pay over.— The condition of a clerk's bond was that he should render an account yearly, on the first Wednesday in January, of all moneys received by him, during the year, by virtue of his office, and "after deducting $1,000, if he should have received so much, to pay one half of the residue," etc. He received nine hundred twenty-seven and sixty-one one-hundredths dollars between the first Wednesday of January and the 23d day of October, when he ceased to be clerk. It was held in a suit on his bond that he was not bound to pay over, as he had not received more than one thousand dollars, although he had received more than at the rate of one thousand dollars per annum. Harris *v.* Dinsmore, 11 Me. 365.

99. Matter of Lewis, 52 Mo. 550.

1. *Arkansas.*— Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164; McDonald *v.* Logan County, 55 Ark. 577, 18 S. W. 1047.

California.— Bicknell *v.* Amador County, 30 Cal. 237.

Illinois.— Satterfield *v.* Jefferson County, 85 Ill. 347; Edgar County *v.* Mayo, 8 Ill. 82.

Indiana.— *Ex p.* Harrison, 112 Ind. 329, 14 N. E. 225; Taylor *v.* Washington County, 110 Ind. 462, 11 N. E. 436; Noble *v.* Wayne County, 101 Ind. 127; Livengood *v.* Vermillion County, 32 Ind. 84; Morgan County *v.* Johnson, 31 Ind. 463; Wabash County *v.* Sivey, 16 Ind. 425; Huntington County *v.* Buchanan, 21 Ind. App. 178, 51 N. E. 939.

Kansas.— Heller *v.* Shawnee County, 23 Kan. 128.

Kentucky.— Wortham *v.* Grayson County Ct., 13 Bush (Ky.) 53.

Minnesota.— Rasmusson *v.* Clay County, 41 Minn. 283, 43 N. W. 3; Wilcox *v.* Sibley County, 34 Minn. 214, 25 N. W. 351.

New York.— Fairlie *v.* Maxwell, 1 Wend. (N. Y.) 17.

Ohio.— Clark *v.* Lucas County, 58 Ohio St. 107, 50 N. E. 356; Butler County *v.* Welliver, 12 Ohio Cir. Ct. 440, 5 Ohio Cir. Dec. 569.

Pennsylvania.—Com. *v.* Philadelphia County, 8 Serg. & R. (Pa.) 151; Lyon *v.* Adams, 4 Serg. & R. (Pa.) 443; Sipler *v.* Clarion County, 8 Pa. Dist. 253; Close *v.* Berks County, 2 Woodw. (Pa.) 453.

South Carolina.— Ostendorff *v.* Charleston County, 14 S. C. 403.

Tennessee.— Perkins *v.* State, 9 Baxt. (Tenn.) 1.

United States.— U. S. *v.* Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. ed. 399 [*reversing* 41 Fed. 571]; Goodrich *v.* U. S., 42 Fed. 392; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; *In re* Clerk's Charges, 5 Fed. 440.

See 10 Cent. Dig. tit. "Clerks of Courts," § 35.

Contra cases.— In two early cases the county was held liable for certain services and expenditures of a clerk, although no statutory provision authorized such compensation. Boone County *v.* Todd, 3 Mo. 140; Bright *v.* Chenango County, 18 Johns. (N. Y.) 242.

Civil suit — State a party.— In civil causes clerks of courts are entitled to the same fees, where they render services for the state, that they would be if the services were performed for private persons. People *v.* Rockwell, 3 Ill. 3; U. S. *v.* Wolters, 51 Fed. 896.

City cannot deprive clerk of his costs.— A city has no right to deprive a clerk of court of his costs for services rendered in the cause, by causing a fieri facias issued on a judgment in its favor to be set aside. Lynne *v.* New Orleans, 26 La. Ann. 48.

Idaho — Minimum compensation.— Under Ida. Const. art. 18, § 7, providing that the compensation of a district court clerk shall not fall below five hundred dollars for any one year, if the fees and commissions received by a clerk during a year do not aggregate that amount the county must make up the deficiency. Hillard *v.* Shoshone County, 2 Ida. 843, 848, 27 Pac. 678, 680. The intent of the provision is to limit the liability of the county for the costs of the office of clerk of the district court to the fees provided for by law, except when such fees do not amount to the minimum fixed by the constitution. Woodward *v.* Idaho County, (Ida. 1897) 51 Pac. 143.

power to contract obligations for it,[2] nor will the allowance of an unlawful claim by the person or body authorized to contract obligations for the municipality bind the municipality.[3]

2. Private Individuals. Usually the party for whom services are rendered or the assignee of his interest[4] is answerable to the clerk for his fees,[5] and where the clerk cannot make his fees out of the unsuccessful party he may generally hold the successful party liable for them.[6]

C. When Payable — 1. In General. As to when the fees of a clerk are payable is a question depending upon the statutes and the practice of the particu-

2. Rasmusson *v.* Clay County, 41 Minn. 283, 43 N. W. 3; Ostendorff *v.* Charleston County, 14 S. C. 403.

3. Huntington County *v.* Buchanan, 21 Ind. App. 178, 51 N. E. 939; St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

Action to recover back unauthorized fees — Burden of proof. — In an action by a county against a county clerk to recover fees allowed him from the county which were unauthorized by law the county has the burden of proof, and must show by affirmative evidence the illegality of any item complained of. St. Croix County *v.* Webster, 111 Wis. 270, 87 N. W. 302.

4. **Assignee of party's interest.** — Under Cal. Code Civ. Proc. §§ 796, 798, the costs of a partition suit must be paid by the parties entitled to share in the lands divided in proportion to their respective interests. In such a suit the interest of the plaintiff was purchased by the defendants and the suit was thereafter prosecuted solely for the benefit of such defendants. In the decree an allowance was made to the plaintiff covering the fees due the clerk for services rendered in the cause, but the said fees were never paid. In an action by the clerk against the defendants in the partition suit, it was held that he was entitled to recover his fees from them notwithstanding the allowance to the plaintiff on that account. The defendants having acquired the plaintiff's interest assumed the liability for costs chargeable thereon. Wickersham *v.* Denman, 68 Cal. 383, 9 Pac. 723.

Admiralty — Third person defending for party. — Where a third person appears and defends a suit in admiralty, in behalf and in the absence of the party to the suit, he is to be treated as a party, and made liable, personally, for the fees of the clerk of the court, for services rendered in the cause at his request. *In re* Stover, 1 Curt. (U. S.) 201, 23 Fed. Cas. No. 13,507 [*cited* in The Maggie M., 33 Fed. 591].

5. Moore *v.* Porter, 13 Serg. & R. (Pa.) 100; De la Garza *v.* Carolan, 31 Tex. 387; Caldwell *v.* Jackson, 7 Cranch (U. S.) 276, 3 L. ed. 341. See also, generally, Costs.

If the clerk is unable to collect from the parties he must himself sustain the loss and cannot hold the county liable. *Ex p.* Harrison, 112 Ind. 329, 14 N. E. 225; Peter *v.* Prettyman, 62 Md. 566.

No lien on land in suit. — Where an action to recover land is dismissed by plaintiff the clerk and the examiner have no lien on the land for services rendered by them in the action for the benefit of plaintiff. Skaggs *v.* Hill, 12 Ky. L. Rep. 382, 14 S. W. 363.

Where fee charged to attorney. — Plaintiff is liable to the prothonotary for the price of the original writ, although secured by and charged to his attorney in the docket. Banks *v.* Juniata Bank, 16 Serg. & R. (Pa.) 155.

In a criminal case, where a new trial is asked for, defendant is liable for the clerk's motion fees (Burton *v.* State, 16 Lea (Tenn.) 135); and so, on reversal of a conviction, defendant is liable for his clerk's fees in the appellate court (Green *v.* Com., 93 Ky. 299, 14 Ky. L. Rep. 169, 19 S. W. 978). For a full discussion see, generally, Costs.

A decree dismissing a libel in admiralty "without costs to either party" merely imports that the parties are not liable to each other for any costs, but does not affect the liability of a party to the clerk for his fees for services rendered to such party. *In re* Stover, 1 Curt. (U. S.) 201, 23 Fed. Cas. No. 13,507 [*cited* in U. S. *v.* Ames, 99 U. S. 35, 25 L. ed. 295; Goodyear *v.* Sawyer, 17 Fed. 2].

6. *Alabama.* — South, etc., R. Co. *v.* Bradley, 84 Ala. 468, 4 So. 611.

Mississippi. — Officers of Ct. *v.* Fisk, 7 How. (Miss.) 403.

North Carolina. — Clerk Davidson County Ct. *v.* Wagoner, 26 N. C. 131.

Pennsylvania. — Lyon *v.* McManus, 4 Binn. (Pa.) 167.

Tennessee. — *In re* Clerk's Motions, 12 Heisk. (Tenn.) 152; Carren *v.* Breed, 2 Coldw. (Tenn.) 465; Ewing *v.* Lusk, 4 Yerg. (Tenn.) 459.

See 10 Cent. Dig. tit. "Clerks of Courts," § 35.

Execution may be issued against the successful party in some jurisdictions. Officers of Ct. *v.* Fisk, 7 How. (Miss.) 403; Clerk Davidson County Ct. *v.* Wagoner, 26 N. C. 131. But see Washington *v.* Ewing, Mart. & Y. (Tenn.) 45, holding that an execution must be based upon a precedent judgment.

Sureties on the prosecution bond cannot be held liable for such fees where plaintiff succeeds in his suit and the fees cannot be made out of defendant. Carren *v.* Breed, 2 Coldw. (Tenn.) 465.

Plaintiff in error, whether plaintiff or defendant below, is liable for the fees on affirmance. The prothonotary, however, cannot resort to the recognizance in the writ of error for his fees; but the court in which such re-

lar court. In regard to some services the clerk may collect his costs as they accrue irrespective of the final result,[7] while as to others his costs must abide the event.[8]

2. RIGHT TO DEMAND PREPAYMENT. In the absence of any express or implied statutory prohibition it would seem that a clerk may demand prepayment of his fees before performing the required services, although it must be confessed that no well settled rule on this point can be deduced from the cases.[9] Even where the

cognizance is sued should see that the fees are secured, so far as they are covered by the recognizance. Moore *v.* Porter, 13 Serg. & R. (Pa.) 100.

7. Cavender *v.* Cavender, 3 McCrary (U. S.) 383, 10 Fed. 828.

In Louisiana clerks have the right every six months after the institution of the suit to demand their costs from plaintiff. Matter of New Orleans, 19 La. Ann. 382.

In Pennsylvania the prothonotary receives immediate payment for original writs, writs of removal, subpœnas, searches by the parties, copies of papers in a cause, and rules of court; but for other services, as the entry of oyer and special imparlances, filing declarations, entries of pleas, and the like, the costs abide the event. Lyon *v.* McManus, 4 Binn. (Pa.) 167.

Scire facias on judgment.—A prothonotary is entitled to demand his fees due in a suit conducted to judgment, although a scire facias thereon has issued, on which the proceedings are not terminated. Banks *v.* Juniata Bank, 16 Serg. & R. (Pa.) 155.

8. Matter of Albany County, 5 How. Pr. (N. Y.) 11, 3 Code Rep. (N. Y.) 102 (fee for entering judgment); Hyams *v.* Boyce, 1 McMull. (S. C.) 95.

Fund in receiver's hands.—Under Ga. Code, § 3684, the clerk of a court has no right to his costs out of a fund in a receiver's hands until such fund has been adjudged subject to costs on the termination of the case. Ballin *v.* Ferst, 55 Ga. 546.

9. See the following cases:

Alabama.— McRae *v.* Juzan, 4 Ala. 286.

Arkansas.— Thorn *v.* Clendenin, 12 Ark. 60.

California.— Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501; Bolander *v.* Gentry, 36 Cal. 127; People *v.* Myers, 20 Cal. 76.

Georgia.— Ball *v.* Duncan, 30 Ga. 938; Rutherford *v.* Jones, 12 Ga. 618.

Illinois.— Meserve *v.* Delaney, 112 Ill. 353; People *v.* Harlow, 29 Ill. 43; People *v.* Rockwell, 3 Ill. 3; McArthur *v.* Artz, 28 Ill. App. 466 [*affirmed* in 129 Ill. 352, 21 N. E. 802].

Indiana.— State *v.* Wallace, 41 Ind. 445; Kerr *v.* State, 35 Ind. 288; Falkenburgh *v.* Jones, 5 Ind. 296.

Iowa.— Ripley *v.* Gifford, 11 Iowa 367; Dickerson *v.* Shelby, 2 Greene (Iowa) 460.

Kentucky.— Duncan *v.* Baker, 13 Bush (Ky.) 514; Bates *v.* Foree, 4 Bush (Ky.) 430; Collins *v.* Cleveland, 17 B. Mon. (Ky.) 459; Mulholland *v.* Troutman, 7 Ky. L. Rep. 517.

Louisiana.— State *v.* Robertson, 28 La. Ann. 580; State *v.* Clerk Second Dist. Ct., 22 La. Ann. 585; State *v.* Clerk Sixth Dist. Ct., 22 La. Ann. 578; State *v.* Clerk Seventh Dist. Ct., 22 La. Ann. 563; State *v.* Behrens, 17 La. Ann. 67.

Maine.— Tilton *v.* Wright, 74 Me. 214, 43 Am. Rep. 578.

Maryland.— Walter *v.* Baltimore Second Nat. Bank, 56 Md. 138.

Massachusetts.—Knapp *v.* Lambert, 3 Gray (Mass.) 377 [*followed* in Rice *v.* Nickerson, 4 Allen (Mass.) 66].

Montana.— State *v.* Northrup, 13 Mont. 424, 34 Pac. 608.

New York.— Malcomb *v.* Jennings, 1 Code Rep. (N. Y.) 41.

North Carolina.— Oxford Bank *v.* Bobbitt, 111 N. C. 194, 16 S. E. 169.

Ohio.— State *v.* Raynolds, Tapp. (Ohio) 181.

Oregon.— McDonald *v.* Crusen, 2 Oreg. 258.

Pennsylvania.— Baldwin *v.* Cash, 7 Watts & S. (Pa.) 427.

Tennessee.— Western Union Tel. Co. *v.* Ordway, 8 Lea (Tenn.) 558.

Texas.— ——— *v.* Costley, 7 Tex. 460; Dade *v.* Smith, 1 Tex. App. Civ. Cas. § 701.

United States.— Steever *v.* Rickman, 109 U. S. 74, 3 S. Ct. 67, 27 L. ed. 861. See also COSTS.

See 10 Cent. Dig. tit. "Clerks of Courts," § 37.

As to right to demand prepayment of fees before delivery of transcript on appeal: In civil cases see APPEAL AND ERROR, 2 Cyc. 817. In criminal cases see CRIMINAL LAW.

Fee for previous service.— The clerk is bound to perform each service required of him on his being paid his fee therefor. He cannot insist that before performing some service required of him he shall first be paid his fees for some previous service, for which he has given credit. Purdy *v.* Peters, 15 Abb. Pr. (N. Y.) 160, 23 How. Pr. (N. Y.) 328.

Services performed after leaving office.— A clerk will not be compelled to surrender a transcript of record partially made before, and completed after, the expiration of his term, until his fees therefor are paid. The transcript having been completed after the clerk had ceased to act officially, he held it as personal and individual property. The party had a right to have a complete transcript made by the clerk's successor at legal rates. Bates *v.* Foree, 4 Bush (Ky.) 430.

Waiver of right to demand prepayment.— Where a clerk accepted a demurrer for filing, without demanding his legal fees, he was held to have waived his right to a prepayment of such fees, and the demurrer was regarded as filed. Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501.

clerk is deemed to have no right to refuse arbitrarily to perform the desired services until his fees have been paid, the court will exercise discretion, and where necessary to the protection of the clerk will order that the fees be paid in advance.[10]

D. Proceedings to Recover Fees or Salary — 1. Against the Public. In order to recover fees or salary due him for public services[11] the clerk must make a claim sufficiently specific to show that the services were of a nature authorizing the charges made,[12] which claim must usually be passed upon by the judge or some other designated official or body.[13]

10. Duncan *v.* Baker, 13 Bush (Ky.) 514; Mulholland *v.* Troutman, 7 Ky. L. Rep. 517.

After delivery of copies to court.— The court on the suggestion of the clerk will not proceed with the hearing of the case on the law docket until the clerk's fees for copies are paid, although such suggestion is not made until after the copies have been delivered to the court. Gardner *v.* Gardner, 2 Gray (Mass.) 434.

11. Jurisdiction of federal court.— The district court has jurisdiction of a petition by the clerk of the circuit court for compensation for attendance thereon. Pleasants *v.* U. S., 35 Fed. 270.

Petition — Averment as to population of county.— In an action by a clerk to recover his salary under a statute providing that the clerk of the circuit court should receive a salary of twenty-two hundred and fifty dollars in every county having a population of thirty thousand and less than forty thousand, a petition is sufficient which alleges that his salary was twenty-two hundred and fifty dollars, without also averring that the population of the county was within the specified limits. Lycett *v.* Wolff, 45 Mo. App. 489.

Evidence.— In Missouri clerks of court are required to make out annual statements specifying the amount of each fee received and to file the same each year with the county clerk, and the county court is required to examine every such statement deducting all amounts necessarily paid to deputies and ordering the payment into the county treasury of any excess above the amount allowed the clerk as salary. In an action by a circuit clerk to recover his salary it was held that such statements were admissible in evidence to show the amounts collected by the clerk and the amounts allowed by the county court as deputy hire; and that the fact that the clerk had on the expiration of his term taken away the book containing the original entries of the fees collected by him, and that such book had been lost or destroyed, did not affect the admissibility of such evidence. Lycett *v.* Wolff, 45 Mo. App. 489. In an action by the clerk of a circuit and district court against the United States to recover fees charged for record entries made in criminal cases, which have been disallowed by the treasury department, the clerk's accounts, which were presented to and approved by the court, are *prima facie* evidence of the correctness of the items therein contained, and the plaintiff is not required to prove that each separate entry for which a charge is made therein, which purports to relate to a separate and distinct transaction, does in fact relate to such a transaction, so as to entitle him to charge for the same as a folio under U. S. Rev. Stat. § 854, and especially where the statements of disallowances by the auditor do not disclose what particular items are objected to, nor any principle upon which the disallowances were made. Marsh *v.* U. S., 109 Fed. 236.

Defenses.— It is no defense to the action that the claim has been disallowed by the officials authorized to audit the clerk's accounts (U. S. *v.* Fitch, 70 Fed. 578, 37 U. S. App. 103, 17 C. C. A. 233), that the clerk had failed to furnish a new bond upon being requested to do so (Laramie County *v.* Atkinson, 4 Wyo. 334, 33 Pac. 995), or that he had failed or refused to account for fees received by him (Laramie County *v.* Atkinson, 4 Wyo. 334, 33 Pac. 995).

Liability of city for salary paid intruder. — On Dec. 31, 1872, plaintiff, who was the assistant clerk of court, was unlawfully excluded from office by K, who, claiming under an appointment, entered on and continued to occupy the office until March 1, 1874, when by virtue of a judgment of ouster plaintiff again came into possession. The salary of the office was by statute required to be paid by the comptroller of the city in monthly instalments. It was paid to K from the time of his intrusion to Dec. 1, 1873. Plaintiff, during the time he was excluded, was ready to perform the duties of the office and proffered his services to the clerk, which were refused. It was held that plaintiff was not entitled to recover the salary for the period during which it had been paid to K, for defendant was in no way a party to the usurpation or responsible for the unlawful exercise of the power of appointment by the justice; and such appointment, although unauthorized, when joined with the possession of the office, constituted K an officer *de facto*, so that although as an officer *de facto* only he was not entitled to the salary and could not have maintained an action to recover it, yet payment to him while in possession was a good defense, the comptroller being justified in acting on the apparent title. Dolan *v.* New York, 68 N. Y. 274, 23 Am. Rep. 168.

12. Desha County *v.* Jones, 51 Ark. 524, 11 S. W. 875 (account itemized obscurely in abbreviated form); U. S. *v.* McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. ed. 334; Martin *v.* U. S., 26 Ct. Cl. 160.

13. Houston County *v.* Culler, 58 Ga. 131, county commissioners.

2. AGAINST PARTIES FOR WHOM SERVICES RENDERED. The fees due a clerk for official services performed by him at the request of a party, being such as are authorized by law, constitute a debt for which an action of debt or *indebitatus assumpsit* will lie against such party,[14] and the clerk may set off such fees against an action on his bond by the party from whom the fees are due.[15] In some jurisdictions a summary remedy is given the clerk by statute,[16] but in the absence of an express provision to that effect he can only proceed by action or fee bill.[17]

Effect of disallowance.— The disallowance by the first comptroller of the treasury of fees claimed by a clerk of the court is not conclusive against the clerk on a petition by him for the recovery of such fees. Davis *v.* U. S., 45 Fed. 162 [*following* Harmon *v.* U. S., 43 Fed. 560]. See also U. S. *v.* Fitch, 70 Fed. 578, 37 U. S. App. 103, 17 C. C. A. 233.

Payment directed by court.— Where the department refused payment of the account of a clerk of a federal court for services rendered the government in cases of arrest on the ground that the names of the defendants were not given and the nature of the suits not sufficiently described, and a duplicate of the account filed in the clerk's office showed who the defendants were, and the records of the court show that they were subsequently indicted and tried and that the services were actually rendered, the court directed payment of the fees. Clough *v.* U. S., 55 Fed. 921.

Effect of approval.— The allowance of a clerk's accounts by the presiding justice is a judgment, and as such conclusive. If the settlement be erroneous it may be reopened and corrected by motion to the court and notice to defendant; but assumpsit will not lie to recover an alleged excess after the account has been approved by the court. County *v.* Clark, 60 N. H. 209.

Exceeding maximum emolument.—A judgment against the United States for fees alleged to be due a clerk of court cannot be reversed on the ground that the record fails to show that the amount of the judgment, together with the amount already paid the clerk, would not increase his emoluments beyond the maximum allowed by law. This is a matter to be determined by the department when the whole account is stated and settled. U. S. *v.* Jones, 147 U. S. 672, 13 S. Ct. 437, 37 L. ed. 325 [*following* U. S. *v.* Harmon, 147 U. S. 268, 13 S. Ct. 327, 37 L. ed. 164].

14. South, etc., R. Co. *v.* Bradley, 84 Ala. 468, 4 So. 611; Moore *v.* Porter, 13 Serg. & R. (Pa.) 100; Johnson *v.* MacCoy, 32 W. Va. 552, 9 S. E. 887; Caldwell *v.* Jackson, 7 Cranch (U. S.) 276, 3 L. ed. 341.

Necessity to place in officer's hands.— A clerk of a circuit court may maintain an action for his fees without first having placed them in an officer's hands and had them returned "No property found." Johnson *v.* MacCoy, 32 W. Va. 552, 9 S. E. 887. But see Craigen *v.* Lobb, 12 Leigh (Va.) 627.

Negligence as a defense.— If the prothonotary has performed the services for which suit is brought he is entitled to recover his fees, although he has not in all respects literally complied with the letter of the law. The remedy of defendant for any damages sustained by the neglect of the prothonotary is by action. Cone *v.* Donaldson, 47 Pa. St. 263.

Action against predecessor.— Under Md. Code Pub. Gen. Laws, art. 38, § 8, which imposes on the incoming clerk the duty of finishing all business left unfinished by his predecessor, and provides that he shall be paid the usual fees for such work by his predecessor, where the latter has received the fees no action lies for the same till all the unfinished business has been finished. State *v.* Carman, 27 Md. 706.

Action for fees collected by sheriff.— An action can be maintained by the clerk of a superior court in his own name, on the official bond of the sheriff, for the recovery of costs accrued in such court and collected by the sheriff and due and payable to said clerk and others. Jackson *v.* Maultsby, 78 N. C. 174.

15. Craigen *v.* Lobb, 12 Leigh (Va.) 627.

16. *Alabama.*— Westcott *v.* Booth, 49 Ala. 182.

Louisiana.— Matter of New Orleans, 19 La. Ann. 382.

South Carolina.— Scharlock *v.* Oland, 1 Rich. (S. C.) 207; Corrie *v.* Jacobs, Harp. (S. C.) 325; Butler *v.* Ryan, 3 Desauss. (S. C.) 178.

Tennessee.— Stuart *v.* McCuistion, 1 Heisk. (Tenn.) 427; Carren *v.* Breed, 2 Coldw. (Tenn.) 465.

Texas.— De la Garza *v.* Carolan, 31 Tex. 387.

See 10 Cent. Dig. tit. "Clerks of Courts," § 65; and, generally, COSTS.

Attachment.— The clerk of the circuit court for the District of Columbia may have an attachment for contempt for the nonpayment of his fees. Lee *v.* Patterson, 2 Cranch C. C. (U. S.) 199, 15 Fed. Cas. No. 8,198. *Compare* Forrest *v.* Hanson, 1 Cranch C. C. (U. S.) 12, 9 Fed. Cas. No. 4,942, holding that the clerk was not entitled to attachment of privilege.

17. Hoover *v.* Missouri Pac. R. Co., 115 Mo. 77, 21 S. W. 1076; Beedle *v.* Mead, 81 Mo. 297; Page *v.* Bettes, 19 Mo. App. 624; Moore *v.* Porter, 13 Serg. & R. (Pa.) 100.

Must have authority from judgment creditor or attorney.—A clerk of court has no authority to issue execution for costs without authority from the judgment creditor or his attorney. His remedy must be by action against the party from whom costs are due or by fee bill. Wickliff *v.* Robinson, 18 Ill. 145.

E. Forfeiture of Fees. In some jurisdictions it is provided by statute that a clerk shall forfeit his fees for certain specified causes.[18]

F. Power to Alter Compensation During Term. In the absence of any constitutional prohibition the legislature has power to reduce or increase the compensation of a clerk during his term of office.[19]

VIII. POWERS AND DUTIES.

A. General Principles Applicable — 1. Obligation to Perform Duties. A clerk of court is obliged to perform the official duties imposed on him by law,[20] and he may be compelled to do so by mandamus[21] or by rule of court.[22] In the performance of his duties as the ministerial officer of the court he is subject to the control of the court,[23] and if he fail or refuse to perform any

18. **Taking illegal fees.**—In some jurisdictions if a clerk charges illegal fees the court may declare his fees forfeited. Herod *v.* Lawler, 20 Ill. 610; Rodes *v.* Reese, 4 B. Mon. (Ky.) 586. As to penalties for taking illegal fees see *infra*, IX, A, 3, c.

Alabama — Failure to enter fees in book. — Under Ala. Code, § 5007, requiring a clerk to keep a fee book, the penalty for failure to keep such book is a forfeiture of all fees; and where such book is kept any fee not entered therein is forfeited. Bilbro *v.* Drakeford, 78 Ala. 318. But if the clerk enter his fees after adjournment of the court but before execution thereof it is sufficient, and a failure to enter such fees at the time the services are rendered will not cause a forfeiture. McDonald *v.* Cox, 104 Ala. 379, 16 So. 113.

Tennessee — Negligence of clerk. — Under the Tennessee statutes where a party sustains loss through the negligence of the clerk the latter forfeits his fees as to such party. Dean *v.* Hale, 7 Lea (Tenn.) 613. Thus where a clerk does not do his work in a proper manner in making a transcript on appeal his fees are forfeited. Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085; Sible *v.* State, 3 Heisk. (Tenn.) 137; Bass *v.* Shurer, 2 Heisk. (Tenn.) 216; State *v.* White, 5 Sneed (Tenn.) 620.

19. Matter of Burris, 66 Mo. 442; Clark *v.* Silver Bow County, 17 Mont. 80, 42 Pac. 104; Warner *v.* People, 2 Den. (N. Y.) 272, 43 Am. Dec. 740; State *v.* Gales, 77 N. C. 283.

Under the Kentucky constitution the legislature cannot change the compensation of any officer during his term, and a statute increasing or reducing the pay of clerks of court does not apply to clerks in office at the time of its passage. Com. *v.* Carter, 21 Ky. L. Rep. 1509, 55 S. W. 701; Bright *v.* Stone, 20 Ky. L. Rep. 817, 43 S. W. 207; Norman *v.* Cain, 17 Ky. L. Rep. 492, 31 S. W. 860.

A statute increasing the amount of fees to be paid a clerk does not violate a constitutional prohibition against increasing his compensation during his term, where it is also provided that the clerk shall not receive more than a specified amount per annum, the excess received by him to be paid into the county treasury. People *v.* Gaulter, 149 Ill. 39, 36 N. E. 576.

20. **As to liabilities for failure or refusal to perform** duties or the negligent performance thereof see *infra*, IX, A, 1.

A press of business in his office is no excuse for a clerk's failure to furnish a litigant a transcript for an appeal within a reasonable time after demand. *In re* Barstow, 54 Ark. 551, 16 S. W. 574.

Presumption as to performance of duty. — It will be presumed in the absence of any showing to the contrary that a clerk has performed a duty imposed on him by law. Palmer *v.* Emery, 91 Ill. App. 207.

21. *Alabama.* — Roney *v.* Simmons, 97 Ala. 88, 11 So. 740.

Arkansas. — *In re* Barstow, 54 Ark. 551, 16 S. W. 574; Howard *v.* McDiarmid, 26 Ark. 100.

Colorado. — Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18.

Indiana. — Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 93; Brower *v.* O'Brien, 2 Ind. 423.

Vermont. — State *v.* Meagher, 57 Vt. 398.

Contra. — Gooch *v.* Gregory, 65 N. C. 142.

Service not required to be performed. — Mandamus will not be granted to compel a clerk to perform a service where the law imposes upon him no duty to perform it. *Ex p.* Lawson, 11 Ark. 323; Pace *v.* Ortiz, 72 Tex. 437, 10 S. W. 541.

California — Jurisdiction of supreme court. — The California supreme court has no original jurisdiction to issue a writ of mandamus; and if a clerk refuses to perform a duty imposed on him by law, the parties must in the first instance seek their relief in the court of which he is an officer, and the supreme court can obtain jurisdiction to review the rulings of the lower court. Cowell *v.* Buckelew, 14 Cal. 640.

22. Gooch *v.* Gregory, 65 N. C. 142.

23. Houston *v.* Williams, 13 Cal. 24, 73 Am. Dec. 565; Baltimore *v.* Baltimore County, 19 Md. 554; State *v.* Bowen, 41 Mo. 217.

A "ministerial act," within the meaning of La. Acts (1882), No. 43, conferring certain powers on clerks of district courts and distinguishing between ministerial and judicial acts, is one which is performed in a prescribed manner in obedience to legal authority, without regard to, or the exercise of, any judgment on the part of the clerk. Le-

of such duties when directed to do so by the court he may be punished for contempt.[24]

2. TIME OF PERFORMANCE. While a clerk is, in the absence of any statute requiring it, under no obligation to perform official duties outside of office hours, as for instance to take an appeal on Sunday,[25] yet he is at liberty to do so if he wishes, unless forbidden by some statute.[26] The powers of a clerk in vacation depend for the most part upon the statutes.[27]

3. PLACE OF PERFORMANCE. In the absence of any statute to that effect a ministerial act of a clerk is not void, although performed away from his office,[28] or even outside of his county;[29] and ministerial acts need not be performed in court to be valid.[30]

4. EFFECT OF INTEREST IN PROCEEDINGS. Under some statutes a clerk of court is disqualified to perform the duties of his office in relation to a matter in which he has an interest.[31] Such an interest will always disqualify him from performing

moine *v.* Ducote, 45 La. Ann. 857, 12 So. 939 [*citing* Bouvier L. Dict.].

Necessity for order of court.— A merely ministerial act may be performed by the clerk in term-time without an order of the court. Pennington *v.* Streight, 54 Ind. 376.

Power to appoint another to perform clerk's duties.—Though a clerk failed to perform certain duties of his office, the court cannot authorize another to perform such duties, and thereby render the clerk's sureties liable for the amount paid for the work. Alexander *v.* Marshall, 3 Head (Tenn.) 475.

24. State *v.* Watson, 38 Ark. 96; *In re* Contempt of Four Clerks, 111 Ga. 89, 36 S. E. 237; Harris *v.* State, 14 Tex. App. 676; State *v.* Reesa, 57 Wis. 422, 15 N. W. 383. But see Swift *v.* State, 63 Ind. 81.

Failure to make return.— Where the statute requires a clerk to whom a writ of error is directed either to indorse thereon or attach to it his return signed as clerk and to seal with his seal of office, a failure to make such return is a contempt of the higher court, and the clerk is not excused because he was ignorant of the law, though he states in his answer that no contempt was intended. State *v.* Simmons, 1 Ark. 265.

Refusal to obey order of judge.—The clerk of a court is guilty of contempt where he refuses to obey the order of an associate justice of said court on the ground that such justice has not filed his commission and oath of office with him and that he was not officially advised that the justice had duly qualified, having been assured by the presiding justice of the court that there was no requirement that the commission and oath of office be recorded in the clerk's office and that he would be fully protected in complying with the order. Territory *v.* Clancy, 7 N. M. 580, 37 Pac. 1108.

Sending up imperfect copy of record.—The court of appeals cannot punish the clerk of an inferior court for sending up an imperfect copy of the record of a cause in which an appeal was prayed, as the court has not cognizance of the cause at the time the offense is committed. Moore *v.* Jessamine, Litt. Sel. Cas. (Ky.) 104.

25. Russell *v.* Pickering, 17 Ill. 31.

26. Zimmerman *v.* Cowan, 107 Ill. 631, 47 Am. Rep. 476; Polhemus' Appeal, 32 Pa. St. 328.

27. **Acts clerk can do in vacation.**— Under some statutes it has been held that a clerk has power in vacation to issue, on the request of the prosecuting officer, subpœnas for witnesses to appear before the grand jury (O'Hair *v.* People, 32 Ill. App. 277), to appoint an administrator (Brown *v.* King, 2 Ind. 520; State *v.* Chrisman, 2 Ind. 126), to issue process on the order of the plaintiff (Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446, 32 S. E. 256), or to enter judgment (Phelan *v.* Ganebin, 5 Colo. 14).

Acts clerk cannot do in vacation.— It has been held that without statutory authority the clerk has no power in vacation to receive money in his official capacity (Currie *v.* Thomas, 8 Port. (Ala.) 293), to administer oaths (Albee *v.* May, 8 Blackf. (Ind.) 310; Thompson *v.* Porter, Litt. Sel. Cas. (Ky.) 194; Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498), to receive an appearance and make an entry (State *v.* Jones, 8 Md. 88), to take and approve the bond of a receiver (Newman *v.* Hammond, 46 Ind. 119), or to issue a writ of prohibition (Casby *v.* Thompson, 42 Mo. 133).

28. Helena First Nat. Bank *v.* Batchelder Egg Case Co., 51 Fed. 137, 138, 4 U. S. App. 614, 615, 2 C. C. A. 141, 142; People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126.

29. Collier *v.* State, 2 Stew. (Ala.) 388. But see Conley *v.* Turner, 10 Wend. (N. Y.) 572, where, under a statute authorizing the deputy clerk to perform the duties of the clerk in the principal's absence, it was held that the principal clerk had no power to perform such duties while absent from his county.

30. People *v.* Fletcher, 3 Ill. 482, receiving and filing sheriff's bond and administering oath of office.

A clerk has no authority to take a recognizance out of court, such recognizance being required to be taken by the court. Chinn *v.* Com., 5 J. J. Marsh. (Ky.) 29.

31. **In North Carolina** a clerk of court cannot act in relation to any estate if he has

acts of a judicial nature,[32] but it has been held in a number of jurisdictions that he may perform a purely ministerial act, such as the issuance of process, notwithstanding he be a party to the action.[33]

B. Particular Powers and Duties — 1. In General. The official duties of a clerk of court embrace every act which the law requires him to perform by virtue of his office,[34] not only those which the statutes expressly impose upon him but also such duties as by the long established practice of the court he has been required to perform.[35] Most questions relating to particular powers and duties of clerks fall more appropriately under other specific titles[36] in this work and will be found treated in their proper places.

an interest therein or is so related to any person having an interest that he would be disqualified as a juror, unless such disqualification be waived in writing. Scranton, etc., Land, etc., Co. *v.* Jennett, 128 N. C. 3, 37 S. E. 954.

In Texas the clerk is by statute forbidden to act as such in an action to which he is a party (Lewis *v.* Hutchison, 4 Tex. App. Civ. Cas. § 79, (Tex. App. 1890) 16 S. W. 654; Womack *v.* Stokes, 9 Tex. Civ. App. 592, 29 S. W. 1113); but this disqualification applies only to himself and will not prevent his issuing a writ of garnishment or taking the answer of other garnishees merely because he is included in the writ (Womack *v.* Stokes, 12 Tex. Civ. App. 648, 35 S. W. 82); and an indirect interest in the suit will not disqualify the clerk if he is not a party (Laning *v.* Iron City Nat. Bank, (Tex. Civ. App. 1896) 36 S. W. 481).

A clerk cannot act as attorney or agent for a litigant in his court. Kirkland *v.* Texas Express Co., 57 Miss. 316; *Ex p.* Collins, 2 Va. Cas. 222. And see Carlisle *v.* Dodge, 5 N. H. 326. But see Blount *v.* Wells, 55 Ga. 282, where an execution was held not to be illegal, although the clerk who issued it was one of the attorneys for the plaintiff in the execution.

May appoint himself commissioner to sell land.—In proceedings before him for the sale of land belonging to heirs, a clerk may appoint himself commissioner to make sale of the land, and may direct himself, as commissioner, to pay over the proceeds to the proper persons. Spencer *v.* Credle, 102 N. C. 68, 8 S. E. 901.

When disqualified to act as trustee.— A clerk of the county court, who is designated by law to take the bond of, and administer the oath to, trustees named in deeds of trust for the benefit of creditors is not competent to act as such trustee, unless exonerated from giving bond and taking oath by the beneficiaries. It is not allowable for him to give bond to, and take the oath before, his deputy. Barcroft *v.* Snodgrass, 1 Coldw. (Tenn.) 430.

32. Admitting deed to probate.— The adjudication by a clerk of court that the acknowledgment of a deed of trust, to which he is a party, made before a justice of the peace, is in due form, and his act in admitting such deed to probate and ordering registration are ineffectual to pass title as against third parties, such acts being judicial in nature. Turner *v.* Connelly, 105 N. C. 72, 11 S. E. 179; White *v.* Connelly, 105 N. C. 65, 11 S. E. 177.

33. May issue process.— Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633; Kerns *v.* Huntzinger, 2 Leg. Rec. (Pa.) 79; Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503.

34. McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

Control of legislature.— In the absence of any constitutional provision to the contrary, the legislature has full control over the powers and duties of clerks of courts, and may take from or add to them. State *v.* McDiarmid, 27 Ark. 176.

35. Coleman *v.* Ormond, 60 Ala. 328; Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719].

36. In election proceedings see Elections.

In naturalization proceedings see Aliens.

To admit to bail see Bail, 5 Cyc. 85.

To act as receiver see Receivers.

To allow appeal see Appeal and Error, 2 Cyc. 807, n. 2.

To appoint administrators see Executors and Administrators.

To appoint attorney for appellee constructively summoned.— The clerk of the court of appeals is not authorized to appoint attorneys to defend for persons constructively summoned, such power being limited to "the court" by statute. Arthurs *v.* Harlan, 78 Ky. 138.

To approve bonds.— Clerks are frequently given power to pass upon bonds of various kinds required to be filed with them. People *v.* Fletcher, 3 Ill. 482; Winningham *v.* State, 56 Ind. 243. And see the specific titles involving bonds, such as Appeal and Error; Attachment; etc. Where the clerk receives a bond in due time and indorses it filed in office he cannot afterward be heard to deny that he "approved" it. Approbation is a mental act sufficiently evidenced by the fact of his receiving and filing the bond. Pearson *v.* Gayle, 11 Ala. 278.

To draw decree see Equity.

To enter judgment see Judgments.

To enter order of discontinuance.— A county clerk, acting as a clerk of the supreme court, has authority to enter in that court an order of discontinuance of an action, on stipulation of plaintiff's attorney and affidavit that the defendant has not appeared. This power, although not expressly given by statute, is recognized on the ground of long usage. Hotaling *v.* Schermerhorn, 28 Misc. (N. Y.)

2. To Make and Keep Records — a. Duty to Record Court Proceedings. It is the duty of the clerk to make a record of the proceedings in his court.[37] In so

311, 59 N. Y. Suppl. 484 [*affirmed* in 63 N. Y. Suppl. 1110].

To have and use seal.— The clerk is not one of the officers specially required by law to have and use a seal on all occasions. The court itself has a seal, which must be used by the clerk as prescribed by statute. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459. The court having a clerk will take judicial notice of his signature, and it is not necessary that such signature be attested by a seal. State *v.* Pfenninger, 76 Mo. App. 313.

To issue county warrants.— In Arkansas the statutes confer no power on the county clerk to issue county warrants otherwise than upon the order of the county court. Parsel *v.* Barnes, 25 Ark. 261.

To issue writs, process, and notices see, generally, Process and the specific titles treating of writs, such as Appeal and Error; Assistance, Writ of; Attachment; Certiorari; Executions; Habeas Corpus; Prohibition. As to warrants of arrest see Criminal Law. As to commissions to take testimony see Depositions.

To prepare appeal-bond.— It is the duty of the clerk of the court to which an appeal is to be taken to prepare the appeal-bond for the party appealing. Adams *v.* Settles, 2 Duv. (Ky.) 76.

To search titles.— It is no part of the official duty of a clerk of the district court to make searches of the records in his office for judgments, liens, or suits pending, affecting the title to real property, and certify to the result of such search. Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 510, 22 L. R. A. 99.

To select court for trial of cause.— The clerk of oyer and terminer, who is also the clerk of quarter sessions, has no power, without the authority of the court, to arbitrarily select the court of oyer and terminer for the trial of any prosecution in which that court or the court of quarter sessions has concurrent jurisdiction, so as to entitle him to the larger fees allowed in the former court. Trach *v.* County, 2 Lehigh Val. L. Rep. (Pa.) 253.

To sue on appeal-bond.— The clerk of the common pleas is the proper party to sue on an appeal-bond to a former commissioner. Clark *v.* Smith, 13 S. C. 585; Daniels *v.* Moses, 12 S. C. 130.

To take acknowledgments see Acknowledgments, 1 Cyc. 546, 550, 552.

To tax costs see Costs.

37. Pearce *v.* Bruce, 38 Ga. 444; Matter of Mason, 9 Rob. (La.) 105; Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; Peterson *v.* State, 45 Wis. 535.

Care and diligence necessary.— Clerks are bound to exercise proper care and diligence in making up the records. Bayne *v.* Fox, 18 La. 80.

Matters required to be incorporated in bills of exceptions.—Whatever of the proceedings of a court should be brought before the appellate court by bills of exceptions cannot be incorporated into the record of the cause by the mere entries of the clerk; and if so incorporated they will not be available as parts of the record on appeal. Wright *v.* State, 20 Ind. 23; Wilson *v.* Truelock, 19 Ind. 389.

From what record taken.— It is the ordinary duty of the clerk of a court of record to extend the record of the proceedings in each suit from the process and pleadings on file and from the minutes and entries on the dockets, and he can resort to no extrinsic evidence for that purpose. Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172.

The clerk is not bound to enter any rule ordered by the court in a case, unless the attorney requests him to do so and furnishes him with a draft of the rule or a sufficient memorandum to enable him to enter it. Thompson *v.* Pippitt, 18 N. J. L. 176.

Swearing of witnesses.— It is the duty of clerks of the district court in all cases, whether the testimony itself be taken down in writing or not, to make on their minutes a note of the fact of the swearing of witnesses (and giving their names), to the end of perpetuating the evidence of that fact and not leaving it to rest on memory. Mackin *v.* Wilds, 106 La. 1, 30 So. 257.

Record in criminal case.— All applications in criminal cases for summoning witnesses, copies of indictments, or other matters in which the action of the clerk is involved should be made to appear, with the action thereon, on the records or among the files of the court. Van Duzee *v.* U. S., 73 Fed. 794.

Final record at cost of losing party.— Under the Indiana statute of January, 1843, the clerks of the circuit courts are not authorized to make a final record in any cause, at the cost of the losing party, except in certain cases, unless such party direct the record to be made. Carpenter *v.* Montgomery, 7 Blackf. (Ind.) 415.

Iowa — Where title to land involved.— Iowa Code (1873), § 2866, requiring the clerk of the court to make a complete record in cases where the title to land is expressly determined does not apply to an action to subject land, fraudulently conveyed, to a judgment against the grantor, in which plaintiff is unsuccessful. The evidence is not required to be included in such record. Smith *v.* Cumins, 52 Iowa 143, 2 N. W. 1041.

Filing papers.— It is the official duty of the clerk of a district court to file all the papers in a cause presented by the parties, and to mark them "Filed," with the date of filing. Wooster *v.* McGee, 1 Tex. 17.

Indexing journals.— The clerk of the court is not bound, by the acts of the legislature passed in 1839, to make an index to the common pleas and session journals. State *v.* Jones, 5 Strohh. (S. C.) 155.

doing he acts as the amanuensis of the court subject to its control, and record entries are valid only when made under the judicial sanction of the court.[38]

b. Duty to Preserve Records. The clerk is the legal custodian of the records in his office and, while not liable as an insurer, he is bound to exercise a high degree of diligence in their preservation and safe-keeping.[39]

3. To Certify Records, Etc. Ordinarily the clerk is authorized to attest and certify the records and proceedings of his court.[40] His authority in this regard is only as great as the statute gives him,[41] and beyond that his certificate to the

Right to complete record after leaving office.— After leaving office a clerk has no power to complete a record previously begun (Perrin *v.* Reed, 33 Vt. 62), nor can his successor complete such record without an order of court (Rockland Water Co. *v.* Pillsbury, 60 Me. 425; Longley *v.* Vose, 27 Me. 179).

38. Houston *v.* Williams, 13 Cal. 24, 73 Am. Dec. 565; People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523; Vanderkarr *v.* State, 51 Ind. 91; Baltimore *v.* Baltimore County, 19 Md. 554.

Nebraska — District court records.—Under Nebr. Comp. Stat. (1887), c. 19, § 27, which makes it the duty of the clerk of the district court to keep a record of the proceedings of the court under the direction of the judge of such court, the clerk is under the control of the district court, and the supreme court has no jurisdiction in the matter of the preparation of the records of said court; its jurisdiction, except in certain cases, being appellate and not original. State *v.* Le Fevre, 25 Nebr. 223, 41 N. W. 184.

Data furnished by judge's calendar.— The clerk must make his record entries from the data furnished by the judge's calendar and he cannot enter any decree not warranted by the entries in such calendar. Smith *v.* Cummins, 52 Iowa 143, 2 N. W. 1041.

The reasons which influenced the court in making an order need not be entered of record, and if so entered will not be available as part of the record on appeal. Ferrier *v.* Deutchman, 51 Ind. 21; Wilson *v.* Truelock, 19 Ind. 389; Hasselback *v.* Sinton, 17 Ind. 545.

Power to correct mistakes.— It has been held that a clerk may correct an error in his minutes. Smith *v.* Coe, 7 Rob. (N. Y.) 477. In Petty *v.* People, 19 Ill. App. 317, it was held to be the duty of the clerk to correct a mistake in the indorsement of filing on a paper. And see Maxcy *v.* Clabaugh, 6 Ill. 26, where the clerk was allowed to correct a mistake in a conveyance by his predecessor. But see Prowattain *v.* McTier, 1 Phila. (Pa.) 105, 7 Leg. Int. (Pa.) 183 (in which it was held that the clerk could not correct the spelling of defendant's name); Warner *v.* Texas, etc., R. Co., 54 Fed. 920, 2 U. S. App. 647, 4 C. C. A. 670 (where it was held that the clerk had no power, on the return of a writ of error, bond, and citation, to alter the dates therein).

Cannot correct judge's memorandum from memory.— Where a clerk of court keeps no minutes of the action of the court he will not be allowed to substitute in vacation his recollection of the action of the court in any given case for the written memorandum of the judge upon his docket, even though in so doing he may honestly believe that he is correcting an error or mistake of the court. Crowell *v.* Deen, 21 Ill. App. 363.

39. McFarland *v.* Burton, 89 Ky. 294, 11 Ky. L. Rep. 499, 12 S. W. 336; Forsythe County *v.* Blackburn, 68 N. C. 406 (not compelled to surrender records to board of county commissioners); Nussear *v.* Arnold, 13 Serg. & R. (Pa.) 323 (responsible for papers taken from office); Kennedy *v.* Kennedy, 13 Lea (Tenn.) 24 (clerk's duty to preserve records from alterations or additions).

40. Byrd *v.* State, 1 How. (Miss.) 247; Boardman *v.* Paige, 11 N. H. 431.

Where the same person is judge and clerk of a court it is competent for him to attest and certify the records and proceedings of his own court. Huff *v.* Cox, 2 Ala. 310; Dozier *v.* Joyce, 8 Port. (Ala.) 303.

Transcripts from dockets of deceased justices.— The clerk of a county may exemplify transcripts from the dockets of deceased justices which are deposited in his office. Woodruff *v.* Woodruff, 4 N. J. L. 436.

Attesting outside county.— A clerk may lawfully make a certificate of attestation of a record, although he be not within his county. Collier *v.* State, 2 Stew. (Ala.) 388.

Certificate of magistracy.— A clerk of a county court can properly certify to the official character of a magistrate. Hague *v.* Porter, 45 Ill. 318.

Should designate court.— In certifying his official acts a clerk should use such a signature as will designate the court of which he is the clerk. The mere affixing of the word "clerk" is not sufficient. Garner *v.* State, 36 Tex. 693.

Substance not sufficient.— The clerk of a court has no right to certify the substance, purport, or effect of a judgment of record in his office. U. S. *v.* Makins, Hoffm. Op. 500, 26 Fed. Cas. No. 15,710, 3 Am. L. Rev. 777.

Cannot supply lost record from memory.— A clerk in a case in insolvency, who made up and deposited in the office of the register of probate a record of the proceedings therein, which has been lost, is not authorized to make up a new record partly from recollection. Ryan *v.* Merriam, 4 Allen (Mass.) 77.

41. *Georgia.*— Lambert *v.* Smith, 57 Ga. 25.

Illinois.— Melrose *v.* Bernard, 126 Ill. 496, 18 N. E. 671.

Indiana.— Miles *v.* Buchanan, 36 Ind. 490; Earp *v.* Putnam County, 36 Ind. 470.

record or proceeding is of no greater force or value than the certificate of any other individual.[42]

4. To Administer Oaths. The authority of a clerk of court to administer oaths — other than those administered in open court — is statutory and extends to such oaths only as are contemplated by the statute.[43]

5. To Purchase Supplies. A clerk has only such power to purchase supplies as is given him by statute.[44]

6. To Receive and Keep Money — a. Official Capacity to Receive Money. There is nothing in the nature of a clerk's office or in his official relations to the court which requires that he should become the receiver and custodian of money deposited or paid into court; and so, in the absence of statutory authority, a clerk has no official power to receive money except under an order of the court.[45]

b. Control and Disbursement of Funds. When the clerk receives a fund in his official capacity his possession is that of the court, and the court has an

Maryland.— Hammond *v.* Norris, 2 Harr. & J. (Md.) 130.

New Jersey.— State *v.* Cake, 24 N. J. L. 516.

Texas.— Campbell *v.* Townsend, 26 Tex. 511.

See 10 Cent. Dig. tit. "Clerks of Courts," § 103.

Only matters legally included in record.— A clerk of the supreme court has no authority to certify under the seal of the court the hour of the day when a judgment was entered. Only such matters as may be legally included in the record can be so certified. The day on which judgment was entered may be certified but not the hour. Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850.

42. Boardman *v.* Paige, 11 N. H. 431.

43. *Alabama.*— Hull *v.* State, 79 Ala. 32.

Arkansas.— Love *v.* McAlister, 42 Ark. 183; Lafferty *v.* Lafferty, 10 Ark. 268.

California.—People *v.* Vasalo, 120 Cal. 168, 52 Pac. 305.

Illinois.— Fergus *v.* Hoard, 15 Ill. 357.

Indiana.—McGragor *v.* State, Smith (Ind.) 179; Albee *v.* May, 8 Blackf. (Ind.) 310.

Kentucky.— Laha *v.* Daly, 1 Bush (Ky.) 221; Thompson *v.* Porter, Litt. Sel. Cas. (Ky.) 194.

Louisiana.—State *v.* Isaac, 3 La. Ann. 359; Sandeman *v.* Deake, 17 La. 332.

Maryland.—Atwell *v.* Grant, 11 Md. 101.

Michigan.— Greenvault *v.* Farmer's, etc., Bank, 2 Dougl. (Mich.) 498.

Mississippi.—Ayres *v.* Taylor, 25 Miss. 200.

Nebraska.— Sharp *v.* State, 61 Nebr. 187, 85 N. W. 38.

New Mexico.—Bucher *v.* Thompson, 7 N. M. 115, 32 Pac. 498.

Texas.— Smith *v.* Wilson, 15 Tex. 132; Carlee *v.* Smith, 8 Tex. 134.

Virginia.— Com. *v.* Williamson, 4 Gratt. (Va.) 554.

West Virginia.— Parker *v.* Clark, 7 W. Va. 467; Chesapeake, etc., R. Co. *v.* Patton, 5 W. Va. 234.

See 10 Cent. Dig. tit. "Clerks of Courts," § 96.

For a fuller discussion see Affidavits, 2 Cyc. 11; Oaths and Affirmations.

44. **For construction of statutes in regard to the power of clerks to purchase supplies** see the following cases:

Arkansas.— Clark County *v.* Scott, 21 Ark. 467.

Colorado.— Miller *v.* Edwards, 8 Colo. 528, 9 Pac. 632.

Illinois.— Peoria County *v.* Roche, 65 Ill. 77.

Ohio.— State *v.* McConnell, 28 Ohio St. 589.

Pennsylvania.— Smith *v.* Philadelphia, 5 Phila. (Pa.) 1, 19 Leg. Int. (Pa.) 13.

See 10 Cent. Dig. tit. "Clerks of Courts," § 104.

45. Hardin *v.* Carrico, 3 Metc. (Ky.) 289; Chinn *v.* Mitchell, 2 Metc. (Ky.) 92; Durant *v.* Gabby, 2 Metc. (Ky.) 91. And see Lewis *v.* Smith, 99 Ga. 603, 27 S. E. 162, holding that an entry made on a writ of execution by a clerk acknowledging the receipt of the costs due thereon would not suffice to relieve from dormancy the judgment upon which the execution was based.

For a full discussion of this subject see Deposits in Court.

In Illinois a clerk is not by virtue of his office receiver of his court, and is not bound to receive deposits except under an order of the court. Hammer *v.* Kaufman, 39 Ill. 87.

To receive payment of judgment.— In the absence of any statute a clerk is not authorized to receive payment of a judgment, and such payment if made to him is not a satisfaction thereof nor will he have any authority to enter a satisfaction upon the record upon such demand. Seymour *v.* Haines, 104 Ill. 557; Lewis *v.* Cockrell, 31 Ill. App. 476; Blair *v.* Lanning, 61 Ind. 499; Hays *v.* Boyer, 59 Ind. 341; Chinn *v.* Mitchell, 2 Metc. (Ky.) 92; Texas, etc., R. Co. *v.* Walker, 93 Tex. 611, 57 S. W. 568 [*overruling* Roberts *v.* Powell, 22 Tex. Civ. App. 211, 54 S. W. 643]. Under some statutes clerks are authorized to receive payment of judgments. Aicardi *v.* Robbins, 41 Ala. 541, 94 Am. Dec. 614; Governor *v.* Read, 38 Ala. 252; Murray *v.* Charles, 5 Ala. 678; Dirks *v.* Juel, 59 Nebr. 353, 80 N. W. 1045; McDonald *v.* Atkins, 13 Nebr. 568, 14 N. W. 532; State *v.* Hobson, 6 Ohio S. & C. Pl. Dec. 338, 5 Ohio N. P. 321. But the clerk can receive in payment only such money as the judgment creditor is bound to

inherent right to control such funds.[46] Usually the clerk has no power, without an order of the court, to make any transfer or alteration in the disposition of such fund[47] or pay it out of court;[48] and it has been held that a clerk paying over money contrary to an order of the court will not be protected by an order subsequently procured, on his instance, directing him to pay the money to the one

accept. Aicardi *v.* Robbins, 41 Ala. 541, 94 Am. Dec. 614; Crews *v.* Ross, 44 Ind. 481; Armsworth *v.* Scotten, 29 Ind. 495; Prather *v.* State Bank, 3 Ind. 356. For a full discussion of clerk's power to accept payment of judgment see JUDGMENTS.

Demand not reduced to judgment.— In the absence of statutory authority the clerk has no power to receive payment of a demand which has not been reduced to judgment, and a payment so made will not constitute a defense to an action on the demand which is claimed to have been discharged thereby. Ball *v.* State Bank, 8 Ala. 590, 42 Am. Dec. 649; Windham *v.* Coats, 8 Ala. 285; Currie *v.* Thomas, 8 Port. (Ala.) 293. But if the clerk receives the money from the defendant before judgment, retains it in his hands until after judgment, and then manifests by some plain and unequivocal act his intention to hold it in his official capacity as clerk, the payment is good and the judgment thereby discharged. Governor *v.* Read, 38 Ala. 252.

What constitutes "funds."— A county order paid into the hands of a county clerk under order of court is "funds" within Ind. Rev. Stat. (1881), § 5850, authorizing the clerk to receive "all such funds as may be ordered to be paid into the respective courts," etc. Jewett *v.* State, 94 Ind. 549.

Effect of recording unauthorized receipt.— An entry by the clerk of a court of money received by him without authority of court is no part of the record of the court, and hence could not operate to make the money so received a fund in court. People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523.

Alabama—Register in chancery.—In Coleman *v.* Ormond, 60 Ala. 328, it was held that in the system of chancery practice prevailing in Alabama the duties which in England pertained to masters and registrars in chancery were blended and devolved on the register in chancery, and he was the proper person to be appointed the custodian or special receiver of a fund or choses in action in court.

Power to receive money in vacation.— In the absence of statutory provisions money cannot be lawfully paid to the clerk of court in vacation, or in any other manner than as the officer of the court in term-time. Currie *v.* Thomas, 8 Port. (Ala.) 293.

46. Hornish *v.* Ringen Stove Co., (Iowa 1902) 89 N. W. 95; Bowden *v.* Schatzell, Bailey Eq. (S. C.) 360, 23 Am. Dec. 170.

As to clerk's liability for funds see *infra*, IX, A, 2.

In hands of clerk at his death.— Moneys in the hands of a clerk and master of a chancery court at his death, held by him in his official capacity or by order of the court as receiver, commissioner, trustee, or in any other fiduciary capacity are not assets of his estate, in the ordinary sense, for the payment of debts and for distribution, but belong to the court and are subject to its orders, and will on application of the personal representative be so ordered as to protect him. Massey *v.* Gleaves, 1 Tenn. Ch. 149.

Order not designating clerk as depositary. — Money received by a clerk of court under a decree providing for its payment into court, but not designating the clerk as depositary, is under the control of the court, which accordingly has jurisdiction of a motion to compel the clerk and his successor, or either of them, to account for the fund. Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256 [*reversing* 60 Ill. App. 647].

North Carolina — Clerk as public depositary.— Money paid to the office of the clerk of the superior court by executors, administrators, and collectors, under the provisions of N. C. Code, §§ 1543, 1544, does not pass into the jurisdiction of the superior court, but the clerk receives and is responsible for it, officially, as a public depositary. The superior court cannot direct the disposition of such money. *Ex p.* Cassidey, 95 N. C. 225.

47. Farmers' L. & T. Co. *v.* Walworth, 1 N. Y. 433; Matter of Kellinger, 9 Paige (N. Y.) 62; Rountree *v.* Barnett, 69 N. C. 76.

Cannot use for his own purposes.— The clerk of a court has no right to employ money deposited in his office for his own purposes. Mott *v.* Pettit, 1 N. J. L. 344.

Money deposited to pay costs.—Where defendant deposits money with the clerk of court to pay the costs which may accrue, and judgment is rendered against her, the clerk cannot appropriate the money to the judgment and refuse to apply the same to the costs of filing a motion for a new trial. Schweizer *v.* Mansfield, 14 Colo. App. 236, 59 Pac. 843.

48. Craig *v.* Governor, 3 Coldw. (Tenn.) 244.

Payment to wrong person.—Where a clerk, without authority, pays money deposited with him to the wrong person he is liable for the amount to the person entitled to receive it (Hunt *v.* Milligan, 57 Ind. 141; Logan *v.* McCahan, 102 Iowa 241, 71 N. W. 252; State *v.* Ehringhaus, 30 N. C. 7; Carey *v.* Campbell, 3 Sneed (Tenn.) 62); but where an appeal was taken from a decree in favor of several claimants payment of the fund in controversy to them during its pendency did not subject the clerk of the court to personal liability, no order for its retention having been made (McFadden *v.* Swinerton, 36 Oreg. 336, 59 Pac. 816, 62 Pac. 12).

Summary order for disbursement.— Under Iowa Code (1873), § 2906, which provides

to whom he had already paid it, and not purporting to confirm what he had done.[49]

e. Duty to Account. It is the duty of the clerk of court to account for moneys received by him in his official capacity,[50] and the court may compel

that a final order may be obtained on motion by plaintiffs in execution against sheriffs, constables, and other officers for the recovery of money collected by them, the district court has jurisdiction to make an order requiring the clerk of such court to pay over money in his hands which was collected on a judgment. Peterson *v.* Hays, 85 Iowa 14, 51 N. W. 1143.

In case of a dispute regarding the ownership of money in the hands of a clerk, it is not proper to direct payment by rule of court to a particular claimant, but the remedy should be by a proceeding at law or in equity. Lewis *v.* Cockrell, 31 Ill. App. 476.

When order not necessary.— While it is safer for the clerk, upon the dissolution of an attachment, to have an order of court made directing the disposition of moneys placed in his hands by the sheriff, as the proceeds of the sale of the property attached, yet he does not render himself liable to the plaintiff by a payment without such an order of such moneys to the attachment defendant, if such payment is made in good faith, and without notice of plaintiff's intention to appeal and continue his attachment lien by a supersedeas. Danforth *v.* Rupert, 11 Iowa 547. When money is ordered to be paid by an executor to a clerk of court, according to the terms of a settlement made between the clerk and executor, which showed who was entitled to the money, the clerk may, after receiving the money, pay it out without an order of court. Yoakley *v.* King, 10 Lea (Tenn.) 67. A clerk of the county court, on expiration of his term of office, is entitled to pay to his successor money in his hands arising from the sale of land in litigation in such court, without an order of court requiring or authorizing it, and such payment discharges him from all further liability therefor. Peeler *v.* Fane, (Tenn. Ch. 1901) 62 S. W. 206.

Sufficient showing to relieve clerk of liability.— A finding that one presented a certificate of appointment as guardian to a clerk, and demanded and received money, is a sufficient finding that he received this money in his alleged capacity as guardian, so as to relieve the clerk of liability. State *v.* Christian, 18 Ind. App. 11, 47 N. E. 395.

49. Boothe *v.* Bailey, 3 Humphr. (Tenn.) 594.

50. Payment over to designated custodian. — It is frequently provided by statute that the clerk shall pay over to the county treasurer or some other designated custodian fees, costs, taxes, and other moneys — or a specified proportion thereof — received by him in his official capacity. For constructions of such statutes see the following cases:

Arkansas.— Lee County *v.* Govan, 31 Ark. 610.

California.— People *v.* Hamilton, 103 Cal. 488, 37 Pac. 627; Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833.

Colorado.— Airy *v.* People, 21 Colo. 144, 40 Pac. 362.

Illinois.— People *v.* McClellan, 137 Ill. 352, 27 N. E. 181 [*reversing* 38 Ill. App. 162]; Cook County *v.* Sennott, 125 Ill. 423, 17 N. E. 791; Weisenborn *v.* People, 53 Ill. App. 32; People *v.* McClellan, 38 Ill. App. 162 [*affirmed* in 137 Ill. 352, 27 N. E. 181].

Indiana.— State *v.* Newton County, 66 Ind. 216; State *v.* Robinson, 2 Ind. 40.

Maine.— White *v.* Fox, 22 Me. 341.

Michigan.— People *v.* Treadway, 17 Mich. 480.

Missouri.—St. Louis *v.* Clabby, 88 Mo. 573; State *v.* O'Gorman, 75 Mo. 370.

Nebraska.— State *v.* Whittemore, 12 Nebr. 252, 11 N. W. 310.

New York.— Matter of Brooklyn City Ct., 25 Hun (N. Y.) 593.

Oklahoma.— Territory *v.* Pitts, 3 Okla. 745, 41 Pac. 728; Pitts *v.* Logan County, 3 Okla. 719, 41 Pac. 584.

Pennsylvania.— Com. *v.* Fry, 183 Pa. St. 32, 38 Atl. 417; Perot's Appeal, 86 Pa. St. 335; Cohen *v.* Com., 6 Pa. St. 111.

Tennessee.— Donelson *v.* State, 3 Lea (Tenn.) 692; Head *v.* Barry, 1 Lea (Tenn.) 753.

United States.— U. S. *v.* McMillan, 165 U. S. 504, 17 S. Ct. 395, 41 L. ed. 805 [*reversing* 10 Utah 184, 37 Pac. 263]; U. S. *v.* Hill, 120 U. S. 169, 7 S. Ct. 510, 30 L. ed. 627 [*affirming* 25 Fed. 375].

See 10 Cent. Dig. tit. "Clerks of Courts," § 112.

As to payment of salary out of fees collected see *supra*, VII, A, 5.

Duty to pay over to successor in office.— It is generally the duty of the clerk to pay over to his successor in office moneys held by him in his official capacity. Peebles *v.* Boone, 116 N. C. 57, 21 S. E. 187; O'Leary *v.* Harrison, 51 N. C. 338; Smith *v.* Lake, 5 S. C. 341. A formal settlement is not necessary under Ind. Rev. Stat. (1881), § 5850. Scott County *v.* McFadden, 88 Ind. 333. If the outgoing clerk fails to account to his successor the latter may sue without an order requiring such accounting. And the fact that plaintiff has not been injured by such failure is no defense. Peebles *v.* Boone, 116 N. C. 57, 21 S. E. 187. The remedy for such failure, under the North Carolina statutes, is by attachment and by a regular suit for the statutory penalty, not by summary motion. O'Leary *v.* Harrison, 51 N. C. 338. In Wisconsin an action may be brought on the clerk's bond. Mulholland *v.* Gerry, 81 Wis. 647, 51 N. W. 960. In South Carolina it has been held that a rule to show cause is not the proper remedy. Smith *v.* Lake, 5 S. C. 341.

such clerk to do so,[51] even though his term of office as clerk of court has expired.[52]

7. Judicial Powers — a. In the Absence of Statute. Inasmuch as a clerk of court is essentially a ministerial officer,[53] he cannot, without express statutory authority to that effect, exercise any judicial functions,[54] and the court, it has

When payment to party proper.— Money was paid into court by a defendant to keep good an alleged tender, and judgment was ordered for plaintiff on the ground that no sufficient tender had been made; but such judgment was never entered because the controversy was settled by the parties. On motion of said defendant, with due notice to all parties, and on proof that he was entitled to such moneys as against plaintiff, the court made an order requiring its former clerk, by whom such money had been received and not paid over to his successor, to pay the same to the moving party. It was held that there was no error. Schnur *v.* Schnur, 47 Wis. 632, 3 N. W. 442; Schnur *v.* Hickcox, 45 Wis. 200.

51. Lee County *v.* Abrahams, 31 Ark. 571, where it was held that if the circuit court neglected to require its clerk to account, the county court might, under its general jurisdiction, force him to settle.

As to liabilities for funds see *infra*, IX, A, 2.

Must be held in official capacity.—In order to justify the court in ruling the clerk to pay over money in his hands it must be shown that such money is held by him in his official capacity as clerk. Lewis *v.* Cockrell, 31 Ill. App. 476.

Right to have funds paid into court.— Parties entitled to a fund in the hands of a clerk and master may have the fund paid into court on motion; and while a petition in such case is unusual it is not an improper practice. Such petition is not an original suit but only an incidental proceeding in the original cause, and this being so the petitioner need not give security for the prosecution of the suit. *Ex p.* Yowell, 7 Heisk. (Tenn.) 561.

52. Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256.

53. See *supra*, I.

54. *Alabama.*— Hull *v.* State, 79 Ala. 32.

California.— Oliphant *v.* Whitney, 34 Cal. 25; People *v.* Loewy, 29 Cal. 264.

Illinois.— Melrose *v.* Bernard, 126 Ill. 496, 18 N. E. 671; Wight *v.* Wallbaum, 39 Ill. 554; Hughes *v.* Streeter, 24 Ill. 647, 76 Am. Dec. 777.

Indiana.— Gregory *v.* State, 94 Ind. 384, 48 Am. Rep. 162; Everett *v.* Gooding, 53 Ind. 72; Willett *v.* Porter, 42 Ind. 250; McGragor *v.* State, 1 Smith (Ind.) 179.

Kansas.— *In re* McClasky, 52 Kan. 34, 34 Pac. 459; *In re* Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327. See also State *v.* Johnson, 8 Kan. App. 269, 55 Pac. 506, holding that the statute authorizing clerks of the district courts to issue warrants, on informations filed charging defendants with a misdemeanor, does not confer judicial powers.

Kentucky.— Wallenweber *v.* Com., 3 Bush (Ky.) 68.

Louisiana.—Price's Succession, 35 La. Ann. 905; State *v.* Green, 34 La. Ann. 1027; Tanner's Succession, 22 La. Ann. 91; Clapp *v.* Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Neda *v.* Fontenot, 2 La. Ann. 782.

Michigan.— People *v.* Colleton, 59 Mich. 573, 26 N. W. 771.

Montana.— *In re* Kane, 12 Mont. 197, 29 Pac. 424, holding that the Montana act of March 6, 1891, did not give clerks any judicial powers.

New York.— Paine *v.* Aldrich, 13 N. Y. Suppl. 455, 36 N. Y. St. 999.

Tennessee.— Frierson *v.* Harris, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220.

Texas.— Doughty *v.* State, 33 Tex. 1.

Virginia.— Page *v.* Taylor, 2 Munf. (Va.) 492.

Wisconsin.—State *v.* McBain, 102 Wis. 431, 78 N. W. 602.

See 10 Cent. Dig. tit. "Clerks of Courts," § 98.

Objection not available on collateral attack.— The objection cannot be raised collaterally that the clerk allowed a stay of execution after the expiration of the ten days provided by statute for the filing of a stay-bond, his action being judicial in its nature. Maynes *v.* Brockway, 55 Iowa 457, 8 N. W. 317.

What are judicial acts.— The following have been held to be judicial acts which the clerk had no power to do: Opening or adjourning court (Wight *v.* Wallbaum, 39 Ill. 554; *In re* Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327; *In re* McClasky, 52 Kan. 34, 34 Pac. 459; State *v.* McBain, 102 Wis. 431, 78 N. W. 602); admitting a prisoner to bail (Wallenweber *v.* Com., 3 Bush (Ky.) 68; Doughty *v.* State, 33 Tex. 1. See, generally, Bail, 5 Cyc. 85); the issuance of a scire facias (Frierson *v.* Harris, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220. See, generally, Scire Facias); the taking and approval of an injunction bond (McGragor *v.* State, Smith (Ind.) 179); the taking of a complaint and issuance of a warrant for a misdemeanor (People *v.* Colleton, 59 Mich. 573, 26 N. W. 771); the acceptance of a verdict in the absence of the judge (Willett *v.* Porter, 42 Ind. 250); the admission of a will to prohate (Tanner's Succession, 22 La. Ann. 91); the allowance of the filing of a substituted bill of exceptions (Everett *v.* Gooding, 53 Ind. 72); adjudging a person insane and appointing a guardian in vacation (*In re* Kane, 12 Mont. 197, 29 Pac. 424); the dismissal, under stipulation, of an action at the request of plaintiff (People *v.* Loewy, 29 Cal. 264); the determination of what portion

been held, has no power in the absence of statutory authority to delegate such matters to the clerk.[55]

b. Where Conferred by Statute — (I) *In General.* In some states clerks of court are, by statute or constitutional provision, vested with certain judicial or quasi-judicial powers.[56] Where this is the case the clerk's jurisdiction is strictly limited within the terms of the statute conferring it.[57]

(II) *Constitutionality of Statutes.* Where all the judicial powers of a court are by the constitution vested in the judge, a statute conferring judicial powers upon the clerk is unconstitutional and void.[58]

IX. LIABILITIES.

A. Civil Liability — 1. For Negligence or Misconduct — a. In General. Where a clerk of court fails or refuses to perform, or is negligent in the performance of a duty imposed upon him by law, or is guilty of misconduct in office, the court will sometimes "animadvert upon his conduct";[59] and if any injury has resulted

of the record pertains to any particular issue, or particular matter adjudicated by the court (Melrose *v.* Bernard, 126 Ill. 496, 18 N. E. 671); the homologation of the deliberations of creditors touching on the sale of the property of insolvent successions (Neda *v.* Fontenot, 2 La. Ann. 782).

Rendition and entry of judgment.— The rendition of a judgment, decree, or order is a judicial act. State *v.* Green, 34 La. Ann. 1027; Clapp *v.* Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Paine *v.* Aldrich, 13 N. Y. Suppl. 455, 36 N. Y. St. 999. See, generally, Judgments. But in entering judgment by confession or default the clerk acts ministerially and not judicially, the law itself declaring what the judgment shall be.

California.— Willson *v.* Cleaveland, 30 Cal. 192; Harding *v.* Cowing, 28 Cal. 212.

Colorado.— Phelan *v.* Ganebin, 5 Colo. 14.

Florida.— Blount *v.* Gallaher, 22 Fla. 92.

Illinois.— Ling *v.* King, 91 Ill. 571. But see Hall *v.* Marks, 34 Ill. 358.

Minnesota.—Dillon *v.* Porter, 36 Minn. 341, 31 N. W. 56; Skillman *v.* Greenwood, 15 Minn. 102.

Oregon.— Graydon *v.* Thomas, 3 Oreg. 250.

Granting writ of error a ministerial act.— The granting of a writ of error by the clerk of a circuit court in pursuance of the statute is a ministerial and not a judicial act. McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

55. Oliphant *v.* Whitney, 34 Cal. 25 (to hear evidence and try issue); Wight *v.* Wallbaum, 39 Ill. 554 (to open or adjourn court); State *v.* McBain, 102 Wis. 431, 78 N. W. 602 (to adjourn court).

56. *Louisiana.*— Price's Succession, 35 La. Ann. 905; Herriman *v.* Janney, 31 La. Ann. 276; Boyd's Succession, 12 La. Ann. 611; Mason *v.* Hall, 12 La. Ann. 94; Mason *v.* Fuller, 12 La. Ann. 68; Gerald *v.* Gerald, 5 La. Ann. 242.

Maine.— Porell *v.* Cousins, 93 Me. 232, 44 Atl. 896; Guptill *v.* Richardson, 62 Me. 257.

New York.— Deutermann *v.* Wilson, 14 Daly (N. Y.) 563, 3 N. Y. Suppl. 113, 20 N. Y. St. 101, 15 N. Y. Civ. Proc. 411.

North Carolina.— Bryan *v.* Stewart, 123 N. C. 92, 31 S. E. 286; Durham, etc., R. Co. *v.* Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041; Spencer *v.* Credle, 102 N. C. 68, 8 S. E. 901; Brittain *v.* Mull, 91 N. C. 498; Cottingham *v.* McKay, 86 N. C. 241; Rowark *v.* Gaston, 67 N. C. 291; Hunt *v.* Sneed, 64 N. C. 176.

Oregon.— State *v.* Smith, 1 Oreg. 250.

Tennessee.— State *v.* Smith, 9 Humphr. (Tenn.) 457.

Texas.— De las Fuentes *v.* McDonald, 85 Tex. 132, 20 S. W. 43.

See 10 Cent. Dig. tit. "Clerks of Courts," § 98.

57. Norrie *v.* McCullough, 74 Ga. 602; Price's Succession, 35 La. Ann. 905; McCauley *v.* McCauley, 122 N. C. 288, 30 S. E. 344; Bragg *v.* Lyon, 93 N. C. 151; Matter of Lewis, 88 N. C. 31; State *v.* McBain, 102 Wis. 431, 78 N. W. 602.

58. Hall *v.* Marks, 34 Ill. 358; Gregory *v.* State, 94 Ind. 384, 48 Am. Rep. 162. See, generally, Constitutional Law.

Under the Minnesota constitution a district court clerk cannot be given judicial powers. Guerin *v.* Hunt, 8 Minn. 477; Zimmerman *v.* Lamb, 7 Minn. 421; Morrison *v.* Lovejoy, 6 Minn. 183. But the legislature can grant such powers to the clerks of municipal courts. St. Paul *v.* Umstetter, 37 Minn. 15, 33 N. W. 115.

Contra.— In Crawford *v.* Beard, 12 Oreg. 447, 8 Pac. 537, it was held that a statute authorizing the clerk to enter judgment by default or upon confessions was not unconstitutional, although the constitution required all judicial powers to be vested in the courts. The court reached this conclusion with reluctance, being governed by the fact that the statute had long been in force and been acquiesced in by the bench and bar, and if upset at that late day would cause a disturbance of property rights and occasion great mischief.

59. Com. *v.* Beckley, 4 Call (Va.) 4, where the clerk was suspended temporarily.

As to removal for breach of good behavior see *supra*, VI, C.

from such conduct,[60] without contributory negligence on the part of the party complaining,[61] the clerk is liable in damages therefor both personally and on his official bond.[62]

b. Instances of Liability — (I) *In General.* The extent of the clerk's official duties and obligations is of course largely dependent upon statutory provisions, and in determining whether he is liable in any particular instance reference should be had to the statutes. He is always liable for injuries resulting

60. As to liability where no injury results see *infra*, IX, A, 1, c, (III).

61. As to effect of contributory negligence see *infra*, IX, A, 1, c, (IV).

62. *Alabama.*— Wade *v.* Miller, 104 Ala. 604, 16 So. 517; Steele *v.* Thompson, 62 Ala. 323; Coleman *v.* Ormond, 60 Ala. 328; Buckley *v.* Wilson, 56 Ala. 393; Williams *v.* Hart, 17 Ala. 102; Governor *v.* Wiley, 14 Ala. 172; Snedicor *v.* Barnett, 9 Ala. 434.

California.— Lick *v.* Madden, 36 Cal. 208, 95 Am. Dec. 175.

Colorado.— Cooper *v.* People, 28 Colo. 87, 63 Pac. 314.

Georgia.— Luther *v.* Banks, 111 Ga. 374, 36 S. E. 826; Stewart *v.* Sholl, 99 Ga. 534, 26 S. E. 757; Markham *v.* Ross, 73 Ga. 105; Collins *v.* McDaniel, 66 Ga. 203; Spain *v.* Clements, 63 Ga. 786.

Illinois.— People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091; Governor *v.* Dodd, 81 Ill. 162; Billings *v.* Lafferty, 31 Ill. 318; Governor *v.* Ridgway, 12 Ill. 14; Day *v.* Graham, 6 Ill. 435; Weisenborn *v.* People, 53 Ill. App. 32.

Indiana.— Johnson *v.* Schloesser, 146 Ind. 509, 45 N. E. 702, 58 Am. St. Rep. 367, 36 L. R. A. 59; State *v.* Ritter, 20 Ind. 406; Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349; State *v.* Christian, 13 Ind. App. 308, 41 N. E. 603.

Iowa.— Hubbard *v.* Switzer, 47 Iowa 681; Parks *v.* Davis, 16 Iowa 20.

Kentucky.— Bates *v.* Foree, 4 Bush (Ky.) 430; Com. *v.* Chambers, 1 Dana (Ky.) 11; State Bank *v.* Haggin, 1 A. K. Marsh. (Ky.) 306; Houston *v.* Wandelohr, 12 Ky. L. Rep. 345, 14 S. W. 345; Burton *v.* McFarland, 3 Ky. L. Rep. 536.

Louisiana.— Anderson *v.* Joiiett, 14 La. Ann. 614.

Minnesota.— Selover *v.* Sheardown, 73 Minn. 393, 76 N. W. 50, 72 Am. St. Rep. 627; Rosenthal *v.* Davenport, 38 Minn. 543, 38 N. W. 618.

Mississippi.— Lewis *v.* State, 65 Miss. 468, 4 So. 429; Brown *v.* Lester, 13 Sm. & M. (Miss.) 392; Planters' Bank *v.* Conger, 12 Sm. & M. (Miss.) 527; McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

Missouri.— State *v.* Gideon, 158 Mo. 327, 59 S. W. 99; State *v.* Henderson, 142 Mo. 598, 44 S. W. 737.

Nebraska.— Heater *v.* Pearce, 59 Nebr. 583, 81 N. W. 615; Toncray *v.* Dodge County, 33 Nebr. 802, 51 N. W. 235; Brock *v.* Hopkins, 5 Nebr. 231.

North Carolina.— Redmond *v.* Staton, 116 N. C. 140, 21 S. E. 186; Young *v.* Connelly, 112 N. C. 646, 17 S. E. 424; State *v.* Merritt, 65 N. C. 538; Gooch *v.* Gregory, 65 N. C. 142; State *v.* Gaines, 30 N. C. 168; Newbern Bank *v.* Jones, 17 N. C. 284.

Pennsylvania.— Wilson *v.* Arnold, 172 Pa. St. 264, 37 Wkly. Notes Cas. (Pa.) 379, 33 Atl. 552; Saylor *v.* Com., (Pa. 1886) 5 Atl. 227; Van Etten *v.* Com., 102 Pa. St. 596; Siewers *v.* Com., 87 Pa. St. 15; Ziegler *v.* Com., 12 Pa. St. 227; Com. *v.* Conard, 1 Rawle (Pa.) 249; Work *v.* Hoofnagle, 1 Yeates (Pa.) 506.

South Carolina.— Strain *v.* Babb, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905.

Tennessee.— State *v.* Whitworth, 98 Tenn. 263, 39 S. W. 10; Dean *v.* Hale, 7 Lea (Tenn.) 613; State *v.* Cole, 6 Lea (Tenn.) 492; Buford *v.* Cox, 3 Lea (Tenn.) 518; Alston *v.* Sharp, 2 Lea (Tenn.) 515.

Texas.— Crews *v.* Taylor, 56 Tex. 461; Clark *v.* Wilcox, 31 Tex. 322.

Virginia.—Russell *v.* Clayton, 3 Call (Va.) 41.

See 10 Cent. Dig. tit. "Clerks of Courts," §§ 119, 127.

As to obligation of clerk to perform official duties and methods of compelling him to do so see *supra*, VIII, A, 1.

On general principles of law, independent of statute, the clerk is personally liable for injuries arising from his official malfeasance or nonfeasance. Markham *v.* Ross, 73 Ga. 105; Crews *v.* Taylor, 56 Tex. 461.

The remedy on the bond is cumulative and does not prevent his being sued at common law for his negligence, etc. Pass *v.* Dibrell, 8 Yerg. (Tenn.) 469.

Action on bond not precluded by existence of other remedy.—A county is not precluded from resorting to the bond of a clerk of the court who has issued and put in circulation false and fraudulent witness certificates, which were accepted as genuine and paid by the county, by the fact that it may indemnify itself by suit against the sheriff and tax-collector, county treasurer, or other persons. Lewis *v.* State, 65 Miss. 468, 4 So. 429. See also *infra*, IX, A, 3, c.

Wrongful taxation of costs — Accrual of right of action.— The right to sue the clerk on his bond for the wrongful taxation of costs does not accrue until after such costs have been retaxed by the judgment of the court, and the statute of limitations only begins to run from such date. State *v.* Hollenbeck, 68 Mo. App. 366.

Where bond lost.— Where a clerk's official bond is lost and no certified copy thereof can be obtained, a person having a right of action against the clerk on such bond can maintain a suit in equity against the sure-

from his official misconduct[63] or negligence.[64] Thus a clerk has been held liable for his failure or refusal to issue process,[65] to record a deed left with him for registration,[66] to certify and send up a bill of exceptions,[67] to make a transcript on appeal,[68] to collect a state tax,[69] to make a correct statement of fees received by him,[70] to enter an action on the docket,[71] to enter an attachment within the time fixed by law,[72] to enter judgment,[73] or for negligence in making such entry,[74] for

ties to establish the bond and to obtain leave to sue upon it. Howe *v.* Taylor, 6 Oreg. 284.

What court has jurisdiction.— In Missouri the county court has no jurisdiction of a suit on the official bond of a county clerk. Such suit should be brought in the circuit court. State *v.* Dent, 121 Mo. 162, 25 S. W. 924.

63. Acts amounting to misconduct.— It is a breach of a clerk's bond to obtain from the state treasury the payment of an unauthorized and illegal fee bill (Com. *v.* Carter, 21 Ky. L. Rep. 1509, 55 S. W. 701), to make a false certificate of acknowledgment (People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091 [*reversing* 38 Ill. App. 428]), to issue process without authority (Frankem *v.* Trimble, 5 Pa. St. 520), or to issue and put in circulation false and fraudulent witness certificates (Lewis *v.* State, 65 Miss. 468, 4 So. 429).

As to what constitutes misconduct justifying removal from office see *supra*, VI, C, 2.

64. Acts of negligence creating liability.— Clerks have been held liable for the following acts of negligence: For failing to collect and pay in jury and docket-fees (Governor *v.* Ridgway, 12 Ill. 14), for failing to tax costs (State *v.* Gideon, 158 Mo. 327, 59 S. W. 99), for failing to copy a sheriff's return on a summons (Clark *v.* Wilcox, 31 Tex. 322), for failing to comply with the orders of the court in relation to a partition sale (State *v.* Gaines, 30 N. C. 168), for failing to insert the waiver in a writ of fieri facias issued under a judgment entered by virtue of a warrant of attorney "waiving exemption and inquisition" (Wilson *v.* Arnold, 172 Pa. St. 264, 37 Wkly. Notes Cas. (Pa.) 379, 33 Atl. 552), for issuing a scire facias for too small a sum (Russell *v.* Clayton, 3 Call (Va.) 41), for a mistake in a certificate of judgment (Ziegler *v.* Com., 12 Pa. St. 227), for furnishing incorrect and misleading information regarding the time a judgment was entered (Selover *v.* Sheardown, 73 Minn. 393, 76 N. W. 50, 72 Am. St. Rep. 627), or for the unauthorized issuance in term-time of letters of guardianship (State *v.* Christian, 13 Ind. App. 308, 41 N. E. 603).

65. Citation.— Anderson *v.* Joliett, 14 La. Ann. 614, where in a suit brought against the clerk and his sureties for failure to issue citation it was held that defendants could not plead, by way of defense, that the party who had acquired the right to prescription through their neglect would not plead it.

Attachment.— Alston *v.* Sharp, 2 Lea (Tenn.) 515.

Execution.— Steele *v.* Thompson, 62 Ala. 323; State *v.* Ritter, 20 Ind. 406; Burton *v.* McFarland, 3 Ky. L. Rep. 536; State *v.* Merritt, 65 N. C. 558; Gooch *v.* Gregory, 65 N. C. 142. But in order for the clerk to be liable there must have been a request for such issuance or a statute commanding it. Badham *v.* Jones, 64 N. C. 655. And see State *v.* Ruland, 12 Mo. 264.

Excuse for failure to issue execution.— A general order of the circuit court, granting to the clerk twenty days, in addition to the time allowed by the statute, for issuing executions, excuses the clerk for failing to issue executions within the time prescribed by the statute. Davidson *v.* Wiley, 31 Ala. 452.

Loss of the record is no defense to an action against the clerk for failing to issue execution unless it be also shown that defendant exercised proper diligence in preserving the record. McFarland *v.* Burton, 89 Ky. 294, 11 Ky. L. Rep. 499, 12 S. W. 336.

66. State *v.* Haggin, 1 A. K. Marsh. (Ky.) 306.

67. Collins *v.* McDaniel, 66 Ga. 203; Houston *v.* Wandelohr, 12 Ky. L. Rep. 345, 14 S. W. 345.

68. Bates *v.* Foree, 4 Bush (Ky.) 430.

Omission from transcript.— A clerk commits a breach of his bond if he fails to insert in a transcript of a record anything properly belonging to it. Com. *v.* Chambers, 1 Dana (Ky.) 11.

69. State *v.* Cole, 6 Lea (Tenn.) 492.

70. State *v.* Henderson, 142 Mo. 598, 44 S. W. 737, holding further that the fact that the county had not ordered the clerk to pay over did not preclude an action on his bond for making a false report.

71. Brown *v.* Lester, 13 Sm. & M. (Miss.) 392.

72. Stewart *v.* Sholl, 99 Ga. 534, 26 S. E. 757.

73. Johnson *v.* Schloesser, 146 Ind. 509, 45 N. E. 702, 58 Am. St. Rep. 367, 36 L. R. A. 59; Young *v.* Connelly, 112 N. C. 646, 17 S. E. 424; Strain *v.* Babb, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905. See also Day *v.* Graham, 6 Ill. 435.

Proof of neglect.— To prove neglect to properly enter a transcript of judgment on the judgment record, it is necessary to show that he was requested to make the entry. Such request, however, will be conclusively shown by the fact of his having entered it, on its delivery for that purpose, although so defectively as to defeat the object sought. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276.

74. Governor *v.* Dodd, 81 Ill. 162; Saylor *v.* Com., (Pa. 1886) 5 Atl. 227.

Failure to index judgment.— The clerk of the court is liable for damages to a judgment creditor arising from his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands.

an erroneous entry of satisfaction of a judgment,[75] and for neglecting to keep safely the court records.[76]

(11) *Approving Insufficient Bond.* Where it is a part of the clerk's official duty[77] to examine and pass upon a certain bond and he is so negligent in the performance of such duty as to cause damage[78] he can be held liable on his official bond therefor.[79] But the clerk's duty in such matter usually extends no further than the use of due care in ascertaining the sufficiency of the sureties.[80] The

Redmond *v.* Staton, 116 N. C. 140, 21 S. E. 186.

Duty of plaintiff to oversee entry.— The rule that it is the duty of a plaintiff to see that his judgment is properly entered applies only as between the parties and those affected by the want of constructive notice, but has no reference to the question of the liability of the prothonotary to plaintiff whose judgment was wrongly entered. Saylor *v.* Com., (Pa. 1886) 5 Atl. 227.

75. Van Etten *v.* Com., 102 Pa. St. 596; Coyne *v.* Souther, 61 Pa. St. 455.

76. Toncray *v.* Dodge County, 33 Nebr. 802, 51 N. W. 235.

Misplacing papers.—When papers required to be filed in the office of the clerk of court are presented to him for that purpose it is his duty to file and deposit them in a proper place, so that they may be found on reasonable examination; and if he misplaces such papers he is chargeable with negligence. Rosenthal *v.* Davenport, 38 Minn. 543, 38 N. W. 618.

77. Where not within scope of clerk's duties.— If the bond be one which the clerk is not by law required to examine and approve there is no liability on his bond. Reno *v.* McCully, 65 Iowa 629, 22 N. W. 902, 66 Iowa 730, 24 N. W. 530; Kinnison *v.* Carpenter, 9 Bush (Ky.) 599; Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396; McAlister *v.* Scrice, 7 Yerg. (Tenn.) 276, 27 Am. Dec. 504.

78. Where no injury results there is no liability. Wade *v.* Miller, 104 Ala. 604, 16 So. 517; Williams *v.* Hart, 17 Ala. 102; People *v.* Leaton, 25 Ill. App. 45 [*affirmed* in 121 Ill. 666, 13 N. E. 241]; Field *v.* Wallace, 89 Iowa 597, 57 N. W. 303.

79. *Alabama.*— Buckley *v.* Wilson, 56 Ala. 393; Governor *v.* Wiley, 14 Ala. 172.

Georgia.— Spain *v.* Clements, 63 Ga. 786.

Indiana.— Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349.

Iowa.— Field *v.* Wallace, 89 Iowa 597, 57 N. W. 303; Hubbard *v.* Switzer, 47 Iowa 681.

Mississippi.— McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

Nebraska.— Heater *v.* Pearce, 59 Nebr. 583, 81 N. W. 615; Brock *v.* Hopkins, 5 Nebr. 231.

Pennsylvania.— Work *v.* Hoofnagle, 1 Yeates (Pa.) 506.

Tennessee.— Dean *v.* Hale, 7 Lea (Tenn.) 613.

Virginia.— Chase *v.* Miller, 88 Va. 791, 14 S. E. 545.

See 10 Cent. Dig. tit. "Clerks of Courts," §§ 120, 131.

When right of action accrues.— A right of action against a clerk for negligently approving and accepting an insufficient stay-bond does not accrue until the expiration of the stay. Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768; Steel *v.* Bryant, 49 Iowa 116.

Sufficient proof of approval.— When the clerk, pursuant to an order of the court that a bond to be approved by him should be filed within ninety days, receives a bond within the time and indorses it filed in office, he cannot afterward be permitted to testify that he did not approve or disapprove it. Approbation is shown by the fact of filing. Pearson *v.* Gayle, 11 Ala. 278.

What not a release of liability.— Where a clerk was found to have been negligent in approving a stay-bond, the fact that counsel for the creditors complained of its insufficiency, and the clerk informed them that he would disregard it and issue execution if they would furnish evidence of its insufficiency, which they did not do, did not release such clerk from liability. Haverly *v.* McClelland, 57 Iowa 182, 10 N. W. 342.

80. People *v.* Leaton, 121 Ill. 666, 13 N. E. 241 [*affirming* 25 Ill. App. 45]; Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 93; Leeds *v.* Peaslee, 10 Ohio S. & C. Pl. Dec. 567, 8 Ohio N. P. 105.

What care and diligence necessary.— The care and diligence required of the clerk are those which ordinarily careful and prudent persons would exercise in transactions of like importance. Field *v.* Wallace, 89 Iowa 597, 57 N. W. 303.

Evidence of due care.— In an action by a creditor of an intestate on the bond of the clerk for approving an insufficient administrator's bond, one administrator and three sureties being intestate's heirs, and the other surety his widow, the clerk may testify as to the estimate put by intestate's bankers on his property, and may prove by business men, in position to know, the reputed financial standing of intestate and his firm when he died, in order to show that he exercised due care before approving the bond. Field *v.* Wallace, 89 Iowa 597, 57 N. W. 303.

Evidence as to the style of living of such sureties several years after the bond was given is not admissible in behalf of the clerk to show their financial responsibility. Field *v.* Wallace, 89 Iowa 597, 57 N. W. 303.

What not proof of due care.— The fact that a clerk in approving a stay-bond made inquiry of the surety as to the value of his unincumbered property and was informed that it was nearly equal to the amount of the penalty of the bond is not sufficient to establish, as matter of law, that he was not negligent. Haverly *v.* McClelland, 57 Iowa 182, 10 N. W. 342.

clerk cannot be considered an insurer of a bond which in his official capacity he has examined and approved as sufficient.[81]

c. Limitations of Liability — (I) *In General.* A clerk is not liable for an act performed under a judgment which subsequently proves to be void,[82] nor is he liable for issuing process against property under a standing rule of court, although the court had no jurisdiction in the premises,[83] for canceling a mortgage under a forged order,[84] for an error in interpreting a statute,[85] or for failure to observe a directory provision of a statute.[86]

(II) *Where No Duty Imposed by Law.* A clerk of court incurs no official liability by failing to perform, or negligently performing, a service which the law does not require of him.[87] In order to hold the clerk personally liable in such case the plaintiff must show an express agreement to perform such service.[88]

(III) *Where No Injury Results.* In order to recover against the clerk it must be shown that some injury resulted from his act or omission.[89] But it has

81. Santee River Co. *v.* Webster, 23 R. I. 599, 51 Atl. 218.

Not liable for forged signature.— A judgment was obtained in one county and a stay-bond thereon executed in another, and the clerk of the court in the latter certified that the party "whose name appears to the within bond as surety" was worth a certain specified amount, whereupon the bond was accepted by the clerk of the court where the judgment was rendered. It was held that the clerk did not certify to the genuineness of the signature of the surety, and he was not liable to the judgment plaintiff for the amount of the judgment, on proof that the signature was forged. Bringolf *v.* Burt, 44 Iowa 184.

82. Graham *v.* Smart, 18 U. C. Q. B. 482.

83. The Salomoni, 29 Fed. 534.

84. Luther *v.* Banks, 111 Ga. 374, 36 S. E. 826.

85. Com. *v.* Conard, 1 Rawle (Pa.) 249.

86. Barrow *v.* Robichaux, 14 La. Ann. 207; Fornell *v.* Koonce, 51 N. C. 379. See also Day *v.* Graham, 6 Ill. 435.

87. *Illinois.*— People *v.* Leaton, 121 Ill. 666, 13 N. E. 241; Governor *v.* Ridgway, 12 Ill. 14.

Iowa.— Reno *v.* McCully, 65 Iowa 629, 22 N. W. 902, 66 Iowa 730, 24 N. W. 530.

Kansas.— Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99.

Kentucky.— Com. *v.* Craig, 6 T. B. Mon. (Ky.) 45.

Nebraska.— Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396.

Virginia.— Page *v.* Taylor, 2 Munf. (Va.) 492.

United States.— Warner *v.* Texas, etc., R. Co., 54 Fed. 920, 2 U. S. App. 647, 4 C. C. A. 670.

See 10 Cent. Dig. tit. "Clerks of Courts," § 119 *et seq.*

Matters requiring judge's approval.— In matters which the clerk is required to submit to the judge for approval it will be presumed that they were done under the sanction and direction of the judge; and in such case the clerk is responsible only where he refuses to discharge his duty when requested by the judge, or where he is guilty of fraud in collusion with the judge. Such duties are not governed by the same principles as regulate duties which he is required to perform independent of and without regard to the dictation of any superior. Kinnison *v.* Carpenter, 9 Bush (Ky.) 599 (defective execution of guardian's bond); Com. *v.* Thompson, 2 Bush (Ky.) 559 (order or judgment drawn by clerk and approved and signed by court); McAlister *v.* Scrice, 7 Yerg. (Tenn.) 276, 27 Am. Dec. 504 (appeal-bond).

Clerk acting under court orders.—Where a clerk is acting under the orders of the court in the care of an estate in his hands he cannot be held liable for failing to do an act in regard thereto which is not directed to be done by any order of court. State *v.* Whitworth, (Tenn. Ch. 1898) 46 S. W. 454.

88. Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99.

89. *Alabama.*— Wade *v.* Miller, 104 Ala. 604, 16 So. 517; Williams *v.* Hart, 17 Ala. 102; Governor *v.* Wiley, 14 Ala. 172.

California.— Lick *v.* Madden, 36 Cal. 208, 95 Am. Dec. 175.

Illinois.— People *v.* Leaton, 25 Ill. App. 45 [*affirmed* in 121 Ill. 666, 13 N. E. 241].

Indiana.— State *v.* Fleming, 124 Ind. 97, 24 N. E. 664.

Iowa.— Field *v.* Wallace, 89 Iowa 597, 57 N. W. 303; Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989; Parks *v.* Davis, 16 Iowa 20.

Kansas.— U. S. Wind Engine, etc., Co. *v.* Linville, 43 Kan. 455, 23 Pac. 597; Symns *v.* Cutter, 9 Kan. App. 210, 59 Pac. 671.

Kentucky.— Goode *v.* Miller, 78 Ky. 235.

New York.— Blossom *v.* Barry, 1 Lans. (N. Y.) 190.

North Carolina.— Darden *v.* Blount, 126 N. C. 247, 35 S. E. 479; State *v.* Lowe, 64 N. C. 500; Simpson *v.* Simpson, 63 N. C. 534; State *v.* Biggs, 46 N. C. 364 [*overruling* State *v.* Watson, 29 N. C. 289].

Ohio.— State *v.* Sloane, 20 Ohio 327.

As to measure of damages see *infra*, IX, A, 3, a, (VI).

Must be proximate cause of injury.— In order for a clerk to be liable in an action for damages such damages must be the natural and proximate consequences of his negligence

been held that although no actual damage be proved plaintiff is entitled to recover nominal damages and costs.[90]

(IV) *WHERE PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE.* Where, but for the negligence of the party complaining, the injury would not have occurred the clerk cannot be held liable.[91]

d. Extent and Duration of Sureties' Liability — (I) *IN GENERAL.* The liability of the sureties on a clerk's official bond is naturally dependent in large measure upon the form of the bond itself,[92] as well as upon the intention of the statute under which the bond is drawn.[93] Where the bond is conditioned for the faithful discharge of his duties it embraces every duty and obligation imposed upon the clerk by express statute or the practice of the court.[94] But

or misconduct. Eslava *v.* Jones, 83 Ala. 139, 3 So. 317, 3 Am. St. Rep. 699.

Action for taking insufficient bond.— To a suit brought against a clerk of court on his official bond, for not taking bond with sufficient sureties on surrendering certain property in his hands as clerk, it is a good defense that plaintiffs have put in suit the bond taken by him on such surrender and received a large sum of money in discharge of that bond. Bevins *v.* Ramsey, 15 How. (U. S.) 179, 14 L. ed. 652.

90. Heater *v.* Pearce, 59 Nebr. 583, 81 N. W. 615.

91. Lick *v.* Madden, 36 Cal. 208, 95 Am. Dec. 175; Parks *v.* Davis, 16 Iowa 20; Crews *v.* Taylor, 56 Tex. 461.

What not contributory negligence.— That one injured by the failure of a clerk of the superior court to certify and send up a bill of exceptions did not, by mandamus, compel the clerk to send up the record is not such negligence as will defeat a recovery of damages by him in an action on the official bond of the clerk. Collins *v.* McDaniel, 66 Ga. 203.

That plaintiff did not see to the performance of a duty imposed on the clerk by law — such as the issuance of process upon the filing of a precipe — is not a defense to an action against the clerk for failing to perform such duty. Baltimore, etc., R. Co. *v.* Weedon, 78 Fed. 584, 47 U. S. App. 306, 24 C. C. A. 249.

When negligence not implied.— Negligence on the part of the person presenting papers for filing is not implied from the fact that papers relating to different matters are presented in one package, without explanation, they being properly indorsed so as to show their character. Rosenthal *v.* Davenport, 38 Minn. 543, 38 N. W. 618.

When assignee not infected with assignor's fraud.—The fact that the mortgagee induced the clerk of court to falsely certify an acknowledgment to a forged mortgage is no defense to a suit therefor on his official bond for the use of an assignee of the mortgage, since the assignee's right of action arose directly from his loss, and was not derived from the mortgagee. Bartels *v.* People, 152 Ill. 557, 38 N. E. 898 [*affirming* 45 Ill. App. 306].

92. As to necessity, form, and sufficiency of bond see *supra*, IV, B, 2.

Special bond.— Where a bond is given to meet a "particular exigency" the sureties are liable for the clerk's defaults only so far as they are connected with the "particular exigency" which called the bond into being. Longmire *v.* Fain, 89 Tenn. 393, 18 S. W. 70.

Bond as special commissioner.— Where a bond is executed by the clerk and master as special commissioner, the sureties are liable for any default as such commissioner, although the clerk and master was never appointed commissioner in the cause wherein he acted as such. Buford *v.* Cox, 3 Lea (Tenn.) 518.

93. Massachusetts — For protection of county only.— The bond of the clerk of the court of common pleas, for the true discharge of all the duties of his office, and for keeping up the records seasonably and in good order, does not secure the fees of the crier of the court, although they are, by law, to be received by the clerk and paid over by him to the crier. The bond provided for by the statute then existing was intended merely as a protection to the county and not to individuals. Crocker *v.* Fales, 13 Mass. 260.

North Carolina — Bond to secure payment of tax fees, etc.— The bond of a clerk of court required by N. C. Rev. Stat. c. 28, § 11, was only intended to secure the payment of tax-fees on actions, fines, forfeitures, etc., while c. 19, § 7, was intended to secure the faithful payment of moneys generally to the person entitled. Hence where money collected on execution was paid into the clerk's office, it was held not to be recoverable on a bond given pursuant to the former act, although it embraced a condition "to pay over to the person or persons entitled to receive the same all other moneys which might come to his hands by virtue of his office." Hunter *v.* Routlege, 51 N. C. 216; Latham *v.* Fagan, 51 N. C. 62.

Virginia — Confined to clerical duties.— The bond of a clerk of the county or circuit court, given under the Virginia statute of 1792, for the faithful discharge of his duties, was confined to clerical duties, and did not extend to the collection, etc., of taxes on law process, although it was his duty to collect and account for such taxes. Auditor *v.* Dryden, 3 Leigh (Va.) 703.

94. Coleman *v.* Ormond, 60 Ala. 328; Brown *v.* Lester, 13 Sm. & M. (Miss.) 392;

for acts of the clerk not within the scope of his official duties the sureties are not liable.[95]

(II) *Effect of Giving New Bond.* Ordinarily on the execution and approval of a new bond the responsibilities of the old sureties cease,[96] but of course they are still liable for defaults which occurred before the new bond became operative.[97]

(III) *Duties Added After Execution of Bond.* Additional duties imposed by law upon the clerk subsequent to the execution of the bond, if different in degree only and not in kind from those formerly pertaining to the office, are covered by the bond.[98] But as to any duty not pertinent in its nature to the office as it existed when the bond was given there is no liability upon the sureties in such bond.[99]

(IV) *Acts Done Before Giving of Bond.* While the sureties are not ordinarily liable for an act done by the clerk previous to the giving of such bond,[1] yet where the act constitutes a continuing violation of official duty — such as a failure to account for funds officially held — the liability attaches to a bond subsequently given.[2]

(V) *Acts Done After Expiration of Term.* The contract of the sureties must be strictly construed and they cannot be held liable for acts of the clerk done after the expiration of his term of office.[3]

Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719].

As to what duties are imposed upon clerks of court see *supra*, VIII, B.

A sale of real estate by the clerk and master in equity, under an order of court, pursuant to statute, is an official act within the condition of his bond. Judges *v.* Deans, 9 N. C. 93.

Where clerk of several courts.— Although the bond of the clerk of the court of Hamilton county only designates that officer as "clerk of the court of common pleas," yet by virtue of the statute after his election he becomes clerk of the superior court and circuit court, and is liable on his bond for acts done as clerk of the last mentioned courts. State *v.* Hobson, 6 Ohio S. & C. Pl. Dec. 338, 5 Ohio N. P. 321.

95. McKee *v.* Griffin, 66 Ala. 211; McNeil *v.* Smith, 55 Ga. 313 (devastavit of estate); State *v.* White, 152 Mo. 416, 53 S. W. 1064; State *v.* Blakemore, 7 Heisk. (Tenn.) 638 (acts done in another capacity).

96. Rodes *v.* Com., 6 B. Mon. (Ky.) 359; Bowen *v.* Evans, 1 Lea (Tenn.) 107.

In Indiana the board of county commissioners has power only to accept the original bonds of county clerks and cannot accept new bonds whereby the sureties on the original bond are released. The only way in which such sureties may be released is by pursuing the method prescribed by the Indiana act of May 31, 1852. Sullivan *v.* State, 121 Ind. 342, 23 N. E. 150.

97. Cullom *v.* Dolloff, 94 Ill. 330; Sharpe *v.* Connely, 105 N. C. 87, 11 S. E. 177. And see Hunter *v.* Routlege, 51 N. C. 216; Latham *v.* Fagan, 51 N. C. 62.

98. Governor *v.* Ridgway, 12 Ill. 14; Weisenborn *v.* People, 53 Ill. App. 32; Denio *v.* State, 60 Miss. 949; Wilmington *v.* Nutt, 78 N. C. 177, 80 N. C. 196.

The sureties of a clerk are not discharged by a change by law in some of the duties of the office, and in his liabilities, subsequent to their becoming sureties. White *v.* Fox, 22 Me. 341.

99. Denio *v.* State, 60 Miss. 949.

1. Ward *v.* Hassell, 66 N. C. 389.

2. Judges *v.* Bryan, 14 N. C. 390; State *v.* Moses, 18 S. C. 366, 20 S. C. 465. See also Walters-Cates *v.* Wilkinson, 92 Iowa 129, 60 N. W. 514.

3. People *v.* Toomey, 25 Ill. App. 46 [*affirmed* in 122 Ill. 308, 13 N. E. 521]; Gregory *v.* Morrisey, 79 N. C. 559; Holloman *v.* Langdon, 52 N. C. 49; Hutchinson *v.* Com., 6 Pa. St. 124 [*following* Com. *v.* West, 1 Rawle (Pa.) 29]. But see Latham *v.* Fagan, 51 N. C. 62, where the money and property of an infant without a guardian was ordered by a decree of the county court to be paid over to the clerk of that court, to be by him invested and managed, under the direction of the court, to the use of the infant, it was held that such clerk and his sureties were liable on the official bond in force at the time of the making of the decree, independent of the time when the property was received.

Where clerk his own successor.— Where a county court clerk succeeds himself in office and has on hand money received but not demanded during his first term, the sureties on his first bond will not be liable therefor (Yoakley *v.* King, 10 Lea (Tenn.) 67); and the presumption is, as between the sureties on his bonds, that money coming to his hands during the first term was on hand at the commencement of his second term. Nor is such presumption rebutted by proof merely that his bank-account was overdrawn at the commencement of his second term, there being no evidence of defalcation (State *v.* Cole, 13 Lea (Tenn.) 367. *Contra*, State *v.* Smith, 95 N. C. 396).

2. Liability For Funds — a. Nature of Liability — (i) *For Funds Held by Virtue of Office* — (A) *In General.* Where a clerk of court fails to account for and pay over, at the time when it becomes his legal duty so to do,[4] money received and held by him by virtue of his office, it constitutes a breach of his official bond,[5] even though his default occurred previously to the giving of such

South Carolina — Liability extended by statute.— Where the clerk of the common pleas and general sessions, having been re-elected for a new term, neglects to give a new bond, the liability of himself and sureties on his bond is, by statute, extended to his official defalcations during his new term. State Treasurers *v.* Lang, 2 Bailey (S. C.) 430.

4. When demand necessary.—Before bringing an action upon the bond of a clerk for moneys payable to private individuals, received by color of his office, a demand is necessary and the statute of limitations will not begin to run in his favor until after such demand is made. Furman *v.* Timberlake, 93 N. C. 66.

When demand unnecessary.— Where the clerk of court fails at the time prescribed by law, to account for and pay over the fees and moneys required by law to be accounted for, he thereby becomes liable, without demand, to an action therefor. Moore *v.* State, 55 Ind. 360; Little *v.* Richardson, 51 N. C. 305. And if he has converted moneys payable to private individuals no demand is necessary. Furman *v.* Timberlake, 93 N. C. 66.

Necessity for order.—Where money is held by a clerk in his official capacity subject to the orders of the court, no right of action accrues against him for not paying it over until the court orders him so to do.

Delaware.— State *v.* Houston, 1 Harr. (Del.) 230.

Iowa.— Walters-Cates *v.* Wilkinson, 92 Iowa 129, 60 N. W. 514.

Missouri.— State *v.* Dent, 121 Mo. 162, 25 S. W. 924.

South Carolina.— State *v.* Lake, 30 S. C. 43, 8 S. E. 322.

Tennessee.— Smalling *v.* King, 5 Lea (Tenn.) 585; Bowen *v.* Evans, 1 Lea (Tenn.) 107.

In Missouri if the clerk make a false report of the fees received by him suit may be brought on his bond without any previous order to him to pay over. State *v.* Gideon, 158 Mo. 327, 59 S. W. 99; State *v.* Chick, 146 Mo. 645, 48 S. W. 829; State *v.* Henderson, 142 Mo. 598, 44 S. W. 737.

Necessity to audit accounts.— In an action on the official bonds of a clerk for failing to pay into the county treasury fees collected by him in excess of his compensation and disbursements, where the board had made efforts to procure a settlement, and a few days before the action was brought ordered him to pay a sum into the treasury, it was held that the action would lie without a previous auditing of his accounts, although the amount claimed was for more than he was liable to pay. Cullom *v.* Dolloff, 94 Ill. 330.

Statute of limitations.— As to application of the statute of limitations to such actions see the following cases:

Alabama.— McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313.

Illinois.— Weisenborn *v.* People, 53 Ill. App. 32.

Indiana.— Moore *v.* State, 55 Ind. 360; Lynch *v.* Jennings, 43 Ind. 276.

Missouri.— State *v.* Dailey, 4 Mo. App. 172.

Nebraska.— Bantley *v.* Baker, 61 Nebr. 92, 84 N. W. 603.

And see, generally, Limitations of Actions.

5. *Alabama.*— Mitchell *v.* Rice, 132 Ala. 120, 31 So. 498; Coleman *v.* Ormond, 60 Ala. 328.

Arkansas.— State *v.* Watson, 38 Ark. 96.

Illinois.—Weisenborn *v.* People, 58 Ill. App. 114, 53 Ill. App. 32; People *v.* Barnwell, 41 Ill. App. 617; People *v.* Stewart, 6 Ill. App. 62.

Indiana.— Meyer *v.* State, 125 Ind. 335, 25 N. E. 351; Jewett *v.* State, 94 Ind. 549.

Iowa.— Walters-Cates *v.* Wilkinson, 92 Iowa 129, 60 N. W. 514; Morgan *v.* Long, 29 Iowa 434.

Maryland.— State *v.* Norwood, 12 Md. 177.

Missouri.— State *v.* Gideon, 158 Mo. 327, 59 S. W. 99; State *v.* Thornton, 8 Mo. App. 27.

Nebraska.— Bantley *v.* Baker, 61 Nebr. 92, 84 N. W. 603; Dirks *v.* Juel, 59 Nebr. 353, 80 N. W. 1045; McDonald *v.* Atkins, 13 Nebr. 568, 14 N. W. 532.

North Carolina.— Walters *v.* Melson, 112 N. C. 89, 16 S. E. 918 [*distinguishing* Kerr *v.* Brandon, 84 N. C. 128]; State *v.* Upchurch, 110 N. C. 62, 14 S. E. 642; State *v.* Boone, 108 N. C. 78, 12 S. E. 897; Sharpe *v.* Connely, 105 N. C. 87, 11 S. E. 177; State *v.* Odom, 86 N. C. 432; State *v.* Nutt, 79 N. C. 263; State *v.* Blair, 76 N. C. 78; Havens *v.* Lathene, 75 N. C. 505; Cooper *v.* Williams, 75 N. C. 94; Alexander *v.* Johnston, 70 N. C. 295; State *v.* Morrison, 63 N. C. 508; Broughton *v.* Haywood, 61 N. C. 380; State *v.* Gaines, 30 N. C. 168; State *v.* Ehringhaus, 30 N. C. 7. See also Peebles *v.* Boone, 116 N. C. 57, 21 S. E. 187.

Ohio.— State *v.* Orr, 16 Ohio St. 522.

Pennsylvania.— Yohe *v.* Com., (Pa. 1888) 13 Atl. 546; Watson *v.* Smith, 26 Pa. St. 395; Deckert's Appeal, 5 Watts & S. (Pa.) 342.

South Carolina.—Fort *v.* Assmann, 38 S. C. 253, 16 S. E. 887 [*distinguishing* Childs *v.* Alexander, 22 S. C. 169]; State *v.* Moses, 18 S. C. 366.

Tennessee.— State *v.* Whitworth, 98 Tenn. 263, 39 S. W. 10; Buford *v.* Cox, 3 Lea (Tenn.) 518; Hill *v.* Alston, 12 Heisk. (Tenn.) 569; Tanner *v.* Dancy, 4 Heisk. (Tenn.) 482;

bond, the liability being regarded as a continuing one.[6] Accounting for such funds is one of the duties of the clerk's office and is covered by a bond conditioned generally for the faithful discharge of his duties;[7] and the liability on such bond for a misappropriation of money held under order of court cannot be avoided by showing agreement between the clerk and the party entitled thereto that the clerk should retain the money and pay interest thereon.[8]

(B) *When Funds Held in Official Capacity.* Whether or not a clerk is

Williams *v.* Bowman, 3 Head (Tenn.) 678; Waters *v.* Carroll, 9 Yerg. (Tenn.) 101; Allen *v.* Perkins, (Tenn. Ch. 1897) 45 S. W. 445.

Texas.— Scott *v.* Hunt, 92 Tex. 389, 49 S. W. 210.

Wisconsin.— Mulholland *v.* Gerry, 81 Wis. 647, 51 N. W. 960.

United States.— Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719]; *In re* Finks, 41 Fed. 383.

Canada.— Middlefield *v.* Gould, 10 U. C. C. P. 9; Cool *v.* Switzer, 19 U. C. Q. B. 199; Reg. *v.* Patton, 7 U. C. Q. B. 83.

See 10 Cent. Dig. tit. "Clerks of Courts," § 132 *et seq.*

Acts for which sureties liable.— The following acts in regard to funds held by clerks by virtue of office have been held to constitute breaches of their official bonds: Making an unauthorized loan (Mitchell *v.* Rice, 132 Ala. 120, 31 So. 498), making a false return by understating the fees received and overstating the amount paid out for salaries (State *v.* Gideon, 158 Mo. 327, 59 S. W. 99), depositing the fund to his private account (Dirks *v.* Juel, 59 Nebr. 353, 80 N. W. 1045), and failing to deposit the fund in the bank designated by the court (Yohe *v.* Com., (Pa. 1888) 13 Atl. 546).

Sureties on two bonds liable pro rata.— In counties where, under Ill. Const. art. 10, the clerk of the circuit court is *ex officio* recorder of deeds, he really holds only one office. The compensation allowed him by the county board covers services in both capacities; the fees received constitute one fund, from which the clerk may retain his salary, but he must account for the balance; and if the balance is made up from fees received by him in both capacities the sureties on his bond as circuit clerk and those on his bond as recorder are liable *pro rata* for its payment. People *v.* Stewart, 6 Ill. App. 62.

Power of surety to limit liability.—Where the surety on the official bond of a register in chancery, who was also his brother, furnished money to the register to enable him to pay the proceeds of land sales to some of the parties entitled, which the register reported as done in his official capacity, the surety cannot, in an action on the bond by one entitled to part of the proceeds, claim that the money was paid by him as surety, so as to limit his liability to the difference between the amount so paid and the amount of the bond. Mitchell *v.* Rice, 132 Ala. 120, 31 So. 498.

Where money received not legal tender.— In a suit on a court clerk's bond to recover the amount of money paid into court as a tender, the fact that the money was not legal tender is no defense. Whatever was its character, the clerk having received it officially was liable to the party entitled to it. Billings *v.* Teeling, 40 Iowa 607.

Non-performance of condition in decree — Waiver.— The non-performance of some condition in a decree for the specific execution of a contract of sale is no defense to an action against the clerk of the court for conversion of money paid to him in accordance with the requirements of the decree, if it be made to appear that the party for whose benefit the condition was inserted has waived it. Bantley *v.* Baker, 61 Nebr. 92, 84 N. W. 603.

Invalid attempt to discharge obligation.— The clerk of court having in his possession a bond of a large amount, which had been deposited in his office by order of the court, and belonged to certain parties to a suit pending in the said court, transferred the bond to one A. As part consideration of this transfer, A gave the clerk a receipt for a sum of money then in the clerk's hands, in his official capacity, and belonging to the wards of A. The amount of said bond was afterward recovered from A by the persons to whom it belonged. It was held that under these circumstances the receipt of A, the guardian, was no bar to an action by the wards on the clerk's official bond, to recover the money due to them. State *v.* Arrington, 25 N. C. 99.

Invalid sale — Ratification.— The sureties on the bond of a clerk of a county court cannot defend against liability for proceeds of a sale of land officially received by him, on the ground of invalidity of the sale, in that one who was a defendant by publication as a nonresident was dead, where his heirs are ratifying the sale by seeking to recover the fund. Ferrell *v.* Grigsby, (Tenn. Ch. 1899) 51 S. W. 114.

Action by county — Set off by deputies' salaries.— In an action on the bond of a clerk of the common pleas court, salaries paid by the clerk to his deputies may be set off against the amount alleged to be due the county from such clerk, although such salaries were not paid, as required by statute, by a warrant on the treasurer for funds deposited by the clerk. State *v.* Hobson, 6 Ohio S. & C. Pl. Dec. 338, 5 Ohio N. P. 321.

6. Judges *v.* Bryan, 14 N. C. 390; State *v.* Moses, 20 S. C. 465, 18 S. C. 366.

7. U. S. *v.* Ambrose, 2 Fed. 552.

8. Sullivan *v.* State, 121 Ind. 342, 23 N. E. 150.

charged with the duty or vested with the right to receive money officially[9] in any particular instance or for any particular purpose without an order of court[10] is a question depending for the most part upon the statutory provisions. There is no presumption that money held by a clerk was acquired by him in an official capacity.[11]

(II) *For Funds Held in Private Capacity.* For a failure of the clerk to account for money not received by virtue of his office there is no liability upon the sureties on his official bond,[12] notwithstanding the payment was made in the

9. Money not received by virtue of office. — In the following instances it was held that the money was not received by virtue of office: Money received by the clerk after the expiration of his term (People *v.* Toomey, 122 Ill. 308, 13 N. E. 521 [*affirming* 25 Ill. App. 46]; State *v.* Dailey, 4 Mo. App. 172); money paid to clerk in vacation (State *v.* Enslow, 41 W. Va. 744, 24 S. E. 679); money received in the capacity of special commissioner (Alcorn *v.* State, 57 Miss. 273; Williams *v.* Bowman, 3 Head (Tenn.) 678); money belonging to a ward deposited with the clerk by a guardian (State *v.* Fleming, 46 Ind. 206; Scott *v.* State, 46 Ind. 203); fees of other officers collected by the clerk (State *v.* Givan, 45 Ind. 267; Matthews *v.* Montgomery, 25 Miss. 150); or money arising from the sale of swamp land or received under the stray act (State *v.* Moeller, 48 Mo. 331).

Money received by virtue of office.—In the following instances the clerk was deemed to have received money by virtue of his office: Purchase-money of lands sold under order of the court (State *v.* Blair, 76 N. C. 78; State *v.* Morrison, 63 N. C. 508; State *v.* Gaines, 30 N. C. 168; Fort *v.* Assmann, 38 S. C. 253, 16 S. E. 887); money necessary to make a tender good (Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719]); money received on a judgment (Morgan *v.* Long, 29 Iowa 434; McDonald *v.* Atkins, 13 Nebr. 568, 14 N. W. 532; Deckert's Appeal, 5 Watts & S. (Pa.) 342. But see Lewis *v.* Johnson, Walk. (Miss.) 260. And as to the clerk's right to receive payment of judgments see JUDGMENTS); money made on a fieri facias and placed in his office by the sheriff in vacation (Judges *v.* Williams, 12 N. C. 426); costs due to his predecessor (Watson *v.* Smith, 26 Pa. St. 395); jail fees (State *v.* Norwood, 12 Md. 177); fees collected for other officers, jurors, or witnesses (Smith *v.* Johnson, 5 N. J. L. 603; Middlefield *v.* Gould, 10 U. C. C. P. 9); proceeds of bonds received from predecessor, although delivered without any order of the court (Alexander *v.* Johnston, 70 N. C. 295); or taxes collected above the amount authorized by law (State *v.* Nutt, 79 N. C. 263. But see State *v.* Norwood, 12 Md. 177, holding that taxes collected by the clerk without authority to do so were not officially received).

North Carolina — As receiver for infant.— Under the North Carolina statutes money received by a clerk while acting as receiver of the estate of an infant having no guardian is received by virtue of his office (Waters *v.* Melson, 112 N. C. 89, 16 S. E. 918; State *v.* Upchurch, 110 N. C. 62, 14 S. E. 642; State *v.* Boone, 108 N. C. 78, 12 S. E. 897; State *v.* Odom, 86 N. C. 432), unless his office of receiver be independent of his office as clerk (Syme *v.* Bunting, 91 N. C. 48; State *v.* Odom, 86 N. C. 432), as where the plain import of the order appointing him receiver is to impose upon him a personal obligation only (Kerr *v.* Brandon, 84 N. C. 128).

10. Money paid in on order of court is received by the clerk in his official capacity.

Arkansas.— State *v.* Watson, 38 Ark. 96.

Iowa.— Walters-Cates *v.* Wilkinson, 92 Iowa 129, 60 N. W. 514.

Nebraska.— Bantley *v.* Baker, 61 Nebr. 92, 84 N. W. 603; Dirks *v.* Juel, 59 Nebr. 353, 80 N. W. 1045.

North Carolina.— Sharpe *v.* Connely, 105 N. C. 87, 11 S. E. 177.

Tennessee.— Waters *v.* Carroll, 9 Yerg. (Tenn.) 101.

United States.— U. S. *v.* Howard, 93 Fed. 719. And this is true although such order be based on the practice of the court and not on direct statutory authority. *In re* Finks, 41 Fed. 383.

As to power to receive money without an order of the court see *supra*, VIII, B, 6.

Money paid into court by clerk.— Where a clerk by order of court pays in money which had been deposited with him as an individual, and not in his official capacity, the money becomes a fund in court by virtue of the order, and not of the original deposit; the order not being a ratification by the court of the act of its clerk in accepting the deposit. People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523.

Clerk cannot change nature of liability.— Where one who was clerk of a county court and also guardian *ad litem* to a minor received payment, as clerk, of a judgment rendered in favor of the minor and gave his receipt as clerk, he cannot, by an entry on his docket afterward, change the character of the payment, so as to make it appear that he received it as guardian *ad litem*. Haynes *v.* Wheat, 9 Ala. 239.

11. Vogel *v.* St. Louis, 13 Mo. App. 116 [*affirmed* in 84 Mo. 432].

12. *Colorado.*— People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523.

Illinois.— People *v.* Toomey, 122 Ill. 308, 13 N. E. 521 [*affirming* 25 Ill. App. 46].

Indiana.— Bowers *v.* Fleming, 67 Ind. 541; State *v.* Fleming, 46 Ind. 206; Scott *v.* State, 46 Ind. 203; State *v.* Givan, 45 Ind. 267; Carey *v.* State, 34 Ind. 105; Jenkins *v.*

belief that the money was to be received by him in his official capacity.[13] But in such case the person entitled to the money may maintain an action against the clerk personally,[14] or after his death against his estate.[15]

b. Extent of Liability — (I) *In General.* It has been held that in the absence of any statute or constitutional provision to the contrary, a clerk who receives money by virtue of his office is a bailee and his duty and liability in regard thereto are measured by the law of bailment.[16] If he act in good faith and without negligence he cannot be held responsible for the loss of the fund[17] or for a depreciation of its value.[18] But if he converts the money to his own use he is liable for its full value at the time of its conversion.[19]

(II) *For Interest.* A clerk is liable for interest lost by his failure to obey

Lemonds, 29 Ind. 294; State *v.* McGill, 15 Ind. App. 289, 40 N. E. 1115, 43 N. E. 1016.

Kentucky.— Hardin *v.* Carrico, 3 Metc. (Ky.) 289; Snape *v.* Sanford, 3 Ky. L. Rep. 760.

Maryland.— State *v.* Norwood, 12 Md. 177.

Mississippi.—Alcorn *v.* State, 57 Miss. 273; Matthews *v.* Montgomery, 25 Miss. 150; Lewis *v.* Johnson, Walk. (Miss.) 260.

Missouri.— State *v.* White, 152 Mo. 416, 53 S. W. 1064; State *v.* Moeller, 48 Mo. 331; State *v.* Dailey, 4 Mo. App. 172.

Nebraska.— Bantley *v.* Baker, 61 Nebr. 92, 84 N. W. 603.

North Carolina.— Syme *v.* Bunting. 91 N. C. 48; State *v.* Odom, 86 N. C. 432; Kerr *v.* Brandon, 84 N. C. 128.

Tennessee.—Bowen *v.* Evans, 1 Lea (Tenn.) 107; Allen *v.* Wood, 2 Baxt. (Tenn.) 401. See also Thouron *v.* East Tennessee, etc., R. Co., 90 Tenn. 609, 18 S. W. 256.

Virginia.— Stuart *v.* Madison, 1 Call (Va.) 481.

West Virginia.—State *v.* Enslow, 41 W. Va. 744, 24 S. E. 679.

Canada.—Preston *v.* Wilmot, 23 U. C. Q. B. 348.

For instances of money not held by virtue of office see *supra*, IX, A, 2, a, (I), (B).

13. People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523, holding that the clerk's misrepresentations as to his authority to receive the money had no effect on his liability for such deposit in his official capacity. But see State *v.* McGill, 15 Ind. App. 289, 40 N. E. 1115, 43 N. E. 1016, where it was held that an action would lie on the bond for money received by "color" of office. See also Thomas *v.* Connelly, 104 N. C. 342, 10 S. E. 520.

14. Bowers *v.* Fleming, 67 Ind. 541; Hunt *v.* Milligan, 57 Ind. 141; Moore *v.* State, 55 Ind. 360; Snape *v.* Sanford, 3 Ky. L. Rep. 760; Stuart *v.* Madison, 1 Call (Va.) 481.

An action for money had and received may be maintained against a clerk where the money was not received by virtue of office. Bowers *v.* Fleming, 67 Ind. 541; Duffield *v.* Burrough, 54 N. J. L. 47, 22 Atl. 798; Howard *v.* Walton, 2 U. C. Q. B. 266.

Assumpsit lies on the part of a county to recover of the clerk of the county court money received by him and not accounted for when he in equity or good conscience ought to account for it. Belknap County *v.* Clark, 58 N. H. 150.

15. State *v.* Givan, 45 Ind. 267.

16. Wilson *v.* People, 19 Colo. 199, 34 Pac. 944, 41 Am. St. Rep. 243, 22 L. R. A. 449. See, generally, BAILMENTS.

The contrary view is maintained in some jurisdictions and it is held that the clerk's liability can be discharged only by payment. Havens *v.* Lathene, 75 N. C. 505.

For a full discussion of this question see OFFICERS.

Relation of debtor and creditor.— A default of the clerk of the circuit court in the payment to the county of surplus fees raises merely the relation of debtor and creditor between them, and does not give the county any special property in deposits of a litigant in the hands of the clerk. Vogel *v.* St. Louis, 84 Mo. 432 [*affirming* 13 Mo. App. 116].

17. Sufficiency of security.—Where a clerk and master loaned money without security, but afterward accepted the borrower's partner, and the firm soon failed, it was held, in an action against the clerk and surety, that clear and satisfactory proof of the clerk's good faith should be required to relieve defendants of liability. Summar *v.* Page, 5 Baxt. (Tenn.) 657. But where the clerk took security which was regarded by business men as good he was not liable, although it afterward became worthless by reason of a panic. State *v.* Whitworth, (Tenn. Ch. 1897) 39 S. W. 745.

Loss by failure of bank.— Where the clerk of court, as such, deposits with a bank in good standing moneys paid into court pending litigation, he is not liable on his official bond for the amount so deposited in case of failure of the bank. Wilson *v.* People, 19 Colo. 199, 34 Pac. 944, 41 Am. St. Rep. 243, 22 L. R. A. 449. *Contra*, Havens *v.* Lathene, 75 N. C. 505. But where a clerk makes a general individual deposit in bank of official funds, and receives interest on the deposit for his own use, he is liable for whatever portion of the fund may be lost through the failure of the bank. Hill *v.* Alston, 12 Heisk. (Tenn.) 569.

18. State *v.* Engelhard, 70 N. C. 377; Touchstone *v.* Whittington, 2 Baxt. (Tenn.) 68; Clevenger *v.* Clevenger, 1 Heisk. (Tenn.) 104.

19. Mott *v.* Pettit, 1 N. J. L. 344; Touchstone *v.* Whittington, 2 Baxt. (Tenn.) 68.

an order requiring him to deposit a fund in bank and take a certificate of deposit bearing interest at a specified rate,[20] and if he make an unauthorized use of the money he is chargeable with interest from the time of such misappropriation.[21]

3. PROCEEDINGS TO ENFORCE LIABILITY — a. Actions For Damages — (I) *WHO MAY SUE* — (A) *In General.* As a general rule an action for damages may be brought against the clerk by any person injured by his breach of duty.[22] As to who is a person injured depends very largely of course upon the facts of the particular case.[23]

20. Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256 [*reversing* 60 Ill. App. 647].

Liability of successor.— When a clerk of court renders himself liable for interest lost by reason of his failure to obey an order requiring him to deposit a fund in a specified bank, if he pays over the fund to his successor, who has no knowledge of the order, the latter is liable only for the interest actually received by him while he holds the fund. Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256.

21. McPhillips *v.* McGrath, 117 Ala. 549, 23 So. 721; State *v.* Ehringhaus, 30 N. C. 7, where the clerk, having used the money, was held liable for interest up to the time of payment to the party entitled thereto.

Rate of interest recoverable.—In an action on a clerk's bond to recover moneys received by him in his official capacity, plaintiff is entitled to interest at six per cent from the time of the receipt of such money by the clerk, and to twelve per cent from the time of demand and refusal to pay. State *v.* Boone, 108 N. C. 78, 12 S. E. 897.

Interest on fees collected for sheriff.— A prothonotary to whom the fees of a sheriff have been paid is not liable for interest thereon until demand made for payment. Shafer *v.* McIlhaney, 154 Pa. St. 58, 26 Atl. 213 [*affirming* 1 Pa. Dist. 765, 12 Pa. Co. Ct. 27].

License duties not paid over within required time.— Where a clerk is sued on his bond for not paying over license duties within the time stipulated therein, if he has paid before suit brought, the action cannot be supported for interest during the delay. Gage *v.* Gannett, 11 Mass. 217.

22. *Georgia.*—Stewart *v.* Sholl, 99 Ga. 534, 26 S. E. 757.

Illinois.— People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091.

Mississippi.—Brown *v.* Lester, 13 Sm. & M. (Miss.) 392; McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

Pennsylvania.— Com. *v.* Conard, 1 Rawle (Pa.) 249.

Texas.— Crews *v.* Taylor, 56 Tex. 461.

United States.— Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719].

23. **Who a person injured.**— The following have been held to be "persons injured" so as to be entitled to sue the clerk for his breach of duty: A person entitled to money which the clerk holds by virtue of his office and refuses to pay out (Meyer *v.* State, 125 Ind. 335, 25 N. E. 351), as for instance an administrator to whom the clerk refuses to pay a fund belonging to the estate, although ordered by the court to do so (Sharpe *v.* Connely, 105 N. C. 87, 11 S. E. 177); a ward whose funds have been misappropriated by the clerk (State *v.* Upchurch, 110 N. C. 62, 14 S. E. 642); a *bona fide* purchaser of real estate which was subject to a judgment not entered in the judgment docket (Johnson *v.* Schloesser, 146 Ind. 509, 45 N. E. 702, 58 Am. St. Rep. 367, 36 L. R. A. 59); or a creditor or purchaser injured by the clerk's neglect to record a deed (State Bank *v.* Haggin, 1 A. K. Marsh. (Ky.) 306).

Successor in office.—Where the clerk's successor has a legal right to demand and receive moneys held by the outgoing clerk by virtue of his office, he is a "person injured" by the latter's failure to pay over such money. Mulholland *v.* Gerry, 81 Wis. 647, 51 N. W. 960. But the successor is not a party injured by the omission of the outgoing clerk to make entries and write up the records of his court, where there is no law requiring the successor to supply such omissions. Willis *v.* Jones, 11 Tex. 594. And the state, having no right to sue for the neglect of the clerk of the court of common pleas to record the judgments of that court, cannot authorize, by resolve of the legislature, the successor of the clerk to sue on the bond to obtain pay for recording judgments rendered in the time of his predecessor. Treasurers *v.* Ross, 4 McCord (S. C.) 273.

A county may sue on the bond of a clerk of court elected by the county for failure to record pleadings and judgments as required by law, and especially for failure to record criminal cases, for which he has been paid by the county. Chester County *v.* Hemphill, 29 S. C. 584, 8 S. E. 195. But where the duties required to be performed for the county are secured by a separate bond as county clerk, the county cannot sue for a breach of such duties upon the bond given to protect parties having business in the county court. Satterfield *v.* People, 104 Ill. 448.

Certificate of search — To whom liable.— A prothonotary is bound by a reaffirmance of his certificate of search, although such republication was made on the application of an agent of the person employing him; and the prothonotary is liable in damages for any injury resulting from a neglect to include a judgment in said search. The liability is only to the person employing him to make the search. In this case the search was made for another but was reaffirmed for agent of plaintiff. Siewers *v.* Com., 87 Pa. St. 15.

(B) *In Whose Name Action Brought on Bond.* Where the action is on the bond it is usually required to be brought in the name of the state or other party holding the legal right of action,[24] for the benefit of the real party in interest.[25]

(II) *Declaration, Petition, or Complaint.* In an action to recover damages for the misfeasance or nonfeasance of a clerk of court, the declaration, petition, or complaint must of course contain sufficient allegations to show a cause of action.[26] The breach of duty complained of must be alleged with sufficient par-

Texas—Failure to record mortgage.—Only the parties interested in and who had a right to have the instrument recorded can maintain an action against the clerk under Paschal's Dig. Tex. art. 5018, for failure to keep a file-book for entering mortgages and to record a mortgage. Crews *v.* Taylor, 56 Tex. 461.

Massachusetts — Failure to account for fines in criminal cases.— Clerks of courts are bound by Mass. Rev. Stat. c. 141, § 9, to pay to the county treasurer all fines received by them in criminal cases, and are not liable to actions by cities or towns to whose use the fines are appropriated by statute. Taunton *v.* Sproat, 2 Gray (Mass.) 428.

24. See, generally, BONDS, 5 Cyc. 819 *et seq.*

In name of United States.— Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719].

In name of state.— *Colorado.*— Cooper *v.* People, 28 Colo. 87, 63 Pac. 314.

Indiana.— Moore *v.* State, 55 Ind. 360.

Maryland.— State *v.* Norwood, 12 Md. 177.

North Carolina.— State *v.* Upchurch, 110 N. C. 62, 14 S. E. 642.

Ohio.— State *v.* Orr, 16 Ohio St. 522.

South Carolina.— State *v.* Moses, 18 S. C. 366.

In name of governor of state.— Brown *v.* Lester, 13 Sm. & M. (Miss.) 392.

By injured party in his own name.—Under the Alabama act of 1819, the bond of a circuit court clerk running to the governor of the state could not be sued on in the name of the governor for the use of the person aggrieved, but the proceeding must be in the name of the latter, the bond being assigned to him for that purpose by the governor. Bagby *v.* McRae, 2 Ala. 708.

The prothonotary in office is the proper plaintiff, to the use of the court, in an action on the official bond of a former prothonotary to recover a deficit in his account for moneys paid into court. Yohe *v.* Com., (Pa. 1888) 13 Atl. 546.

Objection not available on demurrer.— An objection that the action is not brought in the name of the state can be raised by demurrer only. State *v.* Moses, 18 S. C. 366.

25. Brown *v.* Lester, 13 Sm. & M. (Miss.) 392; State *v.* Upchurch, 110 N. C. 62, 14 S. E. 642; Howard *v.* U. S., 102 Fed. 77, 42 C. C. A. 169 [*affirming* 93 Fed. 719].

Where the county is the party in interest the action should be for the use of the officer on board authorized to represent the county in that regard, such as the county treasurer (Weisenborn *v.* People, 53 Ill. App. 32; Hewlett *v.* Nutt, 79 N. C. 263), county commissioners (Cooper *v.* People, 28 Colo. 87, 63 Pac. 314; State *v.* Orr, 16 Ohio St. 522; State *v.* Piatt, 1 Ohio Dec. (Reprint) 99, 2 West. L. J. 213), or the auditor (State *v.* Robinson, 2 Ind. 40). See, generally, COUNTIES.

The attorney-general is the proper party to institute the proceeding where the state is the party in interest. Moore *v.* State, 55 Ind. 360.

The mayor and city council may sue on the clerk's bond, in the name of the state, to recover fees due the city and not paid over. State *v.* Norwood, 12 Md. 177.

26. See, generally, PLEADING.

Failure to issue process.— Where a clerk is not bound to issue process unless a written precipe has been filed according to the statute, in an action on his bond for failure to issue process it must be alleged that such precipe was filed. State *v.* Caffee, 6 Ohio 150.

Payment of excessive deputy hire.—An allegation in a suit on the official bond of a clerk of court, which alleges that it was possible for said clerk to obtain good and competent deputy hire for thirty-five dollars per month, but that with intent to defraud the county he paid to his deputy the sum of sixty-six dollars per month, that being the whole sum allowed him for such use, does not state a cause of action, where it does not allege that the services of the person actually employed have been secured for thirty-five dollars per month. People *v.* Dieckman, 84 Ill. App. 244.

What averments unnecessary.— In an action on the bond of a clerk of the court of common pleas by the county commissioners to recover fines, fees, and costs received by him in his official capacity, the declaration need not aver that the indictments wherein they arose were determined in favor of the state, or show for what grade of offenses such fines, etc., were assessed, or contain an allegation that the clerk had been qualified as such. State *v.* Piatt, 15 Ohio 15.

Necessity to negative plaintiff's consent.— In an action on the case against a clerk of a court for indorsing credits on an execution to the injury of plaintiff, the declaration must aver that the indorsements were so made without the order or consent of plaintiff. Monroe *v.* Webb, 4 Munf. (Va.) 73.

Surplusage.— A declaration alleging, as a breach of a bond of a clerk of the United States court, a failure to make proper returns and to pay over surplus funds is good, although the breach alone consists in failure to make the proper returns. The allegation as to failure to pay over may be treated as sur-

ticularity to apprise defendant of the nature of the demand against him,[27] and actual damage resulting from such breach must be averred.[28] Where the breach assigned is a failure of the clerk to account for money received by virtue of his office it must be alleged that the clerk received such money[29] and held it in his official capacity.[30] Where the action is brought on the clerk's bond the declara-

plusage (U. S. *v.* Ambrose, 2 Fed. 552), and in an action on the official bond of a clerk of court for failure to include in his report fees received by him, allegations in the petition that after the expiration of defendant's term the county court determined the amount of fees received by defendant and not reported, and ordered him to pay the same to the county, do not make the petition demurrable, on the ground that such order was without jurisdiction of such court, and was not a sufficient fulfilment of a condition precedent to suit on defendant's bond, since such allegations were superfluous (State *v.* Gideon, 158 Mo. 327, 59 S. W. 99).

Sufficient declaration, petition, or complaint.—In action for failure of clerk to account for funds held by virtue of office see Sullivan *v.* State, 121 Ind. 342, 23 N. E. 150; Brown *v.* Harrison, 93 Ind. 142; Moore *v.* State, 55 Ind. 360; State *v.* Temple, 50 Ind. 585. In trespass on the case against a clerk for approving an insufficient appeal-bond see Billings *v.* Lafferty, 31 Ill. 318. In debt on the bond for approving an insufficient bond see Governor *v.* Wiley, 14 Ala. 172. In an action on the bond for failure to certify and send up a bill of exceptions see Collins *v.* McDaniel, 66 Ga. 203. In an action on the bond for failure to copy on a summons the sheriff's return see Clark *v.* Wilcox, 31 Tex. 322. In an action on the bond by the county for the clerk's failure to record criminal cases, for which he has been paid by the county see Chester County *v.* Hemphill, 29 S. C. 584, 8 S. E. 195.

27. State *v.* Caffee, 6 Ohio 150.

Sufficient assignment of breach.—In an action for the unauthorized issuance of an injunction to restrain the collection of a fieri facias see Governor *v.* Wiley, 14 Ala. 172. In an action for the clerk's failure to put plaintiff's case on the docket see Brown *v.* Lester, 13 Sm. & M. (Miss.) 392.

28. State *v.* Fleming, 124 Ind. 97, 24 N. E. 664; Symns *v.* Cutter, 9 Kan. App. 210, 59 Pac. 671; Houston *v.* Wandelohr, 12 Ky. L. Rep. 345, 14 S. W. 345.

Insufficient allegation — Legal conclusion. — In an action against a clerk for failure to furnish a bill of exceptions by reason of which plaintiff lost his right of appeal, a petition which does not state the facts to show that reversible error existed in the judgment sought to be appealed from is defective; and an allegation that plaintiff believes he would have obtained a reversal of the case is insufficient, being a mere conclusion of the pleader. Houston *v.* Wandelohr, 12 Ky. L. Rep. 345, 14 S. W. 345.

Sufficient allegation of damage.— In a petition in an action on the official bond of the clerk of a district court to recover for damages occasioned by the neglect of the clerk to properly enter a transcript of judgment on the judgment record, so as to create a lien on real estate of defendant, it is not necessary to allege that an execution has been issued on the judgment, and returned unsatisfied for want of property whereon to levy; but an allegation showing that defendant owned no other property than that on which the lien was sought, and that owing to such neglect this has become lost to him, is sufficient. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276.

Damage by giving misleading information. — In an action against a clerk for giving plaintiff misleading information whereby he was induced to expend time and money in the preparation of an appeal, it is not necessary to allege that he would have succeeded in the appellate court in order to authorize recovery. In such case the ground of his claim is not the loss of the suit, but the labor and money which he has been induced to expend in reliance upon the false information furnished by the defendant. Selover *v.* Sheardown, 73 Minn. 393, 76 N. W. 50, 72 Am. St. Rep. 627.

29. Governor *v.* Ridgway, 12 Ill. 14.

Need not specify sources from which received.— In an action by the bailiff of a division court against the clerk's sureties for failure of the clerk to pay over to the bailiff fees collected, the declaration need not specify the names of the parties from whom or the suits in which the moneys claimed were received. Cool *v.* Switzer, 19 U. C. Q. B. 199.

30. People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523.

Sufficient allegation.—A clerk of court may receive or collect costs and fees not his own, under the statute authorizing costs tendered to be brought into court; and hence, in an action on his bond conditioned to pay over all moneys received by him "by virtue of his office," an allegation that he had "by virtue of his office" received costs taxed in plaintiff's favor and had failed to turn them over is sufficient to withstand a demurrer. Connole *v.* People, 46 Ill. App. 72.

Legal conclusion.— Where a clerk had received a deposit of money upon his representation that he had authority to receive the same in his official capacity, when in fact he had no such authority, a complaint charging that he received the deposit by virtue of his office alleges merely a conclusion of the pleader, and hence a demurrer to the complaint does not admit the truth thereof. People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523.

Presumed that docket-fee legally taxed.— In a suit on the bond of a clerk of the circuit court the presumption is that a docket-fee, if

tion or complaint must set out so much of such bond as entitles plaintiff to his cause of action.[31]

(III) *Plea or Answer.* Under a general denial in an action on the bond defendant may offer in evidence any circumstance tending to prove that the acts complained of were not a breach of the bond as alleged.[32] *Nul tiel record* is not a good plea in such an action, although the bond be by law directed to be recorded.[33]

(IV) *Evidence.*[34] To recover damages for a breach of duty on the part of a clerk the delinquency must be established by competent evidence,[35] and actual loss resulting therefrom must be proved.[36] Where the action is based on a failure of the clerk to account for funds records in other causes are admissible to show the amounts received,[37] and entries made by the clerk in books kept for that purpose are *prima facie* evidence of the receipt of such money;[38] but such

taxed, was legally done, and it need not be so averred. Governor *v.* Ridgway, 12 Ill. 14.

31. State *v.* Houston, 1 Harr. (Del.) 230; State *v.* Caffee, 6 Ohio 150. And see, generally, Bonds.

Nature of party's interest need not be set out.— In a suit on the bond, brought in the name of the state by the party injured, it is sufficient to name the person for whose use the suit is brought in the process and declaration, without setting forth the nature of his interest. State *v.* Caffee, 6 Ohio 150.

32. State *v.* Reynolds, 68 N. C. 264, where a clerk and master was alleged to have broken his official bond by failing to loan money received by him on security, and to pay to plaintiff the interest as required by order of court. It was held that the obligors, under a general denial, might show that the clerk and master deposited the money in a savings bank, which paid the interest to plaintiff, who consented to such arrangement.

Amendment.— Where in an action against a clerk for failure to issue an execution the defense set up was that the record was lost, it was held error to refuse an amendment alleging proper diligence on the part of the clerk in preserving such record. McFarland *v.* Burton, 89 Ky. 294, 11 Ky. L. Rep. 499, 12 S. W. 336.

33. State *v.* Houston, 1 Harr. (Del.) 230.

34. See, generally, Evidence.

35. Insufficient evidence.—In an action by a mortgagee against a clerk of a county court for failure to make correct probate of a mortgage whereby the mortgagee lost his lien, a copy of the mortgage, with the alleged certificate of the clerk thereon certified by the register, is not competent evidence to establish the delinquency, but it must be proved by the production of the original mortgage and certificate of the clerk, or by a sworn copy, if the original mortgage has been lost or destroyed. Barnes *v.* Smith, 3 Humphr. (Tenn.) 82.

Sufficient evidence of guardian's appointment.— In an action on the official bond of a clerk for failure to take a sufficient guardian's bond, the record of the appointment of the guardian is sufficient evidence of the appointment. State *v.* Windley, 99 N. C. 4, 5 S. E. 14.

36. Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989; Symns *v.* Cutter, 9 Kan. App. 210, 59 Pac. 671; Blossom *v.* Barry, 1 Lans. (N. Y.) 190.

Approving invalid bond — What evidence necessary.— Where a clerk accepts a totally invalid bond to dissolve garnishment, it is not necessary for the plaintiff in an action on the clerk's official bond to show that an effort was made to have judgment entered on the garnishment bond, for such bond being a mere nullity it would have been a waste of time to attempt to have judgment entered on it. Spain *v.* Clements, 63 Ga. 786.

Sufficient showing of injury.—The creditor of an insolvent having lost his share in the estate by reason of the clerk having misplaced the statutory release filed by the debtor, in order to recover against the clerk need not show that the debtor has not again become solvent. It sufficiently appeared that he had sustained damage when it was shown that he had wholly lost his distributive share in the insolvent estate. Rosenthal *v.* Davenport, 38 Minn. 543, 38 N. W. 618.

37. Records of other causes showing amount.— In an action on a clerk's bond to recover moneys received by him officially during his term, the records of the causes in which such money was received and the record of a cause between him and his successor in office brought by the latter to recover such moneys are admissible in evidence to show the amounts received. State *v.* Lake, 30 S. C. 43, 8 S. E. 322.

Record in previous action for same demand.— In an action against a clerk and one of his sureties on his official bond the record of a judgment against the clerk and others of his sureties in a previous action against them for the same demand and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. State *v.* Smith, 95 N. C. 396.

38. Cooper *v.* People, 28 Colo. 87, 63 Pac. 314; People *v.* Treadway, 17 Mich. 480; Middlefield *v.* Gould, 10 U. C. C. P. 9.

What entries not a defense.— Where, in a suit on the bond of a clerk of the county court for withholding surplus fees, it appeared that entries on the record of the county court

evidence may be rebutted by proof that no such payments were in fact made.[39]

(v) *TRIAL.*[40] Where the action is tried before a jury[41] a verdict properly given for the penalty of the bond will not be vitiated by additional findings for the parties injured by the default, as such findings may be rejected as surplusage.[42]

(vi) *DAMAGES.*[43] The amount of damages which may be recovered is measured by the actual loss resulting to plaintiff by reason of the clerk's breach of duty.[44]

(vii) *JUDGMENT.*[45] In an action on a clerk's bond judgment is properly rendered for the penalty with execution for the assessed damages.[46] The judgment may go against any number of the defendants warranted by the testimony.[47]

stating that there was no surplus had been set aside by proceedings instituted in said court therefor, such entries were no defense either to the clerk or his sureties. State *v.* O'Gorman, 75 Mo. 370.

39. People *v.* Treadway, 17 Mich. 480.

Evidence not admissible to disprove embezzlement.— In an action on a clerk's bond to recover moneys alleged to have been embezzled, evidence that the clerk had on deposit in bank, to his credit officially, money in excess of the amount claimed to have been embezzled, was rightly excluded. Such evidence does not tend to show that the clerk did not unlawfully appropriate the money for which the action was brought. Ida County *v.* Woods, 79 Iowa 148, 44 N. W. 247.

40. See, generally, TRIAL.

41. **Question determinable by court.**— In a suit on the bond of a clerk of the county court for withholding surplus fees, the circuit court in which such suit is pending may determine what surplus remained in defendant's hands after making the deductions authorized. State *v.* O'Gorman, 75 Mo. 370.

Questions for jury.— In an action against the clerk of a court and the sureties on his bond for his failure to account for the amount of a judgment defendants proved payment by the clerk by deposit of one hundred dollars in the bank to the credit of the judgment creditor, and a receipt of the judgment creditor, indorsed on the record of the judgment for one hundred and seventy-five dollars and bearing no date. It was held that it was a question for the jury whether the sum deposited in the bank was included in the receipt. State *v.* Cheek, 4 Ind. 543. Where suit is brought against a clerk of a court to recover damages for fees alleged to have been excessively and corruptly charged, and the evidence shows that he received fees which he neglected to credit on his books, the question as to whether this was done inadvertently, or for the purpose of compelling payment of such fees a second time, is for the jury. Hurd *v.* Atkins, 1 Colo. App. 449, 29 Pac. 528.

42. State *v.* Moses, 18 S. C. 366.

Defective verdict.—In a proceeding against several persons as sureties of a clerk to recover money received by him and not paid over, the verdict found as special facts that the money was paid to the clerk on a certain day and was demanded. It was held that the verdict was defective, as it should have either found specially all of the facts upon which the defendant's liability depended, or found generally for the amount demanded, with interest. State Bank *v.* Davenport, 19 N. C. 45.

43. See, generally, DAMAGES.

44. *Georgia.*— Spain *v.* Clements, 63 Ga. 786.

North Carolina.—State *v.* Windley, 99 N. C. 4, 5 S. E. 14; Newbern Bank *v.* Jones, 17 N. C. 284.

Oregon.— Howe *v.* Taylor, 9 Oreg. 288.

Pennsylvania.— Wilson *v.* Arnold, 172 Pa. St. 264, 33 Atl. 552.

Tennessee.—Alston *v.* Sharp, 2 Lea (Tenn.) 515.

Virginia.—Russell *v.* Clayton, 3 Call (Va.) 41.

Erroneous instruction.— In an action on the bond of a clerk for failing to enroll, enter, or index a decree, whereby plaintiffs lose the amount of it, it is error to charge that plaintiffs are entitled to the full amount of their claim if junior judgments and liens swept the judgment debtor's entire property away. *Non constat* but that the property thus swept away might have been insufficient to pay plaintiff's decree in full. Strain *v.* Babb, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905.

What may be shown in mitigation of damages.— In an action against the clerk of a court for failing to issue process in error to review a judgment against the plaintiff, when legally required to do so by proper proceedings on the plaintiff's part, the measure of damages is, *prima facie*, the amount of the judgment which the plaintiff has been obliged to pay, but the defendant may show, in mitigation of damages, that even if the plaintiff had had an opportunity to review the judgment he would have been unable to reduce the recovery against him. Baltimore, etc., R. Co. *v.* Weedon, 78 Fed. 584, 47 U. S. App. 360, 24 C. C. A. 249.

45. See, generally, JUDGMENTS.

46. State *v.* Hollenbeck, 68 Mo. App. 366.

In South Carolina the judgment is rendered for the penalty and stands for the benefit of all parties who may show that they have been injured. Strain *v.* Babb. 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905; State *v.* Moses, 18 S. C. 366.

47. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276.

b. Summary Proceedings. In some jurisdictions the statutes provide a summary remedy[48] for injuries arising from breaches of duty on the part of clerks of court. Such remedy being of statutory origin and in derogation of the common law must be strictly pursued and cannot be extended by construction.[49]

c. Penalties. In some jurisdictions clerks of court are, by statute,[50] made liable to penalties for certain acts and omissions.[51] Such penalty is usually

48. See, generally, SUMMARY PROCEEDINGS.

What court has jurisdiction.— In Tennessee it has been held that a summary proceeding against a clerk of a criminal court for failure to pay over fees collected may be brought in the court of which he is clerk (Smiley *v.* Bigley, 5 Sneed (Tenn.) 279) or in the circuit court (Donelson *v.* State, 3 Lea (Tenn.) 692).

Necessity for notice.— In some instances notice to the clerk is required (Hockaday *v.* Com., 4 T. B. Mon. (Ky.) 12; Ray County *v.* Barr, 57 Mo. 290), while in others no notice is necessary (Rodes *v.* Com., 6 B. Mon. (Ky.) 359; Tanner *v.* Dancy, 4 Heisk. (Tenn.) 482); but notice to the clerk is sufficient to bind the sureties (Young *v.* Hare, 11 Humphr. (Tenn.) 302).

In whose name.— The motion against a clerk and his sureties authorized and directed to be made by Tenn. Acts (1852), c. 256, § 12, for not enrolling causes should be made in the name of the county trustee. Ellis *v.* Rogers, 2 Swan (Tenn.) 63.

Against whom.— By some statutes the summary remedy is given against both the clerk and his sureties. Cooper *v.* Williams, 75 N. C. 94; Broughton *v.* Haywood, 61 N. C. 380; Donelson *v.* State, 3 Lea (Tenn.) 692; Tanner *v.* Dancy, 4 Heisk. (Tenn.) 482; Smith *v.* Woods, 1 Coldw. (Tenn.) 535; Young *v.* Hare, 11 Humphr. (Tenn.) 302; Garner *v.* Carroll, 7 Yerg. (Tenn.) 364. But other statutes provide for a proceeding against the clerk alone and not for one on his official bond. Woodward *v.* Alston, 12 Heisk. (Tenn.) 581; Smiley *v.* Bigley, 5 Sneed (Tenn.) 279; Combs *v.* Bramlitt, 4 Yerg. (Tenn.) 569.

Against executor or administrator.— In North Carolina, for a failure of a clerk to pay over money, a summary proceeding may, after the clerk's death, be instituted against his executor or administrator (*Ex p.* Curtis, 82 N. C. 435; Cooper *v.* Williams, 75 N. C. 94); but it has been held that such remedy is not available against a personal representative unless the statute in terms extends to him (Prowell *v.* Fowlkes, 5 Baxt. (Tenn.) 649).

Time of making motion.— See Wright *v.* Shelby County, 9 Baxt. (Tenn.) 145; Garner *v.* Carroll, 7 Yerg. (Tenn.) 364.

Jury unnecessary.— On a proceeding by motion against a clerk by the commonwealth for failure to pay up the public dues, if the amount to be recovered is liquidated, no jury is necessary unless rendered so by the nature of the defense relied on. Rodes *v.* Com., 6 B. Mon. (Ky.) 359.

Evidence of amount due.— On a motion by the commonwealth against a clerk to recover money not accounted for by him, the clerk's report of the amount received by him for the commonwealth and payable into the treasury, made within a reasonable time after his removal from office, is *prima facie* evidence of the amount due to the commonwealth, both against himself and the sureties. Rodes *v.* Com., 6 B. Mon. (Ky.) 359.

What judgment must show.— Judgment against a clerk and his sureties on the summary process by motion must show that he was clerk at the time the default happened or it will not be valid. Garner *v.* Carroll, 7 Yerg. (Tenn.) 364.

Judgment rendered in name of successor.— A summary judgment against a former clerk and his sureties for money not accounted for to his successor in office is properly rendered in the name of the successor who is the rightful custodian of such money. Tanner *v.* Dancy, 4 Heisk. (Tenn.) 482.

49. Prowell *v.* Fowlkes, 5 Baxt. (Tenn.) 649. And see Summey *v.* Johnston, 60 N. C. 98.

For money received in a private capacity and not paid over the summary remedy will not lie. Allen *v.* Wood, 2 Baxt. (Tenn.) 401.

50. **Only where imposed by statute.**— A clerk is liable to a penalty only where expressly made so by statute. The court cannot impose a penalty where the law has imposed none. Com. *v.* Craig, 6 T. B. Mon. (Ky.) 45; Baldwin *v.* Cash, 7 Watts & S. (Pa.) 427.

Constitutionality of statutes.— Statutes allowing such penalties as fixed damages to the injured party have generally been held to be constitutional. Harrison *v.* Chiles, 3 Litt. (Ky.) 194; Graham *v.* Kibble, 9 Nebr. 182, 2 N. W. 455.

51. See, generally, PENALTIES.

Failure to issue execution.— Williamson *v.* Kerr, 88 N. C. 10.

Issuing process without taking security.— King *v.* Wooten, 52 N. C. 533; Fite *v.* Lander, 52 N. C. 247; Wright *v.* Wheeler, 30 N. C. 184.

Taking excessive or illegal fees.— Foster *v.* Blount, 18 Ala. 687; Rodes *v.* Reese, 4 B. Mon. (Ky.) 586; Lydick *v.* Palmquist, 31 Nebr. 300, 47 N. W. 918.

The receipt of several items of illegal fees from the same person, as one transaction, constitutes but one cause of action. Lydick *v.* Palmquist, 31 Nebr. 300, 47 N. W. 918.

What not illegal fee bill.— Where a clerk issued a fee bill for services rendered for E in this form, "Elizabeth Dogget (William Byram to pay) Dr.," the sheriff was not authorized to make distress on B, and B having paid the bill to the sheriff on a threat of distress, the clerk is not liable as for issuing an illegal bill. The fee bill was legally issued against E and gave the sheriff no power to

recoverable in an action against the clerk personally,[52] but the right to sue on the bond for the actual damages sustained by reason of the clerk's delinquency is not taken away by a statute providing a penalty for the same act.[53]

B. Criminal Liability[54] — **1. In General.** In some jurisdictions clerks of court are, by statute, made criminally liable for certain acts and omissions,[55] such

exact the amount of B. Marshall *v.* Byram, 1 Bibb (Ky.) 341.

Abatement by clerk's death.— Where an action was brought against the administrator of a clerk, on his official bond, for the penalty of two hundred dollars, for issuing a writ without requiring security to the prosecution bond, it was held that the right to sue for the penalty abated at the death of the clerk. Fite *v.* Lander, 52 N. C. 247.

52. Sureties not liable for penalty.—State *v.* Baker, 47 Miss. 88; Foote *v.* Vanzandt, 34 Miss. 40.

Declaration — Taking insufficient security. — In an action against a clerk to recover a statutory penalty for not taking sufficient security for costs, the declaration was held to be bad because it did not set forth in what the insufficiency consisted. The declaration in such case must set forth either that the clerk took no security or that he took insufficient security knowing it to be insufficient. In an action to recover a statutory penalty the declaration must set forth every fact necessary to show that the case is within the statute. Wright *v.* Wheeler, 30 N. C. 184.

Need not aver loss or damage.—Under Mo. Rev. Stat. (1899), § 2265, that on the failure of the clerk to transmit a transcript of record, etc., on a change of venue, he shall forfeit one hundred dollars to the party "aggrieved," to be recovered by a civil action, such party need not aver any loss or damages on account of the negligence of the clerk, but may recover the penalty whenever it is shown that he has been harassed or oppressed, or his right to a speedy trial has been denied, because of such negligence. Randol *v.* Garoutte, 78 Mo. App. 609.

Defenses — Inability to do work.—Where a clerk of the court is sued by a litigant to recover the penalty allowed by Mo. Rev. Stat. (1889), § 2265, for failure to transmit a transcript of the record, etc., on a change of venue, he may not maintain the defense that he was not able to do the work of his office in the manner and within the time required by law, since it is his duty in such case to employ competent help. Randol *v.* Garoutte, 78 Mo. App. 609.

Mistake or ignorance, without corrupt intent, is no defense to an action for the statutory penalty for taking excessive fees. Cobbey *v.* Burks, 11 Nebr. 157, 8 N. W. 386, 38 Am. Rep. 364.

Illegal costs paid into state treasury.— The clerk is not liable for illegal costs taxed against defendant in a criminal case, which were paid without objection, and which he paid into the state treasury before notice that he would be proceeded against for collecting them. State *v.* Oden, 101 Tenn. 669, 49 S. W. 750.

Money accounted for but not paid over.— Under a statute requiring the clerk to account for and pay over money, it is no defense to a proceeding to recover the penalty that he has accounted for such money, where he has not also paid it over. Steptoe *v.* Auditor, 3 Rand. (Va.) 221.

Neglect to set up defense — Equitable relief.— On a motion against a clerk for the penalty for failing to pay the taxes on law process, he may defend by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office and certify thereon as the law requires, and was prevented by the default of such commissioner from obtaining a quietus; and if he neglects to make such defense he cannot obtain relief in equity on the same ground. Auditor *v.* Nicholas, 2 Munf. (Va.) 31.

53. State *v.* Baker, 47 Miss. 88; Foote *v.* Vanzandt, 34 Miss. 40; Planters' Bank *v.* Conger, 12 Sm. & M. (Miss.) 527; State *v.* Orr, 16 Ohio St. 522; Pass *v.* Dibrell, 8 Yerg. (Tenn.) 469.

54. See, generally, CRIMINAL LAW.

55. For power of court to punish clerk for contempt in failing to perform duties see *supra*, VIII, A, 1.

Alabama — Other penalty provided by statute.— Under Ala. Code, § 4159, which makes it a misdemeanor for a clerk to fail "to perform any duty imposed on him, for the failure to perform which no other penalty is provided," a failure to issue execution is not indictable, since another penalty for such failure is provided by section 3380. Chapman *v.* State, 73 Ala. 20.

Colorado — Failure to pay over fees.— Under Mills' Anno. Stat. Colo. § 1246, a clerk is liable to indictment for failure or refusal to pay over fees belonging to the county. Adams *v.* People, 25 Colo. 532, 55 Pac. 806.

Georgia — Altering documents on file.— It is grossly improper for the clerk in concert with an attorney to privately and secretly add to or otherwise alter any docket on file in the clerk's office, the same being forbidden as a criminal offense by Ga. Code, § 4471. Matthews *v.* Reid, 94 Ga. 461, 19 S. E. 247.

Mississippi — Issuing false witness certificates.— A circuit clerk who fraudulently issues a false certificate for witness fees is guilty of fraud in office, although the certificate differs in some respects from the form required by law; and he may be indicted and convicted under Miss. Code, § 2790, providing that if any officer commit any fraud or embezzlement in office he shall be imprisoned in the penitentiary. Bracey *v.* State, 64 Miss. 17, 8 So. 163.

Missouri — Refusal to produce records and papers.— It is a misdemeanor in office for

as a failure to report receipts of money as required by statute.[56] But a clerk, being a mere ministerial officer, cannot be held criminally responsible for obeying the orders of the court, even though the court have no authority to make such orders.[57]

2. INDICTMENT.[58] The allegations of the indictment must be sufficient to show an offense within the contemplation of the statute,[59] but where certain cases are excepted from the operation of the act the indictment need not show that the case is not one of those excepted.[60] Where the clerk is charged with collecting and failing to pay over money belonging to the county the proof must show that the collection was made in money or its equivalent.[61]

the clerk of a county court to refuse to produce the records and papers belonging to his office on demand being made by the justices of the court. State *v.* Bowen, 41 Mo. 217.

Wisconsin — Conspiracy to cheat and defraud city.— Under Wis. Laws (1876), c. 370, requiring the clerk of a court to pay periodically, at fixed times, into the treasury of a city, unpaid witness fees received by him, and making the city, after receiving the moneys, merely liable to pay the witnesses upon their demand, the city has at least a special property in the money after it becomes payable into its treasury which will support an averment of property in the city in an information against the clerk and another person for conspiracy to cheat and defraud the city. Casper *v.* State, 47 Wis. 535, 2 N. W. 1117.

Corrupt motive necessary.— To establish a charge of misdemeanor the conduct of the clerk must be shown to have resulted from corrupt motives; error in judgment or mistake of law not being enough, unless it be so gross as to show him to be wholly unfit for the office. State *v.* Hixon, 41 Mo. 210. But see State *v.* Jones, 2 Lea (Tenn.) 716.

56. What not excuse for failure to report revenue.— The fact that a county clerk has received no revenue does not exempt him from liability to indictment for omitting to make report and return of revenue, as required by statute. State *v.* Jones, 2 Lea (Tenn.) 716.

Missouri — When liability attaches.— Under Wagner's Stat. Mo. p. 631, § 29, making it a misdemeanor for clerks of courts at the end of each year to fail to file a statement of the fees received during the year, the criminal liability on such failure attaches immediately at the end of the year. State *v.* O'Gorman, 68 Mo. 179.

Evidence not prejudicial to defendant.— In a prosecution against a county clerk for failure to make an annual statement as required by law, showing the amount of fees and emoluments received by him during a certain year, the admission of evidence offered by the state showing that he had made such statements in previous years is not prejudicial to the defendant and will not warrant a reversal of a judgment against him. State *v.* O'Gorman, 68 Mo. 179.

57. State *v.* Bowen, 41 Mo. 217; State *v.* Hixon, 41 Mo. 210.

58. See, generally, INDICTMENTS AND INFORMATIONS.

59. For a sufficient indictment against a county court clerk, under the Arkansas revenue act of 1883, for failing to publish a financial report within thirty days after an annual settlement with the county collector, see Moose *v.* State, 49 Ark. 499, 5 S. W. 885.

Failure to pay over fees.— Under Mills' Anno. Stat. Colo. § 1246 (Gen. Stat. (1883), § 769), providing that if an officer shall fail or refuse to pay over all moneys belonging to any county when required he shall be punished, etc., provided that the money not paid over shall amount to one hundred dollars, an indictment against a clerk which charges the failure to pay over a large number of fees is not defective as charging more than one offense; and this, although the fees were collected during three different terms of office. Adams *v.* People, 25 Colo. 532, 55 Pac. 806.

Averment of legal conclusion.— An indictment against a clerk for failure to pay over fees, etc., must allege sufficient to show that the money in question has become payable to the state. An allegation that such funds are "due and owing to the state" is a mere conclusion of law. State *v.* Record, 56 Ind. 107.

Necessity to charge corrupt intent.— An indictment under the Tennessee act of 1875, for a county court clerk's failure to make return of revenue, need not charge that the omission was corruptly made. State *v.* Jones, 2 Lea (Tenn.) 716. But *compare* State *v.* Hixon, 41 Mo. 210.

60. State *v.* O'Gorman, 68 Mo. 179.

61. County claims not equivalent to money.—An indictment charging a clerk with collecting and refusing to pay to the county treasurer certain money is not supported by proof that the collection was made in "county claims." A payment in county claims is not a payment in money, and consequently such proof does not agree with the allegation. Tucker *v.* State, 16 Ala. 670.

What not a variance.— Under an indictment charging a clerk with failure to pay over money, proof that he collected checks and drafts and deposited them to his account is not a variance, since he being required by law to accept money only, his acceptance of checks and conversion of them into money was equivalent to collecting money. Adams *v.* People, 25 Colo. 532, 55 Pac. 806.

X. DEPUTY CLERKS.

A. Appointment — 1. Power to Appoint. By statute in many jurisdictions authority is expressly conferred upon clerks to appoint deputies,[62] and it seems that this power of appointing a deputy exists independently of any statutory authority.[63] But in order to make a valid appointment the clerk must himself have power to exercise the functions of his office.[64]

2. Sufficiency of Appointment — a. In General. It seems that, in the absence of any statutory inhibition,[65] a verbal appointment is sufficient,[66] especially in regard to the performance of an act by a third person in the presence and under the direction of the clerk, for such an act is in fact that of the clerk himself.[67] It will be presumed, nothing appearing to the contrary, that a person acting as deputy clerk was duly appointed and qualified.[68]

b. De Facto Deputies. A person claiming to be a deputy clerk by virtue of an appointment and recognized as such by the public is at least a *de facto* deputy,[69] and his acts are valid notwithstanding some defect or irregularity in his appointment or qualification.

62. *Colorado.*— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Florida.— Willingham *v.* State, 21 Fla. 761; McKinnon *v.* McCollum, 6 Fla. 376.

Georgia.— Graves *v.* Warner, 26 Ga. 620.

Illinois.— Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591 [*affirming* 41 Ill. App. 476]; Hague *v.* Porter, 45 Ill. 318.

Massachusetts.— Com. *v.* Wetherbee, 153 Mass. 159, 26 N. E. 414, assistant clerk.

Pennsylvania.—Robinson *v.* Lloyd, 10 Kulp (Pa.) 56.

Wisconsin.— See State *v.* Olin, 23 Wis. 309.

See 10 Cent. Dig. tit. "Clerks of Courts," § 12.

Idaho — Necessity for appointment.— Under the provisions of Ida. Const. art. 18, § 6, the board of county commissioners must authorize the clerk of court *ex officio* auditor and recorder, to employ a deputy whenever it is shown that a necessity exists therefor; and the facts creating the necessity ought to be shown upon the record of the board. Woodward *v.* Idaho County, (Ida. 1897) 51 Pac. 143.

Michigan — Necessity certified by justices. — Howell's Anno. Stat. Mich. § 709*g*, as amended March 6, 1893, provides that the clerk of the justices' courts of Detroit "shall have power to appoint one or more deputies, when the necessity therefor shall be certified by the justices, and said clerk may revoke said appointment at pleasure." It was held that where the justices certified that seven deputy clerks were necessary, and that number were appointed by the clerk, who afterward revoked the appointment of two of them, the fact that the justices then certified that it was unnecessary to fill the vacancies, as five were enough to do the work, did not render invalid appointments by the clerk to fill the vacancies, as it was for the clerk to name those who should remain, on the reduction of the force. Seabury *v.* Wayne County, 96 Mich. 46, 55 N. W. 456.

It will be presumed that the laws of another state authorized the appointment of a deputy clerk, and an act done by such deputy in the name of his principal is *prima facie* sufficient. Hope *v.* Sawyer, 14 Ill. 254.

63. Small *v.* Field, 102 Mo. 104, 14 S. W. 815. But see Carter *v.* Territory, 1 N. M. 317.

64. **County occupied by hostile force.**— During the Civil war the clerk of a county court went with the Confederates when they abandoned the county, taking the records with him, and the Federal forces took possession of the county. Held that no one could administer the duties of the office in the Federal lines as deputy for the clerk while the latter was within the Confederate lines. Herring *v.* Lee, 22 W. Va. 661.

65. **In North Carolina** one cannot act as a deputy clerk without an appointment in writing and qualification by taking the oath of office. Suddereth *v.* Smyth, 35 N. C. 452; Shepherd *v.* Lane, 13 N. C. 148.

66. Montgomery *v.* Buck, 6 Humphr. (Tenn.) 415; Bonds *v.* State, Mart. & Y. (Tenn.) 142, 17 Am. Dec. 795; Thompson *v.* Johnson, 84 Tex. 548, 19 S. W. 784. But see Atkinson *v.* Micheaux, 1 Humphr. (Tenn.) 312, in which case it was held that where a clerk made a verbal request to an individual to attend to all the duties of his office in his absence, but did not appoint him his deputy, and no oath was administered to such person, he had no power to administer an oath or issue a capias ad satisfaciendum.

67. McMahan *v.* Colclough, 2 Ala. 68; Jackson *v.* State, 55 Miss. 530; Gamble *v.* Trahen, 3 How. (Miss.) 32.

68. Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; Hague *v.* Porter, 45 Ill. 318. See also Yonge *v.* Broxson, 23 Ala. 684.

69. *Alabama.*— Joseph *v.* Cawthorn, 74 Ala. 411.

Illinois.— Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61.

Iowa.— Wheeler, etc., Mfg. Co. *v.* Sterrett, 94 Iowa 158, 62 N. W. 675; Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204.

B. Eligibility and Qualification — 1. Eligibility. In the absence of any statute or constitutional provision to the contrary the office of deputy clerk may be held by a minor[70] or by a woman.[71] The offices of deputy clerk of the county court and of justice of the peace are incompatible.[72]

2. Qualification. Provision is usually made by statute for the qualification of deputy clerks.[73]

C. Compensation. Ordinarily provision is made by statute for the compensation of deputy clerks.[74] Where the deputy is by statute made an employee of the county he may maintain an action against the county for services rendered;[75] but the county is liable to him only where made so by statute.[76] Where the deputy's remuneration is not otherwise provided for it is not improper for the clerk to contract with him that he shall receive a certain share of the fees taxed and collected during the deputyship.[77]

D. Powers and Duties — 1. Ministerial Acts. In the absence of any statutory provision or implication to the contrary a deputy clerk is authorized to perform any official[78] ministerial act[79] that may be done by his principal,

Kentucky.— Com. *v.* Arnold, 3 Litt. (Ky.) 309.

Maryland.— Izer *v.* State, 77 Md. 110, 26 Atl. 282.

Mississippi.—Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905; Mobley *v.* State, 46 Miss. 501.

South Carolina.—State *v.* Hopkins, 15 S. C. 153.

Tennessee.— Kelley *v.* Story, 6 Heisk. (Tenn.) 202; Farmers', etc., Bank *v.* Chester, 6 Humphr. (Tenn.) 458, 44 Am. Dec. 318.

Texas.— Thompson *v.* Johnson, 84 Tex. 548, 19 S. W. 784.

United States.— Nofire *v.* U. S., 164 U. S. 657, 17 S. Ct. 212, 41 L. ed. 588.

Who not a de facto deputy.— One who has been deputy county clerk during the first term of the clerk, and continues to act without reappointment during his second term, is not a *de facto* officer. A *de facto* officer is one who exercises the duties of an office, claiming the right to do so under some commission or appointment. Smith *v.* Cansler, 83 Ky. 367.

70. Talbott *v.* Hooser, 12 Bush (Ky.) 408.

Where a minor is ineligible, his acts may nevertheless be valid as those of a *de facto* officer if he is recognized as the deputy by the public. Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905.

71. Jeffries *v.* Harrington, 11 Colo. 191, 17 Pac. 505; Warwick *v.* State, 25 Ohio St. 21.

72. Amory *v.* Gloucester Justices, 2 Va. Cas. 523.

As to holding incompatible offices generally see Officers.

73. Official oath.— Ala. Sess. Acts (1878–1879), pp. 106–109, providing that the circuit clerk of Barbour county may appoint a deputy, do not affect Ala. Code, § 676, requiring deputy clerks to take an official oath. Joseph *v.* Cawthorn, 74 Ala. 411. In Louisiana if a deputy act in two courts the law is satisfied if he be sworn in either. State Bank *v.* Watson, 15 La. 38.

Official bond.— In Iowa it is not necessary to the validity of the bond of a deputy clerk of court that it be approved by the board of supervisors. Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768. In Alabama the bond of a deputy clerk need not be in writing. Stewart *v.* Desha, 11 Ala. 844.

74. Burke *v.* Edgar, 67 Cal. 182, 7 Pac. 488, salary of deputy county clerk.

New York — Power to reduce salary.—The board of apportionment had no power, under N. Y. Laws (1871), c. 583, to reduce the salary of deputy clerks of the court of common pleas of New York county. Landon *v.* New York, 39 N. Y. Super. Ct. 467.

Need not let office to lowest bidder.— Where a clerk is allowed by the county board eight hundred dollars a year for deputy hire he is not obliged to let the office of deputy to the lowest bidder, and the fact that he could have procured a deputy at a less salary than he actually paid will not subject him to any liability on his official bond. People *v.* Dieckmann, 84 Ill. App. 244.

75. Sortedahl *v.* Polk County, 84 Minn. 509, 88 N. W. 21, discussing deputy's right to sue the county under Minn. Spec. Laws (1891), c. 424, § 11.

Must show appointment.— A deputy clerk suing to compel payment of his salary as such must show his appointment to that position. Burke *v.* Edgar, 67 Cal. 182, 7 Pac. 488.

76. Peoria County *v.* Roche, 65 Ill. 77; Lord *v.* Essex, 98 Mass. 484. See also Gamble *v.* Marion County, 85 Iowa 675, 52 N. W. 556. And see, generally, Counties.

Idaho — Sickness or absence of clerk.—Under Ida. Const. art. 18, § 6, if the necessity for the appointment of a deputy is occasioned by the sickness or absence of the clerk on business not connected with his office, the county is not liable for the compensation of the deputy. The deputy must look to the clerk for his compensation in such case. Woodward *v.* Idaho County, (Ida. 1897) 51 Pac. 143.

77. Cheek *v.* Tilley, 31 Ind. 121.

78. The rule is different where duties not necessarily belonging to his office as clerk are imposed upon the principal by statute. Harrison *v.* Harwood, 31 Tex. 650.

79. *Florida.*— McKinnon *v.* McCollum, 6 Fla. 376.

except to make a deputy.[80] Thus it has been held that a deputy clerk may administer oaths,[81] take affidavits[82] and acknowledgments,[83] take claims of witnesses for attendance,[84] approve bonds,[85] make certificates,[86] issue and test

Illinois.— Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591 [*affirming* 41 Ill. App. 476].

Iowa.— Abrams *v.* Ervin, 9 Iowa 87.

Kentucky.— Drye *v.* Cook, 14 Bush (Ky.) 459; Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271.

Minnesota.— Piper *v.* Chippewa Iron Co., 51 Minn. 495, 53 N. W. 870.

Missouri.— Small *v.* Field, 102 Mo. 104, 14 S. W. 815; Springer *v.* McSpadden, 49 Mo. 299.

Nebraska.— Nightingale *v.* State, 62 Nebr. 371, 87 N. W. 158.

New York.— Lynch *v.* Livingston, 6 N. Y. 422.

North Carolina.— Miller *v.* Miller, 89 N. C. 402; Jackson *v.* Buchanan, 89 N. C. 74.

Ohio.— Warwick *v.* State, 25 Ohio St. 21.

Pennsylvania.— Harden *v.* Roberts, 9 Pa. Co. Ct. 160.

Texas.— Harrison *v.* Harwood, 31 Tex. 650.

See 10 Cent. Dig. tit. "Clerks of Courts," § 15 *et seq.*

Regarded as act of principal.— An act done in the clerk's name by his deputy will be construed to be the act of the clerk, the deputy merely signing his principal's name by his authority. Trout *v.* Williams, 29 Ind. 18.

Powers cannot be restricted.— A properly constituted deputy clerk has all the powers of his principal, and cannot be restricted in his powers. Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271. But *compare* State *v.* Olin, 23 Wis. 309.

Notice to deputy binding on clerk.— A clerk of court is bound by notice received by one of several deputies in the discharge of his duties. Baltimore, etc., R. Co. *v.* Gaulter, 165 Ill. 233, 46 N. E. 256.

Judicial notice of signature and official character.— Judicial notice will be taken in the district court of the signature and official character of deputies appointed by the clerk, as all such appointments must be approved by the judge of the court. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

Distinction between deputy and assistant.— In Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271, 276, the court said: "A deputy is a clerk with all the powers of the principal. An assistant does not mean a deputy. Clerks and other public officers have assistants who are not deputies. Where the clerk desires to confide the business of administering oaths to witnesses, to one of his assistants who is not a deputy, the court may specially empower such assistant; but a deputy by the very act and authority which constitutes him such, has power to do any act which his principal may do."

80. McKinnon *v.* McCollum, 6 Fla. 376.

81. *Georgia.*— Graves *v.* Warner, 26 Ga. 620, poor suitor's oath.

Indiana.— Muir *v.* State, 8 Blackf. (Ind.) 154.

Iowa.— Finn *v.* Rose, 12 Iowa 565; Wood *v.* Bailey, 12 Iowa 46.

Kansas.— Ferguson *v.* Smith, 10 Kan. 396.

Kentucky.— Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271.

Nebraska.— Nightingale *v.* State, 62 Nebr. 371, 87 N. W. 158 (county attorney's oath to criminal information); Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389.

Ohio.— Warwick *v.* State, 25 Ohio St. 21, oath on application for marriage license.

Pennsylvania.— Reigart *v.* McGrath, 16 Serg. & R. (Pa.) 65; *In re* Bose, 6 Kulp (Pa.) 83; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 1.

Tennessee.— Campbell *v.* Boulton, 3 Baxt. (Tenn.) 354; Martin *v.* Porter, 4 Heisk. (Tenn.) 407 (oath verifying pleading).

See 10 Cent. Dig. tit. "Clerks of Courts," § 17; and, generally, OATHS AND AFFIRMATIONS.

82. *Louisiana.*— Kirkman *v.* Wyer, 10 Mart. (La.) 126.

Michigan.— Dorr *v.* Clark, 7 Mich. 310.

Mississippi.—Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905.

New York.— People *v.* Powers, 19 Abb. Pr. (N. Y.) 99. But see Norton *v.* Colt, 2 Wend. (N. Y.) 250, in which it was held that an affidavit to ground a motion for a nonsuit could be taken before a deputy clerk, the clerk being alive.

North Carolina.— Jackson *v.* Buchanan, 89 N. C. 74.

Texas.— Harrison *v.* Harwood, 31 Tex. 650.

And see, generally, AFFIDAVITS, 2 Cyc. 12.

For power of deputy clerk to take affidavits for attachments see ATTACHMENTS, 4 Cyc. 474.

83. Pinkard *v.* Ingersol, 11 Ala. 9; Kemp *v.* Porter, 7 Ala. 138; Abrams *v.* Ervin, 9 Iowa 87; Frizzell *v.* Johnson, 30 Tex. 31; Rose *v.* Newman, 26 Tex. 131, 80 Am. Dec. 646 [*overruling* Miller *v.* Thatcher, 9 Tex. 482, 60 Am. Dec. 172]. And see, generally, ACKNOWLEDGMENTS, 1 Cyc. 548, 549.

84. Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271.

85. Harris *v.* Regester, 70 Md. 109, 16 Atl. 386 (appeal-bond); Harrison *v.* Harwood, 31 Tex. 650 (attachment bond).

86. *Illinois.*—Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591 [*affirming* 41 Ill. App. 476]; Hague *v.* Porter, 45 Ill. 318.

Kentucky.— Drye *v.* Cook, 14 Bush (Ky.) 459.

Louisiana.— Burton *v.* Hicks, 27 La. Ann. 507; Downes *v.* Tarkington, 3 La. Ann. 247.

Massachusetts.— Com. *v.* Crawford, 111 Mass. 422; Com. *v.* Harvey, 111 Mass. 420.

New Mexico.— Territory *v.* Christman, 9 N. M. 582, 58 Pac. 343.

New York.— Lynch *v.* Livingston, 8 Barb. (N. Y.) 463; Jennings *v.* Newman, 52 How. Pr. (N. Y.) 282.

writs,[87] draw the names of grand jurors,[88] and order the seizure of personalty in an action of claim and delivery.[89] By statute in some jurisdictions a deputy clerk is given express authority to perform the duties of his principal in case of the absence or disability of the latter,[90] but it has been held that such a statute does not deprive the deputy of power to act when his principal is not absent or disabled.[91]

2. JUDICIAL FUNCTIONS. Judicial powers vested in the clerk cannot be exercised by a deputy in the absence of express statutory authority.[92]

3. IN WHOSE NAME DEPUTY SHOULD ACT. Where the deputy clerk is recognized as an officer distinct from the clerk it is held that he may properly perform his official duties in his own name,[93] but where the deputy is regarded as merely the agent or servant of his principal he must act in the name of the principal.[94]

See 10 Cent. Dig. tit. "Clerks of Courts," § 18.

But see Sumner *v.* Roberts, 13 N. C. 527, where it was held that the certificate of the probate of a will made and signed by the deputy clerk in his own name was invalid. Taking the probate of a will being a power given to the court, the certificate of the clerk or the will itself was received as evidence of the probate because he was the "proper officer" to attest the acts of the court, but such certificate could not be made by the deputy.

87. *Alabama.*— Yonge *v.* Broxson, 23 Ala. 684.

Georgia.— Goodwyn *v.* Goodwyn, 11 Ga. 178.

Louisiana.— Rhodes *v.* Myers, 16 La. Ann. 398, commission to take testimony.

Massachusetts.— Jacobs *v.* Measures, 13 Gray (Mass.) 74.

North Carolina.— Miller *v.* Miller, 89 N. C. 402.

Pennsylvania.— Harden *v.* Roberts, 9 Pa. Co. Ct. 160.

Texas.— Harrison *v.* Harwood, 31 Tex. 650.

West Virginia.— Pendleton *v.* Smith, 1 W. Va. 16.

See 10 Cent. Dig. tit. "Clerks of Courts," § 15; and the specific articles treating of writs, such as ATTACHMENT, 4 Cyc. 466; EXECUTIONS; PROCESS.

88. Willingham *v.* State, 21 Fla. 761.

89. Jackson *v.* Buchanan, 89 N. C. 74.

90. Stewart *v.* Desha, 11 Ala. 844; Sanxey *v.* Iowa City Glass Co., 68 Iowa 542, 27 N. W. 747 (accepting service of notice of appeal); Manners *v.* Ribsam, 61 N. J. L. 207, 41 Atl. 676 (taking verdict of jury).

Appointment of judge pro hac vice.— Under the Georgia statutes the deputy clerk of the superior court has power, in the absence of his principal, to appoint a judge *pro hac vice* where the regular judge is disqualified and the parties fail to agree on an attorney to act as such. Steam Laundry Co. *v.* Thompson, 91 Ga. 47, 16 S. E. 198.

Meaning of "absence."—"Absence" as used in the New Jersey act of April 21, 1876 (1 Gen. Stat. p. 841), providing that a deputy clerk, in the clerk's absence, shall have his powers and perform his duties, means nonpresence in the courts. Manners *v.* Ribsam, 61 N. J. L. 207, 41 Atl. 676.

Presumption of authority to act.— In the absence of anything to show the contrary it will be presumed that the circumstances were such as authorized the deputy to act. Kemp *v.* Porter, 7 Ala. 138; Miller *v.* Lewis, 4 N. Y. 554; Delaney *v.* Schuette, 49 Wis. 366, 5 N. W. 796.

91. Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768.

92. Gerald *v.* Gerald, 5 La Ann. 242; White *v.* Connelly, 105 N. C. 65, 11 S. E. 177; State *v.* Smith, 1 Oreg. 250.

To grant injunction.— A deputy clerk has no power to grant an injunction. Sale *v.* Van Bibber, 11 La. Ann. 628.

To grant order of arrest.— Deputy clerks are not authorized to grant orders of arrest for debt. Weingerter *v.* White, 5 La. Ann. 487.

Appointment of referees.— Where the law confers upon a clerk a power requiring the exercise of judgment and sound discretion for the protection of interests which are manifestly, from the face of the statute, the subjects of a legislative solicitude, he cannot delegate the trust to a deputy but must faithfully discharge it himself. Thus it was held that a deputy clerk could not appoint referees under an act of assembly to bind lands. Carlisle *v.* Thomas, 2 Harr. (Del.) 318.

93. *Georgia.*— MacKenzie *v.* Jackson, 82 Ga. 80, 8 S. E. 77.

Louisiana.— Louisiana Bank *v.* Watson, 15 La. 38.

Michigan.— Calender *v.* Olcott, 1 Mich. 344.

New York.— People *v.* Warden District Prisons, 73 Hun (N. Y.) 118, 25 N. Y. Suppl. 1095, 57 N. Y. St. 4.

Oregon.— Willamette Falls Canal, etc., Co. *v.* Gordon, 6 Oreg. 175.

Tennessee.— Beaumont *v.* Yeatman, 8 Humphr. (Tenn.) 541.

See 10 Cent. Dig. tit. "Clerks of Courts," § 15.

94. *Arkansas.*— Hyde *v.* Benson, 6 Ark. 396.

Kentucky.— Talbott *v.* Hooser, 12 Bush (Ky.) 408.

Missouri.— Springer *v.* McSpadden, 49 Mo. 299.

Texas.— Wimbish *v.* Wofford, 33 Tex. 109.

E. Liabilities. Defaults committed by a deputy clerk while acting within the scope of his duties and in the name of his principal are in legal contemplation the defaults of the clerk himself and the latter is liable accordingly to third persons injured thereby.[95] The deputy, however, is liable over to his principal,[96] and if the act be one of misfeasance or malfeasance he is also personally liable to third persons.[97]

CLERKS OF INDICTMENTS. Officers attached to the central criminal court in England, and to each circuit.[1]

CLERKS OF RECORDS AND WRITS. Three officers in chancery appointed under 5 & 6 Vict. c. 103.[2]

CLERKS OF SEATS. Officers, in the principal registry of the probate division, who discharge the duty of preparing and passing the grants of probate and letters of administration, under the supervision of the registrars.[3]

West Virginia.— Pendleton *v.* Smith, 1 W. Va. 16.

See 10 Cent. Dig. tit. "Clerks of Courts," § 15.

Right to use principal's name.— A deputy clerk has power to use his principal's name in performing acts which the principal is authorized to do. Abrams *v.* Ervin, 9 Iowa 87; Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 438.

Designation.— It is not material whether a deputy of the clerk of court, when signing the jurat to an affidavit of intention to become a citizen, designates himself as a "deputy" or a "deputy clerk." State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

Sufficient signature.— A certificate signed "Joseph Sears, clerk, by Geo. L. Richardson, deputy," is valid. Hague *v.* Porter, 45 Ill. 318.

95. Snedicor *v.* Davis, 17 Ala. 472; Tucker *v.* State, 16 Ala. 670; McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

For liability of principal for acts of deputy generally see OFFICERS.

Honest error of judgment.— The clerk of the circuit court for the District of Columbia is not liable for the honest error of judgment of his deputy, the latter being competent to act as such deputy, in indorsing on an execution the amount on payment of which the debtor was to be discharged, where no minutes or instructions to the contrary were given to the clerk or his deputy. Patons *v.* Lee, 2 Cranch C. C. (U. S.) 646, 18 Fed. Cas. No. 10,800.

Acts not in ordinary course of business.— While the clerk is bound by the acts of his deputy, yet where the act is not in the ordinary course of business, and especially where it has been done through the procurement and misrepresentation of a party, the liability of the clerk may be doubtful, and under such circumstances the court will not award a summary mode of redress against him. Welddes *v.* Edsell, 2 McLean (U. S.) 366, 29 Fed. Cas. No. 17,375.

For money paid to the deputy without the intervention of the court the clerk is not liable, since the deputy had no authority to receive it. Stuart *v.* Madison, 1 Call (Va.) 481.

Cannot assert invalidity of appointment.— A circuit clerk charged with misfeasance cannot defend on the ground that the act was committed by one whom he had put in charge of the office in his absence, but who had not been legally constituted a deputy. It does not lie in the mouth of the clerk to assert the invalidity of such deputy's appointment. Beard *v.* Holland, 59 Miss. 164.

96. Snedicor *v.* Davis, 17 Ala. 472; McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

Accepting insufficient sureties.— It is the duty of a deputy clerk, in approving and accepting a bond, to satisfy himself by proper inquiry at the time of the sufficiency of the sureties, and not to be governed by the fact that the clerk has on former occasions accepted such sureties as good; and for a loss caused by his failure in such respect the deputy and his sureties are liable to the clerk. Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768.

Accrual of cause — Statute of limitations.— As to when the cause of action in favor of the clerk against his deputy accrued and when it is barred by the statute of limitations see Snedicor *v.* Davis, 17 Ala. 472; Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768.

97. Coltraine *v.* McCain, 14 N. C. 273, 24 Am. Dec. 256, holding further that for the nonfeasance of the deputy the principal alone was liable to third persons. But *compare* Snedicor *v.* Davis, 17 Ala. 472; McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641.

1. Black L. Dict.; Rapalje & L. L. Dict. Clerks of indictments prepare and settle indictments against offenders, and assist the CLERK OF ARRAIGNS, *q. v.* Sweet L. Dict.

2. Wharton L. Lex.

By the Judicature Acts of 1873 and 1875, they were transferred to the chancery division of the high court. Now by the Judicature Act of 1879, they have been transferred to the central office of the supreme court, under the title of masters of the supreme court, and the office of clerk of records and writs has been abolished. Sweet L. Dict.

3. Sweet L. Dict.

There are six seats, the business of which is regulated by an alphabetical arrangement, and each seat has four clerks. They have to

CLERONIMUS. An heir.[4]

CLERUS. In old English law, the clergy.[5]

CLEYMER. To claim.[6]

CLIENS. In the Roman law, a client or dependent; one who depended upon another as his patron or protector, adviser or defender, in suits at law and other difficulties, and was bound, in return, to pay him all respect and honor, and to serve him with his life and fortune in any extremity.[7]

CLIENT. One who applies to an advocate for counsel and defense; one who retains the attorney, is responsible to him for his fees, and to whom the attorney is responsible for the management of the suit.[8]

CLIENTELA. In old English law, clientship, the state of a client; and correlatively, protection, patronage, guardianship.[9]

CLIFFORD'S INN. An inn of chancery.[10]

CLITO. In Saxon law, the son of a king, or emperor; the next heir to the throne; the Saxon Adeling.[11]

CLOERE.[12] A gaol; a prison or dungeon.[13]

CLOS. Shut up.[14]

CLOSE. As an adjective, closed or sealed up;[15] pent up;[16] near.[17] As an adverb, tightly or closely.[18] As a noun, a portion of land, as a field, inclosed, as by a hedge, fence, or other visible inclosure;[19] in law, the interest of the party

take bonds from administrators, and to receive caveats against a grant being made in a case where a will is contested. They also draw the "acts," that is, a short summary of each grant made, containing the name of the deceased, amount of assets, and other particulars. Sweet L. Dict.

4. Burrill L. Dict.; Jacob L. Dict.

5. Burrill L. Dict.

Signifies the assembly or body of clerks or ecclesiastics, being taken for the whole number of those who are *de clero Domini*, of our Lord's lot or share, as the tribe of Levi was in Judea; and are separate from the noise and bustle of the world, that they may have leisure to spend their time in the duties of the christian religion. Jacob L. Dict.

6. Burrill L. Dict.

7. Black L. Dict.; Burrill L. Dict. See, generally, ATTORNEY AND CLIENT; CLIENT.

8. McFarland *v.* Crary, 6 Wend. (N. Y.) 297, 312. See also ATTORNEY AND CLIENT, 4 Cyc. 897.

The term "client" as used in Wagner's Stat. Mo. p. 1374, § 8, should be considered in its most enlarged sense. Cross *v.* Riggins, 50 Mo. 335, 337.

9. Black L. Dict.

Applied to the relation of a church to its patron. 2 Bl. Comm. 21.

10. Black L. Dict. See INNS OF CHANCERY.

11. Burrill L. Dict.

Clitones, the eldest, and all the sons of kings. Jacob L. Dict.

12. It is conjectured to be of British original; the dungeon or inner prison of Wallingford castle *temp.* Hen. II was called *cloere brien*, i. e. *carcer brieni*. Jacob L. Dict.

13. Black L. Dict.; Wharton L. Lex.

14. Burrill L. Dict.

15. Black L. Dict.

Applied to writs and letters as distinguished from those that are open or patent. Black L. Dict.

"Close under the hand and seal," etc., we suppose should receive the meaning which the words ordinarily bear when applied to parcels generally which are transmitted through the post-office. A letter is usually quite close, so that no part of the contents can be seen; but many documents are closed up and passed through the post-office which are not wholly closed or inclosed; and we are not prepared to say that a document quite inclosed in an envelope, excepting that one end of the covering is burst, is not a document which may be called close or closed; or that a parcel folded and secured by tape and cord merely, so that it cannot be read or opened without force, is not also a document which may properly be called close or closed, especially when the opening was scarcely large enough to allow of the papers coming out. Frank *v.* Carson, 15 U. C. C. P. 135.

16. "One of the definitions of 'close' given by Mr. Webster is, 'pent up,' which, we take, is tantamount to imprisonment." Gladden *v.* State, 2 Tex. App. 508, 509.

17. Century Dict.

"In close proximity," or "in the immediate vicinity," are equivalent terms. Ward *v.* Wilmington, etc., R. Co., 109 N. C. 358, 363, 13 S. E. 926.

18. Century Dict. And see First Cong. Meeting House Soc. *v.* Rochester, 66 Vt. 501, 506, 29 Atl. 810, where it is said: "Nor do we think that the court's further instruction that the jury were to be 'closely governed' by the charge, either improper or injurious to the defendant. It was no more than telling the jury that they were to take the law of the case from the court, and be governed by it."

19. Locklin *v.* Casler, 50 How. Pr. (N. Y.) 43, 45, where it is said: "'Close' is defined by Blackstone (3 Bl. Comm. 209), to signify 'a portion of lands; as, a field inclosed; as by a hedge, fence, or other sensible inclosure.' This definition is approved in Burrill L. Dict."

"The term close, in its common acceptation, means an inclosed field." Wright *v.* Bennett,

in the land whether inclosed or not;[20] the interest of a person in any particular piece of ground whether actually inclosed or not;[21] in practice, termination; winding up.[22] The verb "to close" is used substantially in its vernacular senses, to shut up; to bound or inclose; to terminate or complete.[23] (Close: Breaking, see TRESPASS.)

4 Ill. 258, 259; Locklin *v.* Casler, 50 How. Pr. (N. Y.) 43, 44.

Distinguished from "enclosure."— In Dudley *v.* McKenzie, 54 Vt. 685, 687, it is said: "In Porter *v.* Aldrich, 39 Vt. 326, it was held that the word 'enclosure,' as used in the statute, imports more than the word 'close,' which embraces land owned or rightfully possessed by a party, although inclosed only by the imaginary boundary line that defines its territorial limits, but signifies land inclosed with some visible and tangible obstruction, such as a fence, hedge, ditch, or their equivalent, for the protection of the premises against cattle."

20. Wright *v.* Bennett, 4 Ill. 258, 259, where it is also said: "It signifies any interest which will enable the party to maintain trespass for an injury to real property, or to the mere possession." And see the following cases:

Alabama.— Blakeney *v.* Blakeney, 6 Port. (Ala.) 109, 115, 30 Am. Dec. 574, where it is said: "The word 'close,' in an action of this kind, has a technical meaning, signifying the interest in the soil."

California.— Meade *v.* Watson, 67 Cal. 591, 593, 8 Pac. 311, where it is said: "The word 'close' is purely technical, and relates to the interest in the soil and to its invisible boundaries, and not to those artificial barriers often erected around land."

Connecticut.— Peck *v.* Smith, 1 Conn. 103, 139, 6 Am. Dec. 216, where it is said: "The word 'close' imports an absolute interest in the soil, and not land inclosed by a fence."

Indiana.— Richardson *v.* Brewer, 81 Ind. 107, 108, where it is said: "The word 'close' signifies an interest in the soil."

Maine.— Matthews *v.* Treat, 75 Me. 594.

New York.— Van Rensselaer *v.* Van Rensselaer, 9 Johns. (N. Y.) 377, 380.

England.— Clarke *v.* Tinker, 10 Q. B. 604, 10 Jur. 263, 15 L. J. Q. B. 19, 59 E. C. L. 604; Cox *v.* Glue, 5 C. B. 533, 550, 12 Jur. 185, 17 L. J. C. P. 162, 57 E. C. L. 533.

21. Black L. Dict. [*citing* Stammers *v.* Dixon, 7 East 200, 207, 3 Smith K. B. 261, 8 Rev. Rep. 612]. Thus when Stephen Van Rensselaer gave the plaintiff a right to enter and hold the interest reserved out of the Slingerlands' lease, the entry and erection of a mill-dam, and saw-mill, was a complete severance of the freehold, and it became a distinct and independent close. Van Rensselaer *v.* Van Rensselaer, 9 Johns. (N. Y.) 377, 380.

Does not include waste or common.— It seems to me that we cannot assume "close" to mean waste or common. Clarke *v.* Tinker, 10 Q. B. 604, 10 Jur. 263, 15 L. J. Q. B. 19, 59 E. C. L. 604.

The surface, as well as the subsoil, may be included within the meaning of the term. Cox *v.* Glue, 5 C. B. 533, 550, 12 Jur. 185, 17 L. J. C. P. 162, 57 E. C. L. 533.

The words "fishery and fishing privilege" may indicate that the word "close" is used in its more comprehensive sense. Matthews *v.* Treat, 75 Me. 594, 600.

22. Black L. Dict. And see Flood *v.* Pragoff, 79 Ky. 607 (where it is said: "The statute requiring that the signature of the testator be placed at the 'end or close thereof' is complied with, although it precedes the date"); Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 114, 21 Am. Dec. 262 ("the close of their interview and negotiation"); Patton *v.* Ash, 7 Serg. & R. (Pa.) 116, 128 ("put a close to this affair").

Thus the close of the pleadings is where the pleadings are finished, that is, when issue has been joined. Black L. Dict.

23. Abbott L. Dict. As "to close the bargain" (Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60, 67); to "close its business of banking" (Metropolitan Nat. Bank *v.* Claggett, 141 U. S. 520, 12 S. Ct. 60, 35 L. ed. 841); or "to close the transaction" (Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451, 453 [*citing* White *v.* Smith, 54 N. Y. 522]). See also Patton *v.* Ash, 7 Serg. & R. (Pa.) 116, 128, where it is said: "Now, we see, that in this letter, Patton expressly acknowledged an unsettled account with Craig's estate, and an intention to close it. By closing it, I understand, paying it, if the balance should be against him."

"An account closed is not a stated account. Death closes accounts in one sense, that is, there can be no further additions to them on either side; but they remain open for adjustment and set-off, which is not the case in an account stated; for that supposes a rendering of the account by the party who is the creditor, with a balance struck, and an assent to that balance, expressed or implied; and thus the demand is essentially the same as if a promissory note had been given for the balance." Bass *v.* Bass, 8 Pick. (Mass.) 187, 192. See also ACCOUNTS AND ACCOUNTING.

"A saloon is not 'closed' within the meaning of the law requiring such places to be closed at certain times, so long as it is possible for persons desiring liquor to get in peaceably, whether by the outside entrance or any other, or so long as any customer who is inside at the time for closing remains inside." People *v.* Cummerford, 58 Mich. 328, 25 N. W. 203. See also Harvey *v.* State, 65 Ga. 568; People *v.* James, 100 Mich. 522, 59 N. W. 236; People *v.* Higgins, 56 Mich. 159, 162, 22 N. W. 309; People *v.* Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; People *v.* Waldvogel, 49 Mich. 337, 13 N. W. 620; Kurtz *v.* People, 33 Mich. 279; and, generally, INTOXICATING LIQUORS.

"The bargain is thereby closed . . What I mean by its being closed is, that nothing mutual between the parties remains to be done to give to either a right to have it car-

CLOSE COPIES. Copies of legal documents which might be written closely or loosely at pleasure; as distinguished from office copies, which were to contain only a prescribed number of words on each sheet.[24]

CLOSED OUT. Sold out, a term used in transactions commonly known as dealing in futures.[25] (See CLOSING OUT.)

CLOSE-HAULED. In admiralty law, this nautical term means the arrangement or trim of a vessel's sails when she endeavors to make a progress in the nearest direction possible toward that point of the compass from which the wind blows. But a vessel may be considered as close-hauled, although she is not quite so near to the wind as she could possibly lie.[26] (See, generally, COLLISION.)

CLOSE ROLLS or **CLAUSE ROLLS.** Rolls containing the record of the close writs (*literæ clausæ*) and grants of the king, kept with the public records.[27]

CLOSE-SEASON, or **CLOSE-TIME.** A season of the year during which it is unlawful to catch and kill certain kinds of game and fish.[28]

CLOSE WRITS, CLAUSE WRITS, or **WRITS CLOSE.** In English law, certain letters of the king, sealed with his great seal, and directed to particular persons and for particular purposes, which, not being proper for public inspection, are

ried into effect; either can enforce it against the other, or recover damages for the nonfulfilment of it." Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 115, 21 Am. Dec. 262. See also CONTRACTS.

"The trust in this case has not been closed. We do not think it a sufficient answer to this to say that the trust could not be carried out; that the ore failed, and the trustees ceased working, by reason of lack of money to pay expenses. This is not the meaning of the word 'closed' when applied to trusts. The trust cannot be closed until the work is accomplished. To say that the trust has run its course and is completed, because there are no 'rents, issues and profits,' is simply to say that the trust is accomplished because it could not be accomplished." Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 330, 15 Pac. 253. See also TRUSTS.

"'This closed the evidence in the case,' . . . is not equivalent to saying that the bill contained 'all the evidence given upon the trial of the cause.'" Bender *v.* Wampler, 84 Ind. 172, 175 [*citing* Baltimore, etc., R. Co. *v.* Barnum, 79 Ind. 261].

"The closing of the books contemplated by this section, is not a physical act, but is a simple limitation of the time during which those interested can apply to have mistakes in the assessments of property for taxes corrected. Putting the book away in the safe at four o'clock on April 30, was not a closing of the book, nor was the opening of the book on the first day of May an opening of the book, and when the statute says that on the first day of May the books shall be closed, it means that on the first day of May applications for the correction of assessments will not be received. I think therefore that this section of the statute was complied with." Clarke *v.* New York, 55 N. Y. Super. Ct. 259, 263, 13 N. Y. St. 290.

24. Black L. Dict. And see Lucas *v.* Fulford, 2 Burr. 1177, 1 W. Bl. 288.

25. Fortenbury *v.* State, 47 Ark. 188, 193, 14 S. W. 462. And see Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451, 453. "A speculator comes to a commission firm and orders them to purchase a quantity of grain or stock for him; he does not pay for it, but simply deposits with the commission firm as a 'margin' a proportion, say ten per cent., of the cash value of the grain or stock 'bought' for him. The grain or stock is then purchased and held by the commission man, subject to the order of the speculator. If prices advance he orders a sale at the advance and pockets the profits. If prices recede, the 'margin' stands as security to protect the commission man, if he is compelled to sell at a loss. If prices go so low as to absorb the entire 'margin' more margins are called for, and if the speculator fails to respond, he is 'closed out;' that is the commission man sells the grains or stocks at a loss and reimburses himself out of his customer's margin." Fortenbury *v.* State, 47 Ark. 188, 193, 1 S. W. 58, 59.

26. Black L. Dict. In Chadwick *v.* Dublin Steam Packet Co., 6 E. & B. 771, 778, 3 Jur. N. S. 207, 88 E. C. L. 771, it is said: "I do not find that the Judge defined as a matter of law either the word 'close-hauled' or the words 'kept under command;' but he used them in summing up like other words. He used the word close-hauled, as I understand it, not as meaning literally as close as possible to the wind, but in the sense that a vessel may be more or less close-hauled — may be close-hauled though a little off the wind." See also The Ada A. Kennedy, 33 Fed. 623, 624, where it is said: "It was held by Judge Lowell in The Ontario, 2 Lowell (U. S.) 40, 18 Fed. Cas. No. 10,543, 7 Am. L. Rev. 754, that a ship hove to, and making both headway and leeway, was a ship close-hauled, within the rules of navigation, and this was agreed to by Judge Shepley on appeal. Swift *v.* Brownell, Holmes (U. S.) 467, 23 Fed. Cas. No. 13,695.

27. 3 Bl. Comm. 346.

28. Century Dict.

A "close season" for hunting and fishing, or a time in the year when all persons are prohibited from hunting and fishing. See State *v.* Theriault, 70 Vt. 617, 620, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290.

closed up and sealed on the outside, and are thence called "writs close;"[29] writs directed to the sheriff, instead of to the lord.[30]

CLOSH. An unlawful game forbidden by 17 Edw. IV, c. 3, and 37 Hen. VIII, c. 9.[31]

CLOSING OUT. Selling out.[32] (See SOLD OUT.)

CLOTHING. Garments in general; covering for the person; clothes; dress; raiment; apparel.[33] (Clothing: Exemption From — Duties, see CUSTOMS DUTIES; Seizure and Sale, see EXEMPTIONS.)

CLOTURE. The procedure in deliberative assemblies whereby debate is closed.[34]

CLOUD ON TITLE.[35] An outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently and on its face has that effect,[36] but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question;[37] a title or encum-

29. 2 Bl. Comm. 346.

30. 3 Reeves Hist. Eng. L. 45. And see Black L. Dict.; Burrill L. Dict. *Compare* Shelbury *v.* Bird, Cro. Eliz. 158.

31. Wharton L. Lex.

It is said to have been the same with our ninepins; and is called *closhcayles* by 33 Hen. VIII, c. 9. It was also called *hailes*, or skittles. Jacob L. Dict.

32. Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451, 454, where it is said: "Closing out, . . . is done, by going into the market, and buying the cotton, at the lowest price at the time that it could be bought, and using that in settlement of the contract with the buyer on the principal contract."

33. Century Dict.

34. Black L. Dict.

35. In Ward *v.* Dewey, 16 N. Y. 519, 529, it was said: "None of the cases define what is meant by a cloud upon title, nor attempt to lay down any general rules by which what will constitute such a cloud may be ascertained." In Thompson *v.* Etowah Coal Co., 91 Ga. 538, 540, 17 S. E. 663, Lumpkin, J., says: "Some of the later American cases have endeavored to formulate rules which would relieve the matter of difficulty; but to Mr. Justice Field . . . is probably due the credit of first defining, accurately and precisely, the correct test which should govern in all cases."

Has reference to real estate.— In legal parlance cloud upon title arises with reference to real estate only. State *v.* Wood, 155 Mo. 425, 446, 56 S. W. 474, 48 L. R. A. 596 [*citing* Warrensburg *v.* Miller, 77 Mo. 56; Mechanics' Bank *v.* Kansas City, 73 Mo. 555; Leslie *v.* St. Louis, 47 Mo. 474; Lockwood *v.* St. Louis, 24 Mo. 20; Sayre *v.* Tompkins, 23 Mo. 443].

36. Black L. Dict.

"In other words, the facts which are said to constitute the cloud must be such as apparently confer some right, title, or interest in the property." Gilman *v.* Van Brunt, 29 Minn. 271, 272, 13 N. W. 125.

If it "is insufficient to make a prima facie case in an action of ejectment, and would fall of its own weight without proof in rebuttal, it does not amount to a cloud." Benner *v.* Kendall, 21 Fla. 584, 588 [*quoting* 2 Beach Mod. Eq. Jur. § 558].

The terms used in the statute, expressive of the scope of the jurisdiction, viz.: 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which creates them, is apparent rather than 'real;' is 'semblance' rather than substance; obscures rather than destroys or defeats." Huntington *v.* Allen, 44 Miss. 654, 662.

37. Black L. Dict.

"**The true test,** as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist: if the proof would be unnecessary, no shade would be cast by the presence of the deed." Pixley *v.* Huggins, 15 Cal. 128, 133 [*quoted* in Barnes *v.* Mayo, 19 Fla. 542, 545; Davidson *v.* Seegar, 15 Fla. 671, 679; Thompson *v.* Etowah Iron Co., 91 Ga. 538, 540, 17 S. E. 663; *cited* in Rea *v.* Longstreet, 54 Ala. 291, 293; Shalley *v.* Spillman, 19 Fla. 500, 517]. See also the following cases:

Alabama.— Lytle *v.* Sandefur, 93 Ala. 396, 9 So. 260 [*cited* in Thompson *v.* Etowah Iron Co., 91 Ga. 538, 541, 17 S. E. 663]; Anderson *v.* Hooks, 9 Ala. 704.

Connecticut.— Hartford *v.* Chipman, 21 Conn. 488.

Florida.— Benner *v.* Kendall, 21 Fla. 584; Barnes *v.* Mayo, 19 Fla. 542; Shalley *v.* Spillman, 19 Fla. 500 [*cited* in Thompson *v.* Etowah Iron Co., 91 Ga. 538, 541, 17 S. E. 663].

Michigan.— Scofield *v.* Lansing, 17 Mich. 437, 446.

New York.— Marsh *v.* Brooklyn, 59 N. Y. 280; Allen *v.* Buffalo, 39 N. Y. 386, 390; Ward *v.* Dewey, 16 N. Y. 519.

Oregon.— Murphy *v.* Sears, 11 Oreg. 127, 4 Pac. 471.

Wisconsin.— Gamble *v.* Loop, 14 Wis. 465; Moore *v.* Cord, 14 Wis. 213.

"**It is settled by a long line of decisions in this Court that if the title against which relief is prayed be of such a character as that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense,**

brance apparently valid, but in fact invalid;[38] the semblance of a title, either legal or equitable,[39] or a claim of an interest in lands, appearing in some legal form, but which is, in fact, unfounded, or which it would be inequitable to enforce;[40] something which constitutes an apparent encumbrance upon the title, or an apparent defect in it;[41] something that shows *prima facie* some right of a third party, either to the whole or some interest in the title.[42] Anything is a cloud which is calculated to cast doubt or suspicion upon the title, or seriously to embarrass the owner, either in maintaining his rights or in disposing of the property;[43] thus a conveyance, mortgage, judgment, tax-levy, etc., may all, in proper cases, constitute a cloud on title.[44] Every conveyance from the grantor, through whom the party complaining deduces title, not void on its face, but the invalidity of which can be made apparent only on evidence of extrinsic facts,[45] necessarily

it constitutes a cloud which the latter has the right to call upon the Court to remove and dissipate. If, on the other hand, the title be void on its face; if it be a nullity — a mere *felo de se*, when produced, so that an action based upon it will 'fall of its own weight,' as has been said, then the title of the party plaintiff is not necessarily clouded thereby." Lick *v.* Ray, 43 Cal. 83, 88 [*cited* in Thompson *v.* Etowah Iron Co., 91 Ga. 538, 541, 17 S. E. 663].

"When the claim . . . appears to be valid on the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony, it presents a case invoking the aid of a court of equity to remove it as a cloud upon the title." Sanxay *v.* Hunger, 42 Ind. 44, 49 [*citing* Crooke *v.* Andrews, 40 N. Y. 547; 1 Story Eq. § 711]; Ward *v.* Dewey, 16 N. Y. 519, 522.

38. Goodkind *v.* Bartlett, 136 Ill. 18, 21, 26 N. E. 387; Bissell *v.* Kellogg, 60 Barb. (N. Y.) 617, 629; Teal *v.* Collins, 9 Oreg. 89, 92.

39. "A cloud upon a title does not mean a legal as contradistinguished from an equitable title; a deed, as we have seen, may constitute a cloud upon the title, although the defense is as perfect in law as in equity." Ward *v.* Dewey, 16 N. Y. 519, 529.

40. Rigdon *v.* Shirk, 127 Ill. 411, 412, 19 N. E. 698 [*quoted* in Griffiths *v.* Griffiths, 198 Ill. 632, 637, 64 N. E. 1069; Shults *v.* Shults, 159 Ill. 654, 663, 43 N. E. 800, 50 Am. St. Rep. 188], where it is also said: "If the claim sought to be removed is valid, and may be enforced either at law or in equity, it cannot be said to be a cloud."

41. Frost *v.* Leatherman, 55 Mich. 33, 37, 20 N. W. 705; Detroit *v.* Martin, 34 Mich. 170, 173, 22 Am. Rep. 512.

"A cloud upon a title is but an apparent defect in it.— If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove." Whitney *v.* Port Huron, 88 Mich. 268, 272, 50 N. W. 316, 26 Am. St. Rep. 291.

42. Waterbury Sav. Bank *v.* Lawler, 46 Conn. 243, 245; Frost *v.* Leatherman, 55 Mich. 33, 37, 20 N. W. 705; Detroit *v.* Martin, 34 Mich. 170, 173, 22 Am. Rep. 512.

Chief Justice Cooley says: "A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud." Cooley Tax. 542 [*quoted* in Frost *v.* Leatherman, 55 Mich. 33, 37, 20 N. W. 705; Detroit *v.* Martin, 34 Mich. 170, 173, 22 Am. Rep. 512].

43. Ward *v.* Dewey, 16 N. Y. 519, 529.

44. Black L. Dict.

45. "In order for outstanding conveyances to be a cloud upon title, it is necessary that they of themselves, or in connection with alleged extrinsic facts, should constitute an apparent title; that is, one upon which a recovery could or might be had against the true owner were he in possession and relying upon possession alone. Anything which would force him to attack the adverse title, or to exhibit his own, would be a cloud; anything which would not have this effect, would be no cloud." Thompson *v.* Etowah Iron Co., 91 Ga. 538, 17 S. E. 663. "It is sufficient if there be a deed, valid upon its face, accompanied with a claim of title based upon facts showing an apparent title under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner of the property." Fonda *v.* Sage, 48 N. Y. 173, 181. "When such circumstances exist, in connection with a deed, as not only give to it an apparent validity, but will enable the grantor to make out a *prima facie* title under it, a cloud is created." Ward *v.* Dewey, 16 N. Y. 519, 529. "If it is a deed, purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title." Lyon *v.* Hunt, 11 Ala. 295, 308, 46 Am. Dec. 216.

Color of title must appear.— "To constitute a cloud upon the title of lands, there must be some color of title shown in the defendant. The conveyance of land by the grantor who sets up no title whatever does not cast any cloud over the title of the true owner." Dunklin County *v.* Clark, 51 Mo. 60, 62.

casts a cloud upon the title.[46] Every instrument purporting by its terms to convey land from the original source of title,[47] however invalid, creates a cloud upon the title if it requires extrinsic evidence to show its invalidity.[48] (Cloud on Title: As Ground For Cancellation, see CANCELLATION OF INSTRUMENTS. Removal of, see QUIETING TITLE.)

CLOUGH. A word made use of for valley, in Domesday book; but among merchants, it is an allowance for the turn of the scale, on buying goods wholesale by weight.[49]

CLOVE. The two-and-thirtieth part of a weight of cheese, that is, eight pounds.[50]

C. L. P. An abbreviation for common law procedure, in reference to the English acts so entitled.[51]

C. L. P. ACT. An abbreviation for Common Law Procedure Act.[52]

CLUB. A heavy staff or piece of wood;[53] a heavy staff or stick, fit to be used in the hand as a weapon; a bludgeon.[54]

CLUB-LAW. Rule of violence; regulation by force; the law of arms.[55]

Conveyance need not be sufficient per se.— "It cannot be necessary, to constitute a cloud, that the conveyance should be sufficient *per se*, without being connected with any other evidence, to make out a *prima facie* title; because no conveyance, even if valid, could do this." Ward *v.* Dewey, 16 N. Y. 519, 529.

"**When an action cannot be sustained upon a conveyance** in the absence of rebutting proof, it cannot be said to be a cloud upon the title." Davidson *v.* Seegar, 15 Fla. 671, 679 [*citing* Fonda *v.* Sage, 48 N. Y. 173; Overing *v.* Foote, 43 N. Y. 290; Livingston *v.* Hollenbeck, 4 Barb. (N. Y.) 9, 16; Van Doren *v.* New York, 9 Paige (N. Y.) 388; Wiggin *v.* New York, 9 Paige (N. Y.) 16, 23; Meloy *v.* Dougherty, 16 Wis. 269; and *cited* in Thompson *v.* Etowah Iron Co., 91 Ga. 538, 541, 17 S. E. 663].

46. Rea *v.* Longstreet, 54 Ala. 291, 293 [*cited* in Thompson *v.* Etowah Iron Co., 91 Ga. 538, 541, 17 S. E. 663], where it is said: "It will embarrass the alienation of the estate, and freedom of alienation it is the policy of the law to promote. It will render the true owner uneasy in the possession and enjoyment of the estate, because it may at any time be the foundation of litigation; and it awakens suspicions of his title in the minds of others, though when the facts are developed its invalidity may be as apparent as if written on its face."

47. "Every deed from the same source through which the plaintiff derives his real property must, if valid on its face, necessarily have the effect of casting such cloud upon the title." Pixley *v.* Huggins, 15 Cal. 128, 132 [*quoted* in Thompson *v.* Etowah Iron Co., 91 Ga. 538, 543, 17 S. E. 663].

"**If an entire stranger assumes to convey** the premises to which he has no shadow of a title, and of which another is in possession, no real cloud is thereby created. There is nothing to give such a deed even the semblance of force. It can never be used to the serious annoyance or injury of the owner." Ward *v.* Dewey, 16 N. Y. 519, 529. "A sale of the land of the true owner, as the property of a mere stranger, with whom he is not connected, from whom he does not mediately or immediately trace title, cannot cast a cloud on his title." Rea *v.* Longstreet, 54 Ala. 291, 295 [*quoted* in Thompson *v.* Etowah Iron Co., 91 Ga. 538, 544, 17 S. E. 663].

48. Stoddard *v.* Prescott, 58 Mich. 542, 546, 25 N. W. 508 [*citing* Pixley *v.* Huggins, 15 Cal. 127, 128; Van Wyck *v.* Knevals, 106 U. S. 360, 370, 1 S. Ct. 336, 27 L. ed. 201].

49. Jacob L. Dict.

50. Jacob L. Dict.; 9 Hen. VI, c. 8.

51. Black L. Dict. See also COMMON LAW PROCEDURE ACTS.

52. Wharton L. Lex. See also COMMON LAW PROCEDURE ACTS.

53. Webster Dict. [*quoted* in State *v.* Phillips, 104 N. C. 786, 789, 10 S. E. 463].

54. Worcester Dict. [*quoted* in State *v.* Phillips, 104 N. C. 786, 790, 10 S. E. 463, where it is said: "A club means more — not only a large, but a heavy stick"].

A club is a deadly weapon. See ASSAULT AND BATTERY, 3 Cyc. 1029, note 79.

"**A pistol is not a club** and has no resemblance to it. The one is a recognized dangerous weapon; the other only when employed as such." State *v.* Braxton, 47 La. Ann. 158, 159, 16 So. 745.

55. Black L. Dict.

CLUBS

EDITED BY GEORGE W. BARTCH
Justice Supreme Court of Utah

I. DEFINITION AND NATURE, 259
A. *Definition*, 259
B. *Nature*, 259

II. INCORPORATION, 259
A. *Right to Incorporate*, 259
B. *Application For*, 260

III. RIGHTS AND LIABILITIES OF CLUB, 260
A. *Rights*, 260
1. *In General*, 260
2. *Immunity From Public Interference*, 260
B. *Liabilities*, 260

IV. MEMBERS, 260
A. *Right to Sue on Behalf of Club*, 260
B. *Liabilities*, 261
1. *In General*, 261
2. *For Dues and Assessments*, 261
C. *Resignation*, 262
D. *Expulsion*, 262
1. *In General*, 262
2. *Necessity of Observing Prescribed Procedure*, 262
3. *Grounds For Judicial Interference*, 263
E. *Reinstatement*, 263

V. OFFICERS, 263

VI. DISSOLUTION, 264

CROSS-REFERENCES

For Matters Relating to:
Agricultural Societies, see AGRICULTURE.
Associations Generally, see ASSOCIATIONS.
Beneficial Associations, see MUTUAL BENEFIT INSURANCE.
Building and Loan Associations, see BUILDING AND LOAN SOCIETIES.
Charitable Societies, see CHARITIES.
Corporations Generally, see CORPORATIONS.
Educational Societies, see COLLEGES AND UNIVERSITIES; SCHOOLS AND SCHOOL DISTRICTS.
Exchanges, see EXCHANGES.
Gaming, see GAMING.
Joint Stock Companies, see JOINT STOCK COMPANIES.
Medical Societies, see PHYSICIANS AND SURGEONS.
Partnerships Generally, see PARTNERSHIP.
Religious Societies, see RELIGIOUS SOCIETIES.
Sales of Intoxicating Liquor, see INTOXICATING LIQUORS.
Societies For Prevention of Cruelty to Animals, see ANIMALS.
Trade Unions, see LABOR UNIONS.

I. DEFINITION AND NATURE.

A. Definition. The word "club," which has no very definite meaning in law,[1] has been defined as "a company of persons organized to meet for social intercourse, or for the promotion of some common object, as literature, science, politics, etc." [2]

B. Nature. Clubs may be either incorporated [3] or voluntary associations.[4] They are not partnerships [5] and have been held not to be "associations" within the meaning of 12 & 13 Vict. c. 108.[6]

II. INCORPORATION.

A. Right to Incorporate. Statutes permitting the incorporation of clubs usually require not only that their purposes be lawful,[7] but that they have, as well, a worthy and commendable object.[8] Hence clubs for the "cultivation and improvement of German manners and customs," [9] or one composed of Russians for drill and discipline, as a military company,[10] or a purely political club with no capital or property [11] have been refused incorporation. On the other hand it is no objection to the application for incorporation that the name is indicative of political belief or affiliation, if the real purpose be legitimate;[12] nor is it essential that there

1. Com. *v.* Pomphret, 137 Mass. 564, 567, 50 Am. Rep. 340, where Field, J., said: "One inquiry always is whether the organization is *bona fide* a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the constitution and rules of the club, or whether, either the form of a club has been adopted for other purposes . . . or a mere name has been assumed without any real organization behind it."

"They are, generally speaking . . . all formed on this principle: the candidate must be elected, he must then pay an entrance fee, and also an annual sum or subscription." Matter of St. James' Club, 2 De G. M. & G. 383, 387, 16 Jur. 1075, 51 Eng. Ch. 300, 12 Eng. L. & Eq. 589.

2. Century Dict. See also Black L. Dict.; Bouvier L. Dict.

3. Lavretta *v.* Holcombe, 98 Ala. 503, 12 So. 789.

Incorporation of clubs see *infra*, II.

4. Lavretta *v.* Holcombe, 98 Ala. 503, 12 So. 789; Com. *v.* Philadelphia Union League, 135 Pa. St. 301, 327, 26 Wkly. Notes Cas. (Pa.) 142, 19 Atl. 1030, 20 Am. St. Rep. 870, 8 L. R. A. 195, where the court said: "The English clubs are not incorporated; they are formed under written articles of agreement." See also Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. (N. Y.) 300 [*disapproving* Park *v.* Spaulding, 10 Hun (N. Y.) 128], where it was held that a social club, although without formal constitution and by-laws, organized without purpose of profit or pecuniary advantage, may be held liable, in an action under the statute, as a joint-stock association or an association of seven or more persons having a common interest.

To prove the character of such club, evidence that it is a voluntary association is admissible, and, for such purpose, one may testify that he has been elected its president, and has served as such. Lavretta *v.* Holcombe, 98 Ala. 503, 12 So. 789.

5. Richmond *v.* Judy, 6 Mo. App. 465; Matter of St. James' Club, 2 De G. M. & G. 383, 16 Jur. 1075, 51 Eng. Ch. 300, 13 Eng. L. & Eq. 589.

6. Matter of St. James' Club, 2 De G. M. & G. 383, 16 Jur. 1075, 51 Eng. Ch. 300, 13 Eng. L. & Eq. 589, holding further that they are not a "company" within the meaning of the winding-up acts of 1848–1849.

7. *In re* Lake Wynola Assoc., 3 Pa. Co. Ct. 626, construing the Pennsylvania act of April 29, 1874.

The purposes of a club are lawful, which, as expressed in the articles of association, are "to promote social intercourse amongst the members; to provide for them the convenience of a clubhouse, pleasure grounds, and proper facilities for improving, training, and exhibiting horses at meetings to be held at stated times." Detroit Driving Club *v.* Fitzgerald, 109 Mich. 670, 67 N. W. 899.

8. *In re* East End Social Club, 8 Pa. Dist. 272; *In re* Chinese Club, 1 Pa. Dist. 84 (in which case the application for incorporation of a Chinese social club, the subscribers to which were mainly Chinese, was refused); *In re* Grant Club, 20 Pa. Co. Ct. 592, 28 Pittsb. Leg. J. N. S. (Pa.) 318.

9. *In re* Sangerbund, 2 Pa. Dist. 73, 12 Pa. Co. Ct. 89.

10. *In re* Russian American Guards Charter, 13 Pa. Co. Ct. 148, 23 Pittsb. Leg. J. N. S. (Pa.) 402.

11. *In re* Ton-a-lu-ka Club, 12 Pa. Co. Ct. 26.

12. *In re* Central Democratic Assoc., 8 Pa. Co. Ct. 392.

be an absolute necessity of incorporation or that the title be in the English language.[13]

B. Application For. The application for incorporation must state the purposes of the club with sufficient definiteness to enable the court to determine whether or not the object falls within the purview of the law.[14]

III. RIGHTS AND LIABILITIES OF CLUB.

A. Rights — 1. In General. A club may adopt or change rules for its government,[15] and may, under a statute authorizing it to hold real and personal estate, and to provide suitable buildings for its accommodation, borrow money for such purposes.[16]

2. Immunity From Public Interference. The public authorities have no right to interfere with the festivities of a private club, organized for a legitimate purpose and conducted in a manner not amounting to a nuisance or breach of the peace.[17]

B. Liabilities. The liability of a club, as an organization, for any service performed for it depends upon the scope of the authority which it has given its committee, who are empowered to act for it.[18] A club may also be held liable for a tort committed by its members or guests while engaged in the sport for which it was organized.[19]

IV. MEMBERS.

A. Right to Sue on Behalf of Club. Where the assets of a club have fallen into the hands of certain members or of a committee it is not necessary, in a suit for an accounting, that all the other members be made parties. It may be brought by one "on behalf, etc.," of the club.[20]

13. *In re* Deutsch-Amerikanischer Volksfest-Verein, 200 Pa. St. 143, 49 Atl. 949.

14. *In re* Americus Club, 6 Pa. Dist. 760, 20 Pa. Co. Ct. 237; *In re* South Fork Social, etc., Club, 4 Pa. Dist. 457.

The declared purposes have been held too indefinite, in the absence of further specifications, when they are stated to be "the promotion of literature and the cultivation of friendly feelings," etc. (*In re* National Literary Assoc., 30 Pa. St. 150) or for "social enjoyments" (*In re* Nether Providence Assoc., 2 Pa. Dist. 702, 12 Pa. Co. Ct. 666; *In re* Penn. Farmer's Club, 24 Pa. Co. Ct. 415; *In re* Jacksonian Club, 11 Pa. Co. Ct. 19. See also *In re* Burger's Military Band Assoc., 19 Pa. Co. Ct. 651).

Validity of charter.— Under the Pennsylvania act of 1847, p. 44, it was held that the court could confer only such rights as by common law were necessary for the validity of a corporate franchise, and that therefore a provision in a charter of a club that its affairs should be governed by the holders of a majority of the stock instead of by a majority of the members was invalid. Com. *v.* Conover, 10 Phila. (Pa.) 55, 30 Leg. Int. (Pa.) 200.

15. Dawkins *v.* Antrobus, 17 Ch. D. 615, 44 L. T. Rep. N. S. 557, 29 Wkly. Rep. 511 (holding that under a provision that a general meeting by a certain majority and with certain formalities might change any of the standing rules affecting the general interests of the club, such meeting may pass a rule providing for the expulsion of a member, whose conduct appears injurious to their best interests); Lambert *v.* Addison, 46 L. T. Rep. N. S. 20 (holding that a by-law readmitting retired members without entrance fees or other formalities necessary to be observed in the admission of new members was not *ultra vires*).

16. Bradbury *v.* Boston Canoe Club, 153 Mass. 77, 26 N. E. 132. *Compare* Kirkwan *v.* Barney, 27 Misc. (N. Y.) 181, 57 N. Y. Suppl. 812, holding that the mere authorization of the board of trustees to "determine all matters affecting the welfare of the club" and to "authorize and control all expenditures" does not confer authority on such board to acquire real estate for the club premises.

17. De L'Harmonie *v.* French, 44 Hun (N. Y.) 123, holding, however, that this rule does not apply to a ball given by the club, tickets for which are sold to all persons, and at which wines and liquors are sold to all persons willing to pay therefor. See, generally, Intoxicating Liquors.

18. Shea *v.* Quaker City Wheelmen, 9 Pa. Super. Ct. 225.

In the absence of any restrictions on the powers of the house committee one who has duly leased the club-house from the officers thereof, for the purpose of maintaining a restaurant for the exclusive use of the members and their guests, may recover for refreshments furnished to guests of the club, at the request of members of the house committee. Deller *v.* Staten Island Athletic Club, 9 N. Y. Suppl. 876, 32 N. Y. St. 84.

19. Thus a rifle club is liable for injury to outside persons resulting from target practice on its premises. Simmonds *v.* Southern Rifle Club, 52 La. Ann. 1114, 27 So. 656.

20. Richardson *v.* Hastings, 7 Beav. 301, 8 Jur. 72, 13 L. J. Ch. 129, 7 Beav. 323, 8

B. Liabilities — 1. In General. Liability can be fastened upon individual members of clubs only by reason of the acts of the individuals themselves or of their agents.[21] Hence if the committee have no authority to pledge the personal credit of the members,[22] it follows that some assent or subsequent approval to a transaction is necessary to render one liable.[23] Where, however, the members expressly authorize an officer to contract liabilities,[24] or by the articles of incorporation assume such obligation,[25] they are bound thereby.

2. For Dues and Assessments.[26] Where, under the rules of a club, the membership of each is to be taken as continued unless notice to the contrary be given, a member may be sued for arrears of his dues, unless he can prove that he gave such notice.[27] It has also been held that a member is liable for his dues, where,

Jur. 207, 13 L. J. Ch. 142, 11 Beav. 17, 16 L. J. Ch. 322. See also Lloyd *v.* Loaring, 6 Ves. Jr. 773.

21. Richmond *v.* Judy, 6 Mo. App. 465.

22. Wood *v.* Finch, 2 F. & F. 447; Flemyng *v.* Hector, 2 Gale 180, 6 L. J. Exch. 43, 2 M. & W. 172.

Where, by the rules of the club, all the concerns of the club, the domestic and other arrangements, and regulations for its establishment and management were to be conducted by a committee of sixteen members, it was held that this rule did not authorize the committee to raise money by debentures or otherwise to pledge the credit of members. Matter of St. James' Club, 2 De G. M. & G. 383, 16 Jur. 1075, 51 Eng. Ch. 300, 13 Eng. L. & Eq. 589. *Compare* Park *v.* Spaulding, 10 Hun (N. Y.) 128 [*criticized* and departed from in Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. (N. Y.) 300].

23. Richmond *v.* Judy, 6 Mo. App. 465; Matter of St. James' Club, 2 De G. M. & G. 383, 16 Jur. 1075, 51 Eng. Ch. 300, 13 Eng. L. & Eq. 589; Delauney *v.* Strickland, 2 Stark. 416, 20 Rev. Rep. 706, 3 E. C. L. 470. And see Aikins *v.* Dominion Live Stock Assoc., 17 Ont. Pr. 303.

Where there is evidence of previous assent to, and subsequent ratification of, the act of a committee in obtaining a loan, a member is liable to contribution to one who has paid the amount owed by the club, and the proceedings at the meetings at which he was not present are admissible in evidence against him, in an action brought to enforce such contribution. Mountcashell *v.* Barber, 14 C. B. 53, 2 C. L. R. 60, 23 L. J. C. P. 43, 2 Wkly. Rep. 96, 78 E. C. L. 53.

Liens against clubs.—If individual members of a committee, under proper authorization from the club, raise money on their individual security for furnishings for the club, they have a lien on such improvements so added, and the court will decree payment, and in default thereof give them liberty to sell the property. Minnitt *v.* Talbot, 1 L. R. Ir. 143.

24. Ferris *v.* Thaw, 5 Mo. App. 279. And see Cockerell *v.* Aucompte, 2 C. B. N. S. 440, 3 Jur. N. S. 844, 26 L. J. C. P. 194, 5 Wkly. Rep. 633, 89 E. C. L. 440, where it was held that under the rules of the club the secretary had the authority to pledge the credit of its individual members.

25. Nelson Distilling Co. *v.* Loe, 47 Mo. App. 31.

26. Authority for assessments.—By the provision of the deed of a club of a lot of its grounds the grantee becomes a member of the club, entitled to all its privileges and subject to its rules and regulations. The by-laws of the club provide for two funds: One, the "Land and Improvement Fund," for the purchase and maintenance of the grounds and other property of the association; the other, into which all dues, membership fees, and assessments should be paid, called the "Current Expense Fund," to be appropriated, in the first instance, to current expenses, including taxes, provides that any surplus remaining at the end of a year might be turned into the land and improvement fund. The by-laws further provided for assessments to pay taxes, and authorized the managers from time to time to make assessments for other purposes as they should deem necessary. It was held that the provision in the deed that the lot should be subject to assessment to meet deficiencies which might arise in defraying the current expenses of the club, when construed with the by-laws, authorized an assessment not merely for keeping up, but for paying for, improvements. Whiteside *v.* Noyac Cottage Assoc., 142 N. Y. 585, 37 N. E. 624, 60 N. Y. St. 303. If, however, no right or authority to levy an assessment is given by the statute under which the club is organized, and the member in no way assents to the assessment, it cannot be enforced against him. Duluth Club *v.* MacDonald, 74 Minn. 254, 76 N. W. 1128, 73 Am. St. Rep. 344.

27. Raggett *v.* Bishop, 2 C. & P. 343, 31 Rev. Rep. 668, 12 E. C. L. 607. See also New York Bldg. Trades Club *v.* Hausling, 26 Misc. (N. Y.) 746, 56 N. Y. Suppl. 1056, where the club officers having denied receiving defendant's resignation, which he and his bookkeeper testified was sent, and it appearing that it was not among the files where all letters were kept, it was held that defendant was liable for dues accruing since the alleged resignation.

Estoppel.—A subscriber to stock of an incorporated driving club cannot avoid paying assessments pursuant to the terms of his subscription, because he did not know that all the stock had not been subscribed or paid in, where, after knowledge of all the facts connected therewith, he participated in its purposes, accepted membership tickets and badges without paying a membership fee, but paid annual dues only, and availed himself of the

after they are due but before payment, the club becomes insolvent and goes into the hands of a receiver.[28]

C. Resignation. In the absence of any rules to the contrary a member of a voluntary club or society who has paid his subscription for the current year, and is in no other arrears to his fellow members, may resign his membership at any time by communicating such intention to the society. Nor is it necessary that such resignation be accepted.[29]

D. Expulsion — 1. In General. If the offense with which the member is charged is not grave enough to constitute grounds for expulsion by a corporate body at common law[30] it is necessary that authority for his expulsion be expressed by some provision of the charter.[31]

2. Necessity of Observing Prescribed Procedure. In exercising the right of expulsion it is essential that the prescribed conditions and manner of procedure be strictly observed and adhered to.[32]

benefit of being a stock-holder. Detroit Driving Club *v.* Fitzgerald, 109 Mich. 670, 67 N. W. 899.

28. Freedman *v.* Chamberlain, 70 Hun (N. Y.) 193, 24 N. Y. Suppl. 388, 54 N. Y. St. 282.

29. Finch *v.* Oake, [1896] 60 J. P. 309, 1 Ch. 409, 65 L. J. Ch. 324, 73 L. T. Rep. N. S. 716.

30. Com. *v.* Union League, 135 Pa. St. 301, 26 Wkly. Notes Cas. (Pa.) 142, 19 Atl. 1030, 20 Am. St. Rep. 870, 8 L. R. A. 195.

31. Evans *v.* Philadelphia Club, 50 Pa. St. 107, holding that in absence of such provision in the charter the expression of such right in the by-laws will not give the club authority to so proceed. *Compare* Innes *v.* Wylie, 1 C. & K. 257, 47 E. C. L. 257, where, in an unincorporated club, it was held that if there is no property in which the members have a joint interest a majority may by resolution remove any member, although there be no provision therefor in the rules.

The by-laws, when the power to expel is given by charter, may properly prescribe the causes for, and the manner of perfecting such, expulsion, and a by-law is valid which gives the board of directors the power to expel a member for acts or conduct which they may deem disorderly or injurious to the interests or hostile to the objects of the "club," with a right of appeal to a meeting of the club. Com. *v.* Union League, 135 Pa. St. 301, 26 Wkly. Notes Cas. (Pa.) 142, 19 Atl. 1030, 20 Am. St. Rep. 870, 8 L. R. A. 195.

Sufficient grounds for expulsion.— Under a rule providing for the expulsion of members "guilty of improper conduct calculated to bring the society into disrepute," a member may be expelled on charges of having received an initiation fee from a proposed member, and a failure to return the money to such person or to the society, and on the further charge of taking and refusing to return the original roll of the society. People *v.* St. George's Soc., 28 Mich. 261. See also People *v.* Manhattan Chess Club, 23 Misc. (N. Y.) 500, 52 N. Y. Suppl. 726.

32. Labouchere *v.* Wharncliffe, 13 Ch. D. 346, 41 L. T. Rep. N. S. 638, 38 Wkly. Rep. 367; Fisher *v.* Keane, 11 Ch. D. 353, 49 L. J. Ch. 11, 41 L. T. Rep. N. S. 335.

A bill of particulars acquainting defendant with the nature of the charge against him is unnecessary where the matter has already been freely discussed in the newspapers and defendant has taken part therein. Guinane *v.* Sunnyside Boating Co., 21 Ont. App. 49.

Manner of appointing investigating committee.— If the time and manner of appointing an investigating committee is made no more specific than that it shall be done by the "presiding officer," an appointment made after the adjournment of the meeting (which had passed the resolution of reference) by the second vice-president, who had presided at that meeting, and a subsequent appointment by the first vice-president to the places of two who had declined to act is regular. People *v.* St. George's Soc., 28 Mich. 261.

Notice to member.— While it has been held that no notice to defendant of the intended action is necessary in the absence of a requirement therefor (Manning *v.* San Antonio Club, 63 Tex. 166, 51 Am. Rep. 639. *Contra*, Innes *v.* Wylie, 1 C. & K. 257, 47 E. C. L. 257; Fisher *v.* Keane, 11 Ch. D. 353, 49 L. J. Ch. 11, 41 L. T. Rep. N. S. 335. And see Cheney *v.* Ketcham, 7 Ohio S. & C. Pl. Dec. 183, 5 Ohio N. P. 139), yet if a notice to him of the intended action is necessary to make the proceeding regular, he is under no legal obligations to ask for a hearing in event the condition is unobserved (Loubat *v.* Le Roy, 40 Hun (N. Y.) 546). It has also been held that in the absence of any agreement or provision the notice provided for must be personal. People *v.* Hoboken Turtle Club, 60 Hun (N. Y.) 576, 14 N. Y. Suppl. 76, 38 N. Y. St. 4, holding that under a provision that the board of governors of a club could censure, suspend, or expel a member for misconduct, provided ten days' notice in writing had been given such member, a notice sent by mail, which in due course would have been delivered at the member's address ten days previous to the proposed action, but which was not received by him personally until nine days previous thereto, was insufficient.

Notice to trustees of special meeting.— A written notice to each member of the board of trustees of a club being required in a call of a special meeting, it was held that the board had no jurisdiction to expel a member

3. Grounds For Judicial Interference. The foundation for the jurisdiction which a court exercises to prevent an improper expulsion of a club member resting upon the principle that the member may be thereby deprived of his right of property[33] no judicial restraint will be accorded in the absence of such property interest.[34] Nor where the rules or constitution of a club provide the manner of expelling a member will the court enjoin it from thus proceeding, in the absence of prejudice or malice.[35]

E. Reinstatement. One who becomes a member of a club will be held to have known and assented to the provisions or rules pertaining to rights and powers of expulsion,[36] and while the fact that a decision appears unreasonable may be taken as evidence of malice,[37] yet if the proceeding has been in every respect regular,[38] and it does not appear that the action has been in fact capricious or with ill-will, the court will not interfere with the result.[39] A writ of mandamus to compel reinstatement which does not state facts to show that the expulsion was illegal is demurrable.[40]

V. OFFICERS.

Where a committee, on behalf of themselves and their club, make a contract with one to provide them with necessaries for the club they are personally bound,

at a special meeting, if one of the trustees had not received written notice and was not present, although only a two-thirds vote of the trustees present was required for such purpose. People *v.* Greenwood Lake Assoc., 18 N. Y. Suppl. 491, 44 N. Y. St. 914.

Two-thirds vote of committee.— Where it was provided that a member might be expelled by a two-thirds vote of the governing committee, and that a majority of the committee should constitute a quorum, a two-thirds vote of a quorum, there being vacancies in the committee at the time the vote was taken, is insufficient. Loubat *v.* Le Roy, 40 Hun (N. Y.) 546 [*reversing* 15 Abb. N. Cas. (N. Y.) 1].

33. Baird *v.* Wells, 44 Ch. D. 661, 59 L. J. Ch. 673, 63 L. T. Rep. N. S. 312, 39 Wkly. Rep. 61. See also Rigby *v.* Connol, 14 Ch. D. 482.

34. Baird *v.* Wells, 44 Ch. D. 661, 59 L. J. Ch. 673, 63 L. T. Rep. N. S. 312, 39 Wkly. Rep. 61; Lyttelton *v.* Blackburn, 45 L. J. Ch. 219, 33 L. T. Rep. N. S. 641.

35. Gebhard *v.* New York Club, 21 Abb. N. Cas. (N. Y.) 248; Lambert *v.* Addison, 46 L. T. Rep. N. S. 20.

36. Com. *v.* Union League, 135 Pa. St. 301, 26 Wkly. Notes Cas. (Pa.) 142, 19 Atl. 1030, 20 Am. St. Rep. 870, 8 L. R. A. 195. And see Cheney *v.* Ketcham, 7 Ohio S. & C. Pl. Dec. 183, 5 Ohio N. P. 139; Raggett *v.* Musgrave, 2 C. & P. 556, 31 Rev. Rep. 668, 12 E. C. L. 730.

37. Dawkins *v.* Antrobus, 17 Ch. D. 615, 44 L. T. Rep. N. S. 557, 29 Wkly. Rep. 511. And see People *v.* Uptown Assoc., 9 N. Y. App. Div. 191, 41 N. Y. Suppl. 154, 75 N. Y. St. 612, where the cause for expulsion being uncertain and the charge indefinite the court directed an alternative writ that the charge against relator might be made more definite.

Questions for jury.— The question whether the expelled member had a reasonable notice to defend himself on the charge of making a reckless statement in his letter, whether the charge was established before the board, and whether the relator had a fair opportunity to explain his defense should have been submitted to the jury. People *v.* Uptown Assoc., 26 N. Y. App. Div. 297, 49 N. Y. Suppl. 881.

The minutes and reports in writing of the committee is the best evidence of what took place therein, and under a rule of the club that the proceedings of the committee should be strictly private it was held that a member could not be interrogated as to his reasons for his vote, or as to what he deemed proper and sufficient ground for the expulsion of a member. Loubat *v.* Le Roy, 65 How. Pr. (N. Y.) 138.

38. It will be presumed that if proceedings before a committee appointed to investigate charges against a member were not regular they would not have been sanctioned by the society. People *v.* St. George's Soc., 28 Mich. 261.

39. *District of Columbia.*— U. S. *v.* Metropolitan Club, 11 App. Cas. (D. C.) 180.

New York.— Loubat *v.* Le Roy, 15 Abb. N. Cas. (N. Y.) 1 [*reversed* on other grounds in 40 Hun (N. Y.) 546].

Pennsylvania.— Com. *v.* Union League, 135 Pa. St. 301, 26 Wkly. Notes Cas. (Pa.) 142, 19 Atl. 1030, 20 Am. St. Rep. 870.

England.— Hopkinson *v.* Exeter, L. R. 5 Eq. 63, 37 L. J. Ch. 173, 16 Wkly. Rep. 266; Hawkins *v.* Antrobus, 17 Ch. D. 615, 44 L. T. Rep. N. S. 557, 29 Wkly. Rep. 511 (holding that the court will not inquire into the circumstances further than is necessary to satisfy itself that the proceeding has not been *mala fides*); Lyttelton *v.* Blackburn, 45 L. J. Ch. 219, 33 L. T. Rep. N. S. 641; Richardson-Gardner *v.* Fremantle, 24 L. T. Rep. N. S. 81, 19 Wkly. Rep. 456.

Canada.— Guinane *v.* Sunnyside Boating Company, 21 Ont. App. 49.

40. People *v.* Columbia Club, 15 N. Y. Suppl. 821, 20 N. Y. Civ. Proc. 319, the code

and no resort to the other members need be had.[41] If, however, the contract is made with others than the committee it must be shown either that the committee were privy to the contract or that the dealings in such matter were in furtherance of the common object and purposes of the club.[42] Where a statute makes the trustees of a club liable for its debts[43] a creditor need not first exhaust his remedy against the club before proceeding against the trustees.[44]

VI. DISSOLUTION.

For proper cause the franchise of a club may be forfeited,[45] and where the objects for which a club was formed are no longer possible of attainment, and the dissension of the parties has substantially dissolved it, a court of equity will wind up the affairs and order the property sold.[46] If, however, such a condition of affairs be denied, the court, before final hearing, will only restrain the disposition or encumbrance of the property.[47]

requiring the writ in such cases to contain a like statement of facts constituting the grievance as is contained in the complaint.

41. Queensberry *v.* Cullen, 1 Bro. P. C. 396, 1 Eng. Reprint 646. And see Harper *v.* Granville-Smith, 7 L. T. Rep. N. S. 284; Stansfield *v.* Ridout, 5 L. T. Rep. N. S. 656; Steele *v.* Gourley, 3 L. T. Rep. N. S. 772 [*distinguishing* Overton *v.* Hewett, 3 L. T. Rep. N. S. 247]; Thomas *v.* Wilson, 20 U. C. Q. B. 331 [*cited* in Aikins *v.* Dominion Live Stock Assoc., 17 Ont. Pr. 303].

42. Todd *v.* Emily, 7 M. & W. 427, 10 L. J. Eq. 161 [*cited* in Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. (N. Y.) 300, 309].

The question for the jury in an action against the committee on such state of facts is not whether defendants by their course of dealing had held themselves out as personally responsible to plaintiff, but whether they had authorized the making of the contract in the ordering of the wine. Todd *v.* Emly, 8 M. & W. 505, 10 L. J. Eq. 262.

43. Construction of statute.— The statute under which many of the clubs in the state of New York are incorporated is that of 1865, c. 368, § 7, which provides that "the trustees of any company or corporation, organized under the provisions of this act, shall be jointly and severally liable for all debts due from said company or corporation, contracted while they are trustees, provided said debts are payable within one year from the time they shall have been contracted, and provided a suit for the collection of the same shall be brought within one year after the debt shall become due and payable." This statute is construed to mean that the suit to collect such debt must be brought against the trustees within the prescribed time, and not a suit against the club within such time. Hall *v.* Siegel, 7 Lans. (N. Y.) 206.

44. Robinson *v.* Fay, 19 N. Y. Suppl. 120, 46 N. Y. St. 369, holding further that the fact that the creditor has brought an action to enforce a mechanic's lien against the club would not affect his right to enforce a claim against the trustees, under their statutory liability.

The president of a club, if he is not also a trustee, is not individually liable, although the debt be incurred by him as president. Sieger *v.* Culyer, 2 Abb. N. Cas. (N. Y.) 347.

A treasurer of a committee of a society which has two factions, who collects money in his official capacity and pays it over to the treasurer elected by the faction which was in the wrong, is not liable for conversion. Beggar Students' Pleasure Soc. *v.* Eichel, 25 Misc. (N. Y.) 177, 54 N. Y. Suppl. 128.

A member of a club who assumes a fiduciary or confidential relation to the club, by becoming a member of a purchasing committee, cannot, in the exercise of his duty, reserve a benefit to himself or to the firm of which he is a member. By accepting such relationship the club becomes entitled, as against the partnership, to a commission allowed by the vendor. Redhead *v.* Parkway Driving Club, 148 N. Y. 471, 42 N. E. 1047 [*affirming* 7 Misc. (N. Y.) 275, 27 N. Y. Suppl. 887, 58 N. Y. St. 534].

45. The unlawful sale of intoxicating liquors by an incorporated club constitutes cause for annulment of its charter and the forfeiture of its franchises. State *v.* Easton Social, etc., Club, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64; State *v.* Bacon Club, 44 Mo. App. 86.

46. Eury *v.* Merrill, 42 Ill. App. 193.

47. Gobert *v.* Eckhard, (N. J. 1889) 17 Atl. 305.

Application of statutory method for dissolving corporation.— It has been held that N. Y. Code Civ. Proc. c. 17, tit. 11, providing for and regulating proceedings for the dissolution of corporations, does not apply to a social club organized as a corporation. *In re* Livingston Sportsmen's Assoc., 2 N. Y. Suppl. 63, 15 N. Y. Civ. Proc. 215 [*citing* Matter of St. James' Club, 2 De G. M. & G. 383, 16 Jur. 1075, 51 Eng. Ch. 300, 13 L. & Eq. Rep. 589], which held further that, conceding the application of the statute, it would be necessary to show in compliance therein that the club either was insolvent, or that dissolution would be for the interest of the stock-holders, and not injurious to public interests.

CLYPEUS or **CLIPEUS.** In old English law, a shield;[1] metaphorically one of a noble family.[2]

CO. This, an old form of *ceo;*[3] an abbreviation of company[4] and of county;[5] a prefix as in *co-sine, co-secant, co-tangent*, etc., meaning *sine, secant, tangent*, etc., of the complement;[6] a prefix to words, meaning "with" or "in conjunction" or "joint";[7] for example, co-administrator,[8] co-agent,[9] co-appellant,[10] co-appellee,[11] co-conspirator,[12] co-defendant,[13] co-employee,[14] co-executor,[15] co-heir,[16] co-insurer,[17] co-laborer,[18] co-maker,[19] co-mate,[20] co-obligor,[21] co-partner,[22] co-respondent,[23] co-plaintiff,[24] co-salvor,[25] co-servant,[26] co-stipulator, co-surety,[27] co-tenant,[28] co-trespasser,[29] co-trustee,[30] co-worker, etc.; the chemical symbol for cobalt.[31]

C. O. The abbreviation of "care of," common in addressing letters, etc., often written c/o.[32]

COACH.[33] A convenience well known;[34] a kind of carriage, and is distinguished from other vehicles chiefly as being a covered box, hung on leathers, with four wheels.[35]

COADJUTOR. A fellow-helper or assistant;[36] a helper or ally;[37] particularly applied to one appointed to assist a bishop, being grown old and infirm so as not to be able to perform his duties.[38] Also an overseer (coadjutor of an executor)

1. Black L. Dict.
2. Jacob L. Dict.

Clypei prostrati, noble families extinct. Black L. Dict.; Jacob L. Dict.

3. Burrill L. Dict.

Co est à savier,—this is to wit. Burrill L. Dict.

4. Anderson L. Dict. As Smith, Brown & Co. Century Dict. And see Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.
5. Anderson L. Dict. As Orange Co., New York. Century Dict.
6. Century Dict.
7. Black L. Dict.
8. See EXECUTORS AND ADMINISTRATORS.
9. See PRINCIPAL AND AGENT.
10. See APPEAL AND ERROR.
11. See APPEAL AND ERROR.
12. See CONSPIRACY.
13. See PARTIES.
14. See MASTER AND SERVANT.
15. See EXECUTORS AND ADMINISTRATORS.
16. See DESCENT AND DISTRIBUTION.
17. See INSURANCE.
18. See MASTER AND SERVANT.
19. See COMMERCIAL PAPER.
20. See SEAMEN.
21. See CONTRACTS.
22. See PARTNERSHIP.
23. See APPEAL AND ERROR.
24. See PARTIES.
25. See SALVAGE.
26. See MASTER AND SERVANT.
27. See PRINCIPAL AND SURETY.
28. See JOINT TENANCY; TENANCY IN COMMON.
29. See TRESPASS.
30. See TRUSTS.
31. Century Dict.
32. Century Dict.
33. Coach is a generic term and includes mail coach, stage coach, and omnibus. Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11, 12 [*citing* Encyclopedia Americana 271, 272, tit. coach; Johnson Dict.].

A mail coach is a "coach that carries the mail." Johnson Dict. [*quoted* in Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11, 12].

A stage coach is "a coach that regularly carries passengers from town to town." Johnson Dict. [*quoted* in Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11, 12].

A half coach with four wheels used for convenience and pleasure is called a chariot. Johnson Dict. [*cited* in Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11, 12].

34. Jacob L. Dict.
35. Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11, 12. See Frost *v.* Williams, 7 A. & E. 773, 34 E. C. L. 405, for the meaning of the term "coach" as used in the English statutes regulating hackney-coach stands.

In construing Mass. Stat. (1804), c. 125, defining the powers and duties of turnpike corporations and providing that a certain toll shall be paid "for each coach, chariot, phaeton, or other four-wheel spring carriage," the court held that the term coach was not controlled by the words "other four wheel carriage" and that a stage-carriage, the body of which was sustained on thorough-braces attached to four braced iron jacks, was a coach within the provision of the statute. Housatonic River Turnpike Corp. *v.* Frink, 15 Pick. (Mass.) 443.

The common use of the words "car" and "coach," in reference to railroad passenger cars, would seem to indicate that there is no such generic difference between the word "car" and the word "coach," as applied to vehicles devoted to the carriage of passengers, as to make it impossible to use the words interchangeably. New York *v.* Third-Ave. R. Co., 1 N. Y. Suppl. 397, 16 N. Y. St. 122.

36. Jacob L. Dict.
37. Black L. Dict.
38. Jacob L. Dict.

Coadjutor bishop is one who is appointed to perform the functions of a regular bishop who is old and infirm. Olcott *v.* Gabert, 86 Tex. 121, 126, 23 S. W. 985.

and one who disseises a person of land not to his own use, but to that of another.[39]

CO-ADMINISTRATOR. One who is a joint administrator with one or more others.[40] (See, generally, EXECUTORS AND ADMINISTRATORS.)

COADUNATIO. A uniting or combining together of persons; a conspiracy.[41]

COAL. A solid and more or less distinctly stratified mineral, varying in color from dark brown to black, brittle, combustible, and used as a fuel, not fusible without decomposition, and very insoluble.[42] (See, generally, MINES AND MINERALS.)

COALITION. In French law, an unlawful agreement among several persons not to do a thing except on some conditions agreed upon; particularly, industrial combinations, strikes, etc.; a conspiracy.[43] (See, generally, CONSPIRACY.)

COAL-MINE. A mine or pit from which coal is obtained.[44] (See, generally, MINES AND MINERALS.)

COAL NOTE. A species of promissory note, formerly in use in the part of London, containing the phrase "value received in coals."[45] (See, generally, COMMERCIAL PAPER.)

COAL OIL. PETROLEUM,[46] *q. v.* (Coal Oil: Inspection, see INSPECTION. Mining, see MINES AND MINERALS.)

COAL PRIVILEGES. The right of mining and taking out all the coal lying under a certain piece of ground, or a given number of acres, either at a specified rate per bushel, or so much by the acre.[47]

CO-ASSIGNEE. One of two or more assignees of the same subject-matter.[48] (See, generally, ASSIGNMENTS.)

COAST. As a noun, the shore;[49] the seaboard of a country;[50] the sea-shore;[51] the edge or margin of a country bounding on the sea;[52] the contact of the main-land with the main-sea, where no bay intervenes, and with the latter, wherever it exists.[53] As a verb, the term may be defined as meaning to navigate along the

39. Black L. Dict.

40. Black L. Dict.

41. Black L. Dict.

Distinguished from other terms.— *Coadunatio* is a uniting of themselves together, *confœderatio* is a combination amongst them, and *falsa alligantia* is a false binding each to the other, by bond or promise, to execute some unlawful act. Poulterers' Case, 9 Coke 55*b*, 56*b*.

42. Century Dict.

"Coals," as used in an English statute, has been held not to include patent fuel. London *v.* Parkinson, 10 C. B. 228, 70 E. C. L. 228. But *compare* Howard *v.* Great Western Ins. Co., 109 Mass. 384, 389, where the court declined to instruct the jury according to the plaintiff's request, that whether "coal," as used in the policy, includes "patent fuel," or whether patent fuel and coal are the same or different articles, is to be determined under this policy by the usage at the port of lading, namely, Cardiff.

43. Black L. Dict.

44. Century Dict.

The term "mine" when applied to coal is equivalent to a worked vein, for by working a vein it becomes a mine. Springside Coal Min. Co. *v.* Grogan, 53 Ill. App. 60, 65 [*quoting* Westmoreland Coal Co.'s Appeal, 85 Pa. St. 344].

A seam of coal unopened is not a coal mine. Springside Coal Min. Co. *v.* Grogan, 53 Ill. App. 60, 65 [*quoting* Astry *v.* Ballard, 2 Mining Rep. 291].

A coal mine is an improvement on land within the meaning of Ala. Civ. Code (1886), § 3018, relating to mechanics' liens. New York Cent. Trust Co. *v.* Sheffield, etc., Coal, etc., R. Co., 42 Fed. 106, 110, 9 L. R. A. 67.

45. Black L. Dict. By 3 Geo. II, c. 26, §§ 7, 8, these were to be protected and noted as inland bills of exchange. But this was repealed by 47 Geo. III, sess. 2, c. 68, § 28.

46. Century Dict.

47. Peterson *v.* Kier, 2 Pittsb. (Pa.) 191, 199.

48. Black L. Dict.

49. Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435, 463; U. S. *v.* William Pope, Newb. Adm. 256, 259, 28 Fed. Cas. No. 16,703; U. S. *v.* The James Morrison, Newb. Adm. 241, 253, 26 Fed. Cas. No. 15,465, 4 N. Y. Leg. Obs. 333, 6 Pa. L. J. 132.

50. Ravesies *v.* U. S., 35 Fed. 917, 919.

51. Ravesies *v.* U. S., 35 Fed. 917, 919.

52. Black L. Dict.

53. Hamilton *v.* Menifee, 11 Tex. 718, 751.

The term coast undoubtedly suggests to the mind the place of meeting between the main-land and the water of the sea, where no bay intervenes; but it does not so readily suggest also the shores of the bays. It is rather by a process of reasoning than suggestion, that it is made to comprehend the shores of the ocean, and of the bays, as one unbroken line. But whether the laws on the subject should have been construed to include, or otherwise, the shores of the bays, as a part of the coast, can scarcely be regarded as now

shore;[54] to slide on a sled down a hill or incline covered with snow or ice.[55] (See Coasting.)

Coaster. A Coasting Vessel,[56] *q. v.*

Coasting. Sailing along the coast from port to port in the same country for purposes of trade;[57] sliding on a sled down an incline covered with snow or ice.[58] (Coasting: On Highway, see Municipal Corporations; Streets and Highways. Trade, see Coasting Trade. Vessel, see Coasting Vessel.)

Coasting Trade.[59] The trade along the shore;[60] commercial intercourse carried on between different districts in different states, between different districts in the same state, and between different places in the same district, on the sea coast or on a navigable river.[61] The coasting trade is defined by statute to be a trade by sea.[62] (See Coastwise Trade.)

Coasting Vessel. A vessel plying exclusively between domestic ports, and usually one engaged in domestic trade as distinguished from a vessel engaged in the foreign trade or plying between a port of the United States and a port of a foreign country;[63] a vessel performing a voyage coast-wise from state to state, or between different places in the same district on a navigable river.[64] (See, generally, Navigable Waters; Shipping.)

Coast Waters. Harbors and other waters upon the coast communicating directly with the ocean;[65] not merely the waters that face the open sea, but the bays, the passages, the inlets, and the sounds formed by the islands that skirt the coast.[66] (See, generally, Navigable Waters.)

an open question. Hamilton *v.* Menifee, 11 Tex. 718, 751.

Shoals covered with water are not part of the coast or shore. Soult *v.* L'Africaine, Bee Adm. 204, 22 Fed. Cas. No. 13,179.

54. U. S. *v.* The William Pope, Newb. Adm. 256, 259, 28 Fed. Cas. No. 16,703; U. S. *v.* The James Morrison, Newb. Adm. 241, 253, 26 Fed. Cas. No. 15,465, 4 N. Y. Leg. Obs. 333, 6 Pa. L. J. 132.

55. Century Dict.

56. Belden *v.* Chase, 150 U. S. 674, 696, 14 S. Ct. 264, 37 L. ed. 1218.

57. Century Dict.

58. Century Dict. And see Hutchinson *v.* Concord, 41 Vt. 271, 98 Am. Dec. 584.

59. "'The coasting trade' is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of a vessel engaged in it, and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of these operations." Per Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 214, 6 L. ed. 23 [*quoted* in North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713, 747; Ravesies *v.* U. S., 37 Fed. 447].

The term "plying coastwise," in this connection, and the "coasting-trade," have a settled meaning. They were intended to indicate vessels engaged in the domestic trade, or plying between port and port in the United States, as contradistinguished from those vessels engaged in the foreign trade, or plying between a port of the United States and a port of a foreign country. San Francisco *v.* California Steam Nav. Co., 10 Cal. 504, 508.

60. U. S. *v.* The William Pope, Newb. Adm. 256, 259, 28 Fed. Cas. No. 16,703; U. S. *v.* The James Morrison, Newb. Adm. 241, 253, 26 Fed. Cas. No. 15,465, 4 N. Y. Leg. Obs. 333, 6 Pa. L. J. 132.

61. North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713, 747 [*quoted* in San Francisco *v.* California Steam Nav. Co., 10 Cal. 504, 508; Ravesies *v.* U. S., 37 Fed. 447].

62. American Transp. Co. *v.* Moore, 5 Mich. 368, 388, where it is said that the term "embraces now, as we have seen, much business that, before the new laws, was actually foreign in legal contemplation. In the United States it is equally regarded as an external sea-going trade, and this not only by acts of congress, but by courts, and is classed separately from all internal commerce."

63. Belden *v.* Chase, 150 U. S. 674, 696, 14 S. Ct. 264, 37 L. ed. 1218 [*citing* Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23].

64. Walker *v.* Blackwell, 1 Wend. (N. Y.) 557, 560 [*distinguishing* Birkbeck *v.* Hoboken Horse Ferry Boats, 17 Johns. (N. Y.) 54]. See also San Francisco *v.* California Steam Nav. Co., 10 Cal. 504, 507; Chase *v.* Belden, 104 N. Y. 86, 9 N. E. 852.

65. The Victory, 68 Fed. 395, 397, 25 U. S. App. 271, 15 C. C. A. 490.

66. The Garden City, 26 Fed. 766, 773.

"It may not be practicable to define with precision the meaning of the phrase 'ocean waters;' but, so far as this court is concerned, I hold that it embraces all waters opening directly or indirectly into the ocean, and navigable by ships, foreign or domestic, coming in from the ocean, or draft as great as is drawn by the larger ships which traverse the open seas. I hold that all tide waters, navigable from the ocean, with navigable depth for ocean craft, are 'coast waters,' in the meaning of article 21." The Victory, 63 Fed. 631, 636.

COASTWISE. By way of the COAST, *q. v.*; along shore.[67]

COASTWISE TRADE. COASTING TRADE,[68] *q. v.*; trade or intercourse carried on by sea between two ports or places belonging to the same country.[69]

COBBLE. A stone rounded by the action of water, and of a size suitable for use in paving.[70]

COBBLESTONE. A cobble or rounded stone; especially, such a stone used in paving.[71]

COCKET. In English law, a seal belonging to the custom-house, or rather a scroll of parchment, sealed and delivered by the officers of the custom-house to merchants, as a warrant that their merchandises are entered; likewise a sort of measure.[72]

COCK-FIGHTING. A criminal offense;[73] a game in the sense that it is an amusement, diversion, or sport; yet not such a game as is commonly understood may be "played at."[74] (Cock-fighting: As Breach of the Peace, see BREACH OF THE PEACE. As Cruelty to Animals, see ANIMALS.)

COCKPIT. A name which used to be given to the judicial committee of the privy council, the council-room being built on the old cockpit of Whitehall Place.[75]

C. O. D. The initials, and so understood, of the words "collect on delivery."[76] These initials have acquired a fixed and determinate meaning which courts and juries may recognize from their general information.[77] (See, generally, CARRIERS.)

67. Ravesies *v.* U. S., 35 Fed. 917, 919 [*citing* U. S. *v.* The William Pope, Newb. Adm. 256, 28 Fed. Cas. No. 16,703; U. S. *v.* The James Morrison, Newb. Adm. 241, 26 Fed. Cas. No. 15,465, 4 N. Y. Leg. Obs. 333, 6 Pa. L. J. 132].

68. **Synonymous with "coasting trade."**— The district judge held, and gave judgment accordingly, that "coastwise trade" means trade or intercourse carried on by sea between two ports or places belonging to the same country, and does not include trade carried on on the navigable rivers. I am inclined to the opinion that this interpretation is too narrow. In the statutes of the United States relating to commerce, navigation, and revenue, the words "coasting trade" and "coastwise trade" are used synonymously. Ravesies *v.* U. S., 37 Fed. 447.

69. Ravesies *v.* U. S., 35 Fed. 917, 919, where it is also said: "'Coastwise trade' may be a part of the commerce among the several states, but commerce among the several states is not necessarily 'coastwise trade.'" See also U. S. *v.* Patten, Holmes (U. S.) 421, 27 Fed. Cas. No. 16,007, where it was said: "The term 'coastwise trade,' as used in [the statute], does not include trade between the Atlantic and Pacific ports of the United States."

70. Century Dict. [*quoted* in Doyle *v.* New York, 58 N. Y. App. Div. 588, 591, 69 N. Y. Suppl. 120].

71. Century Dict. [*quoted* in Doyle *v.* New York, 58 N. Y. App. Div. 588, 591, 69 N. Y. Suppl. 120].

72. Black L. Dict. [*citing* Fleta, lib. 2, c. ix].

73. Wharton L. Lex.

74. State *v.* Williams, 35 Mo. App. 541, 549.

75. Black L. Dict.

76. American Express Co. *v.* Lesem, 39 Ill. 312, 333. And see the following cases:

Illinois.— American Merchants' Union Express Co. *v.* Schier, 55 Ill. 140.

Indiana.— U. S. Express Co. *v.* Keefer, 59 Ind. 623.

Maine.— State *v.* Intoxicating Liquors, 73 Me. 278.

Michigan.— Hasse *v.* American Express Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328.

New York.—Collender *v.* Dinsmore, 55 N. Y. 200, 201, 14 Am. Rep. 224; Gibson *v.* American Merchants' Union Express Co., 1 Hun (N. Y.) 387.

Vermont.— State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557.

See also, generally, CARRIERS.

Or more fully stated, "C. O. D." means "deliver upon payment of the charges due the seller for the price, and the carrier for the carriage, of the goods." State *v.* Intoxicating Liquors, 73 Me. 278, 279.

Those letters mean the value or price of the package, and which, as marked on the package, will be collected on delivery, and transmitted to the consignor, who has sold it. Those letters have nothing to do with the transportation charges upon a package. American Merchants' Union Express Co. *v.* Schier, 55 Ill. 140, 148 [*citing* American Express Co. *v.* Lesem, 39 Ill. 312].

77. State *v.* Intoxicating Liquors, 73 Me. 278, 279. *Compare* McNichol *v.* Pacific Express Co., 12 Mo. App. 401, 406, where it is said: "It is argued for the defendant that the expression in this letter, 'a C. O. D.,' refers to the bill which was sent on June 28th, and not to the package which was sent on June 26th. We do not think so; but we do not know that the meaning of the abbreviation 'C. O. D.' as used by expressmen, is sufficiently a matter of common knowledge that the circuit court could take judicial notice of it; but it would be for the jury to say whether it referred to the package, or to the bill, or to

CODE. A general collection or compilation of laws by public authority;[78] a system of law; a systematic and complete body of law,[79] such as a civil code,[80] a code of civil procedure,[81] a code of procedure,[82] a criminal code,[83] a code of criminal procedure,[84] a penal code,[85] a political code,[86] a probate code,[87] etc.; also such as *Code Civil*,[88] *Code de Commerce*,[89] *Code de Procedure Civil*,[90] *Code d'Instruction Criminelle*,[91] Code of Justinian,[92] Code Napoleon or Code of Napoleon,[93]

both, and whether this letter was an admission of the fact that both the package and the bill were in the hands of the defendant's agent at Denver, on the 9th of July. This question the court could not undertake to decide for the jury."

"C. O. D." means collect of the consignee on delivery, "and this is the experience of the whole business community in employing such an agency." American Express Co. *v.* Lesem, 39 Ill. 312, 333.

The letters "C. O. D.," followed by an amount in dollars, have come to be very well understood in the community and by the public, but perhaps could not, without the aid of extrinsic evidence, be read and interpreted by the courts; that is, their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purpose for which those letters are used, in the connection in which they are here found, or the contract to be implied from them. It was certainly competent to explain them, and thus remove all ambiguity by parol evidence. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224.

"These letters are by no means cabalistical. They have no occult or mysterious meaning. . . . In the ordinary commerce of the country these letters have acquired such a fixed and determinate meaning that the courts and juries from their general information will readily understand what is meant thereby when they are used as the appellees have used them in their complaint." U. S. Express Co. *v.* Keefer, 59 Ind, 263, 267.

78. Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725, 739.

In its more restricted sense, as intended by the Mississippi act of 1870, it means a collection and compilation of the general statutes. Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725, 739.

"The 'Code of Tennessee' is a well-known volume, containing the revised statute law of the State up to the time of its adoption in 1858. There is but one such book extant. It is made up of parts, chapters, articles, and sections, the latter being numbered consecutively from 1 to 5604, and some of them being divided into subsections, likewise consecutively numbered." State *v.* Runnels, 92 Tenn. 320, 323, 21 S. W. 665.

79. Johnson *v.* Harrison, 47 Minn. 575, 578, 50 N. W. 923, 28 Am. St. Rep. 382, where it is said: "The word 'code,' as now generally used, and as obviously used in this title, means 'a system of law,'—'a systematic and complete body of law.'"

Distinguished from "compilation."—There is quite a difference between a code of laws for a state and a compilation in revised form of its statutes. The code is broader in its scope, and more comprehensive in its purposes. Its general object is to embody as near as practicable all the law of a state, from whatever source derived. When properly adopted by the law-making power of a state, it has the same effect as one general act of the legislature containing all the provisions embraced in the volume that is thus adopted. It is more than evidentiary of the law. It is the law itself. Georgia Central R. Co. *v.* State, 104 Ga. 831, 841, 31 S. E. 531, 42 L. R. A. 518.

"Adopting a code."—"Whenever the legislature, . . . employs such words as 'adopting a code,' no other legitimate or reasonable construction can be given the language itself than an intention to enact and make of force as a statute every provision in the entire work which it has under consideration." Georgia Central R. Co. *v.* State, 104 Ga. 831, 842, 31 S. E. 531, 42 L. R. A. 518.

80. See the California Civil Code. Cal. Civ. Code, § 1.

81. See the California Code of Civil Procedure. Cal. Code Civ. Proc. § 1.

82. See the New York Code of Procedure of 1848.

83. See the Alabama Criminal Code. Ala. Crim. Code (1897), c. 119.

84. See the New York Code of Criminal Procedure. N. Y. Code Crim. Proc. § 1.

85. See the California Penal Code. Cal. Pen. Code, § 1.

The words "Penal Code" mean the Penal Code of this state. People *v.* Mortier, 58 Cal. 262.

86. See the California Political Code. Cal. Polit. Code, § 1.

87. The term "Probate Code" may and should be construed as meaning "the body or system of law relating to the estates of deceased persons and of persons under guardianship." Johnson *v.* Harrison, 47 Minn. 575, 579, 50 N. W. 923, 28 Am. St. Rep. 382.

88. The code which embodies the civil law of France. Black L. Dict.

89. A French code, enacted in 1807, as a supplement to the Code Napoleon. Black L. Dict.

90. That part of the Code Napoleon which regulates the system of courts, their organization, civil procedure, special and extraordinary remedies, and the execution of judgments. Black L. Dict.

91. A French code, enacted in 1808, regulating criminal procedure. Black L. Dict.

92. A collection of imperial constitutions, compiled, by order of that emperor, by a commission of ten jurists, including Tribonian, and promulgated A. D. 529. Black L. Dict.

93. The name of the Code Civil under the Empire. Burrill L. Dict.

Code of Theodosius or the Theodosian Code,[94] Code Penal,[95] etc. The word is from the Latin, Codex, *q. v.* (See Codex.)

Co-defendant. See Parties.

Code pleading. See Pleading.

Codex. A Code (*q. v.*) or collection of laws;[96] as for example, *Codex Gregorianus*,[97] *Codex Hermogenianus*,[98] *Codex Justinianeus*,[99] *Codex Repetitæ Prælectionis*,[1] *Codex Theodosianus*,[2] *Codex Vetus*.[3] (See Code.)

Codicil. See Wills.

Codification. The process of converting the law of a country, or a portion of it, into a Code, *q. v.*, whether that law consists of statutes, or case-law, or customs, or all three.[4]

Co-employee. See Master and Servant.

Coerce. To restrain by force, especially by law or authority; to repress, to curb; to compel or constrain to any action.[5] (See Coercion.)

Coercion. Compulsion; force; duress. It may be either actual, (direct or positive,) where physical force is put upon a man to compel him to do an act against his will, or implied, (legal or constructive,) where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse.[6] (Coercion: By Threat, see Threats. Of Wife, see Husband and Wife. To Procure — Accord and Satisfaction, see Accord and Satisfaction; Acknowledgment, see Acknowledgments; Assignment, see Assignments; Bill of Exchange, see Commercial Paper; Bond, see Bonds; Chattel Mortgage, see Chattel Mortgages; Confession, see Criminal Law; Contract, see Contracts; Deed, see Deeds; Marriage, see Divorce; Marriage; Mortgage, see Mortgages; Payment, see Payment; Promissory Note, see Commercial Paper; Will, see Wills. (See also, generally, Extortion.)

94. More properly and usually called the Theodosian Code, a code compiled by the emperor Theodosius, the younger. Burrill L. Dict.

95. The penal or criminal code of France, enacted in 1810. Burrill L. Dict.

96. Black L. Dict.

97. A collection of imperial constitutions made by Gregorius, a Roman jurist of the fifth century. Black L. Dict.

98. A collection of imperial constitutions made by Hermogines, a jurist of the fifth century. Black L. Dict.

99. The Code of Justinian. See *supra*, note 92.

1. The new code of Justinian. Black L. Dict. See *supra*, note 92.

2. The Code of Theodosius. See *supra*, note 94.

3. The first edition of the Code of Justinian, now lost. Black L. Dict. See *supra*, note 92.

4. Sweet L. Dict.

5. Standard Dict. [*quoted* in State *v.* Darlington, 153 Ind. 1, 3, 53 N. E. 925].

"Coerce had at first only the negative sense of checking or restraining by force; as, to coerce a bad man by punishments, or a prisoner with fetters. It has now gained a positive sense, viz., that of driving a person into the performance of some act which is required of him by another; as to coerce a man to sign a contract; to coerce obedience. In this sense (which is now the prevailing one), 'coerce' differs but little from 'compel,' and yet there is a distinction between them." Webster Int. Dict. [*quoted* in State *v.* Darlington, 153 Ind. 1, 3, 53 N. E. 925; Chappell *v.* Trent, 90 Va. 849, 928, 19 S. E. 314].

"The word 'coerce,' to the ordinary mind not trained to nice distinctions, naturally carries with it the idea of physical force or threats of personal violence." Chappell *v.* Trent, 90 Va. 849, 929, 19 S. E. 314.

6. Black L. Dict.

Actual violence is not necessary to constitute coercion; imaginary terrors may be sufficient for that purpose. Boyse *v.* Rossborough, 6 H. L. Cas. 2, 48, 3 Jur. N. S. 373, 26 L. J. Ch. 256, 5 Wkly. Rep. 414.

"Coercion is usually accomplished by indirect means, as threats or intimidation, physical force being more rarely employed in coercing." Webster Int. Dict. [*quoted* in State *v.* Darlington, 153 Ind. 1, 3, 53 N. E. 925].

"Coercion by law is where a court, having jurisdiction of the person and the subject-matter, has rendered a judgment which is collectable in due course." Peyser *v.* New York, 70 N. Y. 497, 501, 26 Am. Rep. 624 [*quoted* in Cowell *v.* Gregory, 130 N. C. 80, 40 S. E. 849].

Coercion in fact is "duress of person or goods, where present liberty of person or immediate possession of goods is so needful and desirable, as that an action or proceedings at law to recover them will not at all answer the pressing purpose." Peyser *v.* New York, 70 N. Y. 497, 501, 26 Am. Rep. 624.

COERULINE. A dye made by boiling gallein in sulphuric acid, producing green shades.[7]

CO-EXECUTOR. One who is a joint executor with one or more others.[8] (See, generally, EXECUTORS AND ADMINISTRATORS.)

COFFEE-HOUSE. A house of entertainment where guests are supplied with coffee and other refreshments, and sometimes with lodging.[9]

COFFEE ROASTER. A person who takes a sack of coffee and simply puts it in a roaster, and turns that coffee out after it is roasted.[10]

COGITATIONIS POENAM NEMO MERETUR. A maxim meaning "No man deserves punishment for a thought."[11]

COGITATIONIS POENAM NEMO PATITUR. A maxim meaning "No one is punished for his thoughts."[12]

COGNATES or **COGNATI.** Relations by the mother's side;[13] relations by or through females.[14] (See AGNATES or AGNATI.)

COGNATIO. In civil law, COGNATION, *q. v.*; relationship, or kindred generally; relationship through females, as distinguished from *agnatio*, or relationship through males.[15] In canon law, consanguinity, as distinguished from affinity; consanguinity, as including affinity.[16]

COGNATION. In civil law, the kindred which exists between two persons who are united by ties of blood or family, or both.[17]

COGNISANCE. A COGNIZANCE, *q. v.*

COGNISEE. A COGNIZEE, *q. v.*

COGNISOR. A COGNIZOR, *q. v.*

COGNITIO. In old English law, the acknowledgment of a fine; the certificate of such acknowledgment. In Roman law, the judicial examination or hearing of a case.[18]

COGNITOR. In Roman law, an advocate or defender in a private cause; one who defended the cause of a person who was present.[19]

COGNIZANCE, COGNISANCE, or **CONUSANCE.**[20] In old practice, that part of a fine in which the defendant acknowledged that the land in question was the right of the complainant; and from this the fine itself derived its name, as being *sur cognizance de droit*, etc., and the parties their titles of COGNIZOR (*q. v.*) and COGNIZEE (*q. v.*).[21] In modern practice, judicial notice or knowledge; the judicial hearing of a cause; jurisdiction, or right to try and determine causes;[22] acknowledgment; confession; recognition.[23] Of pleas, jurisdiction of causes; a privilege

7. Pickhardt *v.* U. S., 67 Fed. 111, 112, 35 U. S. App. 72, 14 C. C. A. 341.

8. Black L. Dict.

9. Century Dict.

A coffee house is not an inn. Doe *v.* Laming, 4 Campb. 76 [*cited* in Rafferty *v.* New Brunswick F. Ins. Co., 18 N. J. L. 480, 483, 38 Am. Dec. 525; New York Equitable Ins. Co. *v.* Langdon, 6 Wend. (N. Y.) 623, 627]. And see Thompson *v.* Lacy, 3 B. & Ald. 283, 285, 22 Rev. Rep. 385, 5 E. C. L. 169.

10. New Orleans *v.* New Orleans Coffee Co., 46 La. Ann. 86, 88, 14 So. 502.

11. Morgan Leg. Max.

12. Black L. Dict.

13. 2 Bl. Comm. 235.

14. Black L. Dict.

15. Black L. Dict.

16. Black L. Dict. [*citing* Reeves Hist. Eng. L. 56 *et seq.*].

17. Black L. Dict.

18. Black L. Dict.

19. Black L. Dict.

20. "Cognizance" is a word of the largest import, embracing all power, authority, and jurisdiction. Webster *v.* Com., 5 Cush. (Mass.) 386, 400.

"The words 'cognizance and control,' which confer power over sewers, in the street department, are not such as are commonly used to confer legislative authority; they are appropriate words to confer administrative, executive or judicial authority; they imply the existence, actually or potentially, of the sewers over which cognizance and control are to be taken." *In re* Zborowski, 68 N. Y. 88, 101.

"Recognizance," as used in the Iowa code, is distinguished from "cognizance." Comfort *v.* Kittle, 81 Iowa 179, 182, 46 N. W. 988.

21. Black L. Dict.

22. Clarion County *v.* Western Insane Hospital, 111 Pa. St. 339, 342, 3 Atl. 97, where it is said: "The context shows that 'cognizance' is used in the sense of 'the right to take notice of and determine a cause.'"

23. Black L. Dict.

"Lexicographers define cognizance to mean, in law, knowledge or notice; judicial knowledge or jurisdiction; an acknowledgment or confession, as an acknowledgment of a fine." Comfort *v.* Kittle, 81 Iowa 179, 182, 46 N. W. 988.

"There is ambiguity in the expression, that

granted by the king to a city or town to hold pleas within the same.[24] In pleading, a species of answer in the action of replevin, by which the defendant acknowledges the taking of the goods which are the subject-matter of the action, and also that he has no title to them, but justifies the taking on the ground that it was done by the command of one who was entitled to the property.[25] In the process of levying a fine, it is an acknowledgment by the deforciant that the lands in question belong to the complainant.[26] In the language of American jurisprudence, this word is used chiefly in the sense of jurisdiction, or the exercise of jurisdiction; the judicial examination of a matter, or power and authority to make it.[27] (Cognizance: Claim of, see CLAIM OF CONUSANCE. In Replevin, see REPLEVIN. Judicial, see COURTS; EVIDENCE. See also, generally, RECOGNIZANCES.)

COGNIZEE. The party to whom a fine was levied.[28]

COGNIZOR. The party levying a fine.[29]

COGNOMEN. In Roman law, a man's family name.[30] In English law, a surname; a name added to the *nomen* proper, or name of the individual; a name descriptive of the family.[31]

COGNOMEN MAJORUM EST EX SANGUINE TRACTUM, HOC INTRINSECUM EST; AGNOMEN EXTRINSECUM AB EVENTU. A maxim meaning "The cognomen is derived from the blood of ancestors, and is intrinsic; an agnomen arises from an event, and is extrinsic."[32]

COGNOVIT. See JUDGMENTS.

COGNOVIT ACTIONEM. See JUDGMENTS.

COHABIT.[33] To dwell together; to dwell with;[34] to inhabit the same place,[35]

the common law courts have no cognisance of ecclesiastical matters. If it is meant that they have no knowledge of them, the assertion may be fairly questioned. Matters of mere process and practice, which may be in a great measure oral and traditionary, are perhaps familiarly known only to the court to which they belong; but, as to the principles of ecclesiastical law, we have in truth the same means of knowledge, access to the same sources of instruction, and the same opportunities, in all respects, of forming a correct opinion. We have acknowledged on all hands to be bound to restrain their proceedings when they transgress their limits: we must then have organs for discerning where the limits are drawn. The same observation proves that, in the other sense of the word, cognisance, importing jurisdiction, the temporal courts must possess it." Burder *v.* Veley, 12 A. & E. 233, 259, 40 E. C. L. 123.

24. Black L. Dict.

25. Black L. Dict.

26. Black L. Dict.

27. Black L. Dict.

28. 2 Bl. Comm. 351.

29. 2 Bl. Comm. 350, 351.

30. The first name (*prænomen*) was the proper name of the individual; the second (*nomen*) indicated the *gens* or tribe to which he belonged; while the third (*cognomen*) denoted his family or house. Black L. Dict.

31. Black L. Dict.

32. Black L. Dict. [*citing* Finch's Case, 6 Coke 62*b*, 65].

33. It is from the Latin word cohabitare, co, for *con* (with,) and *habitare*, to dwell. State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126.

The primary meaning of "cohabit," is to dwell with, *con*, with, and *habere*, to dwell. U. S. *v.* Cannon, 4 Utah 122, 132, 7 Pac. 369. "The primary meaning of the word cohabit is to dwell with some one — not merely to visit or see them. It includes more than that. Such, too, is the meaning as determined by its derivation, being compounded of *con*, with, and *habito*, to dwell." Calef *v.* Calef, 54 Me. 364, 366, 92 Am. Dec. 549.

Words of large signification.— The word cohabit, and its derivation cohabitation, are words of large signification. Cox *v.* State, 117 Ala. 103, 105, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760. But see State *v.* Chandler, 96 Ind. 591, 592 [*quoting* Bouvier L. Dict.; Webster Dict.; Worcester Dict.], where it is said: "The term 'cohabit' has not such a broad and certain meaning as that annexed to it by the State. The word is not one of a certain meaning."

34. Cox *v.* State, 117 Ala. 103, 105, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Waddingham *v.* Waddingham, 21 Mo. App. 609, 619. And see Bishop Marr. & Div. § 1669 [*quoted* in Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893].

Distinguished from "to visit."— In Calef *v.* Calef, 54 Me. 365 [*quoted* in Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893], it is said: "The primary meaning of the word 'cohabit' is to dwell with some one, not merely to visit or see them. It includes more than that."

To dwell with.— Van Dolsen *v.* State, 1 Ind. App. 108, 27 N. E. 440; State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126.

35. Waddingham *v.* Waddingham, 21 Mo. App. 609, 619.

to live together;[36] to dwell or live together;[37] to dwell with or live together;[38] to dwell or live together as husband and wife;[39] to dwell together in the same house;[40] to dwell with another in the same place;[41] to inhabit or reside in company, or in the same place or country;[42] to live together, as in the same house;[43] to dwell or live together in the same company, place or country;[44] to live together in the same house, claiming to be married;[45] to live together at bed and

36. State *v.* Nadal, 69 Iowa 478, 480, 29 N. W. 451.

37. People *v.* Lehmann, 104 Cal. 631, 634, 38 Pac. 422; Kilburn *v.* Kilburn, 89 Cal. 46, 50, 26 Pac. 636, 23 Am. St. Rep. 447; State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126 [*quoting* Zell Encycl. & Dict.].

38. State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126 [*quoting* Zell Encycl. & Dict.].

39. *Alabama.*— Cox *v.* State, 117 Ala. 103, 106, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760.

Arkansas.— Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893 [*quoting* Bouvier L. Dict.; Burrill L. Dict.; Kinney L. Dict.; Rapalje & L. L. Dict.; Webster Dict.]; Sullivan *v.* State, 32 Ark. 187, 190 [*citing* Webster Dict.].

Idaho.— U. S. *v.* Kuntze, 2 Ida. 446, 449, 21 Pac. 407.

Indiana.— Jackson *v.* State, 116 Ind. 464, 465, 19 N. E. 330; State *v.* Chandler, 96 Ind. 591, 592 [*quoting* Bouvier L. Dict.; Webster Dict.; Worcester Dict.]; Van Dolsen *v.* State, 1 Ind. App. 108, 27 N. E. 440.

Missouri.— State *v.* Chandler, 132 Mo. 155, 161, 33 S. W. 797, 53 Am. St. Rep. 483 [*quoting* Webster Dict.]; State *v.* Sekrit, 130 Mo. 401, 406, 32 S. W. 977 [*quoting* Webster Int. Dict.]; State *v.* Gibson, 111 Mo. 92, 96, 19 S. W. 980.

Nebraska.—Olson *v.* Peterson, 33 Nebr. 358, 361, 50 N. W. 155; State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126; State *v.* Way, 5 Nebr. 283 [*quoted* in Sweenie *v.* State, 59 Nebr. 269, 272, 80 N. W. 815].

Rhode Island.— See *In re* Watson, 19 R. I. 342, 33 Atl. 873.

Utah.— U. S. *v.* Cannon, 4 Utah 122, 132, 7 Pac. 369.

Virginia.— Jones *v.* Com., 80 Va. 18, 20 [*quoting* Webster Dict.].

West Virginia.— State *v.* Miller, 42 W. Va. 215, 217, 24 S. E. 882 [*quoting* Black L. Dict.; Bouvier L. Dict.; Webster Dict.].

United States.— Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561 [*quoting* Webster Dict.; Worcester Dict., and *quoted* in U. S. *v.* Clark, 6 Utah 120, 21 Pac. 463; U. S. *v.* Harris, 5 Utah 436, 17 Pac. 75].

"To cohabit, in the sense of the statute, is for a man and woman to live together in the manner of husband and wife. It implies a dwelling together for some period of time, and is to be understood as something different from occasional, transient interviews for unlawful and illicit intercourse." Turney *v.* State, 60 Ark. 259, 261, 29 S. W. 893.

"To continue 'to cohabit with such second husband or wife,' as the words are used in Pub. Sts. c. 207, § 4, must mean to continue to live or dwell together as husband and wife ordinarily do." Com. *v.* Lucas, 158 Mass. 81, 84, 32 N. E. 1033.

40. Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893.

41. State *v.* Chandler, 96 Ind. 591, 592 [*quoting* Bouvier L. Dict.; Webster Dict.; Worcester Dict.]; Calef *v.* Calef, 54 Me. 365, 366, 92 Am. Dec. 549 [*quoting* Worcester Dict.]; Jones *v.* Com., 80 Va. 18, 20 [*quoting* Webster Dict.]; Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561 [*quoting* Worcester Dict.].

42. Cox *v.* State, 117 Ala. 103, 105, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Van Dolsen *v.* State, 1 Ind. App. 108, 27 N. E. 440; State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126; Webster Dict. [*quoted* in Sullivan *v.* State, 32 Ark. 187, 191; Calef *v.* Calef, 54 Me. 365, 366, 92 Am. Dec. 549; Richardson *v.* State, 37 Tex. 346, 347; State *v.* Miller, 42 W. Va. 215, 216, 24 S. E. 882; Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561].

43. *Alabama.*— Cox *v.* State, 117 Ala. 106, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760 [*quoting* Bouvier L. Dict. (Rawle's ed.)].

Arkansas.— Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893 [*quoting* Bouvier L. Dict.; Burrill L. Dict.; Kinney L. Dict.; Rapalje & L. L. Dict.; Webster Dict.]. And see Bush *v.* State, 37 Ark. 215; Lyerly *v.* State, 36 Ark. 39, 40; Sullivan *v.* State, 32 Ark. 187, 190.

Missouri.— State *v.* Chandler, 132 Mo. 155, 161, 33 S. W. 797, 53 Am. St. Rep. 483.

Nebraska.— State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126.

Ohio.— State *v.* Connoway, Tapp. (Ohio) 90, 91, where it is said: "All the members of a family living together, cohabit with each other."

Virginia.— Jones *v.* Com., 80 Va. 18, 20 [*quoting* Bouvier L. Dict.].

England.— Clerk *v.* Clerk, 2 Vern. 223, where it is said: "Sir Philip Warwick conveys his House of Frognall and four Farms to Trustees upon Trust, that his Sisters, the Lady Turner, and Arabella Clerk, might cohabit in the capital House," etc.

44. U. S. *v.* Cannon, 4 Utah 122, 132, 4 Pac. 369 [*citing* Calef *v.* Calef, 54 Me. 365, 92 Am. Dec. 549; Com. *v.* Calef, 10 Mass. 153, 159; State *v.* Connoway, Tapp. (Ohio) 90].

45. *Alabama.*— Cox *v.* State, 117 Ala. 103, 106, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760.

Arkansas.— Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893; Lyerly *v.* State, 36 Ark. 39, 40; Sullivan *v.* State, 32 Ark. 187, 190.

Missouri.— State *v.* Chandler, 132 Mo. 155, 161, 33 S. W. 797, 53 Am. St. Rep. 483 [*quoting* Bouvier L. Dict.].

board;[46] to live together though not legally married;[47] to have, hold or keep a dwelling or abiding place, to dwell or abide together with;[48] to have the same habitation, so that where one lives and dwells there does the other live and dwell also.[49] The term is often used with reference to persons not legally married, and usually[50] but not always[51] implies sexual intercourse.[52] (See COHABITATION.)

COHABITATION[53] or **COHABITING.** Dwelling together;[54] living together;[55] dwelling together as husband and wife;[56] living together as husband and wife;[57]

Nebraska.— State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126 [*quoting* Bouvier L. Dict.].

Virginia.— Jones *v.* Com., 80 Va. 18, 20 [*quoting* Bouvier L. Dict.].

"If they live together in the same house, in like manner as respects bed and board as marks the intercourse between husband and wife, they, in the sense and meaning of the statute, cohabit as husband and wife." Lyerly *v.* State, 36 Ark. 39, 40. And *compare* Taylor *v.* State, 36 Ark. 84.

46. Sullivan *v.* State, 32 Ark. 187, 190.

Occupying same bed.— "The word does not include, in its signification, necessarily, the occupying the same bed." State *v.* Chandler, 96 Ind. 591, 592 [*citing* Bouvier L. Dict.; Webster Dict.; Worcester Dict.].

47. State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126 [*quoting* Zell Encycl. & Dict.].

48. Calef *v.* Calef, 54 Me. 365, 366, 92 Am. Dec. 549.

49. People *v.* Lehmann, 104 Cal. 631, 634, 38 Pac. 422; Kilburn *v.* Kilburn, 89 Cal. 46, 50, 26 Pac. 636, 23 Am. St. Rep. 447.

50. Burns *v.* Burns, 60 Ind. 259, 260, where it is said: "We use the terms 'cohabit' and 'cohabitation' as implying sexual intercourse."

51. According to the weight of authority, the words do not necessarily imply actual sexual intercourse. Com. *v.* Lucas, 158 Mass. 81, 84, 32 N. E. 1033 [*citing* Bush *v.* State, 37 Ark. 215; Sullivan *v.* State, 32 Ark. 187; State *v.* Nadal, 69 Iowa 478, 29 N. W. 451; Calef *v.* Calef, 54 Me. 365, 92 Am. Dec. 549; Southwick *v.* Southwick, 97 Mass. 327, 93 Am. Dec. 95; Com. *v.* Calef, 10 Mass. 153; *Ex p.* Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. ed. 658; Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561].

"To cohabit together, then, may be the most innocent condition of life, and such proof may fall totally short of fixing any crime whatever upon the parties." Richardson *v.* State, 37 Tex. 346, 347.

52. Cox *v.* State, 117 Ala. 103, 106, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760.

53. "In construing the term 'cohabitation,' as used in the act under consideration, the supreme court of the United States say, in the case of Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561, 'It is the practice of unlawful cohabitation with more than one woman that is aimed at — a cohabitation classed with polygamy and having its outward semblance.'" U. S. *v.* Snow, 4 Utah 280, 287, 9 Pac. 501.

54. Cox *v.* State, 117 Ala. 103, 105, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760. And see Com. *v.* Calef, 10 Mass. 153 [*quoted* in Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893; Luster *v.* State, 23 Fla. 339, 341, 2 So. 690; State *v.* Chandler, 132 Mo. 155, 161, 33 S. W. 797, 53 Am. St. Rep. 483], where it is said: "By cohabiting must be understood a dwelling or living together, not a transient and single unlawful interview."

Cohabitation is not a sojourn, a habit of visiting nor a remaining with for a time. Yardley's Estate, 75 Pa. St. 207, 211, where it is said: "It is a misnomer to call the visits of Howard Yardley to Elizabeth Sithens, cohabitation. It was lacking in its chief element, constancy of dwelling together."

"A cohabiting" "without being lawfully married," which phrase "*ex vi termini*," imports a living or dwelling together. State *v.* Bobbst, 131 Mo. 328, 337, 32 S. W. 1149.

55. *In re* Sbarboro, Myr. Prob. (Cal.) 255, 256 [*quoting* Bouvier L. Dict.]; Calef *v.* Calef, 54 Me. 365, 366, 92 Am. Dec. 549 [*quoting* Bouvier L. Dict.].

56. Robinson *v.* Robinson, 188 Ill. 371, 379, 58 N. E. 906; State *v.* Chandler, 96 Ind. 591, 593; Olson *v.* Peterson, 33 Nebr. 358, 361, 50 N. W. 155; State *v.* Way, 5 Nebr. 283, 290.

"Dwelling together . . . in sexual intercourse." See State *v.* Way, 5 Nebr. 283, 290 [*quoted* in Sweenie *v.* State, 59 Nebr. 269, 272, 80 N. W. 815, construing term as used in a statute].

57. Sharon *v.* Sharon, 79 Cal. 633, 669, 22 Pac. 26, 131; State *v.* Chandler, 96 Ind. 591, 593. And see Brinckle *v.* Brinckle, 12 Phila. (Pa.) 232, 234, 34 Leg. Int. (Pa.) 428, where it is said: "Cohabitation does not mean merely living together; it means living together as husband and wife."

A "state of cohabitation" evidently signifies something different from simply living together as man and wife, which is not unlawful. Parks *v.* State, 4 Tex. App. 134, 138, construing an adultery statute.

"Cohabitation of a man and woman as husband and wife means dwelling together, and not a habit of visiting each other, however frequent. It is the living together in the usual manner resulting from marriage." Robinson *v.* Robinson, 188 Ill. 371, 379, 58 N. E. 906.

"Matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife." Cox *v.* State, 117 Ala. 103, 106, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893 [*quoting* Bishop Marr. & Div. § 1669]. "Matrimonial cohabitation must certainly comprehend a living together as husband and wife, embracing relative duties as such." Stein *v.* Stein, 5 Colo. 55, 56. "The words matrimonial cohabitation have

living together in one house; a boarding or tabling together;[58] occupying the same house;[59] a condition or status of the parties, a status resembling that of the marital relation.[60] Cohabitation in its usual sense implies publicity, since two persons cannot secretly live together.[61] (See, generally, ADULTERY; BIGAMY; COHABIT; FORNICATION; HUSBAND AND WIFE; LEWDNESS.)

COHÆREDES UNA PERSONA CENSENTUR, PROPTER UNITATEM JURIS QUOD HABENT. A maxim meaning "Co-heirs are deemed as one person, on account of the unity of right which they possess."[62]

COHÆRES. In old English law, a Co-HEIR (*q. v.*), or joint heir.[63]

CO-HEIR. One of several to whom an inheritance descends.[64] (See, generally, DESCENT AND DISTRIBUTION.)

CO-HEIRESS. A joint heiress; a woman who has an equal share of an inheritance with another woman.[65] (See, generally, DESCENT AND DISTRIBUTION.)

COHUAGIUM. A tribute paid by those who met promiscuously in the market or fair.[66]

COIF. A title given to serjeants at law, who are called Serjeants of the Coif, from the lawn coif they wear on their heads under their caps, when they are created.[67]

COIN.[68] As a noun,[69] the die used for stamping money;[70] a piece of metal stamped and made legally current as money;[71] a piece of gold or silver, or other metal, stamped by authority of the government, in order to fix its value, and is commonly called money;[72] pieces of metal, of a particular weight and standard, and to which a particular valuc is given in account and payment;[73] pieces of metal, of definite weight and value, thus stamped by national authority;[74] money;[75]

been used in distinction from matrimonial intercourse to signify a living together in the same house without copulation." U. S. *v.* Musser, 4 Utah 153, 156, 7 Pac. 389. To the same effect is Calef *v.* Calef, 54 Me. 365, 92 Am. Dec. 549; *In re* Yardley, 75 Pa. St. 207.

"Marital cohabitation is generally evinced by the parties being received into the society of their friends as man and wife — being entertained by them as such — being visited by respectable families in their neighborhood, and by their attending church together and demeaning themselves in public, and addressing each other as persons actually married, and bearing openly the same name." Brinckle *v.* Brinckle, 12 Phila. (Pa.) 232, 234, 34 Leg. Int. (Pa.) 428.

To constitute the offense of cohabiting as husband and wife, the parties must live together, in the same house, as husband and wife, without being married. Bush *v.* State, 37 Ark. 215.

58. State *v.* Connoway, Tapp. (Ohio) 90, 91 [*quoted* in Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893], where it is said that cohabiting is a living together in the same house; a boarding or tabling together, carrying with it the idea of a fixed residence, in contradistinction to a mere traveling in company together.

59. *In re* Sharboro, Myr. Prob. (Cal.) 255, 256 [*quoting* Bouvier L. Dict.].

Cohabitation is to have the same habitation so that where one dwells there the other dwells with him. *In re* Yardley, 75 Pa. St. 207.

60. Granberry *v.* State, 61 Miss. 440, 444.

61. Granberry *v.* State, 61 Miss. 440, 444.

62. Black L. Dict. [*citing* Coke Litt. 163],

63. Black L. Dict.

64. Black L. Dict.

65. Black L. Dict.

66. Jacob L. Dict.

67. Jacob L. Dict.

68. The words "coin" and "to coin" have a certain and fixed meaning. Latham *v.* U. S., 1 Ct. Cl. 149, 152. And see Borie *v.* Trott, 5 Phila. (Pa.) 366, 403, 21 Leg. Int. (Pa.) 68, where it is said: "The word 'coin' is one of well-settled meaning."

69. "The coins known to the law are those authorized to be issued from the mints of the United States, and those of foreign countries current here." U. S. *v.* Bogart, 9 Ben. (U. S.) 314, 315, 24 Fed. Cas. No. 14,617, 24 Int. Rev. Rec. 46.

A counterfeit coin is one in imitation of the genuine. U. S. *v.* Bogart, 9 Ben. (U. S.) 314, 315, 24 Fed. Cas. No. 14,617, 24 Int. Rev. Rec. 46.

70. Webster Dict. [*quoted* in Borie *v.* Trott, 5 Phila. (Pa.) 366, 403, 21 Leg. Int. (Pa.) 68].

71. U. S. *v.* Bogart, 9 Ben. (U. S.) 314, 315, 24 Fed. Cas. No. 14,617, 24 Int. Rev. Rec. 46.

72. Latham *v.* U. S., 1 Ct. Cl. 149, 152.

73. Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, 490.

74. Knox *v.* Lee, 12 Wall. (U. S.) 457, 484, 20 L. ed. 287.

75. Meyer *v.* Roosevelt, 25 How. Pr. (N. Y.) 97, 118, where it is said: "Coin alone is regarded as money 'among all modern commercial nations.'"

"Strictly speaking, coin differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, shell, &c., which has currency as a medium

pieces of metallic money;[76] all manner of the several stamps and species of money in any kingdom;[77] the sacred currency as well as profane of the ancient world.[78] As a verb, to fashion pieces of metal into a prescribed shape, weight, and degree of fineness, and stamp them with prescribed devices, by authority of government, in order that they may circulate as money;[79] to mint;[80] to stamp and convert it into money;[81] to stamp metal and convert it into coin;[82] to stamp metal as money;[83] to give the stamp of supreme governmental power to any subject — to give it all the attributes of money;[84] not only to shape and stamp, or mint metals, but to make or fabricate other things as well.[85] Thus, to "coin money" means to fabricate it out of metallic substances;[86] to make, stamp and issue coins as money;[87] to mould into form a metallic substance of intrinsic value, and stamp on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency;[88] to mold metallic substance having intrinsic value into certain forms convenient for commerce, and to impress

in commerce. Coin is a particular species, always made of metal, and struck according to a certain process, called coining." Wharton L. Dict. [*quoted* in Borie *v.* Trott, 5 Phila. (Pa.) 366, 403, 21 Leg. Int. (Pa.) 68].

76. Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, 530. And see Com. *v.* Gallagher, 16 Gray (Mass.) 240, 241, where it is said: "As the word 'coin' without any prefix, means metallic money generally, so 'copper coin,' without any further description, means copper money generally, and not a single coin, nor any specific number or kind of coins."

77. Com. *v.* Gallagher, 16 Gray (Mass.) 240, 241, where it is said: "Williams and Tomlins, in their law dictionaries, say that the collective word 'coin' contains in it 'all manner of the several stamps and species of money in any kingdom.' And we doubt not that this legal meaning of the single word 'coin' is the same which is understood by people generally, as well as by professional men. It is the meaning given not only in law dictionaries, but by all lexicographers."

78. Thayer *v.* Hedges, 22 Ind. 282, 304, where it is said: "Coin was the sacred currency as well as profane, of the ancient world. Historically considered, we find that the Almighty, and his Prophets and Apostles, were for a specie basis; that gold and silver were the theme of their constant eulogy. Abraham, the patriarch, 1875 years before Christ, being about 3740 years ago, purchased of Ephron, among the sons of Heth, the field in which was the cave of Machpelah, shaded by a delightful grove, for the burial place of his dead; and he paid for it '400 sheckles of silver, current money with the merchant.' Gen. 23, 16. So Solomon, the wisest of men, seems to have had a decided preference for a hard money currency. In 1st of Kings, chap. 9, verses 27, 28, for example, it is said: 'And Hiram sent in the navy his servants, &c., and they came to Ophir, and fetched from thence gold 420 talents, and brought it to King Solomon.' And in chap. 10, verses 14, 15 and 29: 'Now the weight of gold that came to Solomon in one year was 666 talents, besides that he had of the merchant-men, and of the traffic of the spice merchants, &c.; and a chariot came up and went out of Egypt for 600 shekels of silver, and a horse for 150 shekels,' &c. Again, the prophet Jeremiah, one of the 'greater prophets,' says, chap. 32, verses 9 and 10: 'And I bought the field of Hanameel, my uncle's son, that was in Anothoth, and weighed him the money, even 17 shekels of silver, and I subscribed the evidence and sealed it, and took witnesses, and weighed the money in the balances.'"

79. Black L. Dict.

80. Meyer *v.* Roosevelt, 25 How. Pr. (N. Y.) 97, 118.

81. Meyer *v.* Roosevelt, 25 How. Pr. (N. Y.) 97, 118.

82. Borie *v.* Trott, 5 Phila. (Pa.) 366, 403, 21 Leg. Int. (Pa.) 68.

83. Latham *v.* U. S., 1 Ct. Cl. 149, 152.

84. Shaw *v.* Trunsler, 30 Tex. 390, 396.

85. Hague *v.* Powers, 39 Barb. (N. Y.) 427, 466.

We may say figuratively to coin a story, meaning to invent one, but never to coin the book in which it is printed. The story is a fiction, the coinage of the brain — the book, a reality. Borie *v.* Trott, 5 Phila. (Pa.) 366, 403, 21 Leg. Int. (Pa.) 68.

86. Maynard *v.* Newman, 1 Nev. 271, 278.

87. Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, 490.

88. Griswold *v.* Hepburn, 2 Duv. (Ky.) 20, 29.

"To coin money" refers to coin, and to coin only, not alone in the English language, in its plain and natural sense, but in the language of the constitution as there used. Meyer *v.* Roosevelt, 25 How. Pr. (N. Y.) 97, 118. And see Thayer *v.* Hedges, 22 Ind. 282, 301 (where it is said: "The words delegating to Congress power 'to coin money,' regulate the value thereof, and 'of foreign coin,' do not include the right to make coined money out of paper"); Shollenberger *v.* Brinton, 52 Pa. St. 9, 50 (where it is said: "It cannot be necessary to multiply words and adduce definitions to establish the idea that the words 'to coin money,' embrace the idea of making it of metal. It implies this as plainly as if it had been so said — words could not have made the thought plainer").

To emit stamped paper is not to coin money as the word is generally understood, nor as we think it was used in the Constitution. Maynard *v.* Newman, 1 Nev. 271, 278.

them with the stamp of the government indicating their value.[89] (Coin: As Medium of Payment, see PAYMENT. Counterfeiting, see COUNTERFEITING.)

COINAGE. The process or the function of coining metallic money; also the great mass of metallic money in circulation.[90] (See COIN; COINING OF MONEY.)

COINING OF MONEY. The formation of metallic pieces of money by such mechanical means as are appropriate to such an operation.[91] (See COIN; COINAGE.)

CO-INSURER. A fellow-insurer.[92] (See, generally, INSURANCE.)

COKE. The solid product of the carbonization of coal.[93] (See, generally, MINES AND MINERALS.)

CO-LABORER. See MASTER AND SERVANT.

COLD STORAGE. As used in the trade, a storehouse or storeroom ordinarily used for the preservation of butter and eggs, where the temperature is kept at a low degree, but above the freezing point.[94]

COLD STORAGE BUSINESS. The business of storing commodities in a cool place, for hire or reward.[95]

COLD-WATER-ORDEAL. The trial which was ordinarily used for the common sort of people, who, having a cord tied about them under their arms, were cast into a river; if they sank to the bottom until they were drawn up, which was in a very short time, then they were held guiltless; but such as did remain upon the water were held culpable, being, as they said, of the water rejected and kept up.[96]

COLLAPSE. To fall together suddenly, as the two sides of a hollow vessel; to close by falling or shrinking together; to shrink up; as, a tube in a steam boiler collapses.[97] To fall together, or into an irregular mass or flattened form, through loss of firm connection or rigidity and support of the parts or loss of the contents, as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it.[98]

COLLATERAL. By the side; at the side; attached upon the side. Not lineal, but upon a parallel or diverging line. Additional or auxiliary; supplementary; co-operating.[99] (Collateral: Act, see COLLATERAL ACT. Action, see COLLATERAL PROCEEDING. Agreement, see COLLATERAL UNDERTAKING. Ancestor, see COLLATERAL ANCESTORS. Assurance, see COLLATERAL ASSURANCE. Attack — On Appointment of Administrator, see EXECUTORS AND ADMINISTRATORS; On Appointment of Executor, see EXECUTORS AND ADMINISTRATORS; On Appointment of Guardian, see GUARDIAN AND WARD; On Appointment of Officer, see OFFICERS; On Appointment of Receiver, see RECEIVERS; On Assignment, see

89. Knox *v.* Lee, 12 Wall. (U. S.) 457, 484, 20 L. ed. 287.

90. Black L. Dict.

Coin and coinage are understood to be the stamping of metal in some way so as to give them currency, but is not applied to any other material. Meyer *v.* Roosevelt, 25 How. Pr. (N. Y.) 97, 105.

"The phrase, 'coinage of the United States,' is also the exact legal equivalent of the language of the statute regarding the coin that may be the subject of this crime,— that which is 'coined at the mints of the United States.'" U. S. *v.* Otey, 12 Sawy. (U. S.) 416, 31 Fed. 68.

91. Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, 530.

The phrase "coining" cannot, without violence, be applied to the issue of paper money. Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, 490.

92. Chesbrough *v.* Home Ins. Co., 61 Mich. 333, 335, 28 N. W. 110, where it is said: "The word 'co-insurers' means neither more nor less than fellow-insurers, and is used to put plaintiffs on the same footing with other insurers who issue policies and contribute ratably in case of loss."

93. Century Dict.

Coke has been held to be the produce of a mine within the meaning of an English statute. Bowes *v.* Ravensworth, 15 C. B. 512, 522, 24 L. J. C. P. 73, 3 Wkly. Rep. 241, 29 Eng. L. & Eq. 247, 80 E. C. L. 512.

94. Allen *v.* Somers, 73 Conn. 355, 356, 47 Atl. 653, 84 Am. St. Rep. 158, 52 L. R. A. 106.

95. Stewart *v.* Atlanta Beef Co., 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119.

96. Wharton L. Lex.

97. Webster Dict. [*quoted* in Louisville Underwriters *v.* Durland, 123 Ind. 544, 550, 24 N. E. 221, 7 L. R. A. 399].

98. Century Dict. [*quoted* in Louisville Underwriters *v.* Durland, 123 Ind. 544, 550, 24 N. E. 221, 7 L. R. A. 399].

99. Black L. Dict.

ASSIGNMENT FOR BENEFIT OF CREDITORS; On Attachment Proceeding, see ATTACHMENT; On Condemnation Proceeding, see EMINENT DOMAIN; On Decree, see JUDGMENTS; On Drainage Proceeding, see DRAINS; On Execution Proceeding, see EXECUTIONS; On Highway Proceeding, see STREETS AND HIGHWAYS; On Judgment, see JUDGMENTS; On Judicial Sale, see EXECUTORS AND ADMINISTRATORS; EXECUTIONS; JUDICIAL SALES; On Patent, see MINES AND MINERALS; PUBLIC LANDS; On Taxation Proceeding, see TAXATION. Condition, see BONDS. Consanguinity, see COLLATERAL CONSANGUINITY. Descent, see DESCENT AND DISTRIBUTION. Estoppel, see JUDGMENTS. Facts, see COLLATERAL FACTS. Inheritance Tax, see TAXATION. Issue, see COLLATERAL ISSUE. Kinsman, see DESCENT AND DISTRIBUTION. Legacy Tax, see TAXATION. Limitation, see DEEDS. Promise, see COLLATERAL UNDERTAKING. Proof, see EVIDENCE. Security, see COLLATERAL SECURITY. Undertaking, see COLLATERAL UNDERTAKING. Warranty, see COLLATERAL WARRANTY.)

COLLATERAL ACT. In old practice, the name given to any act (except the payment of money) for the performance of which a bond, recognizance, etc., was given as security.[1]

COLLATERAL ANCESTORS. Uncles, aunts, and other collateral antecessors who are not "ancestors" in the sense of progenitors.[2] (See, generally, DESCENT AND DISTRIBUTION.)

COLLATERAL ASSURANCE. In law, assurance made over and above the principal deed.[3] (See, generally, MORTGAGES.)

COLLATERAL CONSANGUINITY, or COLLATERAL KINDRED. The relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential to constitute this relation that they spring from the same common root or stock, but in different branches.[4] (See, generally, DESCENT AND DISTRIBUTION.)

COLLATERAL FACTS. In law, facts not considered relevant to the matter in dispute in an action.[5] (Collateral Facts: To Impeach Witness, see WITNESSES. See also COLLATERAL ISSUE.)

COLLATERAL ISSUE. In law, an issue aside from the main question in the case.[6] (See COLLATERAL FACTS.)

COLLATERAL PROCEEDING. In law, another proceeding, not for the direct purpose of impeaching the proceeding to which it is said to be collateral.[7] (Collateral Proceeding: As Affecting Appeal, see APPEAL AND ERROR. Jurisdiction of, see COURTS; EQUITY. Pending Appeal, see APPEAL AND ERROR.)

COLLATERAL SECURITY.[8] Any property or right of action, as a bill of sale or stock-certificate, which is given to secure the performance of a contract or the discharge of an obligation and as additional to the obligation of that contract, and

1. Black L. Dict.

2. Century Dict. And see Banks *v.* Walker, 3 Barb. Ch. (N. Y.) 438, 446, where it is said: "I am aware that the term collateral ancestors is sometimes used to designate uncles and aunts, and other collateral antecessors of the person spoken of; who are not in fact his ancestors."

3. Century Dict.

4. Bouvier L. Dict. [*quoted* in The Tyler Tap R. Co. *v.* Overton, 1 Tex. App. Civ. Cas. §§ 533, 534]. And see McDowell *v.* Addams, 45 Pa. St. 430, 432, where it is said: "Collateral consanguinity is that which subsists between persons who lineally descend from the same ancestor, who is the *stirps* or root, but who do not descend the one from the other."

"Collateral relations" refer to legal or lawful collaterals. Montégut *v.* Bacas, 42 La. Ann. 158, 160, 7 So. 449.

5. Century Dict.

6. Century Dict.

7. Century Dict. And see Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110, 116; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303.

8. The etymology of "collateral security" indicates that it is something running along with, and, as it were, parallel to, something else of a similar character. It is collateral to the original indebtedness. Moffatt *v.* Corning, 14 Colo. 104, 123, 24 Pac. 7 [*quoting* note to Le Breton *v.* Peirce, 1 Am. L. Reg. N. S. 38].

The term "collateral," applied to the security of a third person, does not *ex vi termini* confer a right in equity to substitution. Its signification is not technical; and, as used by the parties to the covenant, in our opinion, it means additional, or supplemental. Crump *v.* McMurtry, 8 Mo. 408, 415.

which upon the performance of the latter is to be surrendered or discharged;[9] a separate obligation attached to another contract to guarantee its performance;[10] security for the fulfillment of a contract or a pecuniary obligation in addition to the principal security;[11] security for the performance of covenants, or the payment of money, besides the principal security;[12] a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the means of the creditor to realize the principal debt which it is given to secure;[13] an additional security for the performance of the principal obligation, and, on the discharge of the latter it is to be surrendered;[14] the transfer of property or of other contracts, to insure the performance of the principal agreement.[15] In bank phraseology, "collateral security" means some security additional to the personal obligation of the borrower.[16] (See also, generally, ASSIGNMENTS; COMMERCIAL PAPER; PLEDGES.)

COLLATERAL UNDERTAKING, PROMISE, OBLIGATION, or AGREEMENT. A contract based upon a pre-existing debt, or other liability, and including a promise to pay, made by a third person having immediate respect to and founded upon such debt or liability, without any new consideration moving to him.[17] (Collateral

9. Century Dict. And see Gilcrest *v.* Gottschalk, 39 Iowa 311, 313 [*citing* Bouvier L. Dict.], where it is said: "It seems to us that the taking of a mortgage from the debtor upon the same identical property covered by the mechanic's lien, and for the same debt, cannot be deemed collateral security on the same contract." See also Crump *v.* McMurtry, 8 Mo. 408, 414; Almond *v.* Hart, 46 N. Y. App. Div. 431, 436, 61 N. Y. Suppl. 849, 852.

10. Lochrane *v.* Solomon, 38 Ga. 286, 292; Mervin *v.* Sherman, 9 Iowa 331, 333 [*quoted* in Gilcrest *v.* Gottschalk, 39 Iowa 311, 312; Hale *v.* Burlington, etc., R. Co., 2 McCrary (U. S.) 558, 13 Fed. 203, 205]; Bouvier L. Dict. [*quoted* in Butler *v.* Rockwell, 14 Colo. 125, 136, 23 Pac. 462; National Typewriter Co. *v.* Pope Mfg. Co., 56 Fed. 849, 854].

"Collateral security is a separate obligation, as the negotiable bill of exchange or promissory note of a third person, or other representative of value, indorsed, where necessary, and delivered by a debtor to his creditor, to secure the payment of his own obligation, represented by an independent instrument." International Trust Co. *v.* Union Cattle Co., 3 Wyo. 803, 804, 31 Pac. 408, 19 L. R. A. 640.

11. Webster Dict. [*quoted* in Butler *v.* Rockwell, 14 Colo. 125, 136, 23 Pac. 462].

12. Webster Dict. [*quoted* in Butler *v.* Rockwell, 14 Colo. 125, 136, 23 Pac. 462].

13. Munn *v.* McDonald, 10 Watts (Pa.) 270, 273; McCormick *v.* Falls City Bank, 57 Fed. 107, 110, 9 U. S. App. 203, 6 C. C. A. 683, in both of which cases it is said: "The use of the term 'collateral security,' when a debtor transfers to his creditor an article of value, or an evidence of debt, is intended to express, that it is not received in payment of the principal debt, and that it is not an additional right, to which the creditor is absolutely entitled."

14. Seanor *v.* McLaughlin, 165 Pa. St. 150, 156, 30 Atl. 717, 32 L. R. A. 467, where it is said: "There is no technical, legal definition of the word collateral, distinct from its common signification."

15. Mervin *v.* Sherman, 9 Iowa 331, 333 [*quoted* in Gilcrest *v.* Gottschalk, 39 Iowa 311, 313; Hale *v.* Burlington, etc., R. Co., 2 McCrary (U. S.) 558, 13 Fed. 203, 205]; Bouvier L. Dict. [*quoted* in Lochrane *v.* Solomon, 38 Ga. 286, 292]. And see *In re* Waddell-Entz Co., 67 Conn. 324, 334, 35 Atl. 257, where it is said: "'Collateral security' necessarily implies the transfer to the creditor of an interest in some property or lien on property, or obligation which furnishes a security in addition to the responsibility of the debtor."

16. Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416, 1 Hughes (U. S.) 101, 21 Fed. Cas. No. 12,801, 1 Balt. L. Transcr. 195, 1 Thomps. Nat. Bank Cas. 169 [*quoted* in Edward P. Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 465, 70 N. W. 650]. And see Osborne *v.* Stringham, 4 S. D. 593, 598, 57 N. W. 776, where it is also said: "When a debtor delivers to his creditor an evidence of indebtedness, with the intention that it become additional security for his personal existing obligation, it becomes merely concurrent security, and is designed only to increase the means of the creditor to realize the principal debt which it is given to secure."

17. Bouvier L. Dict. [*quoted* in Robinson *v.* Holmes, 82 Ill. App. 307, 308].

"Collateral" and "original," have become the technical terms, whereby to distinguish promises that are within, and such as are not within the statute. Elder *v.* Warfield, 7 Harr. & J. (Md.) 391, 395. And see Nelson *v.* Boynton, 3 Metc. (Mass.) 396, 400, 37 Am. Dec. 148 [*quoted* in Patton *v.* Mills, 21 Kan. 163, 169], where it is said: "The terms original and collateral promise, though not used in the statute, are convenient enough, to distinguish between the cases, where the direct and leading object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is, to subserve or promote some interest or purpose of his own."

"Where there is no previously existing

Undertaking: As Affecting Original Agreement, see CONTRACTS. Evidence of, see EVIDENCE. When Within the Statute of Frauds, see STATUTE OF FRAUDS.)

COLLATERAL WARRANTY. In old English law, a warranty which did not come from the same ancestor from whom the lands would have descended, but descended in a line collateral to that of the land; distinguished from lineal warranty, where the land and the warranty were descended from the same ancestor.[18] (See, generally, COVENANTS.)

COLLATIO BONORUM. See DESCENT AND DISTRIBUTION.

COLLATION. See DESCENT AND DISTRIBUTION.

COLLATIONE FACTA UNI POST MORTEM ALTERIUS. A writ directed to justices of the common pleas, commanding them to issue their writ to the bishop, for the admission of a clerk in the place of another presented by the crown, where there had been a demise of the crown during a suit.[19]

COLLATIONE HEREMITAGII. A writ whereby the king conferred the keeping of an hermitage upon a clerk.[20]

COLLECT.[21] To gather; to assemble;[22] to gather together; to bring scattered things (assets, accounts, articles of property) into one mass or fund;[23] that which may lawfully be done by the holder of the obligation to secure its payment or liquidation after its maturity.[24]

COLLECTIBLE or **COLLECTABLE.** Capable of being collected.[25] (See, generally, GUARANTY.)

debt, or other liability, but the promise of one is the inducement to, and ground of, the credit given to another, by which a debt or liability is created in him to whom the credit is given, such a promise is a collateral undertaking." Elder *v.* Warfield, 7 Harr. & J. (Md.) 391, 396.

"Where there is a pre-existing debt, or other liability, a promise by a third person, having immediate respect to, and founded upon the original liability, without any new consideration moving to him, to pay or answer for such debt or liability, is a collateral undertaking." Elder *v.* Warfield, 7 Harr. & J. (Md.) 391, 395 [*citing* Fish *v.* Hutchinson, 2 Ld. Ken. 537, 2 Wils. C. P. 94].

18. Century Dict.

"A warranty is collateral where he on whom the warranty descends does not claim the land as heir of him by whom the warranty was made." Den *v.* Crawford, 8 N. J. L. 90, 106 [*citing* 2 Bl. Comm. 302; Coke Litt. 375*b*, 376*a*, and notes 320, 328].

19. Black L. Dict.

20. Black L. Dict.

21. Context.— The meaning of the word, as used in an ordinance, is to be determined from the context. Purdy *v.* Independence, 75 Iowa 356, 360, 39 N. W. 641.

22. Purdy *v.* Independence, 75 Iowa 356, 360, 39 N. W. 641.

23. Black L. Dict.

24. Shenandoah Nat. Bank *v.* Marsh, 89 Iowa 273, 276, 56 N. W. 458, 48 Am. St. Rep. 381.

When used with reference to the collection of money, it often implies much more than the mere act of receiving the money. An attorney brings suit to enforce the payment of a demand, and the amount recovered is made by the sale of the defendant's property on judicial process. The term, as applied to such a proceeding, would describe, not only the act of receiving the money, but all the means by which the payment was enforced. Purdy *v.* Independence, 75 Iowa 356, 360, 39 N. W. 641. The grant of the power "to collect" carries with it "all the usual, ordinary and necessary means for the exercise of the power." McInerny *v.* Reed, 23 Iowa 410, 414. The authority to collect was held to include the right to receive money under the Missouri statutes relating to swamp lands. State *v.* Moeller, 48 Mo. 331, 335. Duty to collect sometimes includes the duty to sell. So held in Fling *v.* Goodall, 40 N. H. 208, 219, construing N. H. Rev. Stat. c. 208, §§ 15, 16. But unless so manifested, the word "collect" and its cognates or derivatives are clearly used to signify the obtainment of the money without suit. People *v.* Reis, 76 Cal. 269, 279, 18 Pac. 309.

The words "for collection," as used in the note, convey the same meaning as the words "to collect." Shenandoah Nat. Bank *v.* Marsh, 89 Iowa 273, 276, 56 N. W. 458, 48 Am. St. Rep. 381. See, generally, COMMERCIAL PAPER.

Not synonymous with a commencement of a legal process.— See Thompson *v.* Hazen, 25 Me. 104, 108, construing the words "allowed to collect" in a statute. But see Iliff *v.* Weymouth, 40 Ohio St. 101, 103, where it is said: "When required to 'collect,' the adoption of the commonly known and most effective means of enforcing collection — the commencement of suit — was necessarily implied."

In legal sense, the term "to collect a fine" includes all the acts by which the penalty is imposed and enforced. Pottawattamie County *v.* Carroll County, 67 Iowa 456, 457, 25 N. W. 703.

The term "collect" and the term "pay over," are not applicable to real estate, but supposing a sale made, they are strictly applicable to the proceeds of such sale. Going *v.* Emery, 16 Pick. (Mass.) 107, 112, 26 Am. Dec. 645, per Shaw, C. J.

25. Century Dict. And see Cowles *v.* Pick,

COLLECTION.[26] An assemblage or gathering of objects;[27] the act or practice of collecting or of gathering together.[28] (Collection: Agency, see MERCANTILE AGENCIES; PRINCIPAL AND AGENT. Of Assets — Of Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; Of Bankrupt Estate, see BANKRUPTCY; Of Insolvent Estate, see INSOLVENCY. Of Estate — Of Decedent, see EXECUTORS AND ADMINISTRATORS; Of Ward, see GUARDIAN AND WARD. Of Tax, see TAXATION.)

COLLECTION OF NOTE. Taking of payment thereof in money or in money's worth.[29] (See, generally, COLLECT; COMMERCIAL PAPER.)

COLLECT ON DELIVERY. See CARRIERS.

COLLECTOR. An official who collects or receives taxes, duties, or other public revenues;[30] one authorized to receive taxes or other impositions; a person appointed by a private person to collect the credits due him.[31] (Collector: Of Customs Duties, see CUSTOMS DUTIES. Of Internal Revenue, see INTERNAL REVENUE. Of Taxes, see TAXATION.)

COLLEGE. An organized assembly or collection of persons, established by law, and empowered to co-operate for the performance of some special function or for the promotion of some common object, which may be educational, political, ecclesiastical, or scientific in its character.[32] In the most common use of the word, it designates an institution of learning (usually incorporated) which offers instruction in the liberal arts and humanities and in scientific branches, but not in the technical arts or those studies preparatory to admission to the professions.[33] In

55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44; Schmitz *v.* Langhaar, 88 N. Y. 503, 506; White *v.* Case, 13 Wend. (N. Y.) 543, 544; Cumpston *v.* McNair, 1 Wend. (N. Y.) 457, 460; Texas City Imp. Co. *v.* Griswold, (Tex. Civ. App. 1897) 41 S. W. 513; French *v.* Marsh, 29 Wis. 649; Dyer *v.* Gibson, 16 Wis. 557, 559.

"To warrant that a debt is collectible, . . . is to warrant that it is legally demandable, and that the debtor is of competent ability to answer it, not that he will pay it when demanded by execution." McDoal *v.* Yoemans, 8 Watts (Pa.) 361, 362.

26. Equivalent to "recovery."— The word "collection" in the sentence quoted from the petition is the equivalent of the word "recovery" contained in N. Y. Code Civ. Proc. § 850. Durland *v.* Durland, 62 Nebr. 813, 815, 87 N. W. 1048.

The act of receiving was considered a collection within the meaning of an ordinance relating to collections made by a treasurer. Purdy *v.* Independence, 75 Iowa 356, 361, 39 N. W. 641.

27. Century Dict.

"The mere purchase of articles of antiquity singly, at separate times, is insufficient to constitute them a collection, if they have not been brought together anywhere, because the paragraph is based upon the idea of an assemblage." Davis *v.* U. S., 77 Fed. 172, 173, 45 U. S. App. 235, 23 C. C. A. 113. And see *In re* Glaenzer, 67 Fed. 532, 533; Tiffany *v.* U. S., 66 Fed. 729, 730; *In re* Glaenzer, 55 Fed. 642, 645, 14 U. S. App. 331, 5 C. C. A. 225.

28. Century Dict.

29. Davis *v.* Cochran, 76 Miss. 439, 444, 24 So. 168, 906.

30. Standard Dict. [*quoted* in State *v.* Moores, 52 Nebr. 770, 783, 73 N. W. 299].

A collector of taxes is a public officer, whose duty it is to collect the taxes, and pay the same into the treasury of the state, or to the parties entitled. State *v.* Nicholson, 67 Md. 1, 8 Atl. 817. And see Baldwin *v.* Hewitt, 88 Ky. 673, 675, 11 Ky. L. Rep. 199, 11 S. W. 803 (where it is said: "The sheriff of a county is, by virtue of his office, the collector of the revenue. If, however, he fails to execute bond therefor, the statute authorizes the county court to appoint a collector. The statute above cited, in speaking of a 'collector,' doubtless refers to a case where one has been appointed in place of the sheriff"); Gabler *v.* Elizabeth, 42 N. J. L. 79, 80 (where it is said: "It is conceded that the term 'collector' used in this act means the officer in either of the municipalities named having the legal custody of and power to disburse the funds of such corporation, and that, in the city of Elizabeth, those officers upon whom process was served unitedly perform those functions"). See also *Ex p.* McCabe, 33 Ark. 396, 398; Bingham *v.* Winona County, 8 Minn. 441.

31. Black L. Dict. And see State *v.* Sarlls, 135 Ind. 195, 198, 34 N. E. 1129, where it is said: "If a person engaged in making collections for others is a collector, by an equally fair interpretation a 'clerk,' a 'servant,' an 'employe,' or 'keeper of accounts,' so engaged, may be collectors; and a collector may be a servant, clerk, employe, and keeper of accounts."

32. Black L. Dict. And see Landewibrevye College Case, 3 Dyer 267*a*.

The term "college" is used in various senses, as a college of electors, a college of surgeons, or a college of cardinals. Academy of Fine Arts *v.* Philadelphia County, 22 Pa. St. 496, 498.

33. Black L. Dict.

"The word 'college' is employed in this country to indicate an institution of learn-

England, it is a civil corporation, company, or society of men, having certain privileges, and endowed with certain revenues, founded by royal license.[34] Commonly used also to describe an edifice appropriated to instruction in the languages and sciences in general.[35] (See, generally, COLLEGES AND UNIVERSITIES; SCHOOLS AND SCHOOL DISTRICTS; UNIVERSITY.)

ing, having corporate powers and possessing the right to confer degrees. Looked at with reference to its educational work, the college consists of the trustees, teachers, and scholars. They make up the membership of the college, and represent its active work." Northampton County *v.* Lafayette College, 128 Pa. St. 132, 144, 18 Atl. 516.

An incorporated medical college is a college within the meaning of a statute which regulates the meetings of the trustees of every college to which a charter is granted. The statutory provision is not confined to "literary" colleges. People *v.* Albany Medical College, 62 How. Pr. (N. Y.) 220.

A high school is not a "college," within the meaning of Mich. Laws (1891), No. 147, § 3, prescribing the qualifications of school commissioner. People *v.* Howlett, 94 Mich. 165, 53 N. W. 1100.

34. Wharton L. Lex.

35. Academy of Fine Arts *v.* Philadelphia County, 22 Pa. St. 496, 498. And see State *v.* Ross, 24 N. J. L. 497, 498, where it is said: "The term college, as here used, is not to be taken in its general sense, and as signifying an assemblage of persons for any political or ecclesiastical purpose; but in its more usual acceptation, a college of learning. Nor in that sense, does it mean the assemblage of the professors and students; nor yet the trustees in their corporate capacity; but certain property belonging to them, edifices and the lands whereon the same are erected." But see Stanwood *v.* Peirce, 7 Mass. 458, 460, where it is said: "The word college is more naturally applied to the place where a collection of students is contemplated, than to the hall or other buildings intended for their accommodation."

"The settled meaning of 'college' as a building or group of buildings in which scholars are housed, fed, instructed and governed under college discipline, while qualifying for their university degree, whether the university includes a number of colleges or a single college, is now attacked. We have deemed it proper to trace this meaning with sufficient detail to demonstrate the utter unreason of the attack. This peculiar function of a college is inherent in the best conception of the university. This meaning has been attached to the English word for 800 years; it was the only meaning known at the time our first American colleges were founded, it was recognized and distinctly affirmed in the charter of Yale College, it has since been affirmed by repeated acts of legislation, and has received the sanction of constitutional confirmation." Yale University *v.* New Haven, 71 Conn. 316, 327, 42 Atl. 87, 43 L. R. A. 490.

"By 'college,' clearly a corporation was intended. Not that the term *ex vi termini* implies a corporate body. Schools and various kinds of associations have sometimes received that appellation, at least by reputation and without a charter." Chegaray *v.* New York, 13 N. Y. 220, 229, construing a statute exempting from taxation every building erected for the use of a college or for other institutions of learning.

"Viewed with reference to its taxability, the college edifice, with the dormitories and other buildings in the same general inclosure, used for the purposes of the school, constitute the college. They are the seat, the home, of the institution, and the place where its educational work is done." Northampton County *v.* Lafayette College, 128 Pa. St. 132, 144, 18 Atl. 516, construing a statute exempting from taxation colleges and institutions of learning, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same.

COLLEGES AND UNIVERSITIES

By Frank E. Jennings

I. Nature, Status, and Organization, 284
- A. *In General,* 284
- B. *Incorporation,* 284
  - 1. *In General,* 284
  - 2. *Power of State to Change Charter,* 285

II. Rights and Powers, 286
- A. *To Acquire, Hold, and Dispose of Property,* 286
  - 1. *Acquisition and Holding,* 286
    - a. *In General,* 286
    - b. *By Private Donations,* 287
  - 2. *Disposal,* 287
- B. *To Change Location,* 287
- C. *To Control Matters Affecting Students,* 288
  - 1. *In General,* 288
  - 2. *Granting Degrees or Diplomas,* 289
  - 3. *Scholarships,* 289
  - 4. *Tuition and Charges,* 290
- D. *To Sue or Be Sued,* 290

III. Public Aid, 291
- A. *In General,* 291
- B. *Appropriations of Money,* 291
- C. *Escheats,* 292
- D. *Grants of Land,* 292

IV. Officers, 293
- A. *Appointment and Removal, Etc.,* 293
- B. *Powers, Duties, and Liabilities,* 294
  - 1. *In General,* 294
  - 2. *Authority to Bind State,* 295
  - 3. *Liability For Funds Received,* 296

V. Custody and Control of Funds, 296

VI. Instructors, 296
- A. *Appointment and Removal,* 296
- B. *Right to Perform Other Services,* 297
- C. *Salary,* 297

VII. Dissolution or Abandonment, 297
- A. *Forfeiture of Franchise,* 297
- B. *What Constitutes Abandonment,* 297
- C. *Disposition of Assets,* 298

VIII. Limiting Credit of Students, 298

CROSS-REFERENCES

For Matters Relating to:

Academies, see Schools and School Districts.

Charitable Institutions of Learning, see Charities.

Corporations, see Corporations.

Exemption From Taxation, see Taxation.

For Matters Relating to — (*continued*)
Schools, see SCHOOLS AND SCHOOL DISTRICTS.
Unincorporated Societies, see ASSOCIATIONS.
United States Naval Academy, see ARMY AND NAVY.

I. NATURE, STATUS, AND ORGANIZATION.

A. In General. In determining the public or private character of a college or university[1] it is necessary to consult the charter or incorporating act of each institution.[2] It may be said, however, that the mere incorporating or chartering of a private college[3] or the fact that it receives aid and funds for its support from the state[4] does not constitute it a public corporation, nor does the fact that private donations have been made to a public institution[5] change its character to other than that of a public institution.

B. Incorporation — 1. IN GENERAL. An institution of learning will not be permitted to incorporate unless it appears that its standard of instruction is in conformity to the law providing for such incorporation,[6] and that the powers which it assumes to possess are within the purview of the statute.[7] If a certain

1. For definition of "college" see COLLEGE. For definition of "university" see UNIVERSITY.

In this article no technical distinction between the terms is observed. They are also sometimes used interchangeably with "institution." Black L. Dict.; Nobles County *v.* Hamline University, 46 Minn. 316, 317, 48 N. W. 1119.

2. Colleges or universities incorporated and supported by the state are generally treated by the courts as public, rather than private, corporations.

Florida.— State *v.* Knowles, 16 Fla. 577.

Illinois.—Thomas *v.* Illinois Industrial University, 71 Ill. 310.

Iowa.—Weary *v.* State University, 42 Iowa 335.

Louisiana.— Tulane Education Fund *v.* Board of Assessors, 38 La. Ann. 292.

Mississippi.— State *v.* Vicksburg, etc., R. Co., 51 Miss. 361.

Nebraska.— State University *v.* McConnell, 5 Nebr. 423.

New York.— People *v.* Jackson, 23 Hun (N. Y.) 568, 60 How. Pr. (N. Y.) 330.

Virginia.— Lewis *v.* Whittle, 77 Va. 415.

See 10 Cent. Dig. tit. "Colleges and Universities," § 1.

But see State *v.* Carr, 111 Ind. 335, 338, 12 N. E. 318, where it is said: "A university so established under the direct authority of the State, through a special act of the Legislature, or that the charter contains provisions of a purely public character, nor yet that the institution was wisely established, and is and should be perpetually maintained at the public expense, for the public good, does not make it a public corporation, or constitute its endowment fund a public fund."

A college is not a membership corporation within the membership corporation law of 1895 and the general corporation law of 1892, classifying the different kinds of corporations. The university law of 1892, which, like the two other and later acts, was the work of the revision commissioners, provides a complete system for the incorporation of colleges. Matter of Lampson, 22 Misc. (N. Y.) 198, 49 N. Y. Suppl. 576.

3. Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642; Koblitz *v.* Western Reserve University, 21 Ohio Cir. Ct. 144, 11 Ohio Cir. Dec. 515; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 [*reversing* 1 N. H. 111]; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229; Atty.-Gen. *v.* Pearce, 2 Atk. 87; Philips *v.* Bury, 1 Ld. Raym. 5, 2 T. R. 346.

4. Cleaveland *v.* Stewart, 3 Ga. 283; Board of Education *v.* Greenebaum, 39 Ill. 609 [*followed* in Board of Education *v.* Bakewell, 122 Ill. 339, 10 N. E. 378, in which case this was held to be true though the board of trustees of a private college had repeatedly represented themselves in their reports to the legislature as a public corporation and asked for appropriations, and although the legislature had declared such college to be a state institution and that the property of the board was the property of the state]; State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 [*reversing* 1 N. H. 111]; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229.

5. Head *v.* State University, 47 Mo. 220 (where private contributions were given to secure the location of the University of Missouri at a certain place); State University *v.* Maultsby, 43 N. C. 257.

6. *In re* American Electropathic Institute, 14 Phila. (Pa.) 128, 37 Leg. Int. (Pa.) 262, where a charter was refused for instruction in electricity as a curative agent, such qualification for the practice of medicine not meeting the standard required by the Pennsylvania act of March 24, 1877.

7. Thus the laws providing for the formation of benevolent, charitable, scientific, and missionary societies do not authorize the incorporation of a medical college (People *v.* Gunn, 96 N. Y. 317 [*affirming* 30 Hun (N. Y.) 322]; People *v.* Cothran, 27 Hun (N. Y.)

endowment or subscription is required as a prerequisite to the granting of a charter[8] it will not be granted where the subscriptions consist almost entirely of lands, the location and descriptions of which are so indefinite that no valuation can be placed thereon.[9]

2. Power of State to Change Charter. Where a college or university is a public corporation its charter may be altered, amended, or repealed at the pleasure of the legislature,[10] even though the state has created a body corporate to control its property and affairs.[11] In the case of private institutions, however, if neither the statute under which the college is incorporated, nor its charter, reserves to the state the right to change or modify its charter no such right exists;[12] and while the state constitutions or the incorporating acts may reserve the right to alter or repeal the charter,[13] yet if such reservation be limited or restricted it can be exercised only in the manner or for the purposes specified.[14]

344), nor is the existence of such a corporation recognized by laws providing for the incorporation of scientific and literary colleges and universities (People *v.* Gunn, 96 N. Y. 317 [*affirming* 30 Hun (N. Y.) 322]). So too under an act providing that any number of persons desiring to form a corporation might prepare an instrument in writing, specifying the objects, conditions, and name of their association, and that the supreme court should examine the same and certify thereon, adjudging the lawfulness of the objects, and that if said court certified the same to be lawful the association should become a body corporate, with powers incidental to corporations, it was held that the court had no authority to certify a medical college whose constitution authorized them to confer degrees, since such power is not incidental to corporations and was not within said act. Philadelphia Medical College's Case, 3 Whart. (Pa.) 445; *In re* Duquesne College, 2 Pa. Dist. 555, 12 Pa. Co. Ct. 491. See also People *v.* State Medical Soc., 18 Wend. (N. Y.) 539, holding that a college chartered "for the instruction and education in the learned languages and liberal arts and sciences" could not be represented in the medical society of the state, notwithstanding the fact that the legislature had recognized its medical faculty and the diplomas issued by it. The act giving colleges the right to be represented in the state society referred only to "colleges of medicine in the state."

The fact that a certain name has once been conferred upon an educational institution will not preclude the chartering of a college in the same name, where the former institution has been absorbed by another college of a different name, and the former name has not been used for many years. *In re* Duquesne College, 12 Pa. Dist. 555, 12 Pa. Co. Ct. 491.

Amendment of charter.— The powers of a college created by special legislation will be determined by interpretation of such special legislation; and where it seeks to have its charter amended to conform to the powers conferred by the special act it need not bring itself within a general law providing for amendments to the charters of existing corporations. *In re* Philadelphia Medico-Chirurgical College, 190 Pa. St. 121, 43 Wkly. Notes Cas. (Pa.) 481, 42 Atl. 524.

8. Matter of Wesleyan College, 1 Cal. 447, holding that a cash subscription of twenty-seven thousand five hundred dollars was a sufficient compliance with the California statute of 1850.

9. Matter of California College, 1 Cal. 329.

10. State University *v.* Winston, 5 Stew. & P. (Ala.) 17; State *v.* Vicksburg, etc., R. Co., 51 Miss. 361.

11. Illinois Industrial University *v.* People, 76 Ill. 187 note; Illinois Industrial University *v.* Champaign County, 76 Ill. 184.

12. *Indiana.*—Kellum *v.* State, 66 Ind. 588, holding that the lottery privilege with which Vincennes University was endowed by the territorial legislature could not be subsequently abrogated by statute.

Kentucky.— Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642.

Ohio.— State *v.* Neff, 52 Ohio St. 375, 40 N. E. 720, 28 L. R. A. 409.

Vermont.— Caledonia County Grammar School Trustees *v.* Burt, 11 Vt. 632.

United States.— Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 [*reversing* 1 N. H. 111]; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229. See also Vincennes University *v.* Indiana, 14 How. (U. S.) 268, 14 L. ed. 416 [*reversing* 2 Ind. 293], holding that land reserved by act of congress of March, 1804 (providing for the disposal of the public lands in Indiana territory and reserving for the use of a seminary of learning certain townships) vested in a board of trustees created by the territorial legislature in 1806, and that therefore a subsequent legislature had no power to appoint other commissioners to sell such land and thereby defeat the trust.

13. Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778.

14. People *v.* Kewen, 69 Cal. 215, 10 Pac. 393; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229, the latter case holding that where a legislature in granting a college charter provided that it might "grant further powers to, or alter, limit, annul, or restrain any of the powers by this Act vested in the said corporation, as shall be judged necessary to promote the best interest of the College" its power is confined to the enlarging, altering, etc., of the powers of the corporation, and do not extend to any inter-

II. RIGHTS AND POWERS.

A. To Acquire, Hold, and Dispose of Property — 1. Acquisition and Holding — a. In General. Upon the principle that every corporation has implied power to do everything that is reasonable, necessary, or convenient to accomplish the objects for which it is instituted [15] a college may receive and apply any endowment not prohibited by its charter or by law,[16] and the receipt of gifts of real or personal property is sometimes expressly authorized by the act of incorporation.[17] The amount of property which a university may take or hold [18] is, however, often limited by its charter or by the statute under which it is incorporated,[19] and an act of the legislature removing the limitation of the power of a

meddling with the property of the corporation or to the extinction of its corporate existence; and that a vote of the trustees of such college that they "acquiesced" in such unconstitutional statute did not import their assent thereto. See also Sterling *v.* State University, 110 Mich. 369, 68 N. W. 253, 34 L. R. A. 150.

What constitutes an ouster of university. —A university in 1807 and afterward had title to, and possession of, a certain township of land, of which fact the state had knowledge. In 1820 a superintendent was appointed by the legislature to collect the rents of these lands; two years afterward an act was passed providing for the sale of said lands, and in five years thereafter by another act commissioners were appointed to make such sale. In 1846 the university brought a suit against the state to recover the purchase-money derived from the sale of these lands, and it was held that the acts done by the state did not of themselves constitute an ouster of the university. State *v.* Vincennes University, 5 Ind. 77.

15. It has been held that a college incorporated to acquire and "hold property in trust for . church, . . and to endow, build up, and maintain an institution for educational purposes," and "to purchase, receive, possess, and dispose of such real and personal property as may be necessary or convenient to carry out the object of said corporation" may, upon being adopted by the legislature as an agricultural college of the state, take and hold land donated for collegiate purposes, entirely independent of any benefit to the church, and that the trustees can convey the same whenever the interest of the college so demands. Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81, 17 Oreg. 103, 21 Pac. 133.

16. Barnett *v.* Franklin College, 10 Ind. App. 103, 697, 37 N. E. 427, 432; Simpson Centenary College *v.* Bryan, 50 Iowa 293 (holding that a failure of the articles of incorporation to authorize the raising of an endowment fund should not be construed as a prohibition against so doing); Farmers' College *v.* Cary, 35 Ohio St. 648. And see Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81.

17. Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642. See also Abend *v.* McKendree College, 74 Ill. App. 654; State *v.* Nashville University, 4 Humphr. (Tenn.) 156, the latter case holding that the university, being empowered by its charter "to have, receive, and enjoy lands," etc., and being a "person" within the meaning of the corporation law, could enter upon lands in the Ocoee district of public lands as a natural person; and that inasmuch as the university was entitled to the proceeds of the sale of two half townships it might enter into such public land without the payment of the money required by law from other persons, but might give its receipt to the state for so much money as the proceeds of the sale of said township land.

By will.— An unincorporated state university recognized by various state statutes relating to its organization, government, and functions as having an existence distinct from that of its regents, who are incorporated, is capable of taking a devise, notwithstanding that its organic act provides that gifts to it may be made to the regents and to the state. Royer's Estate, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364, where it is also said that under Cal. Civ. Code, § 1275, providing that corporations organized for scientific, literary, or educational purposes may take testamentary dispositions of property, although not specially authorized by law, the state university can take a testamentary gift although not specially authorized to receive it.

18. The distinction between the "taking" and "holding" of property recognized in relation to English corporations, owing to the mortmain laws of that country, is not applicable in New York. Hence a university's charter limiting its power to hold property, in the absence of some plain and controlling circumstances showing a contrary legislative intention, must be construed as limiting the taking as well as holding beyond the amount specified. Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirming* 45 Hun (N. Y.) 354].

19. Thus it has been held that under the charter and statute under which it was incorporated, Cornell University had no power to take or hold any more real or personal property than three million dollars in the aggregate. Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirming* 45 Hun (N. Y.) 354].

In determining the value of the grounds

university to hold property cannot affect the rights of property vested before its passage.[20]

b. By Private Donations. It being the policy of the law to encourage educational institutions,[21] a donation to a college will not be defeated by a mere misnomer of the sum given.[22] So too the profits accruing to the vendee in a sale of land scrip, by virtue of the general act of congress, donating such scrip to the state, form no part of the purchase-price thereof, and may be the subject of a valid gift to a university.[23]

2. Disposal. The power to sell property, except where its acquisition is for some special purpose inconsistent with power of sale, being correlative of the right to acquire, a university has the power to sell real estate for purposes clearly tending to promote its interest and the objects for which it was created.[24]

B. To Change Location. An institution established under a condition that it shall be located permanently at a certain place cannot be changed therefrom,[25]

and buildings of a university their worth should be estimated as property held for the purposes of the corporation, and not as if the estate was used as a farm or cut up into building lots. Nor can the university while enjoying the undisputed and full control of a future endowment fund allege as a reason for taking the other property in excess of the statutory limit that it might in the hereafter be claimed that the fund which it is at present in possession of is a trust fund created by the act of congress. Matter of McGraw, 45 Hun (N. Y.) 354 [*affirmed* in 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387].

20. Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirming* 45 Hun (N. Y.) 354].

21. See, generally, Charities, 6 Cyc. 895. And see Burr *v.* Carbondale, 76 Ill. 455, 461, where the court, in discussing the act establishing the Southern Illinois Normal University, which provided that the trustees should receive proposals from certain points, of donations in lands, buildings, bonds, etc., to aid in the foundation of such institution at a certain locality, said: "Setting up the location of State institutions to the highest bidder is, in our judgment, impolitic and unwise, resulting, in many cases, most disastrously to the best interests of the State. . . . It is humiliating to our State pride that resort should be had to such means, but this court has never said or entertained the opinion it was against the constitution so to legislate;" and such legislation is not void as against public policy.

Sufficiency of consideration for promise in favor of college.—Where a party agreed to pay a certain sum, "trusting that the board of trustees would persevere in their efforts to advance the interest of the college until it should become endowed," etc., and such college had, after the execution of the instrument and before his death, raised a certain endowment, there was sufficient consideration to support the promise to pay. Burlington University *v.* Barrett, 22 Iowa 60, 92 Am. Dec. 376. If, however, the fund created by the gift of a note and other notes given under similar circumstances is diverted to purposes in violation of an oral agreement on which the gift of the note was based, as between the maker and payee a defense of the failure of consideration will be sustained. Simpson Centenary College *v.* Tuttle, 71 Iowa 596, 33 N. W. 74.

22. Hence where a college was authorized to receive "donations," but the incorporating act was silent as to "subscriptions" it was held, where a party executed a bond reciting that the same was in fulfilment of an undertaking, agreement, and subscription between the obligor and other persons and the college that such endowment fund is a "donation" within the meaning of the statute. Hooker *v.* Wittenberg College, 2 Cinc. Super. Ct. (Ohio) 353.

23. Thus Ezra Cornell under an agreement purchased the scrip at thirty cents per acre, and it was also agreed that a further sum of thirty cents per acre from the net profits of the sale of the land, if sufficient therefor, should be added to and form a part of the college scrip fund, while the balance of the net profits should form a separate fund to be called the "Cornell Endowment Fund." Under this agreement it was held that the sixty cents per acre constituted the purchase-price of the scrip, and when assigned it became the property of Cornell, and that any profits above that sum belonged to him and were received by the state under that agreement as the property of Cornell University, the state being simply custodian thereof. Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirmed* in Cornell University *v.* Fiske, 136 U. S. 152, 10 S. Ct. 775, 34 L. ed. 427].

24. State University *v.* Detroit Young Men's Soc., 12 Mich. 138. And see Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81.

Authority to execute deed of trust.—An educational corporation authorized to do all "necessary acts" to carry into effect its object has authority to execute a deed of trust on its educational buildings as security for the payment of claims for materials furnished for the construction thereof. Collier *v.* Myers, 14 Tex. Civ. App. 312, 37 S. W. 183.

25. Hascall *v.* Madison University, 8 Barb. (N. Y.) 174, holding that a person who contributes to a fund for its erection has a

but where it appears that the founder of a college does not intend to limit its location permanently upon the premises devised the location may be changed to a more suitable place without a forfeiture of the original site.[26]

C. To Control Matters Affecting Students — 1. In General. A college or university may prescribe requirements for admission[27] and rules for the conduct of its students,[28] and one who enters as a student impliedly agrees to conform to

right to apply for an injunction to prevent its removal. See also *In re* State Institutions, 9 Colo. 626, 21 Pac. 472, to the effect that, under Colo. Const. art. 8, § 5, which designated and provided for the institutions which were to become the property of the state, an amendment was necessary thereto to authorize a change in the location of any such institutions.

Right to establish other colleges.— The chancellor of the University of Oxford had power by charter to create other corporations, and has exerted such power in the erection of several matriculated companies for the purpose of giving instruction (1 Bl. Comm. 474); but in New York it has been held that no college has the right to create any other body, politic or corporate, and the mere designating of an institution created by another college as a corporation amounts to nothing more than a misnomer (Geneva College *v.* Patterson, 1 Den. (N. Y.) 61; People *v.* Geneva College, 5 Wend. (N. Y.) 211).

26. Cincinnati *v.* McMicken, 6 Ohio Cir. Ct. 188.

Where by statute a change of location is authorized the location can be changed only to such places as are authorized by the statute. Hence the provisions of an act authorizing the trustees to change the location of Madison University from Hamilton to Syracuse, Rochester, or Utica, provided they should within one year file with the secretary of state a resolution of the board electing to make such change, determining at which of the places the university should be located, were not complied with by a resolution to move the university to Rochester or its vicinity. Hascall *v.* Madison University, 8 Barb. (N. Y.) 174. *Compare* Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636, holding that a contract to establish a college "at" or "in" a certain town does not require it to be placed within the corporate limits, when a large number of the inhabitants of the town dwell beyond such limits.

Who may institute suit to compel change. — A private individual who has no special interest in the suit cannot, without permission of the court, seek to compel the board of regents of a university to comply with an act requiring the removal of one of its departments. Sterling *v.* State University, 110 Mich. 369, 68 N. W. 253, 34 L. R. A. 150.

27. **Right to deny admission on account of sex.**— Under an act providing that the board of directors should "manage all the business of a college, without compensation" it is held that they are not thereby given absolute discretionary powers in the matter of the admission of students, and that the applicant for admission could not lawfully be rejected on the sole ground that she was a female. Foltz *v.* Hoge, 54 Cal. 28.

Time within which tuition must be demanded.—A student who has paid his tuition and received a certificate entitling him to "all the privileges of a course of study" is not restricted in his right to demand instruction to the term at which he entered, but may do so within a reasonable time. Iron City Commercial College *v.* Kerr, 3 Brewst. (Pa.) 196.

28. **A rule requiring students to attend chapel** which also provides that any one who desires may be excused therefrom by signing a request to that effect does not violate a constitutional provision that "no person shall be required to attend or support any ministry or place of worship against his consent." North *v.* State University, 137 Ill. 296, 27 N. E. 54.

Dismissal and reinstatement.— A college cannot dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence. Com. *v.* McCauley, 3 Pa. Co. Ct. 77. Mandamus may be granted to compel the reinstatement of a student dismissed from a college without a hearing (Com. *v.* McCauley, 2 Pa. Co. Ct. 459, 3 Pa. Co. Ct. 77), but it must be shown that the student applied to the trustees for a hearing or relief (Dunn's Case, 9 Pa. Co. Ct. 417) and it must be alleged that he desires to again become a pupil, or that he will become one if the writ is granted (North *v.* State University, 137 Ill. 296, 27 N. E. 54). On the application for mandamus evidence that the student was guilty of punishable acts of which the college faculty had no knowledge when he was dismissed is inadmissible. Com. *v.* McCauley, 3 Pa. Co. Ct. 77.

In English universities a court known as the vice-chancellor's court had jurisdiction to try and determine certain offenses which in this country would be cognizable by courts of law. Thus the publication of a pamphlet against the established religion in the University of Cambridge was an offense cognizable by that court. Rex *v.* Cambridge University, 6 T. R. 89. See also Kemp *v.* Neville, 10 C. B. N. S. 523, 7 Jur. N. S. 913, 31 L. J. C. P. 158, 4 L. T. Rep. N. S. 640, 10 Wkly. Rep. 6, 100 E. C. L. 523. It was necessary, however, that the offender be charged within the words of the charter. *Ex p.* Hopkins, 17 Cox C. C. 444, 56 J. P. 262, 61 L. J. Q. B. 240, 66 L. T. Rep. N. S. 53, holding that a charge that a woman was "walking with a

such rules of government.[29] It seems, however, that the right to prescribe certain rules depends upon whether the institution is private or public.[30]

2. GRANTING DEGREES OR DIPLOMAS. The power to grant degrees or diplomas may be express or implied.[31] A college or university may, however, refuse a degree to a contumacious student [32] or to one who has not complied with the conditions required therefor,[33] but it cannot arbitrarily refuse to allow one who has complied with such conditions the right to take the final examination which would entitle him to a degree,[34] or deny to him a certificate of attendance and that he satisfactorily passed the final examinations, where the conduct on account of which his degree is denied occurs after final examination.[35]

3. SCHOLARSHIPS.[36] A certificate of a permanent and perpetual scholarship in

member of the university" is not equal to the charge that she was "suspected of evil."

29. Koblitz *v.* Western Reserve University, 21 Ohio Cir. Ct. 144, 11 Ohio Cir. Dec. 515.

30. **Prohibiting membership in secret societies.**— Thus a strictly private incorporated college can forbid its students from joining secret societies, even though such societies have been incorporated by the legislature. People *v.* Wheaton College, 40 Ill. 186. But a public university, endowed by congress, supported mainly by state appropriations, and to which all inhabitants of the state of suitable age and character are entitled to admission, cannot require one to disconnect himself from a legitimate secret order as a prerequisite to his eligibility as a student. State *v.* White, 82 Ind. 278, 288, 42 Am. Rep. 496, which intimates, however, that the admission of students to a public institution is one thing and their government and control after admission quite another thing. This distinction is open to criticism, and Woods, J., in a dissenting opinion, says: "If the moment a student has passed the portal of the institution he is bound to obey a prescribed rule of the college, he may, in all reason, be required, before he is permitted to enter, to promise obedience. The final remedy for disobedience is expulsion, and, if there may be expulsion for disobeying, there may be exclusion for refusing to promise compliance with a proper regulation."

31. **Implied authority.**—A college of medicine, incorporated under a general law authorizing the incorporation of colleges, has implied authority to grant diplomas. State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565. So too dentistry, surgery, and pharmacy are branches of medicine in such a sense that a college authorized to grant degrees in medicine may grant degrees in either of those subjects. *In re* Philadelphia Medico-Chirurgical College, 190 Pa. St. 121, 43 Wkly. Notes Cas. (Pa.) 481, 42 Atl. 524.

Diploma not necessary to granting of degree.— A vote that a degree be conferred on a person invests him with such degree *ipso facto*. A public enunciation or a diploma may be an extremely suitable and appropriate means of declaring and giving notoriety to the act, but it is not necessary. Wright *v.* Lanckton, 19 Pick. (Mass.) 288.

A diploma does not prove itself, but must be authenticated by proof of the corporate seal. Barton *v.* Wilson, 9 Rich. (S. C.) 273.

32. People *v.* New York Law School, 68 Hun (N. Y.) 118, 22 N. Y. Suppl. 663, 52 N. Y. St. 14.

33. State *v.* Osteopathy National School, 76 Mo. App. 439, failure to attend the school for the prescribed time. See also People *v.* New York Homœopathic Medical College, etc., 20 N. Y. Suppl. 379, 47 N. Y. St. 395, holding that where the rules of a medical college leave it to certain medical experts to determine an applicant's qualifications, and such experts decide adversely to the applicant, mandamus will not lie to compel the college to grant him a diploma, although bad faith on the part of the college officers is charged.

34. People *v.* Bellevue Hospital Medical College, 60 Hun (N. Y.) 107, 14 N. Y. Suppl. 490, 38 N. Y. St. 418.

35. People *v.* New York Law School, 68 Hun (N. Y.) 118, 22 N. Y. Suppl. 663, 52 N. Y. St. 14.

36. **Constitutional inhibition against free scholarships.**— Under a constitutional provision prohibiting grants by the state in aid of any individual, an act providing free scholarships in the state university for those students who are dependent upon their own exertions for their education, who are financially unable to obtain it otherwise, and who shall pass the most meritorious examination cannot be upheld, such use of funds being construed as for a private purpose. State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

Election of fellows in English universities. — Where a practice of electing a greater number of fellows than the statute allowed prevailed for many years, a dispensation from the crown authorizing such practice was presumed. Queens College Case, Jac. 1. But until the year 1871 it was necessary that a person offering himself as a candidate to be examined for a fellowship in the university be a member of one of certain specified churches. The Tests Act of 1871, however, provided that such persons should not be required to belong to any specified church, sect, or denomination. In the application of this statute it was held that Hertford College, incorporated in 1874, which also received the property of an existing college known as Magdalen Hall, was not within the restrictions of the Tests Act, and that it could receive an endowment restricted

a college is a valid contract,[37] to which no restrictive conditions can be subsequently annexed.[38] In an action to enforce a subscription made in consideration of such a scholarship, however, defendant cannot avoid his liability on the ground of a mere change in the means of effecting the general purposes of the institution,[39] that the prosperity of the institution had failed to fulfil defendant's expectations,[40] or that tuition had subsequently been made free.[41]

4. TUITION AND CHARGES. The right to charge fees for admission, tuition, and incidental expenses depends upon the statute under which the institution is organized and all the acts in relation thereto.[42]

D. To Sue or Be Sued. A college or university cannot sue or be sued as such, unless it has in fact a corporate existence,[43] and cannot be sued, in the absence of statutory authority, where it is a public or quasi-public corporation and not a mere agent of the state.[44] On the other hand a university may, under its charter, be liable to be sued as an individual,[45] and a college duly incorporated

to members of certain specified churches. Reg. *v.* Hertford College, 3 Q. B. D. 693, 47 L. J. Q. B. 649, 39 L. T. Rep. N. S. 18, 27 Wkly. Rep. 347.

37. Howard College *v.* Turner, 71 Ala. 429, 46 Am. Rep. 326.

The value, in case of a breach thereof, if no marketable value is shown, is *prima facie* the price paid for it. Howard College *v.* Turner, 71 Ala. 429, 46 Am. Rep. 326. See also Genesee College *v.* Dodge, 26 N. Y. 213.

38. Illinois Conference Female College *v.* Cooper, 25 Ill. 148, holding that a subsequent condition that the scholar shall board in the college is void.

39. Washington College *v.* Duke, 14 Iowa 14. See also Bridges *v.* Yellow Springs College, 19 Iowa 572, holding that the granting of a perpetual scholarship in consideration of a note for a certain amount did not make the notes given therefor a perpetual trust fund, and that therefore it is no defense to a note so given that the moneys collected had been applied to general expenses.

40. Oskaloosa College *v.* Hull, 25 Iowa 155.

41. White *v.* Butler University, 78 Ind. 585.

42. Thus each county in the state has a right to send two students to the Indiana University, free of tuition, in the law department, as well as in the other departments of the institution. McDonald *v.* Hagins, 7 Blackf. (Ind.) 525. And in Kansas the board of regents has no power to collect a fee for the use of the library. State *v.* State University, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378. In Wisconsin, however, the regents of the state university have power to exact fees for admission, instruction, or incidental expenses, except in so far as such power is from time to time expressly limited by the legislature. State *v.* State University, 54 Wis. 159, 11 N. W. 472.

It is a question for the jury to determine the liability of parents for tuition of a certain child under an alleged agreement that there should be no charge for such tuition. Roach *v.* Burgess, (Tex. Civ. App. 1901) 62 S. W. 803.

What constitutes payment of tuition.—The payment to a solvent college of its stock for tuition is valid if made before the insolvency of the institution. Roach *v.* Burgess, (Tex. Civ. App. 1901) 62 S. W. 803.

43. Geneva College *v.* Patterson, 1 Den. (N. Y.) 61; Houston *v.* Jefferson College, 63 Pa. St. 428, the latter case holding that Jefferson College having united with Washington College under a new charter ceased to exist under its original charter, and therefore could not maintain a suit. See also Stone *v.* State University, 28 La. Ann. 104, holding, upon a review of the statutory changes pertaining thereto, that the corporate existence of the faculty of the medical department of the University of Louisiana had been continued so far at least as the rights of their creditors were concerned. *Compare* State University *v.* McConnell, 5 Nebr. 423, holding that while the custody and control of the funds of a university is usually delegated to some officer of such corporation, yet if the legislature abolishes the office of treasurer of a university and makes instead the state treasurer the custodian of the funds appropriated therefor, the regents have no authority to maintain a suit to compel a party to relinquish the funds in his possession to the state treasurer.

Judgment, in a suit by or against a college, should not be rendered individually against the college committee, who were agents only in making the contract. Gonzales College *v.* McHugh, 39 Tex. 346.

44. Weary *v.* State University, 42 Iowa 335 (where it was held that the Iowa State University belonged to the state the same as eleemosynary institutions and could not be pursued in an action at law. In arriving at this conclusion, however, the court was forced to disregard the decision in the case of Henn *v.* State University, 22 Iowa 185, where it was assumed that the state was liable, no question having been raised upon that point); Oklahoma Agricultural, etc., College *v.* Willis, 2 Okla. 593, 52 Pac. 921, 40 L. R. A. 677.

45. State University *v.* Bruner, 175 Ill. 307, 51 N. E. 687 [*affirming* 66 Ill. App. 665].

Effect of change in official powers.—So long as there is no breach in the continuity of the corporate existence of a university, an action may be maintained against it through

may maintain an action on an account due it, although not expressly authorized by its charter to collect such accounts.[46]

III. PUBLIC AID.

A. In General. Public aid cannot be extended to a private[47] or sectarian[48] institution where such aid is prohibited by constitutional provisions, but state aid will not be denied a college or university merely because no provision for such aid is expressly made.[49]

B. Appropriations of Money. Appropriations of money in aid of colleges and universities may be absolute and unconditional.[50] If, however, a condition is attached to an appropriation it must be strictly performed to entitle the institution to the sum offered,[51] and under an act making an appropriation to such

its officials, although their powers have been changed or enlarged since the liability was contracted. State University *v.* Moody, 62 Ala. 389, holding that the board of trustees of the university succeeded to the property rights and privileges to which the board of regents succeeded under the constitution of 1868, and that the legal remedies which could have been pursued against the board of regents could be pursued against the trustees.

46. Louisiana College *v.* Keller, 10 La. 164.

Trustees may sue by their corporate title without setting out their individual names. Legrand *v.* Hampden Sidney College, 5 Munf. (Va.) 324. But see Maryville College *v.* Bartlett, 8 Baxt. (Tenn.) 231, holding that it is proper to bring the suit in their individual names if it appeared that they constituted the board of directors, and sued as the body corporate.

Where the name of an institution is changed, or where a new institution is created by the consolidation of others, and the statute authorizes it to collect moneys due under the former title, the action may be brought by the institution in its new name. Newlan *v.* Lombard University, 62 Ill. 195; State University *v.* Baxter, 42 Vt. 99. And see State University *v.* Globe Sav. Bank, 185 Ill. 514, 57 N. E. 417. An averment that the change of name of a university, authorized by an act of the legislature, was made by vote of a majority of the board of directors within the limited time is sufficient, in an action by the university, without alleging who the directors were, how many voted for the change, or whether it was made at a regular or special meeting. Hazelett *v.* Butler University, 84 Ind. 230.

Authority of attorney to appear for university.— Where an action is pending in a court of equity the court has authority to authorize an attorney to appear in behalf of the university, at the request of some of its trustees, even though no regular authority was shown therefor, such as a resolution adopted by the board of trustees. Jenkins *v.* Jenkins' University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785.

47. Ellsberry *v.* Seay, 83 Ala. 614, 3 So. 804 (holding that, the "Alabama University for the Colored People" not being a public school, an appropriation in its behalf from a public school fund for the colored race would be unconstitutional, and that in a bill filed by citizens and taxpayers to enjoin the further payment of public money thereto, the governor in his official capacity, the superintendent of education as one of the trustees, and the state treasurer are all properly joined as defendants); State *v.* Graham, 25 La. Ann. 440 (holding that Straight University, being incorporated as a private corporation, controlled by a board of trustees who were responsible for their management to certain private individuals, and the state having no voice as to the manner in which such university was conducted, is not a public institution, and any appropriation made by the legislature in its favor would be void).

48. Dakota Synod *v.* State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418, holding that it is material that the principal and teachers are approved by the board of education, that the students are excused from any exercises where sectarian doctrines are taught, and that any contract by which the state agrees to pay money to such university, although it may be in payment for services already rendered, is within the constitutional prohibition.

49. Higgins *v.* Prater, 91 Ky. 6, 12 Ky. L. Rep. 645, 14 S. W. 910. See also State *v.* Oglevee, 37 Ohio St. 1.

50. An appropriation is absolute and unconditional which names a specific sum and provides that the amount may be drawn from the state treasury in eight equal quarterly instalments, commencing on a particular day, or as soon thereafter as the treasury will allow. State *v.* Sherman, 46 Iowa 415.

51. Thus where a certain sum for the establishment of a school of homeopathy was donated by the legislature, provided the regents of the university should carry into effect a law which provided that there should always be at least one professor of homeopathy in the department of medicine, at the salary of the other professors in such department, a provision by the regents for a separate school of homeopathy, to be located at a place agreeable to them and not the place where the university was situated, is not a compliance with the condition, and mandamus will not lie to compel the auditor to pay such sum. People *v.* Auditor-Gen., 17 Mich. 161.

Promotion of agriculture and mechanic arts.— The disposition of the funds appropriated by the act of congress of Aug. 30,

schools as shall be actually engaged in a certain kind of instruction it is held that only such colleges may take as were in operation at the time of the appropriation.[52] The amount of such appropriations[53] and the manner of withdrawing the same[54] are generally controlled by statute.

C. Escheats. In some jurisdictions it is provided that all property accruing to the state from escheats,[55] distributive shares of the estates of deceased persons, or unclaimed dividends[56] shall be appropriated to the university of the state. So too the recovery for the death of one who is negligently killed may, if there be no next of kin, go to the university of the state.[57] Inasmuch, however, as there is a presumption that every person who dies leaves heirs, it is incumbent on a university claiming such property to rebut this presumption by substantial proof.[58]

D. Grants of Land. Under the general act of congress of July 2, 1862,[59] which donated public land to such of the states as would provide, within a cer-

1890, providing for the payment to the various states of money for the more complete endowment and maintenance of colleges for the benefit of agriculture and mechanic arts which are established or which may be established in accordance with the act of congress of July 2, 1862, is left with the state, and they are not restricted in the use of such money to one college within their state or to colleges established subsequent to 1862. Massachusetts Agricultural College *v.* Marden, 156 Mass. 150, 30 N. E. 555. It has been held, however, that the state, in the distribution of this national fund, must see that it is applied to an agricultural "college" and not to an agricultural "school." *In re* Agricultural Funds, 17 R. I. 815, 21 Atl. 916.

52. State *v.* White, 116 Ala. 202, 23 So. 31.

53. Maryland Agricultural College *v.* Keating, 58 Md. 580; People *v.* Auditor-Gen., 19 Mich. 13.

An appropriation made without authority of law is not, however, void in the sense that it may not be subsequently ratified. Marks *v.* Purdue University, 37 Ind. 155.

54. Thus under some statutes the appropriation can be withdrawn only upon presentation of proper vouchers (State *v.* Moore, 46 Nebr. 373, 64 N. W. 975; State *v.* Moore, 36 Nebr. 579, 54 N. W. 866; State *v.* Liedtke, 9 Nebr. 468, 4 N. W. 61. See also McCormick *v.* Thatcher, 8 Utah 294, 30 Pac. 1091, 17 L. R. A. 243), while under others the state treasurer turns over the fund to designated officers and is not thereafter concerned with its disbursement (State *v.* Wright, 17 Mont. 77, 42 Pac. 103).

May be used only for expenses of current year.— The appropriation for the Louisiana State University and Agricultural & Mechanical College is to be applied to the disbursements of the university for the year in which it is made, and is not subject to warrants for the payment of expenses of prior years. State *v.* Board of Supervisors State University, 31 La. Ann. 711.

Precedence over other warrants.—Warrants issued in favor of the University of Louisiana, in conformity with arts. 230, 231, of the state constitution, take precedence of all others drawn on the general fund, except warrants in favor of officers whose salaries are fixed by the constitution. State *v.* Burke, 35 La. Ann. 457.

55. Mo. Const. art. 11, § 6 (where it is provided that escheats shall go to the public school fund of which the university fund is a part); Walker *v.* Johnston, 70 N. C. 576; Den *v.* Foy, 5 N. C. 58, 3 Am. Dec. 672; State University *v.* Johnston, 2 N. C. 429.

Grants of escheated lands by officers appointed to convey vacant lands are void. State University *v.* Sawyer, 1 N. C. 67.

A legacy to a person who was filius nullius and who died intestate without children escheats to the university. Walker *v.* Johnston, 70 N. C. 576.

Where the purchaser of land dies before he has obtained a conveyance the university is, under the act giving escheated land to it, entitled to such land but must pay the balance of the purchase-money. State University *v.* Gilmour, 3 N. C. 294.

56. The word "dividend," as used in N. C. Const. art. 9, § 7, which provides that all property which has heretofore accrued to the state or shall hereafter accrue "from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons" shall be appropriated to the use of the university is synonymous with "distributive shares"—the meaning being that all unclaimed dividends or distributive shares of the estates of deceased persons shall be so appropriated. Hence an act authorizing a corporation to sue for unclaimed corporate dividends is too broad and is unconstitutional. State University *v.* North Carolina R. Co., 76 N. C. 103, 22 Am. Rep. 671 [*approving* State University *v.* Maultsby, 43 N. C. 257].

57. Warner *v.* Western North Carolina R. Co., 94 N. C. 250.

58. State University *v.* Harrison, 90 N. C. 385.

Manner of recovering assets.—A university cannot recover in its own name, after the death of an administrator, unclaimed assets which have remained in the hands of such administrator more than seven years, and which thereupon have escheated to it. It can only recover through an administrator *de bonis non.* State *v.* Johnston, 30 N. C. 397.

59. Construction of congressional grant.— This act of congress directed that the pro-

tain time, colleges for the benefit of agriculture and the mechanic arts,[60] and authorized the secretary of the interior to issue land scrip to such states within which there was no land subject to entry, but prohibited any state to which such scrip was issued from locating the land in any other state, no agent could locate such scrip on behalf of the state which held it or obtain patents for the land represented by it.[61]

IV. OFFICERS.

A. Appointment and Removal, Etc. The manner of choosing or removing the regents, trustees, or other governing officers of a university is controlled by the constitution or statute under which it is conducted.[62] Thus under a pro-

ceeds of the sale of the land scrip should be invested in government or other safe stocks. The determination as to what stocks are safe is exclusively within the province of the state legislature, and their decision is binding and conclusive on the judiciary. So held in State *v.* Vicksburg, etc., R. Co., 51 Miss. 361. The act further provided that the entire expense of management and disbursement of the fund should be paid by the state. By N. Y. Laws 1863, c. 460, the legislature accepted the grant and provided for the sale of the lands and investment of the proceeds, reënacting the provisions of the act of congress relating to the investment of the funds and the payment of the expenses. By the act of April 27, 1865, incorporating Cornell University, it was provided that the income received from such fund should be paid to the trustees of such university in the mode and for the purposes defined in the act of congress. Under such statute the trustees of the university are entitled to the income of the fund without any deduction for expenses or for premiums paid in purchasing stocks as required by the act. And when the funds thus vested do not yield an income of five per cent as intended by the act of congress the trustees are entitled to only such sum as is actually received as interest. People *v.* Davenport, 117 N. Y. 549, 23 N. E. 664, 28 N. Y. St. 796 [*affirming* 30 Hun (N. Y.) 177]. See also State *v.* Barrett, 26 Mont. 62, 66 Pac. 504, construing this statute.

No vested right as against state.— In State *v.* Vicksburg, etc., R. Co., 51 Miss. 361, it was held that under its congressional grant of land colleges have no vested right to the property as against a state which has accepted the donation upon the conditions of the grant.

Time and manner of disposition of grants. — Where college lands are required to be sold to provide a fund for the college arising from the interest on the price, the college may receive the principal when its best interest will be promoted thereby, and its officers will be presumed to have acted *bona fide* in receiving the principal before maturity with a bonus. Burtis *v.* Humboldt County Bank, 77 Iowa 103, 41 N. W. 585. And see Crippen *v.* Ohio University, 12 Ohio 96, holding that the trustees of the university have the right to lay off and dispose of land designated as commons by the former founders of a town, such land having been appropriated and set apart by congress for the purpose of endowing a university. And so too in case of eviction a university is entitled to compensation for lands and ground rents donated to it. State University *v.* Com., 1 Yeates (Pa.) 495.

60. **Kind of institution contemplated.**— A state institution incorporated for the purpose of creating and maintaining a society of arts, a museum of arts, and a school of industrial science, and aiding generally by suitable means the demands, the development, and the practical application of science, in connection with arts, agriculture, manufacture, and commerce, and which also by statute was obliged to teach military tactics and industrial science, is such an institution as the general act of congress contemplated. And the fact that the charter of such a college was granted prior to the act of congress does not render it ineligible to participate in the benefit of the fund thereby provided. Massachusetts Agricultural College *v.* Marden, 156 Mass. 150, 30 N. E. 555.

61. Cornell University *v.* Fiske, 136 U. S. 152, 10 S. Ct. 775, 34 L. ed. 427 [*affirming* 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387].

A land patent based on the preëmption right will take precedence over a senior patent to the assignee of a college, which was issued in accordance with an act of congress of April 20, 1832, which provided that such college could locate the quantity of land granted to it on "any vacant or unappropriated land." McAfee *v.* Keirn, 7 Sm. & M. (Miss.) 780, 45 Am. Dec. 331.

62. State *v.* Foster, 130 Ala. 154, 30 So. 477. Thus by Wash. Stat. § 966, it is necessary that the appointment of the board of regents, which is made by the governor, be confirmed by the senate. And before such confirmation they are only officers *de facto*. State *v.* Smith, 9 Wash. 195, 37 Pac. 294. And *compare* State *v.* Foster, 130 Ala. 154, 30 So. 477. And see Com. *v.* Yetter, 190 Pa. St. 488, 43 Atl. 226, holding that while the state normal school, provided for by the Pennsylvania act of 1857, is not, as such, a corporation, yet owing to the later statutes of 1874 the election of its trustees may be governed by Pa. Const. art. 16, § 4, authorizing cumulation of votes in election of trustees of a private corporation.

vision that such officers be "elected" in a certain manner, persons will not be allowed to assume duties of such officers unless duly elected.[63] So too if their removal can be for sufficient cause[64] only, it cannot be effected without notice to them and an opportunity to be heard.[65] Again the duration of the term of office may be fixed by law.[66]

B. Powers, Duties, and Liabilities — **1. In General.** While as a rule the governing board of a public institution, such as a college or university, is a corporation,[67] its functions of administration affecting the public, it has been held, are

A governor's power to appoint visitors for a medical college in case of vacancy which might occur by reason of death, resignation, or otherwise does not permit him to remove visitors and so create a vacancy in order to fill it. Lewis *v.* Whittle, 77 Va. 415.

The authority to appoint medical examiners, conferred upon an incorporated medical society by a statute, is not invalid as committing the execution of the law to a body corporate, which is not an officer or agent of the government, as such society for that purpose may be considered as an agent or officer of the state. Scholle *v.* State, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411.

The statute which authorizes the governor to fill vacancies occurring in the office of trustee of the University of Alabama (Ala. Civ. Code, § 3675) does not apply to vacancies that may arise by reason of the expiration of a term, but confers the authority to fill a vacancy occurring during the term of an incumbent by death, removal, or resignation. State *v.* Foster, 130 Ala. 154, 30 So. 477.

63. Hence where the constitution of the state required that the members of the board of regents of the state university should be "elected" and a subsequent statute provided that "the board . . shall consist of three elective members, as now provided by law, and of the governor and attorney general, who shall be *ex officio* members of said board," it was held that the attorney-general in office at the time of the passage of the act was not entitled to act as a member of the board *ex officio*, the statute not showing the existence of an emergency at the time of its passage. State *v.* Torreyson, 21 Nev. 517, 34 Pac. 870 [*following* State *v.* Arrington, 18 Nev. 412, 4 Pac. 735; State *v.* Irwin, 5 Nev. 111].

64. Sufficient cause for removal.—It is not necessary, in justification of the removal of an officer of a university, to show wrongful intent or fraud upon his part; and a showing that regents had appropriated funds of a college to maintain a dining hall for students, and that one of them had acted as a purchasing agent therefor and had drawn a monthly salary for such services, and that such officers had held meetings of the regents at which no quorum was present, and had transacted business relating to the college at such meetings is sufficient to authorize their removal from office. Yoe *v.* Hoffman, 61 Kan. 265, 59 Pac. 351 [*reversing* Hoffman *v.* Yoe, 9 Kan. App. 394, 58 Pac. 802]. And see Atty.-Gen. *v.* Illinois Agricultural College, 85 Ill. 516.

Right of instructor to be trustee.— Under a statute declaring that no professor of any incorporated college or academy should be a trustee of such college or academy, but which upon amendment refers to academies only (the word college having been omitted therefrom), it is held that a professor of a medical college may properly be a trustee thereof. People *v.* Albany Medical College, 10 Abb. Pr. N. S. (N. Y.) 122, 62 How. Pr. (N. Y.) 220.

65. State *v.* Hewitt, 3 S. D. 187, 52 N. W. 875, 44 Am. St. Rep. 788, 16 L. R. A. 413. And see State *v.* Bryce, 7 Ohio, Pt. II, 82, holding that neither the neglect of a trustee to exercise his powers, nor even an abuse of them *ipso facto*, works a forfeiture of his office, and that it is essential to the validity of his removal that he should be duly summoned.

66. State *v.* Foster, 130 Ala. 154, 30 So. 477, holding that under the provisions of the constitution relating to the appointment and terms of office of the trustees of the University of Alabama (Ala. Const. art. 13, § 9), the duration of the term of said trustees is fixed at six years for all who may be appointed to fill terms after the expiration of the term of the first incumbent.

67. Incorporation by implication.— On the principle that where rights are granted an association of persons which cannot be performed or enjoyed without acting in a corporate capacity, such association is a corporation; the board of directors of the University of Oregon, which are given power to hold and confer land for the benefit of the university and to transmit title to their successors in office is a corporation. Dunn *v.* State University, 9 Oreg. 357 [*approved* in Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81]. And *compare* Neil *v.* Ohio Agricultural, etc., College, 31 Ohio St. 15.

Governing officer of English universities.— In England many of the functions which properly belong to the regents or trustees of a college or university are performed by an officer known as the visitor. The founder of the university usually appoints the visitor, but in the absence of such appointment the right to fill such office devolves upon the king. See Rex *v.* St. Catherine's Hall, 4 T. R. 233, 2 Rev. Rep. 369. Where such university is incorporated under a visitor it is his business to attend to the passing of resolutions conferring degrees, etc., and a court of law or equity has jurisdiction only with respect to such matters, out of the house, as between the university and third persons. Thompson *v.* London University, 10 Jur. N. S.

franchises;[68] and such a board has no powers except those which are conferred upon it either expressly or by fair implication.[69] Again, while mandamus will lie in a proper case to compel a college official to perform his duty,[70] where the regents have a sound discretion to exercise in the performance of a duty the court will not interfere unless their delay in the performance of such duty is unnecessary or wilful.[71]

2. AUTHORITY TO BIND STATE. While it is the duty of the governing board of a university to do such things, and contract such obligations as are necessary for the successful operation of the institution under their control,[72] their authority

669, 33 L. J. Ch. 625, 10 L. T. Rep. N. S. 403, 12 Wkly. Rep. 733. And while the visitors are not restricted to any particular form of proceeding within their jurisdiction (Ely *v.* Bentley, 2 Bro. P. C. 220, 1 Eng. Reprint 898), their powers may be limited by the founder of the institution (St. John's College *v.* Todington, 1 Burr. 158, 1 Ld. Ken. 441). If, however, a visitor refuses to exercise his visitorial power by receiving and hearing an appeal the court will grant a mandamus to compel him (Rex *v.* Worcester, 4 M. & S. 415, 16 Rev. Rep. 512; Rex *v.* Ely, 5 T. R. 475, 2 Rev. Rep. 644), although it cannot afterward review his decision (*Ex p.* Buller, 1 Jur. N. S. 709). But mandamus will not issue where it is doubtful who the real visitor is. Rex *v.* Ely, 1 W. Bl. 52, 1 Wils. C. P. 266. And see Reg. *v.* Hertford College, 3 Q. B. D. 693, 47 L. J. Q. B. 649, 39 L. T. Rep. N. S. 18, 27 Wkly. Rep. 347. And under the early charters of colleges in this country visitors were endowed with similar powers. Bracken *v.* William and Mary College, 3 Call (Va.) 573; Bracken *v.* William and Mary College, 1 Call (Va.) 161.

68. People *v.* State University, 24 Colo. 175, 49 Pac. 286.

69. State University *v.* Hart, 7 Minn. 61; State *v.* Babcock, 17 Nebr. 610, 24 N. W. 202; State *v.* Lindsley, 3 Wash. 125, 27 Pac. 1019; State *v.* State University, 54 Wis. 159, 11 N. W., 472. And see State *v.* Board of Supervisors State University, 31 La. Ann. 711; Onondaga Nation *v.* Thacher, 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014 [*affirming* 29 Misc. (N. Y.) 428, 61 N. Y. Suppl. 1027]. Thus where a state university is by the constitution located at Boulder, the board of regents cannot authorize the faculty of a certain department to conduct their lectures at Denver, even though they provide that the appropriations for that department shall not be increased, and that all graduating exercises shall be held, the business office kept, and the first year's instruction of such department given at Boulder. People *v.* State University, 24 Colo. 175, 49 Pac. 286.

The University of the State of New York has no statutory right or power to be constituted a wampum keeper for an Indian confederacy or for a tribe, although it is authorized to have a museum and to acquire title to such articles as wampum belts. Onondaga Nation *v.* Thacher, 169 N. Y. 584, 62 N. E. 1098 [*affirming* 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014]. Again it has been held that trustees of a college did not have authority to direct the payment of a deceased teacher's salary to his widow for a limited time. People *v.* Jackson, 85 N. Y. 541 [*reversing* 23 Hun (N. Y.) 568, 60 How. Pr. (N. Y.) 330].

Trustee may contract with other trustees. — The position of trustee of a college does not preclude one from entering into a valid contract with the remainder of the board of trustees to perform labor for the college. Chaffe *v.* Minden Female College, 28 La. Ann. 813.

70. See, generally, MANDAMUS. See also Rex *v.* Worcester, 4 M. & S. 415, 16 Rev. Rep. 512; Rex *v.* Ely, 5 T. R. 475, 2 Rev. Rep. 644.

Mandamus lies to compel a warden of a college to affix the common seal of the college to an answer of the fellows in chancery, contrary to the answer he himself has put in. Rex *v.* Windham, Cowp. 377. And see Rex *v.* Cambridge University, 3 Burr. 1647, 1 W. Bl. 547.

Mandamus to compel the appointment of a professor of homeopathy in the department of medicine will be denied where the supreme court is equally divided upon the question as to the power of the legislature under the constitution of the state to control the actions of the regents, and to provide for the appointment of such professor. People *v.* State University, 18 Mich. 469. For a further discussion of the powers of a legislature to regulate and control the governing board of a university see Cable *v.* Ohio University, 36 Ohio St. 113, holding that under the facts of that particular case it was immaterial whether the board was subject to the control of the legislature, or whether they regarded its action merely in the nature of advice or recommendation.

71. People *v.* State University, 4 Mich. 98. And *compare* Rex *v.* Ely, 1 W. Bl. 52, 1 Wils. C. P. 266. But see Atty.-Gen. *v.* Illinois Agricultural College, 85 Ill. 516, holding that a law amending a charter of an agricultural college by providing that the instructors shall be permitted to impart instruction in all branches, as in any similar institution in any of the states, does not release them from the duty imposed in their charter of teaching agriculture and the mechanic arts.

72. See Weinberg *v.* State University, 97 Mich. 246, 56 N. W. 605.

Right to rescind contract. — A legislature, in providing for the sale of lands in behalf of its university, can fix and enforce the terms and conditions of the sale. Smith *v.* Iowa Agricultural College, 28 Iowa 500. Nor would

to bind the state is limited to the amount of the legislative appropriations granted for such purpose.[73]

3. Liability For Funds Received. Every employee of a university[74] is liable for the misuse of moneys received by him in his fiduciary capacity.[75]

V. Custody and Control of Funds.

The custody and control of the funds of a college or university are usually delegated to some officer of the corporation;[76] but such custody and control, especially of the funds of a public institution, are subject to statutory provisions and regulations.[77]

VI. Instructors.

A. Appointment and Removal. To constitute one an instructor it is not necessary that he be formally employed.[78] While it is sometimes provided, either by the statute or rules of the institution[79] that the appointee assumes his position subject to removal at the discretion of the governing boards,[80] his relation is

the repeal of a statute which authorized the board of trustees at their discretion to consider a contract for the sale of land as forfeited, upon the non-payment of interest due thereon, deprive the state university of its right to exercise the general equitable right of vendors of real estate to rescind the contract for non-performance on the part of the vendees. Henn *v.* State University, 22 Iowa 185.

The doctrine of estoppel cannot be applied against a college where a party, under a contract with the trustees, claims rights and privileges which by the law the college had no right to convey. Hillsdale College *v.* Rideout, 82 Mich. 94, 46 N. W. 373. A college is, however, estopped from saying that persons acting as trustees before its organization in obtaining a subscription to buy property for it had no power to bind it by an agreement that it would save harmless those who, in behalf of the college, agreed to indemnify the subscribers against liability for interest called for by the terms of the subscription, the indemnifiers having been compelled to pay such interest which was used by the college. Morton *v.* Hamilton College, 100 Ky. 281, 18 Ky. L. Rep. 765, 38 S. W. 1, 35 L. R. A. 275.

What constitutes ratification of unauthorized contract.— Where the board of regents entered into an unauthorized contract with plaintiff for the planting of trees on the grounds of the state agricultural college, a subsequent presentation of a memorial to the legislature, reciting plaintiff's claim, and the passage of a bill for the payment of such claim by one branch of the legislature only is not a ratification of the contract, and the state would in such instance be liable only for the reasonable value of the trees. Jewell Nursery Co. *v.* State, 8 S. D. 531, 67 N. W. 629 [*reversing* 4 S. D. 213, 56 N. W. 113].

73. Thomas *v.* Illinois Industrial University, 71 Ill. 310; State University *v.* Hart, 7 Minn. 61; Jewell Nursery Company *v.* State, 4 S. D. 213, 56 N. W. 113.

74. A person employed by the regents of a university to assist the directors of a certain department in receiving and accounting for moneys paid into that department, and whose compensation is paid by the regents from the university funds, is an employee of the university. State University *v.* Rose, 45 Mich. 284, 4 N. W. 738, 5 N. W. 674, 7 N. W. 875.

75. State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

76. State University *v.* McConnell, 5 Nebr. 423.

77. Regents *v.* Dunn, (Cal. 1885) 6 Pac. 377; State University *v.* January, 66 Cal. 507, 6 Pac. 376; State University *v.* McConnell, 5 Nebr. 423.

78. Thus the advertising of one as their professor in a catalogue, and the acceptance of services from him with the knowledge that he expected to be paid therefor, will render the university liable to him for his instruction in such position. Tyler *v.* Trustees of Tualatin Academy, 14 Oreg. 485, 13 Pac. 329. And see People *v.* Albany Medical College, 10 Abb. Pr. N. S. (N. Y.) 122, 62 How. Pr. (N. Y.) 220 [*reversed* on other grounds in 26 Hun (N. Y.) 348].

A mere stated account between the superintendent of a university and agricultural and mechanical college and one of the professors is not, however, such conclusive proof of the amount due the professor as would enable him to maintain mandamus against the president of the board of supervisors to compel its payment. State *v.* Board of Supervisors, 31 La. Ann. 711.

79. It has been held that where an instructor of a university agreed to fill a certain position "subject to law" that he might, before the expiration of his contract, be deprived of his position, although he was in every way competent. Head *v.* Missouri University, 19 Wall. (U. S.) 526, 22 L. ed. 160.

80. People *v.* New York Post-Graduate Medical School, etc., 29 N. Y. App. Div. 244, 51 N. Y. Suppl. 420; Devol *v.* State University, (Ariz. 1899) 56 Pac. 737, holding that inasmuch as the regents in employing and instructing had no authority to contract

ordinarily a purely contractual one, subject to the rules of law governing such a relation.[81]

B. Right to Perform Other Services. There is no such rivalry between educational institutions that services with one is to be regarded as hostile to another; hence if an instructor render all the services which he promised and all that the defendant university asked, it is no defense that during part of the time covered by his contract he worked for another university.[82]

C. Salary. In the absence of a contract as to the amount of an instructor's salary the amount may be governed by custom.[83]

VII. DISSOLUTION OR ABANDONMENT.[84]

A. Forfeiture of Franchise. In the absence of a statute providing the manner for the dissolution of a college corporation it may dissolve itself by a voluntary surrender of its franchise,[85] and while a palpable misuse of the powers is ground for its dissolution,[86] a partial decay of one department caused by students refusing to take that special course of instruction would not be ground for forfeiture.[87]

B. What Constitutes Abandonment. What will or will not constitute an abandonment of a college or university must be determined by the facts of each particular case.[88] Thus a failure for ten years to maintain an institution of learn-

for his dismissal on three months' notice, he could not recover his salary for three months on being dismissed without notice. And see Hartigan *v.* State University, 49 W. Va. 14, 38 S. E. 698, where it was held that no notice or hearing was required in a proceeding by the board of regents to remove a professor.

81. Butler *v.* State University, 32 Wis. 124. Therefore, where a professor agrees to hold his office for a term of two years, unless permitted by the executive committee to resign, his salary during such time cannot be diminished without his consent. State University *v.* Walden, 15 Ala. 655. And see Kansas State Agricultural College *v.* Mudge, 21 Kan. 223.

82. State University *v.* Bruner, 66 Ill. App. 665. And see Pusey *v.* Jowett, 1 New Rep. 488, holding that the provisions of the university statutes prohibiting a professor from directly or indirectly teaching or dogmatically asserting anything repugnant to the Catholic faith are to be read by the context and do not extend to any book published by such professor in his private capacity and not used by him in his official teaching. *Compare* Alexander *v.* Cincinnati, 2 Handy (Ohio) 183, 12 Ohio Dec. (Reprint) 393, construing the Ohio act of December 31, 1825, which in effect provided that it should be the duty of the faculty of the medical college of Ohio to visit and attend the patients in the asylum "and to render to said patients such medical and surgical advice and service, as their cases may respectively require, without any charge or pecuniary compensation therefor; in consideration of which the said faculty shall have liberty and power, under such regulations" to allow their students "to witness the treatment of diseases and such surgical operations as may be performed therein." It was held that the faculty were bound to render only so much personal service and advice to the asylum as was consistent with their character as professors and the duties which necessarily attached to their positions.

Whether or not the taking of private pupils by the professor of music in a college is in competition therewith is a question of fact for the jury. Chaddock College *v.* Bretherick, 36 Ill. App. 621.

83. Hosack *v.* New York Physicians, etc., College, 5 Wend. (N. Y.) 547. See also, generally, CUSTOMS AND USAGES.

84. Dissolution by war.— Dartmouth College, being a private, and not a public, corporation, was not dissolved by the Revolutionary war, although its charter was granted by the British crown. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. And see State University *v.* Moody, 62 Ala. 389.

85. People *v.* State College, 38 Cal. 166.

86. As for instance where the trustees sign diplomas in blank and leave them within the control of one of its officers, who sells them and thus confers degrees without regard to merit. State *v.* Mt. Hope College Company, 63 Ohio St. 341, 58 N. E. 799, 52 L. R. A. 365.

87. State *v.* Farmer's College, 32 Ohio St. 487.

88. See State *v.* Vincennes University, 5 Ind. 77, holding that the mere failure of the trustees to attend and hold semiannual meetings, or their removal from the state, would not, under the charter of such university, amount to an abandonment. And whatever the presumption of dissolution might be, an act of the legislature recognizing the existence of the university would rebut any further presumption of its non-existence. Nor would the acceptance of office by the members of one of the faculties of an old under a new corporation amount in law to a dissolution or suspension of the franchises of the old cor-

ing, a sale and removal of its buildings, and an attempt to transfer all its land, in the absence of any evidence that further effort would be made to establish a college, has been held sufficient ground for forfeiture of its charter.[89]

C. Disposition of Assets. Where the functions of a college have ceased and there is no probability of the revival of the exercise of the franchise, it is proper for the court to dispose of the endowment fund raised by subscription.[90]

VIII. LIMITING CREDIT OF STUDENTS.

A statute providing that credit for certain purposes is not to be given to students[91] who are minors attending a college, unless the assent of some officer of the college be obtained, is a proper exercise of legislative functions.[92]

COLLEGIATE CHURCH. In English ecclesiastical law, a church built and endowed for a society or body corporate of a dean or other president, and secular priests, as canons and prebendaries in the said church; such as the churches of Westminster, Windsor, and others.[1]

COLLEGIUM SEU CORPUS CORPORATUM NISI REGNIS CONSTITUTIONIBUS NON POTEST EXISTERE. A maxim meaning "A college or incorporated body can only exist by consent of the sovereign."[2]

COLLIERY. A place where coals are dug;[3] a mine, pit or place where coals are dug, with the machinery used in discharging and raising the coal.[4] (See, generally, MINES AND MINERALS.)

COLLIGENDUM BONA DEFUNCTI. Literally, to collect the goods of the deceased. In practice, certain letters granted to some discreet person, approved by the probate court, authorizing him to take care of the goods and to do other acts for the benefit of those who are entitled to the property of the deceased.[5] (See, generally, EXECUTORS AND ADMINISTRATORS.)

poration. State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

89. Edgar Collegiate Institute *v.* People, 142 Ill. 363, 32 N. E. 494. And see Jenkins *v.* Jenkins' University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785, holding that a showing that the proposed building had not been erected, that a large indebtedness had been incurred, that part of the property donated had been lost by foreclosure and part had been returned to the donors, and that the trustees had failed to meet for a long time and had apparently relinquished all efforts is a sufficient statement of facts in support of the allegation that the project of founding a university had been abandoned, so that gifts for that purpose would revert to the donor.

90. Such fund should be distributed among the contributors creating it and not among the stock-holders of the college. Magee *v.* Genesee Academy, 13 N. Y. St. 60. And see People *v.* State College, 38 Cal. 166, where, under a statute providing that upon the dissolution of an incorporated college and after payment of its debts the residue of its property should belong to the state, a conveyance of the corporate realty to the state in anticipation of insolvency, retaining property sufficient to meet the demands of its creditors, is valid, and vests a good title in the state.

91. One may be a student within the meaning of such a law, although not matriculated, where he attends recitations and lectures and is under the government of the authority presiding over the institution. Morse *v.* State, 6 Conn. 9.

92. Soper *v.* Harvard College, 1 Pick. (Mass.) 177, 11 Am. Dec. 159, holding that a statute imposing a penalty upon liverystable keepers for giving credit to the undergraduates of a college without the consent of some authorized officer of the college, or in violation of its rules, is not unconstitutional. See also Morse *v.* State, 6 Conn. 9. And for an analogous restriction see *Ex p.* Death, 18 Q. B. 647, 21 L. J. Q. B. 337, 17 Jur. 112, 83 E. C. L. 647.

The declaration or information in an action on a statute imposing such a penalty must allege that the rules have been established and that some officer has been authorized to give or withhold consent as the circumstances may require. Morse *v.* State, 6 Conn. 9; Soper *v.* Harvard College, 1 Pick. (Mass.) 177, 11 Am. Dec. 159.

1. Black L. Dict.

2. Peloubet Leg. Max.

3. Johnson Dict.; Webster Dict. [*quoted* in Carey *v.* Bright, 58 Pa. St. 70, 85].

4. Springside Coal Min. Co. *v.* Grogan, 53 Ill. App. 60, 65.

It is probable that many things about a colliery, though not actually affixed to the freehold, may come within that category, like the rolls of an iron-mill, or the machinery of a manufactory, whether fast or loose, which is necessary to constitute it, and without which it would not be a mill or manufactory at all. Carey *v.* Bright, 58 Pa. St. 70, 85 [*citing* Voorhis *v.* Freeman, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490].

5. Brown L. Dict.

COLLISION

By Julian Bedford Shope

I. **Definition**, 302

II. **General Maritime Law With Reference to Collision**, 302

A. *Negligence*, 302

1. *Its Effect*, 302
2. *Of What Negligence May Consist*, 303
   a. *In General*, 303
   b. *As It Relates to the Ship*, 303
   c. *With Respect to Officers and Crew*, 303
   d. *With Respect to Particular Duties Involved in Navigation and Management*, 304
3. *Error In Extremis*, 307
   a. *Rule Stated*, 307
   b. *Cause of the Emergency*, 309
   c. *Errors Excusable*, 309
4. *Negligence of Salvors*, 310
5. *Contributory Negligence*, 311
   a. *Common-Law Rule of Liability Stated*, 311
   b. *Distinction Between Common-Law and Admiralty Rules*, 312
   c. *The Admiralty Doctrine of Contributory Negligence*, 312
      (I) *Mutual and Concurring Negligence*, 312
      (II) *Negligence Contributory but Not Contemporaneous*, 312
      (III) *When Error, Although Contributory, Is Excusable*, 313
      (IV) *Proximate and Remote Cause*, 314

B. *Inevitable Accident*, 314

C. *Inscrutable Fault*, 317

1. *Definition*, 317
2. *When Considered an Inevitable Accident*, 318
3. *When Considered a Case of Mutual Fault*, 319

III. **Rules and Regulations For Preventing Collision**, 319

A. *Application of Rules and Regulations*, 319

1. *General Maritime Law*, 319
2. *Local Usages*, 319
3. *State Statutes and Municipal Ordinances*, 320
4. *Rules of Supervising Inspectors*, 321
5. *Regulations Enacted by Congress*, 322
   a. *Summary*, 322
   b. *Application to Foreign Vessels*, 323
      (I) *Rule in England*, 323
      (II) *Rule Under Decisions of United States Courts*, 324
   c. *To What Classes of Vessels Applicable*, 325
   d. *Application With Reference to Risk of Collision*, 325
      (I) *Rule Stated*, 325
      (II) *What Constitutes Risk of Collision*, 326
   e. *Rules For Construing Regulations*, 327
   f. *The International and Inland Rules*, 328
      (I) *Enacting Clause, Scope, and Penalty*, 328
         (A) *In General*, 328

(1) *Of International Rules*, 328
(2) *Of Inland Rules*, 328
(B) *Penalty*, 328
(1) *Imposed Upon Persons in Charge*, 328
(2) *Imposed Upon Vessel*, 328
(C) *Preliminary Definitions*, 329
(II) *Lights and so Forth*, 329
(A) *In General*, 329
(B) *Steam-Vessels — Masthead Light*, 330
(C) *Steam-Vessels — Side-Lights*, 331
(D) *Steam-Vessels — Range-Lights*, 331
(E) *Steam-Vessels — When Towing*, 331
(F) *Special Lights*, 332
(G) *Lights For Sailing Vessels and Vessels in Tow*, 333
(H) *Lights For Ferry-Boats, Barges, and Canal Boats in Tow*, 333
(I) *Lights For Small Vessels*, 334
(J) *Lights For Small Steam and Sailing Vessels and Open Boats*, 334
(K) *Lights For Pilot-Vessels*, 335
(L) *Lights, Etc., of Fishing-Vessels*, 335
(M) *Lights For Rafts, or Other Craft Not Provided For*, 335
(N) *Lights For Fishing-Vessels Off European Coasts*, 336
(O) *Lights For Overtaken Vessel*, 336
(P) *Anchor Lights*, 337
(Q) *Special Signals*, 338
(R) *Naval Lights and Recognition Signals*, 339
(S) *Steam-Vessel Under Sail by Day*, 339
(III) *Sound Signals in Fog, Etc.*, 339
(A) *Preliminary*, 339
(B) *Speed in Fog*, 341
(IV) *Steering and Sailing Rules*, 345
(A) *Preliminary*, 345
(B) *Sailing Vessels*, 345
(C) *Steam-Vessels*, 349
(1) *The International Rules*, 349
(2) *The Inland Rules*, 350
(a) *Rule One*, 350
(b) *Rule Three*, 351
(c) *Rule Five*, 351
(d) *Rule Eight*, 351
(e) *Rule Nine*, 351
(f) *Supplementary Regulations*, 351
(D) *Two Steam-Vessels Crossing*, 352
(E) *Steam-Vessel Must Keep Out of Way of Sailing Vessel*, 353
(F) *Course and Speed*, 354
(G) *Crossing Ahead*, 356
(H) *Steam-Vessel Must Slacken Speed or Stop*, 358
(I) *Overtaking Vessels*, 359
(J) *Narrow Channels*, 362
(K) *Right of Way of Fishing Vessel*, 365
(L) *General Prudential Rule*, 366
(V) *Sound Signals For Passing Steamer*, 367

(A) *The International Rules*, 367
(B) *The Inland Rules*, 369
(VI) *Precaution*, 369
(VII) *Lights on United States Naval Vessels and Revenue Cutters*, 370
(VIII) *Distress Signals*, 370
(A) *The International Rules*, 370
(B) *The Inland Rules*, 370
B. *Presumption of Fault Arising From Breach of Regulations*, 370
1. *Rule in the United States*, 370
a. *In Federal Courts*, 370
b. *In the State Courts*, 371
2. *Rule in England*, 371
3. *Failure to Stand By After Collision*, 372

IV. RIGHTS AND LIABILITIES GROWING OUT OF COLLISION, 372
A. *Liability For Damage Caused by Collision*, 372
1. *Liability of Ship and Her Owners*, 372
a. *In General*, 372
b. *For Acts of Master and Crew*, 373
2. *Liability of Owners and Charterers*, 374
B. *Maritime Lien Arising From Collision*, 374
1. *Its Character*, 374
2. *How Divested*, 375
3. *The Priority of Such Lien*, 375
C. *Division of Loss*, 375
1. *In Cases of Inevitable Accident*, 375
2. *In Cases of Inscrutable Fault*, 376
3. *In Cases of Mutual Fault*, 377
a. *Rule at Common Law*, 377
b. *Rule in Admiralty*, 377
(I) *Division of Loss to the Two Vessels*, 377
(II) *Division of Loss on Cargo*, 379
(A) *Rule in England, and in United States Previous to Harter Act*, 379
(B) *As Modified by Harter Act*, 380
(III) *Division of Loss in Cases of Personal Injuries*, 382
(IV) *Division of Loss of Personal Effects of Master and Crew*, 382
c. *Forced Intervention*, 382
D. *Limitation of Liability*, 383
1. *Origin of the Rule*, 383
2. *Distinction Between the Rule in England and in the United States*, 383
3. *English Acts*, 384
4. *United States Statutes*, 385
a. *Liability of Owner Not to Exceed His Interest*, 385
(I) *In General*, 385
II) *Meaning of "Amount or Value of the Interest of Such Owner,"* 385
b. *General Average Losses*, 386
c. *Transfer of Interest of Owner to Trustee*, 386
d. *Remedies Reserved*, 386
e. *What Vessels Are Included Within the Act*, 386
f. *Liability of Owners For Debts Limited*, 387
5. *What Injuries or Losses Embraced*, 387
6. *Who Are Included Under Term "Owners,"* 388

7. *Meaning of Words "Without the Privity or Knowledge of Such Owner,"* 389
8. *In Cases of Division of Loss,* 390
E. *Measure of Damages,* 390
1. *In General,* 390
2. *Loss and Injuries to Vessel,* 391
a. *A Vessel Lost or Destroyed,* 391
(I) *When Total Loss Is Allowed,* 391
(II) *Elements of Value,* 392
b. *Vessel Damaged,* 392
(I) *Cost of Repairs,* 392
(II) *Permanent Depreciation,* 392
3. *Loss of Freight,* 392
4. *Loss of and Injury to Cargo,* 393
5. *Loss of Personal Effects of Crew and Personal Injuries,* 393
6. *Expenses Incurred in Consequence of Collision,* 393
7. *Losses Resulting From Collision,* 394
8. *Demurrage,* 394
a. *When Allowed,* 394
b. *Amount to Be Allowed,* 395
9. *Interest,* 395
F. *Evidence,* 396
1. *Burden of Proof,* 396
2. *Presumptions,* 396
3. *Admissibility,* 397
4. *Comparative Weight of Evidence,* 397

CROSS-REFERENCES

For Matters Relating to:

Admiralty Jurisdiction and Practice, see ADMIRALTY.

Collision:

Between Railroad Trains, see CARRIERS.

Of Street Cars With Animals, Persons, or Vehicles, see STREET RAILROADS.

Of Vehicles on Highways, see STREETS AND HIGHWAYS.

Of Vessel Other Than With Another Vessel, see NAVIGABLE WATERS.

Jurisdiction in Collision Cases, see ADMIRALTY.

Marine Insurance, see MARINE INSURANCE.

Salvage, see SALVAGE.

Shipping Generally, see SHIPPING.

I. DEFINITION.

Collision is defined to be a dashing or violently running together.[1] In maritime law "collision" is the act of ships or vessels striking together.[2]

II. GENERAL MARITIME LAW WITH REFERENCE TO COLLISION.

A. Negligence — 1. ITS EFFECT. In order to create a liability on the part of a ship or her owners for damage by collision the collision must appear to have

1. Burrill L. Dict.

Derived from the Latin *collisio*, from *collidere* — to dash together. Burrill L. Dict.

2. Black L. Dict.

In its strict sense collision means the impact of two vessels, both moving. Abbott L. Dict.; Black L. Dict.; Burrill L. Dict. In The Moxey, Abb. Adm. 73, 76, 17 Fed. Cas. No. 9,894, it is said that the nautical acceptation of the term "imports the impinging of vessels together, whilst in the act of being navigated."

By common usage and in judicial opinions the term "collision" is applied to cases where one vessel quite stationary is run into by another. See The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138; The Moxey, Abb. Adm. 73, 17 Fed. Cas. No. 9,894. In Wright *v.* Brown, 4 Ind. 95, 97, 58 Am. Dec. 622, it is said: "It must be the same thing in prin-

been caused by an act of negligence[3] for which the owners or those in charge of the ship are responsible.[4]

2. Of What Negligence May Consist — a. In General. Negligence as the cause of collision may be conveniently considered under the following heads: (1) As it relates to the ship;[5] (2) with respect to the officers and crew;[6] and (3) with respect to particular duties in navigation and management.[7]

b. As It Relates to the Ship. As it relates to the ship negligence may be considered as the cause of the collision, if the accident be the result of any defect or insufficiency in the ship's hull or equipment.[8]

c. With Respect to Officers and Crew. With respect to the officers and crew negligence may be considered as the cause of the collision, if the accident be caused by any deficiency in the officers or crew[9] or any lack of knowledge, skill, judgment, or good seamanship on their part.[10]

ciple, whether the steam-boat ran upon the flat-boat, or forced some other object upon it, to produce the injury."

3. Negligence defined.— Negligence is the failure to exercise that skill, care, judgment, and nerve which are ordinarily to be found in a competent seaman. Marsden Coll. (3d ed.) 2. See also, generally, NEGLIGENCE.

4. Peters *v.* Warren Ins. Co., 14 Pet. (U. S.) 99, 10 L. ed. 371; The City of Aberdeen, 107 Fed. 996; The Plover, 100 Fed. 883; Marsden Coll. (3d ed.) 1.

Evidence of fault see *infra*, IV, F.

There is one exception to this rule, namely, in a case in which the ship has infringed one of the regulations for preventing collision. In such a case the infringement is presumed to have caused the collision, unless it is shown that the breach in question could not possibly have contributed to the disaster. Belden *v.* Chase, 150 U. S. 374, 14 S. Ct. 264, 37 L. ed. 1218; The Steamship Pennsylvania *v.* Troop, 19 Wall. (U. S.) 125, 22 L. ed. 148; Marsden Coll. (3d ed.) 38; 35 & 36 Vict. c. 85, § 17. As to rules and regulations for preventing collision see *infra*, III. As to presumption of fault or negligence see *infra*, III, B; IV, F, 2.

5. See *infra*, II, A, 2, b.

6. See *infra*, II, A, 2, c.

7. See *infra*, II, A, 2, d.

8. The defective or inefficient state of the hull or equipment for which the owners are responsible, if it appear to have caused the collision, includes the condition of her chain, cable, or moorings (Doward *v.* Lindsay, L. R. 5 P. C. 338, 2 Aspin. 118, 29 L. T. Rep. N. S. 355, 22 Wkly. Rep. 6); the trim of the vessel (Marsden Coll. (3d ed.) 24); the place where the anchor was stowed (The Margaret, 4 Aspin. 375, 50 L. J. Adm. 67, 44 L. T. Rep. N. S. 291, 6 P. D. 76, 29 Wkly. Rep. 533; Greenland *v.* Chaplin, 5 Exch. 243, 19 L. J. Exch. 293); the place where the boats were swung (The Avid, 3 Ben. (U. S.) 434, 2 Fed. Cas. No. 678; The Phœnix, 3 Blatchf. (U. S.) 273, 19 Fed. Cas. No. 11,111); the sufficiency and effectiveness of the steering gear (The Altenower, 39 Fed. 118; The Warkworth, 5 Aspin. 194, 53 L. J. P. 4, 49 L. T. Rep. N. S. 715, 9 P. D. 20, 32 Wkly. Rep. 479; The Virgo, 3 Aspin. 285, 35 L. T. Rep. N. S. 519, 25 Wkly. Rep. 397; The Livia, 1 Aspin. 204, 25 L. T. Rep. N. S. 887; The Peru, 1 Pritchard Adm. Dig. 440); faulty construction (see The Albert Dumois, 177 U. S. 240, 20 S. Ct. 595, 44 L. ed. 751; The M. M. Caleb, 10 Blatchf. (U. S.) 467, 17 Fed. Cas. No. 9,683); the arrangement for the communicating of the officer on the bridge with the engine-room as well as those matters provided for expressly in the regulations, such as her lights and means for signaling or making her presence known in a fog (The Kjobenhavn, 2 Aspin. 213, 30 L. T. Rep. N. S. 136).

See 10 Cent. Dig. tit. "Collision," §§ 11, 12.

In England the efficiency of the tugboat, in tow of which the vessel may be proceeding, is included within this rule. Marshall *v.* Moran, L. R. 3 P. C. 205, 23 L. T. Rep. N. S. 218, 6 Moore P. C. N. S. 492, 16 Eng. Reprint 812; The Belgic, 3 Aspin. 348, 35 L. T. Rep. N. S. 929, 2 P. D. 59 note; The Julia, Lush. 224, 14 Moore P. C. 210.

The owners may show as an excuse that the defect was latent or that they took reasonable care to send the ship to sea in a safe and efficient state. Moffatt *v.* Bateman, L. R. 3 P. C. 115, 22 L. T. Rep. N. S. 140, 6 Moore P. C. N. S. 369, 16 Eng. Reprint 765; The Virgo, 3 Aspin. 285, 35 L. T. Rep. N. S. 519, 25 Wkly. Rep. 397. But *compare* The Homer, 109 Fed. 572, 48 C. C. A. 465.

9. As to negligence of the owners in not seeing that the vessel is properly manned see The Nacoochee, 28 Fed. 462; The Echo, 3 Ware (U. S.) 289, 8 Fed. Cas. No. 4,264.

See 10 Cent. Dig. tit. "Collision," §§ 13, 14.

10. The deficiency or unskilfulness of the officers or crew includes such matters as the lack of sufficient knowledge on the part of any of the officers or crew for the particular duty for which he was employed. Germania Ins. Co. *v.* The Steamboat Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499; Union Steamship Co. *v.* New York, etc., Steamship Co., 24 How. (U. S.) 307, 16 L. ed. 699; Haney *v.* Baltimore Steam Packet Co., 23 How. (U. S.) 287, 16 L. ed. 562; Chamberlain *v.* Ward, 21 How. (U. S.) 548, 16 L. ed. 211; St. John *v.* Paine, 10 How. (U. S.) 557, 13 L. ed. 537.

The skill required of the pilot involves

d. With Respect to Particular Duties Involved in Navigation and Management. There are certain particular duties involved in the navigation and management of vessels, the non-performance or improper performance of which resulting in collision may be considered as negligence causing the collision. These duties may relate to and may be grouped under the following subjects: (1) The duty as to lights and signals;[11] (2) the duty as to the lookout;[12]

knowledge of the particular channel (The John F. Tolle, 12 Fed. 444; The Armstrong, Brown Adm. 130, 1 Fed. Cas. No. 540); of obstructions to navigation generally (Altee *v.* Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619); and ability to make allowance for the effect of a cross tide embarrassing the movements of another vessel (The Franz Sigel, 14 Blatchf. (U. S.) 480, 9 Fed. Cas. No. 5,062).

The skill of the deck officer involves the ability to ascertain the character of an approaching vessel and judge of her position (Chamberlain *v.* Ward, 21 How. (U. S.) 548, 16 L. ed. 211; The Leopard, 2 Lowell (U. S.) 238, 15 Fed. Cas. No. 8,263); and to manœuver (The David Dows, 16 Fed. 154).

The man on watch should be able to discern another ship at a reasonable distance. The A. M. Hathaway, 25 Fed. 926.

The officers and crew should also be stationed in their proper places at critical times. Hazlett *v.* Conrad, 1 Dill. (U. S.) 79, 11 Fed. Cas. No. 6,288; The Nautilus, 1 Ware (U. S.) 529, 17 Fed. Cas. No. 10,058. As to the position of master and pilot at critical moments of navigation see The State of New York, 3 Ben. (U. S.) 253, 22 Fed. Cas. No. 13,327; The Obey, L. R. 1 A. & E. 102, 12 Jur. N. S. 817.

Errors of judgment on the part of the master and crew include the failure to take due notice of the tides or to make allowance therefor (The City of Springfield, 29 Fed. 923) or to detect the manœuvers of another vessel (The Commodore Jones, 25 Fed. 506).

11. The vessel's duty with respect to lights requires that they should be properly arranged (The Alhambra, 4 Fed. 86), in good condition, and brightly burning at all times (The Narragansett, 20 Blatchf. (U. S.) 87, 11 Fed. 918). It is a fault to exhibit a confusion of lights (The Huntsville, 8 Blatchf. (U. S.) 228, 12 Fed. Cas. No. 6,915; Lane *v.* The A. Denike, 3 Cliff. (U. S.) 117, 14 Fed. Cas. No. 8,045; The William Young, Olc. Adm. 38, 30 Fed. Cas. No. 17,760), to allow them to be shut out from view by the sails (The Vesper, 9 Fed. 569), or to show lights different from those prescribed (The Frank P. Lee, 30 Fed. 277; The Conoho, 24 Fed. 758; The Sunnyside, Brown Adm. 227, 23 Fed. Cas. No. 13,620, 6 Am. L. T. Rep. 277, 3 Chic. Leg. N. 330, 14 Int. Rev. Rec. 103).

As to duty of overtaken vessel to display a torch see The Columbian, 91 Fed. 801; The I. C. Harris, 29 Fed. 926; The Algiers, 28 Fed. 240; The Oder, 21 Blatchf. (U. S.) 26, 13 Fed. 272; The Narragansett, 20 Blatchf. (U. S.) 87, 11 Fed. 918.

A vessel is also in fault when moored for not displaying the light required by usage of that locality, although not prescribed by law. Shields *v.* Mayor, etc., 18 Fed. 748 [*distinguishing* The Steamer Bridgeport *v.* Shaw, 14 Wall. (U. S.) 116, 20 L. ed. 787; Wetmore *v.* The Steamboat Granite State, 3 Wall. (U. S.) 310, 18 L. ed. 179]. But see Hadden *v.* The J. H. Rutter, 35 Fed. 365. And *compare* The James D. Leary, 110 Fed. 685.

When the lights are obscured it is the duty of a steamer to blow a whistle and slacken speed (The Ping-On *v.* Blethen, 7 Sawy. (U. S.) 482, 11 Fed. 607), and it is the duty of a sailing vessel in such a case to show a torch to an approaching steamer (The Caro, 23 Fed. 734).

The duty as to signals includes giving the proper signals, making sure that they are heard and understood, repeating them when not answered, and acting in accordance therewith (The Galileo, 24 Fed. 386; The Garden City, 19 Fed. 529; The Pegasus, 15 Fed. 921; The Mary Shaw, 5 Hughes (U. S.) 266, 6 Fed. 918); also understanding the signals of other vessels and answering them promptly and properly (The D. Newcomb, 16 Fed. 274; The Franconia, 3 Fed. 397; The Morrisania, 3 Fed. 925). For example it has been held to be negligence to disregard the whistles of the other boat (The Delaware, 6 Fed. 195) or to embarrass her by giving wrong whistles in response (The Bristol, 11 Fed. 156); to answer two blasts to one, when two steamers are approaching head on (The Clifton, 14 Fed. 586); also to fail to give danger signals when there is a risk of collision, such as in a narrow channel (The James M. Thompson, 12 Fed. 189; The Blue Bonnet, 10 Fed. 150), in a snow squall (The Rockaway, 25 Fed. 775), in a fog (The Exchange, 10 Blatchf. (U. S.) 168, 8 Fed. Cas. No. 4,593), or when the steering gear is disabled, even though it may not be prescribed by statute (The Roslyn, 22 Fed. 687).

Further as to lights, etc., see *infra*, III, A, 5, f, (II).

As to sound signals in fog, etc., see *infra*, III, A, 5, f, (III); Connolly *v.* The Brandywine Granite Co. No. 6, 108 Fed. 99; The F. W. Vosburgh, 107 Fed. 539.

12. The John H. Starin, 113 Fed. 419; Wilder's Steamship Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473; The George W. Roby, 111 Fed. 601, 49 C. C. A. 481 [*modifying In re* Lakeland Transp. Co., 103 Fed. 328]; The James D. Leary, 110 Fed. 685; The Devonian, 110 Fed. 588; The A. P. Skidmore, 108 Fed. 972; The Municipal, 108 Fed. 895; The

(3) the duty as to speed;[13] (4) the duty as to steering;[14] (5) the duty as to narrow

Bergen, 108 Fed. 555; The Kennebec, 108 Fed. 300, 47 C. C. A. 339; Connolly *v.* The Brandywine Granite Co. No. 6, 108 Fed. 99; The Valvoline, 107 Fed. 752; The F. W. Vosburgh, 107 Fed. 539; The Patria, 92 Fed. 411 [*affirmed* in 107 Fed. 157, 46 C. C. A. 211].

The lookout must have ordinarily good eyesight (The Avon, 22 Fed. 905) and be stationed in the proper place (The Nevada *v.* Quick, 106 U. S. 154, 1 S. Ct. 234, 27 L. ed. 149; Haney *v.* Baltimore Steam Packet Co., 23 How. (U. S.) 287, 16 L. ed. 562; New York, etc., Transp. Co. *v.* Philadelphia, etc., Steam Nav. Co., 22 How. (U. S.) 461, 16 L. ed. 397; The Paoli, 92 Fed. 940).

It is a fault to employ the same man in the two capacities of pilot and lookout (The Amboy, 22 Fed. 555), but if this has been caused by sickness of the crew it has been held to be excusable (The Southern Home, 16 Blatchf. (U. S.) 447, 22 Fed. Cas. No. 13,187, 8 Reporter 389).

As to the degree of skill and care required on the part of the lookout see The Steamship Java *v.* Judd Linseed, etc., Oil Co., 14 Wall. (U. S.) 189, 20 L. ed. 834; Pfister *v.* Greening, 9 Wall. (U. S.) 505, 19 L. ed. 741; The Mary Morgan, 28 Fed. 333; The Commodore Jones, 25 Fed. 506; The Abby Ingalls, 12 Fed. 217; The Santiago de Cuba, 4 Ben. (U. S.) 264, 21 Fed. Cas. No. 12,332; The City of Norwich, 3 Ben. (U. S.) 575, 5 Fed. Cas. No. 2,760; The Pavonia, 23 Blatchf. (U. S.) 403, 26 Fed. 106; The Fanita, 14 Blatchf. (U. S.) 545, 8 Fed. Cas. No. 4,636; The Elizabeth English, 7 Blatchf. (U. S.) 180, 8 Fed. Cas. No. 4,360. And see The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943.

13. Especial care is required in the matter of speed in a fog or a snow-storm on a dark night, when entering or leaving a harbor and in narrow channels. The Southern Home, 16 Blatchf. (U. S.) 447, 22 Fed. Cas. No. 13,187, 8 Reporter 389; The Perkiomen, 27 Fed. 573; The Pennland, 23 Fed. 551; The Utopia, 1 Fed. 892. It is the duty of both steamers and sailing vessels to go at a moderate speed in a fog (The Rhode Island, 17 Fed. 554; The Matteawan, 4 Ben. (U. S.) 106, 16 Fed. Cas. No. 9,283; The Colorado, Brown Adm. 393, 6 Fed. Cas. No. 3,028), even when going to the assistance of a ship in distress (The Nacoochee, 28 Fed. 462).

The duty of moderating speed is prescribed under the following circumstances: In a thoroughfare (The Rhode Island, 17 Fed. 554), while entering a harbor on a dark night (The Badger State, 15 Fed. 346; The Juniata Paton, 1 Biss. (U. S.) 15, 14 Fed. Cas. No. 7,584, 1 Am. L. Reg. 262; The Leo, 11 Blatchf. (U. S.) 225, 15 Fed. Cas. No. 8,254), while approaching a narrow curving channel (The Scots Greys v. The Santiago de Cuba, 5 Fed. 369), while rounding a point just above a ferry (The Electra, 1 Ben. (U. S.) 282, 8 Fed. Cas. No. 4,337), when uncertain of the course of the other vessel, or when there is probable danger of collision (The City of New York, 15 Fed. 624; The Kate Irving, 2 Fed. 919; The Western Metropolis, 2 Ben. (U. S.) 399, 29 Fed. Cas. No. 17,439; The Huntsville, 8 Blatchf. (U. S.) 228, 12 Fed. Cas. No. 6,915; The Hermann, 4 Blatchf. (U. S.) 441, 12 Fed. Cas. No. 6,408). A vessel is responsible for the effect of excessive speed not only when it causes an actual collision, but also if the result is to raise a swell causing another vessel to sink or to strike against a third alongside of which she was moored. The C. H. Northam, 13 Blatchf. (U. S.) 31, 5 Fed. Cas. No. 2,690; Netherlands Steam Boat Co. *v.* Styles, 9 Moore P. C. 286, 14 Eng. Reprint 305; Smith *v.* Dobson, 3 M. & G. 59, 3 Scott N. R. 336, 42 E. C. L. 40. As to what is moderate speed see The State of Alabama, 17 Fed. 847; The Pennsylvania, 12 Fed. 914. And the fact that a vessel is liable under a contract with the government for failure to deliver the mails within a specified time is no excuse for excessive speed where there is danger of collision. The James Adger, 3 Blatchf. (U. S.) 515, 13 Fed. Cas. No. 7,188, 35 Hunt. Mer. Mag. 453; The Northern Indiana, 3 Blatchf. (U. S.) 92, 18 Fed. Cas. No. 10,320, 16 Law. Rep. 433, 449; Haney *v.* The Louisiana, Taney (U. S.) 602, 11 Fed. Cas. No. 6,021.

Further as to speed see *infra*, III, A, 5, f, (IV), (F), (H).

14. The necessity for care and foresight in steering arises before the vessels have reached the position with respect to each other to which the regulations apply, that is, before there is actual danger of collision. The Steam Ferry-Boat America *v.* Camden, etc., R., etc., Co., 92 U. S. 432, 23 L. ed. 724; The Steamboat Joseph Johnson *v.* McCord, 9 Wall. (U. S.) 146, 19 L. ed. 610; The Clement, 2 Curt. (U. S.) 363, 5 Fed. Cas. No. 2,879; The Independence, 4 L. T. Rep. N. S. 563, Lush. 270, 14 Moore P. C. 103, 9 Wkly. Rep. 582, 15 Eng. Reprint 245; Marsden Coll. (3d ed.) 8.

It is negligence therefore to run close to another boat, even though she be at anchor, or to allow a vessel to gain too close proximity (The Steamer Lucille *v.* Respass, 15 Wall. (U. S.) 676, 21 L. ed. 247; The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; The Cement Rock, 8 Ben. (U. S.) 443, 5 Fed. Cas. No. 2,544), to fail to make due allowance for the effect of wind and tide or to avoid a drifting vessel (The Island City, 5 Blatchf. (U. S.) 264, 13 Fed. Cas. No. 7,108, 2 Int. Rev. Rec. 109; Butterfield *v.* Boyd, 4 Blatchf. (U. S.) 356, 4 Fed. Cas. No. 2,250, 18 How. Pr. (N. Y.) 526, 41 Hunt. Mer. Mag. 708), to run so close as to compel the other to change her course (The Alaska, 7 Ben. (U. S.) 183, 1 Fed. Cas. No. 130), or for the vessel to change her own course before ascertaining whether it would increase or diminish the danger (The Schooner Sarah Watson *v.* The Steamer Sea

channels;[15] and (6) the duty as to docks and harbors, mooring and anchoring;[16]

Gull, 23 Wall. (U. S.) 165, 23 L. ed. 90; The Cumbria, 3 Ben. (U. S.) 334, 6 Fed. Cas. No. 3,472).

It is no excuse for a vessel bound to keep out of the way that precautions are taken as soon as the necessity of them is perceived, if earlier precautions would have prevented the collision. Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302; New York, etc., Steamship Co. *v.* Calderwood, 19 How. (U. S.) 241, 15 L. ed. 612; St. John *v.* Paine, 10 How. (U. S.) 557, 13 L. ed. 537; The Nahor, 9 Fed. 213; The Ellen Tobin, 8 Ben. (U. S.) 446, 8 Fed. Cas. No. 4,379; Ward *v.* The Fashion, 6 McLean (U. S.) 152, Newb. Adm. 8, 29 Fed. Cas. No. 17,154.

Further as to steering see *infra*, III, A, 5, f, (IV).

15. Careful navigation in narrow channels involves laying the course in the proper part of the channel (The St. Lawrence, 19 Fed. 328; The Minnie R. Childs, 9 Ben. (U. S.) 200, 17 Fed. Cas. No. 9,639), taking a safe distance in passing other vessels (The Hattie M. Spraker, 29 Fed. 457), and proceeding at a suitable speed (The Narragansett, 4 Fed. 244).

It is a fault in a steamer to fail to keep her side of the channel (The J. S. Neil, 3 McCrary (U. S.) 177, 8 Fed. 713); to disobey the state statute requiring a steamer in the East river to keep as near mid-river as possible (The Minnie R. Childs, 9 Ben. (U. S.) 200, 17 Fed. Cas. No. 9,639); to run too near the slips at night (The Edwin H. Webster, 22 Fed. 171); to hug the New York shore while rounding the Battery (The Maryland, 19 Fed. 551; The Uncle Abe, 18 Fed. 270); to go too near a wharf when a steamer may be coming out (McFarland *v.* Selby Smelting, etc., Co., 9 Sawy. (U. S.) 53, 17 Fed. 253); to try to pass another boat in too narrow a part of the channel (The George A. Hoyt, 8 Fed. 845), or within twenty feet of the other boat or when the other vessel is aground (The Ellen S. Terry, 7 Ben. (U. S.) 401, 8 Fed. Cas. No. 4,378); to fail in a snow squall to keep a sufficient distance from the known situation of a vessel at anchor (The Rockaway, 19 Fed. 449); or to proceed at too great speed while approaching a tug with a tow in a narrow channel (The Kate Irving, 2 Fed. 919).

It is a fault in a light laden boat not to slow down in a narrow channel to let a heavy laden boat pass. The Scots Greys *v.* The Santiago de Cuba, 5 Fed. 369.

As to the duty of tugs with tows in narrow channels see The Alicia A. Washburn, 19 Fed. 788; The Blue Bonnet, 10 Fed. 150; The Sears, 8 Fed. 365.

It is a vessel's duty to signal while rounding a bend (The Michael Davitt, 28 Fed. 886), particularly if she changes her relative position in so doing (The Wm. H. Beaman, 18 Fed. 334); while lying motionless in a crowded harbor after stopping to avoid collision with another boat (The Wesley A. Gove, 27 Fed. 311); or while turning or changing her course (The Edwin H. Webster, 22 Fed. 171).

With respect to a vessel sunk in the channel way it has been held not to be negligence on the part of the owner to fail to remove the same, and it seems that this is so even if the collision in which she was sunk was caused by her own negligence. Ball *v.* Berwind, 29 Fed. 541; Worth *v.* The Wm. Murtac, 6 Fed. 192; The Swan, 3 Blatchf. (U. S.) 285, 23 Fed. Cas. No. 13,667; The Douglas, 5 Aspin. 15, 51 L. J. Adm. 89, 47 L. T. Rep. N. S. 15, 7 P. D. 151.

Further as to narrow channels, see *infra*, III, A, 5, f, (IV), (J).

16. The care to be taken in mooring and anchoring is not only with reference to the sufficiency and strength of the moorings (The J. H. Rutter, 35 Fed. 365; The Dutchess, 6 Ben. (U. S.) 48, 8 Fed. Cas. No. 4,205) and in seeing that they are properly put down (The Burke, 4 Cliff. (U. S.) 582, 4 Fed. Cas. No. 2,159), but caution should also be exercised with respect to the place of anchorage (The James D. Leary, 110 Fed. 685; The A. P. Skidmore, 108 Fed. 972; The S. Shaw, 6 Fed. 93; The E. A. Packer, 10 Ben. (U. S.) 520, 8 Fed. Cas. No. 1,241. And *compare* The Municipal, 108 Fed. 895). The latter should be chosen in accordance with the local rules, it being held an act of negligence to anchor in a prohibited place (Connolly *v.* The Brandywine Granite Co. No. 6, 108 Fed. 99; The Ailsa, 76 Fed. 868; The Heipershausen, 56 Fed. 619; The Lucy D., 21 Fed. 142. And *compare* The City of Dundee, 108 Fed. 679, 47 C. C. A. 581), with a view to the position of the other vessels anchored or moored near by (The Greenpoint, 18 Fed. 186; The J. T. Easton, 12 Fed. 926), and also with reference to the lights on shore (The Milligan, 12 Fed. 338), to the depth of the water (Scow Without a Name, 7 Ben. (U. S.) 384, 21 Fed. Cas. No. 12,554), and the width of the channel (The Margaret J. Sanford, 30 Fed. 714. And see The Westernland, 24 Fed. 703; The Isaac Bell, 9 Fed. 842).

If the vessel is to be made fast to a pier attention should be given to the position of other vessels at the same pier (The J. T. Easton, 12 Fed. 926) and to the requirements of local navigation (The City of Lynn, 11 Fed. 339).

The following matters have been held to be evidence of negligence: The lack of another anchor, or failure to let go the same when the vessel was drifting (The Wier *v.* The Padre, 29 Fed. 335; The Mary Fraser, 26 Fed. 872; Cramer *v.* Allen, 5 Blatchf. (U. S.) 248, 6 Fed. Cas. No. 3,346); and weakness or insufficiency of moorings of a floating dock or of a vessel, resulting in a collision in a squall (The Christopher Columbus, 8 Ben. (U. S.) 239, 5 Fed. Cas. No. 2,705; Jerome *v.* Floating-Dock, 3 Hughes (U. S.) 508, 13 Fed. Cas. No. 7,291; Bodin *v.* The Thule, 3 Woods (U. S.) 670, 3 Fed. Cas. No. 1,595).

as well as (7) the duty with respect to tugs and tows, including the arrangement of the boats and the length and strength of the hawsers.[17]

3. Error in Extremis — a. Rule Stated. Where a collision is all at once seen to be suddenly impending, a vessel may, in the confusion and excitement of the moment, do something which contributes to the collision or omit to do something by which the collision might be avoided, and unless the emergency has been produced by her own fault or the act or omission amounts to gross negligence it

The refusal of a canal-boat to put out more fastenings at a pier was held to be a fault when it resulted in a tug, which was in the act of towing another boat away from the pier, being pressed against the canal-boat by the tide, causing her to break her fastenings and come into collision with another vessel by which the canal-boat was damaged. The Titan, 8 Ben. (U. S.) 7, 23 Fed. Cas. No. 14,060. It is negligence to make fast in a place where the water was so shallow that at low tide the vessel careened over on another boat (The Behera, 6 Fed. 400; The Lake, 2 Wall. Jr. (U. S.) 52, 28 Fed. Cas. No. 16,878, 14 Law Rep. 669, 1 Phila. (Pa.) 327, 9 Leg. Int. (Pa.) 47), in the way of a steamer rightfully at her pier liable to careen over from the same cause (The Ponca, 19 Fed. 223), for old and weak boats to expose themselves along wharves and slips to the harsh or ordinary contacts of blows from other vessels without giving notice (The N. B. Starbuck, 29 Fed. 797), or for a vessel moored alongside and outside of another not to take measures before a gale by moving away or putting out warps to prevent the vessels pounding together (The Brady, 24 Fed. 300). For a vessel moored to allow the anchor to hang at the hawse pipe below the surface of the water is also a fault (The Palmetto, 1 Biss. (U. S.) 140, 18 Fed. Cas. No. 10,699), and likewise for a ship to place her fender improperly while coming into contact with another boat or while swinging into her berth (Camden, etc., R., etc., Co. *v.* Brady, 1 Black (U. S.) 62, 17 L. ed. 84; The Celestial Empire, 2 Fed. 651), or not putting out a fender between her and the vessel moored alongside (The New York, 6 Ben. (U. S.) 405, 18 Fed. Cas. No. 10,195). It is negligence for a vessel when in the act of heaving up the anchor to refuse to pay out cable on being hailed to do so by a schooner in imminent danger of collision (Wells *v.* Armstrong, 29 Fed. 216), for one of several vessels fastened at a slip with lines to move away without seeing that the lines are unfastened (The Thornton, 2 Ben. (U. S.) 429, 23 Fed. Cas. No. 13,995), or for a steamer in a slip to put her engines in motion without notice to other vessels, thereby creating a swell and causing them to break their moorings (The Leo, 3 Ben. (U. S.) 569, 15 Fed. Cas. No. 8,250; The Morrisania, 13 Blatchf. (U. S.) 512, 17 Fed. Cas. No. 9,838; The Washington, 5 Jur. 1067).

The presumption is in favor of moored or anchored vessels as against those that are in motion, unless the vessel at rest is where she should not have been (The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138; The Rockaway, 19 Fed. 449; The City of Lynn, 11 Fed. 339). But this presumption may be rebutted by showing care on the part of the moving and failure to use proper precaution by the anchored vessel. The City of Aberdeen, 107 Fed. 996; The Worthington & Davis, 19 Fed. 836. *Compare* The City of Dundee, 108 Fed. 679, 47 C. C. A. 581.

As to duty of anchoring see The Media, 45 Fed. 79; The Fred Jansen, 44 Fed. 773; The Raleigh, 41 Fed. 527; The Fred H. Rice, 40 Fed. 690.

A fishing vessel which changes its position at night while the weather is fine and the sea smooth, by sailing over water where several fishing vessels are anchored closely together, is guilty of negligence rendering it liable for injuries caused by collision with one of the vessels at anchor, where the master took no extra precautions in sailing, but was asleep in his cabin at the time of such collision. Conwell *v.* The Reliance, 7 Can. Exch. 181.

17. Those matters with respect to which care should be taken are as follows: The strength of hawsers (The Echo, 7 Ben. (U. S.) 70, 8 Fed. Cas. No. 4,263; The A. R. Wetmore, 5 Ben. (U. S.) 147, 2 Fed. Cas. No. 569); the proper length of the hawser (The Jessie Russell, 5 Fed. 639); the part of the boat which is towed foremost (The Edmund Levy, 8 Ben. (U. S.) 144, 8 Fed. Cas. No. 4,288); and the arrangement of the boats when there are several (The Daniel Drew, 13 Blatchf. (U. S.) 523, 6 Fed. Cas. No. 3,565) so that they will not injure each other or obstruct the view of the steersman or obscure the lights and the manœuvers of the tugboat (The Gorgas, 10 Ben. (U. S.) 541, 10 Fed. Cas. No. 5,622).

Great care is required in casting off tow (The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106), in moving a vessel from a pier (The Ben Hooley, 6 Fed. 318), and in drawing out an outside barge from a fleet moored at a dock so that the other boats do not break adrift (American Dredging Co. *v.* The Redowin, 1 Fed. Cas. No. 299, 26 Int. Rev. Rec. 38, 37 Leg. Int. (Pa.) 52).

It has been held to be negligence, in a case where the bridge obstructed the view from the pilot-house of the tug, to have an incompetent man on the bridge to give directions to the pilot of the tug (The Drew, 25 Fed. 457), to allow the colored lights of the tug to be obscured by the tow (Briggs *v.* Day, 21 Fed. 727; Marshall *v.* The Conroy, 5 Hughes (U. S.) 143, 2 Fed. 785), to damage the boats in tow by running them against some spiles to assist

is excusable.[18] At such time the highest possible degree of skill is not required,

in turning (The Syracuse, 18 Fed. 828), or by getting the boats aground (The David Morris, Brown Adm. 273, 7 Fed. Cas. No. 3,596).

18. The Ludvig Holberg, 157 U. S. 60, 15 S. Ct. 477, 39 L. ed. 620; The City of New York, 147 U. S. 72, 13 S. Ct. 211, 37 L. ed. 84; The Blue Jacket, 144 U. S. 371, 12 S. Ct. 711, 36 L. ed. 469; The Nacoochee, 137 U. S. 330, 11 S. Ct. 122, 34 L. ed. 687; The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175; The Schooner Sarah Watson *v.* The Steamer Sea Gull, 23 Wall. (U. S.) 165, 23 L. ed. 90; The Schooner Mary H. Banks *v.* The Steamer Falcon, 19 Wall. (U. S.) 75, 22 L. ed. 98; The Steamship Favorita *v.* Brooklyn Union Ferry Co., 18 Wall. (U. S.) 598, 21 L. ed. 856; The Steamer Lucille *v.* Respass, 15 Wall. (U. S.) 676, 21 L. ed. 247; The Steamship Telegraph *v.* Gordon, 14 Wall. (U. S.) 258, 20 L. ed. 807; Fincke *v.* The Steamboat Fairbanks, 9 Wall. (U. S.) 420, 19 L. ed. 708; Liverpool, etc., Steamship Co. *v.* Simmons, 9 Wall. (U. S.) 634, 19 L. ed. 751; The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; Brown *v.* Slanson, 7 Wall. (U. S.) 656, 19 L. ed. 157; The Propeller Hypodame *v.* Chapin, 6 Wall. (U. S.) 216, 18 L. ed. 794; The Zouave, Brown Adm. 110, 30 Fed. Cas. No. 18,221; The Bayonne, 110 Fed. 462; The Havana, 54 Fed. 411; The Cadiz, 20 Fed. 157; The Clytie, 10 Ben. (U. S.) 588, 5 Fed. Cas. No. 2,913, 14 Am. L. Rev. 85, 25 Int. Rev. Rec. 335; The Chesapeake, 1 Ben. (U. S.) 23, 5 Fed. Cas. No. 2,642; The Colorado, Brown Adm. 393, 6 Fed. Cas. No. 3,028; Chapin *v.* The Hattie Ross, 5 Fed. Cas. No. 2,598; The Ship Marpesia *v.* The Barque America, L. R. 4 P. C. 212, 1 Aspin. 261, 26 L. T. Rep. N. S. 338, 8 Moore P. C. N. S. 468, 17 Eng. Reprint 387; The Screw Steamship Jesmond *v.* The Screw Steamship Earl of Elgin, L. R. 4 P. C. 1, 1 Aspin. 150, 25 L. T. Rep. N. S. 514, 8 Moore P. C. N. S. 179, 17 Eng. Reprint 280; Inman *v.* Reck, L. R. 2 P. C. 25, 37 L. J. Adm. 25; The Sisters, 3 Aspin. 122, 45 L. J. Adm. 39, 34 L. T. Rep. N. S. 338, 1 P. D. 117, 24 Wkly. Rep. 412; Vennall *v.* Garner, 1 Cr. & M. 21, 3 Tyrw. 85.

See 10 Cent. Dig. tit. "Collision," § 225 *et seq.*

As to the analogous principle at common law see Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L. 439; Jones *v.* Boyce, 1 Stark. 493, 18 Rev. Rep. 812, 2 E. C. L. 189.

For a discussion of the wisdom of the rule see 1 Parsons Shipp. & Adm. § 581.

The explanation of the rule is said to be in the consideration that the important question in such cases is, which vessel is in fault for bringing the two into such proximity, rather than the inquiry as to the prudence of the manœuvers hastily planned and executed or attempted after the peril has become imminent (The Favorite, 10 Biss. (U. S.) 536, 9 Fed. 709); and on the further ground that, when the collision has become so imminent by the fault of one vessel that it cannot be avoided save by the exercise of extraordinary skill or nerve on the part of the other, it would in such a case be a harsher rule to hold the second vessel responsible for a failure on her part to rise to meet the emergency of the occasion than to hold in fault the vessel whose negligence produced the emergency (Maclachlan Shipp. (3d ed.) 314; Marsden Coll. (3d ed.) 3).

Application of the rule.— Where the collision occurred in consequence of the third mate obeying a direction given at the time by the master of the other vessel it was held that the latter could not sustain his claim. The Huntress, 2 Sprague (U. S.) 61, 12 Fed. Cas. No. 6,913. The same principle has been applied where the latter vessel, in obeying the hail of the former, complied with the regulations applicable under the circumstances or with the rules of the general maritime law. As in the case of The Carolus, 3 Hagg. Adm. 343 note, in which a ship close-hauled on the starboard tack hailed another close-hauled on the port tack to keep her luff, the latter did so and a collision occurred. The first ship was held in fault. Upon the same principle if a ship by carrying wrong lights or by navigating in an improper or negligent manner misleads or embarrasses another she cannot attribute as a fault to the latter any act which was the probable result of her own negligence. The Elizabeth Jones, 112 U. S. 514, 5 S. Ct. 468, 28 L. ed. 812; Goslee *v.* Shute, 18 How. (U. S.) 463, 15 L. ed. 462; The Jupiter, 1 Ben. (U. S.) 536, 14 Fed. Cas. No. 7,585; The John Mitchell, 12 Fed. 511; The America, 4 Fed. 337; The Belle, 1 Ben. (U. S.) 317, 3 Fed. Cas. No. 1,269, 9 Leg. & Ins. Rep. 276; The F. W. Gifford, 7 Biss. (U. S.) 249, 9 Fed. Cas. No. 5,166, 9 Chic. Leg. N. 9; Reed *v.* The New Haven, 20 Fed. Cas. No. 11,649, 18 How. Pr. (N. Y.) 482; Hinckley *v.* The Northumberland, 12 Fed. Cas. No. 6,511, 16 Hunt. Mer. Mag. 386; The Mary Hounsell, 4 Aspin. 101, 48 L. J. Adm. 54, 40 L. T. Rep. N. S. 368, 4 P. D. 204; The Rob Roy, 3 W. Rob. 190. The doctrine under which errors *in extremis* are excused seems to have been based upon these considerations, although it has been extended to include cases where the cause of the sudden peril has not been the fault of the other vessel but extraneous circumstances, for which neither ship was to blame. The Ship Marpesia *v.* The Barque America, L. R. 4 P. C. 212, 1 Aspin. 261, 26 L. T. Rep. N. S. 338, 8 Moore P. C. N. S. 468, 17 Eng. Reprint 387 (in this case a sailing ship sighted another in a thick fog within a minute of the collision and in the hurry of the moment neglected to haul aft the head-sheets and let go the lee braces to assist her head in paying off and she was held not in fault therefor); The State of Alabama, 17 Fed. 847 (in this case an erroneous or-

but only such caution and skill as everyone would be expected to exercise who took upon himself the command and navigation of a vessel.[19]

b. Cause of the Emergency. If the imminence of the peril or the dangerous contiguity of the two vessels is occasioned by the lack of caution or mismanagement of the vessel committing the error *in extremis* she will be held responsible for it.[20]

c. Errors Excusable. In the United States[21] infringements of the statutory regulations if committed under circumstances of sudden and extraordinary peril[22] are regarded in the same light as breaches of any rule of the maritime law.

der to change the helm owing to the lookout's mistaking a main trysail of an approaching vessel for the head-sails when she was first dimly seen through the fog, the mistake being corrected as soon as it could be perceived, was held to be excusable). In The Columbus, Abb. Adm. 384, 6 Fed. Cas. No. 3,043, a ferry-boat, on account of her lowness in the water and the condition of the tide, was unable to see a steamboat coming down the river just as she was leaving her slip, the view being obstructed by the piers and also by an intervening vessel in the stream. Here, in the moment when the collision was inevitable, the ferry-boat made a wrong manœuver. This was held not to be a fault. In The Steamship Favorita *v.* Brooklyn Union Ferry Co., 18 Wall. (U. S.) 598, 21 L. ed. 856, the Manhasset, after coming out of her slip, suddenly sighted the Favorita coming up the river, her view having been previously obstructed by other vessels. In the moment of sudden danger she reversed full speed, but this was held not to be a fault. And see The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943; The Blue Jacket, 144 U. S. 371, 12 S. Ct. 711, 36 L. ed. 469; The Chalmette, 93 Fed. 500.

19. Halderman *v.* Beckwith, 4 McLean (U. S.) 286, 11 Fed. Cas. No. 5,907.

20. The Elizabeth Jones, 112 U. S. 514, 5 S. Ct. 468, 28 L. ed. 812; Peters *v.* The Schooner Dexter, 23 Wall. (U. S.) 69, 23 L. ed. 84; The Steamboat Joseph Johnson *v.* McCord, 9 Wall. (U. S.) 146, 19 L. ed. 610; The Steamer C. Vanderbilt *v.* McKibbon, 6 Wall. (U. S.) 225, 18 L. ed. 823; Whitridge *v.* Dill, 23 How. (U. S.) 448, 16 L. ed. 581 (where the close proximity of the second of the two vessels and the resulting confusion was owing to the same cause); The Excelsior, 12 Fed. 195; The David Morris, Brown Adm. 273, 7 Fed. Cas. No. 3,596 (where the tug-boat with a long tow brought the emergency on herself by attempting to pass a raft just as she was entering a narrow channel); Wakefield *v.* The Governor, 1 Cliff. (U. S.) 93, 28 Fed. Cas. No. 17,049; Haney *v.* The Louisiana, Taney (U. S.) 602, 11 Fed. Cas. No. 6,021 (where the fact that the schooner did not see the steamer until she was within one hundred and fifty yards was owing to the schooner's having an inefficient lookout); The Bywell Castle, 4 Aspin. 207, 41 L. T. Rep. N. S. 747, 4 P. D. 219, 28 Wkly. Rep. 293; The Elizabeth Jenkins, 5 Davies 514.

21. **For the English rule** in such cases see The Stoomvaart Maatschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 5 App. Cas. 876, 4 Aspin. 567, 52 L. J. Adm. 1, 42 L. T. Rep. N. S. 610, 29 Wkly. Rep. 173; The Memnon, 6 Aspin. 317, 59 L. T. Rep. N. S. 291, 62 L. T. Rep. N. S. 84; Marsden Coll. (3d ed.) 47.

22. The question of whether a mistake is to be excused as an error *in extremis* has most frequently arisen in those cases in which it was the duty of one vessel to give way and of the other to keep her course, and in which the former, although clearly at fault, has sought to hold the other to blame for a wrong manœuver made at the last moment before they came together. See cases cited *infra*, this note.

Between two sailing vessels.— In Vennall *v.* Garner, 1 Cr. & M. 21, 3 Tyrw. 85, the plaintiff's ship sailing close-hauled contended that although she did not give way the other might have avoided the accident by altering her helm at the right moment; but the latter, it was held, was not in fault for not doing so. In The Austrian Ship Maria, Holt Adm. 105, the bark Guiseppe Accame on the starboard tack and the Maria on the port tack were sailing on intersecting courses, and the former shouted to the latter to keep away and also sounded a horn, but seeing that the Maria did not obey the hail, as the danger was imminent, the Guiseppe Accame ordered her helm down just two minutes before the collision. The Maria was held solely in fault. In The Vessel Byfoged Christensen *v.* The Vessel William Frederick, 4 App. Cas. 669, 4 Aspin. 201, 41 L. T. Rep. N. S. 535, 28 Wkly. Rep. 233, a vessel with the wind a few points freer than the other did not fulfil her duty in keeping away and the other boat luffed at the last moment. The latter was held not to be in fault. In Brown *v.* Slanson, 7 Wall. (U. S.) 656, 19 L. ed. 157, a schooner sailing free met a bark close-hauled on the port tack; the schooner starboarded and the bark put her helm hard up, and at the last moment, seeing that the collision was imminent, starboarded. The bark was held to be free from blame for so doing. In The Brig Belle, 1 Parsons Shipp. & Adm. 581 note, a vessel close-hauled meeting another sailing free which changed her helm at the last moment, as the latter vessel did not keep out of her way, was held not to be at fault. In Chapin *v.* The Hattie Ross, 5 Fed. Cas. No. 2,598, one sailing vessel was prevented from making out the course of the other approaching her through the latter's lack of lights until

4. Negligence of Salvors. A salvor is liable for a collision between his boat

they were very near, and seeing the danger imminent she made a wrong manœuver. It was held not to be a fault. And see The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175; The Mary Augusta, 55 Fed. 343; The Robert Healey, 51 Fed. 462; The Eliza S. Potter, 35 Fed. 220; The John Stuart, 4 Blatchf. (U. S.) 444, 13 Fed. Cas. No. 7,427; Bartlett *v.* Williams, Holmes (U. S.) 229, 2 Fed. Cas. No. 1,081; Cummings *v.* The Emily Johnson, 6 Fed. Cas. No. 3,474.

Collision between a sailing vessel and a steamer.—The question of error of judgment in a moment of peril has frequently arisen in cases where a steamer meeting a sailing vessel has failed to fulfil her duty of keeping out of the way of the latter, and the sailing vessel has, in the moment when the collision was impending, altered her helm. Such a departure from the rules has in these cases been held to be excusable. The Schooner Sarah Watson *v.* The Steamer Sea Gull, 23 Wall. (U. S.) 165, 23 L. ed. 90; The Schooner Mary H. Banks *v.* The Steamer Falcon, 19 Wall. (U. S.) 75, 22 L. ed. 98; Fraser *v.* The Propeller Wenona, 19 Wall. (U. S.) 41, 22 L. ed. 52; The Steamer Lucille *v.* Respass, 15 Wall. (U. S.) 676, 21 L. ed. 247; Fincke *v.* The Steamer Fairbanks, 9 Wall. (U. S.) 420, 19 L. ed. 708; New York, etc., Mail Steamship Co. *v.* Rumball, 21 How. (U. S.) 372, 16 L. ed. 144; The E. Luckenbach, 93 Fed. 841, 35 C. C. A. 628; The George Murray, 22 Fed. 117; The Northern Indiana, 3 Blatchf. (U. S.) 92, 18 Fed. Cas. No. 10,320, 16 Law Rep. 433, 449; The Sisters, 3 Aspin. 122, 45 L. J. Adm. 39, 34 L. T. Rep. N. S. 338, 1 P. D. 117, 24 Wkly. Rep. 412. In The Propeller Ottawa *v.* Stewart, 3 Wall. (U. S.) 269, 18 L. ed. 165, a schooner sighted a propeller's red light off her starboard bow and the propeller soon afterward ported and crossed the bows of the schooner; the schooner then ported to go under the stern of the propeller. It was held that the schooner was not in fault for this change of course, when all hope of otherwise avoiding collision was gone. And see Alexandre *v.* Machan, 147 U. S. 72, 13 S. Ct. 211, 37 L. ed. 84; The Nacoochee, 137 U. S. 330, 11 S. Ct. 122, 34 L. ed. 687; Bentley *v.* Coyne, 4 Wall. (U. S.) 509, 18 L. ed. 457; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058; Bigelow *v.* Nickerson, 70 Fed. 113, 34 U. S. App. 261, 17 C. C. A. 1, 30 L. R. A. 336; The Chatham, 52 Fed. 396, 8 U. S. App. 104, 3 C. C. A. 161; The Agnes Manning, 44 Fed. 110; The Reading, 43 Fed. 815; The Allianca, 39 Fed. 476; The Excelsior, 38 Fed. 272; The Renovator, 30 Fed. 194; The George Murray, 22 Fed. 117; The State of Alabama, 17 Fed. 847; The John Mitchell, 12 Fed. 511; The Norwalk, 11 Fed. 922; The Farnley, 1 Fed. 631; The Western Metropolis, 6 Blatchf. (U. S.) 210, 29 Fed. Cas. No. 17,440.

Steamers meeting.—In The Nor, 2 Aspin. 264, 30 L. T. Rep. N. S. 576, 22 Wkly. Rep. 30, the steamer Asturias starboarded instead of porting as she should have done and this put the Nor in a dilemma, in which she, thinking that even then the Asturias would port, ported her helm and also stopped and reversed. The Nor was held not in fault. In The Bywell Castle, 4 Aspin. 207, 41 L. T. Rep. N. S. 747, 4 P. D. 219, 28 Wkly. Rep. 293, after the Princess Alice, coming up the Thames, had starboarded across the bows of the Bywell Castle showing her green light, the Bywell Castle in the agony of the moment hard-aported into it and was held not to blame. And see The Eutaw, 14 Fed. 479.

Error in not stopping engines.—In The Screw Steamship Jesmond *v.* The Screw Steamship Earl of Elgin, L. R. 4 P. C. 1, 1 Aspin. 150, 25 L. T. Rep. N. S. 514, 8 Moore P. C. N. S. 179, 17 Eng. Reprint 280, two steamers were approaching nearly end on, the Jesmond ported slightly and the Earl of Elgin starboarded; neither slowed. It was held that the Jesmond was not bound to stop and reverse at that moment when the reversal of the engines had become almost impossible. In Inman *v.* Reck, L. R. 2 P. C. 25, 37 L. J. Adm. 25, the steamer City of Antwerp and the ship Friedrich were approaching end on, and the steamer ported bringing her head around six points and the ship starboarded five points. The ship was held solely to blame and the steamer not in fault for not stopping and reversing. In The Chesapeake, 1 Ben. (U. S.) 23, 5 Fed. Cas. No. 2,642, the starting of the wheels of the ferry-boat at the last moment when the danger of collision with the propeller was imminent was held not to be a fault. In The Osceola, 33 Fed. 719, the tug Belle in turning to go down the river ran into a boat in tow with some others of the tug Osceola, which vessel was holding her tow up against the tide by keeping her engines going. She was held not to be at fault for not stopping her engines and letting her tow drift back with the tide, the time for exercise of judgment being brief and the peril having been produced by the fault of the other.

Failing to let go anchor.—In The Elizabeth, 3 Mar. L. Cas. 345, 22 L. T. Rep. N. S. 74, a steamship passed a schooner coming up the Thames and took the ground three hundred yards ahead of her. The schooner was not held to blame for not letting go her anchor at the last moment. In The C. M. Palmer, 2 Aspin. 94, 29 L. T. Rep. N. S. 120, 21 Wkly. Rep. 702, a steamship rounding to in Gravesend reach came suddenly upon another vessel anchored without a riding light, and the engines were stopped and reversed but she was held not to blame for not having let go her anchor.

Change of helm at the last moment to ease the blow.—It seems that the admiralty rule with respect to errors of judgment in moments of peril was not adopted all at once. A distinction was drawn at one time between

and the vessel he is assisting, if it be caused by his own negligence; but such negligence is regarded less severely than in other cases.[23]

5. CONTRIBUTORY NEGLIGENCE — a. Common-Law Rule of Liability Stated. In cases of a disaster arising from the mutual negligence of two parties the party who last has a clear opportunity[24] of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it.[25]

the class of cases referred to above and those in which the change of helm was done wisely for the purpose of easing the blow, which had become inevitable. The Clyde, 2 Spinks 27. In this latter class of cases the act is more clearly justifiable than in the former, as for example The Joseph Somes, Swabey 185, in which the helm of one vessel was starboarded in order to ease the blow of an inevitable collision with a vessel crossing her course. In The James Dunn *v.* The Tyrian, Holt Adm. 109, the schooner was thrown up in the wind when the collision was inevitable and was excused for so doing. See also The Benedetto *v.* The Calypso, Holt Adm. 117. The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392, was the case of a schooner starboarding at the last moment to ease the blow. In Liverpool, etc., Steamship Co. *v.* Simmons, 9 Wall. (U. S.) 634, 19 L. ed. 751, a schooner was held not to be in fault for luffing and then afterward keeping off when a steamer was seen suddenly bearing down upon her. In The Eliza S. Potter, 31 Fed. 687, it was held a proper manœuver for the schooner to starboard and let her main-sheet run at the last moment to receive a glancing blow from another schooner which had failed to give way and with whom the collision was inevitable.

Failure to exercise care after the collision. — In The Elizabeth, 2 Mar. L. Cas. 238, it was held that the bark, after she had been run into by fault of the steamer Lotus, was not to be blamed because her crew did not in the peril of the moment do all that they ought, and the damage was increased thereby. And see The Pangussett, 9 Fed. 109. *Contra*, The Transfer No. 8, 88 Fed. 551.

23. Whether a vessel is liable for damage done by a collision with another for whom she was in the act of performing a salvage service is more properly a question of what constitutes such negligence in a salvor as will operate as a set-off against a claim for salvage award, and is governed by the principles applied in other salvage cases, in which acts of negligence or errors in judgment have been committed by the salvor, while in the act of rendering salvage services, and the property to be saved has been lost, damaged, or lessened in value thereby. Marsden Coll. (3d ed.) 13. In The C. S. Butler, L. R. 4 A. & E. 178, 43 L. J. Adm. 17, 30 L. T. Rep. N. S. 475, 22 Wkly. Rep. 759, a steamer rendering salvage services to a bark in auswer to signals of distress negligently ran into her. It was held that each could recover against the other, one for salvage and the other for damage by collision. In The Thetis, L. R. 2 A. & E. 365, 38 L. J. Adm. 42, 22 L. T. Rep. N. S. 276, 3 Mar. L. Cas. 357, The Thetis fell in with the steamer Sardis disabled, and while endeavoring to tow the Sardis the latter was sunk in a collision caused by the fault of the Thetis, and the Thetis was held liable for it. A salvor can recover from the one she is assisting if a collision results from the negligence of the latter vessel. Mud Hopper No. 4, 4 Aspin. 403, 40 L. T. Rep. N. S. 462. In Stevens *v.* The S. W. Downs, Newb. Adm. 458, 23 Fed. Cas. No. 13,411, the injuries complained of were the result of unavoidable accident attributable to the confusion attendant upon the rescuing of the steamer Downs from the danger of catching fire from a burning boat which was drifting down upon her, and the cross libel of the Downs was dismissed. In Gilman *v.* The Tyler, 3 Woods (U. S.) 111, 10 Fed. Cas. No. 5,446, the tug Tyler going to the assistance of the Garry Owen, disabled and adrift on a dark night with a gale blowing, was carried by the eddy against this boat and damage resulted. She was held not liable therefor, no negligence being shown. And see Workman *v.* New York, 63 Fed. 298.

24. **The word opportunity** is here used in this sense, viz., that although the previous act of negligence of A may have created a position of danger, B is not necessarily liable for mere failure to recognize the existence of the perilous situation; but if he does in fact discover it and could then by the use of ordinary care avoid the casualty, he is liable for the result of a failure to exercise such care. Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 191; The Minnie, 100 Fed. 128, 40 C. C. A. 312; Wilhelmsen *v.* Ludlow, 79 Fed. 979; Radley *v.* London, etc., R. Co., 1 App. Cas. 754, 46 L. J. Exch. 573, 35 L. T. Rep. N. S. 637, 25 Wkly. Rep. 147; Quart. L. Rev. (1886) 507; Marsden Coll. (3d ed.) 21. See also Spaight *v.* Tedcastle, 6 App. Cas. 217, 4 Aspin. 406, 44 L. T. Rep. N. S. 589, 29 Wkly. Rep. 761; The Argo, Swabey 462. And *compare* Chesley *v.* Nantucket Beach Steam-Boat Co., 179 Mass. 469, 61 N. E. 50; The Maling, 110 Fed. 227; The New York, 109 Fed. 909.

For the origin of this rule see the early cases of Butterfield *v.* Forrester, 11 East 60; Davies *v.* Mann, 6 Jur. 954, 12 L. J. Exch. 10, 10 M. & W. 546. In both of these cases the party held in fault was he whose subsequent act or omission, occurring after the negligence of the other, was the final cause of the disaster.

25. Foster *v.* Holly, 38 Ala. 76; Austin *v.* New Jersey Steamboat Co., 43 N. Y. 75, 3 Am. Rep. 663; Card *v.* New York, etc., R. Co., 50 Barb. (N. Y.) 39; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62

b. Distinction Between Common-Law and Admiralty Rules. The question whether any particular act of negligence caused the loss is answered similarly at law and in admiralty, and there is a close analogy between the principles applied in the courts of common law and admiralty respectively, in deciding what constitutes contributory negligence; but there is this difference which has to do with the remedy, namely, that where the party suing has been found guilty of contributory negligence he can still in admiralty recoup himself as to a portion of his loss, whereas at common law he can recover nothing.[26] Where both are in fault[27] the joint loss is to be equally divided, no matter how great it may have been on the one side and how slight on the other.

c. The Admiralty Doctrine of Contributory Negligence — (I) *Mutual and Concurring Negligence.* Where the negligent acts or omissions took place at or about the same time the loss is to be divided,[28] notwithstanding that there may have been a disparity of fault and irrespective of any question of whether or not either of the vessels might have seen the error of the other, or if she had seen it might have avoided the consequences of it.

(II) *Negligence Contributory But Not Contemporaneous.* Where the error of one vessel has exposed her to the danger of collision which was consummated by the subsequent negligence of the other, the practice in the United States has been to divide the loss.[29] In England it has been held that the prior

Am. Dec. 246; Cayzer *v.* Carron Co., 9 App. Cas. 873, 5 Aspin. 371, 54 L. J. Adm. 18, 52 L. T. Rep. N. S. 361, 33 Wkly. Rep. 281; Tuff *v.* Warman, 5 C. B. N. S. 573, 5 Jur. N. S. 222, 27 L. J. C. P. 322, 6 Wkly. Rep. 693, 94 E. C. L. 573. See also, generally, NEGLIGENCE.

26. The Schooner Catharine *v.* Dickinson, 17 How. (U. S.) 170, 15 L. ed. 233; The David Dows, 16 Fed. 154; Cayzer *v.* Carron Co., 9 App. Cas. 873, 5 Aspin. 371, 54 L. J. Adm. 18, 52 L. T. Rep. N. S. 361, 33 Wkly. Rep. 281; General Steam Nav. Co. *v.* Tonkin, 4 Moore P. C. 314, 13 Eng. Reprint 324; Marsden Coll. (3d ed.) 19.

As to division of loss see *infra,* IV, C.

27. This has been adopted by the highest courts of England and the United States as a fixed rule of admiralty as inflexible as is the rule of common law that contributory negligence, even though it be very trifling in degree, will preclude recovery. The Steamship Pennsylvania *v.* Troop, 19 Wall. (U. S.) 125, 22 L. ed. 148; The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106; Rogers *v.* The Steamer St. Charles, 19 How. (U. S.) 108, 15 L. ed. 563; The Schooner Catharine *v.* Dickinson, 17 How. (U. S.) 170, 15 L. ed. 233; Cayzer *v.* Carron Co., 9 App. Cas. 873, 5 Aspin. 371, 54 L. J. Adm. 18, 52 L. T. Rep. N. S. 361, 33 Wkly. Rep. 281.

There are some scattered cases both in England and in this country in which it was held that where there is a great disparity of fault between the two offending ships the loss should be apportioned between them according to their respective degrees of culpability. The Victory, 68 Fed. 395, 25 U. S. App. 271, 15 C. C. A. 490; The Anerly, 58 Fed. 794; The Mary Ida, 20 Fed. 741; General Steam Nav. Co. *v.* Tonkin, 4 Moore P. C. 314, 13 Eng. Reprint 324.

28. In Lane *v.* The A. Denike, 3 Cliff. (U. S.) 117, 14 Fed. Cas. No. 8,045, a brig on the starboard tack and a schooner on the port tack, both nearly close-hauled, were approaching each other on intersecting courses. The brig was held in fault for not keeping out of the way of the schooner, and the schooner in fault for not porting after she saw the mistake of the brig. The loss was divided. Also in Martin *v.* Ohio Northern Transp. Co., 12 Wall. (U. S.) 31, 20 L. ed. 251, a tugboat with a bark in tow approached a steamer end on, just as the steamer passed. The steamer was held in fault for not at that moment putting her helm hard aport, and the damages were divided. The B. & C., 18 Fed. 543, was the case of a collision between boats in a canal where each was in fault for not understanding the signals of the other and for not stopping or going slow when in doubt.

As to division of loss see *infra,* IV, C.

The following are instances in which the loss was divided: The City of Greenville, 22 Fed. 347 (in which neither of two steamers approaching each other gave a sufficient signal); The Captain Miller, 33 Fed. 585 (in which neither of them fully complied with her signal to the other). In The Monticello, 15 Fed. 474, a collision between a steamer and a ferry-boat, the first was held in fault for not keeping in the middle of the river and for not stopping and reversing when the risk of collision became apparent, and the second for starting from her slip without any lookout on her bows.

29. This has been particularly noticeable in that class of cases in which the previous negligent act of a vessel had exposed her to danger of collision which still might have been avoided by ordinary care on the part of the other; as for example a vessel without proper lights, or anchored in an improper place, or proceeding on the wrong side of the

negligence of one party is immaterial, if by ordinary care the other party could have avoided the collision.[30]

(III) *When Error, Although Contributory, Is Excusable.* In the case of a wrong manœuver in a sudden emergency or an error of judgment in a moment of peril, when the necessity of a hurried decision has been forced upon the infringing vessel by the fault of the other boat, and in cases in which the

channel is run into by another going at full speed, too great for safety, or proceeding without efficient lookout, the circumstances being such that the first vessel might, notwithstanding, have been seen, or if seen might have been avoided had the second vessel proceeded with greater caution, or had her lookout been more alert. The Bay State, Abb. Adm. 235, 2 Fed. Cas. No. 1,148, 6 N. Y. Leg. Obs. 198 [*reversed* in 2 Fed. Cas. No. 1,150, 11 N. Y. Leg. Obs. 297]. And see The Nacoochee, 137 U. S. 330, 11 S. Ct. 122, 34 L. ed. 687; The Queen Elizabeth, 100 Fed. 874; The Maurice B. Grover, 79 Fed. 378; The Passaic, 76 Fed. 460. In The Isle of Pines, 24 Fed. 498, a tugboat with a tow navigating a narrow channel attempted to cross the bows of a schooner and the schooner kept straight on, disregarding the tug's evident intention, when she might easily have avoided the collision. Both the tug and the schooner were held in fault. In Foster *v.* The Miranda, 6 McLean (U. S.) 221, Newb. Adm. 227, 9 Fed. Cas. No. 4,977, the bark was in fault for showing a white light instead of a red light while on the starboard tack, but the schooner might have avoided the collision had she had a sufficient lookout. The loss was divided. In Pentz *v.* The Steamer Ariadne, 13 Wall. (U. S.) 475, 20 L. ed. 542, the brig's starboard light was dim, but the steamer might have avoided the collision notwithstanding this fault of the brig had her lookout been attending to his duty. Both vessels were held in fault. In Pfister *v.* Greening, 9 Wall. (U. S.) 505, 19 L. ed. 741, two schooners navigating the narrow straits of Mackinaw and one of them was in fault for having only a white light; but the other saw her in time and could, if she had properly kept her course, and not been grossly negligent, have avoided the collision, and the damages were divided. In Rogers *v.* The Steamer St. Charles, 19 How. (U. S.) 108, 15 L. ed. 563, a schooner at anchor without having a light properly displayed was run into by a steamer going at too great speed on such a dark night in a narrow channel. Both were held in fault. In The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 10 L. ed. 106, a brig was at anchor with a lantern with one dark side, and a tug cast off her tow without stopping to see whether there was anything in the way and the tow came into collision with the brig. The loss was divided. In Swift *v.* Brownell, Holmes (U. S.) 467, 23 Fed. Cas. No. 13,695, a collision between two whaling ships, one was sailing close-hauled on the starboard tack, the other was on the port tack. The first was without proper lights, but the second might have seen her and avoided the collision. Both were held in fault. In The Alabama, 4 Woods (U. S.) 48, 10 Fed. 394, the sloop was in fault for not having proper lights, but the steamship might nevertheless have avoided the collision, as she sighted the sloop two miles off. The damages were divided. In The Pennsylvania, 12 Fed. 914, the failure of the schooner to show a lighted torch and the excessive speed of the steamship in a fog were both held to be contributing causes of the collision. The loss was divided. In The Hercules, 17 Fed. 606, the schooner was in fault for not showing a lighted torch; but the night being clear and her side-lights burning she might have been avoided by the steamer with proper care. Both were held in fault. In Green *v.* The Helen, 5 Hughes (U. S.) 116, 1 Fed. 916, one vessel was anchored in an improper place, but the court said that it was satisfied that if the steamer had been proceeding at a slower speed the damage must have been trifling. The damages were divided.

As applying the rule of the text see also the following cases:

Alabama.— Steamboat Farmer *v.* McCraw, 26 Ala. 189, 62 Am. Dec. 718.

Delaware.— Cummins *v.* Spruance, 4 Harr. (Del.) 315.

Illinois.— Moore *v.* Moss, 14 Ill. 106, collision between steamboats on a river.

Louisiana.— Carlisle *v.* Holton, 3 La. Ann. 48, 48 Am. Dec. 440.

United States.— Martin *v.* Ohio Northern Transp. Co., 12 Wall. (U. S.) 31, 20 L. ed. 251; The Mary Ida, 20 Fed. 741; The Pegasus, 19 Fed. 46; The Warren, 18 Fed. 559; The Santiago de Cuba, 10 Blatchf. (U. S.) 444, 21 Fed. Cas. No. 12,333; Western Ins. Co. *v.* The Goody Friends, 1 Bond (U. S.) 459, 29 Fed. Cas. No. 17,436; The Scioto, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12,508, 11 Law. Rep. 16, 5 N. Y. Leg. Obs. 442.

See 10 Cent. Dig. tit. "Collision," § 296.

As to division of loss see *infra*, IV, C.

The burden of proof is upon the vessel that seeks to exempt herself from the consequences of a previous fault. The Nereus, 23 Fed. 448; and *infra*, IV, F, 1.

30. Marsden Coll. (3d ed.) 22.

The English rule conforms to the doctrine of the common law under which it has been held that the fault of the first vessel in failing to exhibit proper lights or to take the proper side of a channel will relieve from liability one who negligently runs into such a vessel before he sees it. Still it will not be a defense to one who, having timely warning of the danger of collision, fails to use proper care to avoid it. Pollock Torts 374.

breach of a regulation was the only step which offered a chance of safety, or in which the collision was in fact inevitable before the infringement took place, an act of negligence, although contributing to the disaster, if committed under these circumstances, will be excusable.[31] But the fact that the danger is imminent will not be an excuse to a vessel for her error contributing to the collision, when the necessity for the sudden determination was the result of her own fault.[32]

(IV) *Proximate and Remote Cause.* The proximate cause as defined at common law[33] is that cause which in a natural, continuous sequence, unbroken by any new intervening cause, produces the event, and without which the event would not have occurred. In cases of collision[34] an act of negligence is held to be the proximate cause of a disaster under circumstances where an intervening cause has contributed to produce the result, provided such new cause was not itself an act of negligence.

B. Inevitable Accident.[35] An inevitable accident is one happening under such circumstances that nothing could have been done to avoid it or that nothing

31. See *supra*, II, A, 3; and *infra*, II, C. In The Virgo, 7 Ben. (U. S.) 495, 28 Fed. Cas. No. 16,975, a schooner on the starboard tack came up in the wind showing her red light to an approaching steamer, then filled away showing her green light. The steamer on seeing the red light ported, but the schooner on filling away headed across the steamer's course. Here the court held that, although it might have been possible for the steamer to have avoided the schooner by starboarding, it was an error of judgment in a determination which was forced upon her by the fault of the schooner, and the libel against the steamer was dismissed. And see The Bay State, Abb. Adm. 235, 2 Fed. Cas. No. 1,148, 6 N. Y. Leg. Obs. 198 [*reversed* in 2 Fed. Cas. No. 1,150, 11 N. Y. Leg. Obs. 297].

See 10 Cent. Dig. tit. "Collision," § 18.

32. In Peters *v.* The Schooner Dexter, 23 Wall. (U. S.) 69, 23 L. ed. 84, two schooners were approaching end on. One ported and the other kept her course until the danger was imminent and then starboarded by a mistake, which latter manœuver produced the collision. Here it was held that the second schooner was in fault, and the fact that the danger was imminent was no excuse for the mistake, since the necessity of a hurried decision had been brought about by her own lack of care.

33. See, generally, Negligence.

34. Marsden Coll. (3d ed.) 16. In Greenland *v.* Chaplin, 5 Exch. 243, 19 L. J. Exch. 293, a passenger was injured by the vessel's anchor being caused to fall upon him by a collision with another vessel, for which such other vessel was solely in fault. It having been found as facts that there was no negligence in stowing the anchor and that the plaintiff was not at fault for being in that part of the ship where it was stowed, it was held that there was no intervening act of negligence, and the vessel in fault for the collision was held solely liable for the damage. In Mills *v.* The Nathaniel Holmes, 1 Bond (U. S.) 352, 17 Fed. Cas. No. 9,613, the Cuba was moored alongside a wharf-boat and inside a barge. The steamer in attempting to make her landing came against the barge with violence, causing some scantling which had drifted from the river and lodged under the guard of the Cuba and between her and the barge to be driven through the side of the Cuba thus filling her with water and sinking her. The steamer was held to be solely in fault. In Bowas *v.* Pioneer Tow Line, 2 Sawy. (U. S.) 21, 3 Fed. Cas. No. 1,713, there were several intervening causes which finally brought about the damage. A tug cast loose a barge alongside a wharf where the latter tried to make fast, but failed to do so owing to the slipping of her lines and was carried by the tide against the wheel of a ferry-boat, striking the wheel of the ferry-boat which caused it to revolve. There was at the time inside the wheel of the ferry-boat a man working, and the man suffered severe injuries by the turning of the wheel. Here the barge was held in fault for negligence as to making fast her lines and the tug for leaving her before she was fast. It was held that the wheel having been secured in the usual way so as to prevent the ordinary action of the wind and waves the ferry-boat was not in fault. And see Foster *v.* Holly, 38 Ala. 76; Conley *v.* Maine Cent. R. Co., 95 Me. 149, 49 Atl. 668; The Doris, 108 Fed. 552; The North Star, 108 Fed. 436; The Dentz, 29 Fed. 525; The Union, 2 Biss. (U. S.) 18, 24 Fed. Cas. No. 14,345, 2 Chic. Leg. N. 121; Tyson *v.* The Jason, 24 Fed. Cas. No. 14,317; The Eliza & Abby, Blatchf. & H. Adm. 435, 8 Fed. Cas. No. 4,349.

A distinction has been drawn between negligent acts causing a collision and negligence causing the loss. In The Margaret, 4 Aspin. 375, 50 L. J. Adm. 67, 44 L. T. Rep. N. S. 291, 6 P. D. 76, 29 Wkly. Rep. 533, in which a barge by her sole fault came into collision with a schooner having her anchor wrongfully hanging from the hawse-pipe with the stock above water by which the barge was pierced and sunk. Here, although the negligence of the Margaret was the sole cause of the collision, but for the fault of the schooner there would have been no loss. The damages were divided.

35. As to division of loss in case of inevitable accident see *infra*, IV, C, 1.

was done which contributed to it, the omission or commission of which was of such a character as to constitute negligence in the legal sense of that term.[36] Such acts or omissions include not only the exercise of good seamanship at the time when the danger of collision arose, but also the taking of previous precautions to provide against the danger arising and the skilful adoption of such measures as were necessary to prevent the accident extending further than was inevitable.[37] For it is not enough to show that a collision was unavoidable at the moment or some moments before its occurrence, if by precautions taken earlier it could have been prevented.[38] Even a compliance with the regulations[39] will not in all cases be sufficient to sustain the defense of inevitable accident, if there are additional precautions which good seamanship should have suggested by which the collision might have been avoided. In order to decide whether an accident should be classed as inevitable[40] the question in any particular case would seem to be whether the

36. The Steam Tug Clara Clarita *v.* Cox, 23 Wall. (U. S.) 1, 23 L. ed. 146; The Schooner Ann Caroline *v.* Wells, 2 Wall. (U. S.) 538, 17 L. ed. 833; Union Steamship Co. *v.* New York, etc., Steamship Co., 24 How. (U. S.) 307, 16 L. ed. 699; Stainback *v.* Rae, 14 How. (U. S.) 532, 14 L. ed. 530; The Chicago, 100 Fed. 999, 40 C. C. A. 680; The E. W. Gifford, 7 Biss. (U. S.) 249, 9 Fed. Cas. No. 5,166, 9 Chic. Leg. N. 9; Ward *v.* The Fashion, 6 McLean (U. S.) 152, Newb. Adm. 8, 29 Fed. Cas. No. 17,154; The Jeannie Cushman, 3 Ware (U. S.) 309, 13 Fed. Cas. No. 7,250; The Ship Marpesia *v.* The Barque America, L. R. 4 P. C. 212, 1 Aspin. 261, 26 L. T. Rep. N. S. 338, 8 Moore P. C. N. S. 468, 17 Eng. Reprint 387; The Europa, 14 Jur. 627; The Thomas Powell *v.* The Cuba, 14 L. T. Rep. N. S. 603, 2 Mar. L. Cas. 344; The Virgil, 2 W. Rob. 201; Marsden Coll. (3d ed.) 7.

See 10 Cent. Dig. tit. "Collision," § 19.

As defined by some authorities an inevitable accident is one which could not have been prevented by ordinary care and skill, but obviously this only applies to cases involving the usual and ordinary sea perils, and not to those cases in which extraordinary conditions of sea, wind, weather, or other unusual difficulties have presented themselves. In these latter the accident will not be considered inevitable because the exercise of only ordinary care and skill have failed to prevent it, as the law requires a different degree of diligence under different circumstances. The Steam Tug R. L. Mabey *v.* Atkins, 14 Wall. (U. S.) 204, 20 L. ed. 881; Lockwood *v.* The Schooner Grace Girdler, 7 Wall. (U. S.) 196, 19 L. ed. 113; Killam *v.* The Eri, 3 Cliff. (U. S.) 456, 14 Fed. Cas. No. 7,765; Sampson *v.* U. S., 12 Ct. Cl. 480; The Plato *v.* The Perseverance, Holt Adm. 262; The Ship Marpesia *v.* The Barque America, L. R. 4 P. C. 212, 1 Aspin. 261, 26 L. T. Rep. N. S. 338, 8 Moore P. C. N. S. 468, 17 Eng. Reprint 387; The Europa, 14 Jur. 627; The Thomas Powell *v.* The Cuba, 14 L. T. Rep. N. S. 603, 2 Mar. L. Cas. 344; The Lochlibo, 3 W. Rob. 310; The Virgil, 2 W. Rob. 201.

37. The Lepanto, 21 Fed. 651; The Baltic, 2 Ben. (U. S.) 452, 2 Fed. Cas. No. 823; The Brooklyn, 4 Blatchf. (U. S.) 365, 4 Fed. Cas. No. 1,939, 41 Hunt. Mer. Mag. 707; Ellis *v.* The Katy Wise, 3 Hughes (U. S.) 589, 8 Fed. Cas. No. 4,404; The Falcon, 8 Fed. Cas. No. 4,619; Brainard *v.* The Worcester, 4 Fed. Cas. No. 1,804*a*; The Uhla, L. R. 2 A. & E. 29 note, 37 L. J. Adm. 16 note, 19 L. T. Rep. N. S. 89, 3 Mar. L. Cas. 148; Marsden Coll. (3d ed.) 8.

38. The question in such cases is by whose fault, if there was a fault, did the vessels come into such a position that the accident could not be avoided. Austin *v.* New Jersey Steamboat Co., 43 N. Y. 75, 3 Am. Rep. 663; The Chicago, 71 Fed. 537 [*affirmed* in 100 Fed. 999, 40 C. C. A. 680]; Miller *v.* The W. G. Hewes, 1 Woods (U. S.) 363, 17 Fed. Cas. No. 9,594; The Independence, 4 L. T. Rep. N. S. 563, Lush. 270, 14 Moore P. C. 103, 9 Wkly. Rep. 582, 15 Eng. Reprint 245; The Despatch, 3 L. T. Rep. N. S. 219, Lush. 98, 14 Moore P. C. 83, 15 Eng. Reprint 237; Marsden Coll. (3d ed.) 8.

39. In The Utopia, 1 Fed. 892, it was held that if the fog was so thick that a rate of speed only sufficient to maintain steerage way would not enable a steamer to avoid other vessels it was her duty to stop from time to time and lie to. And see The Homer, 109 Fed. 572, 48 C. C. A. 465.

40. Those cases in which the defense of inevitable accident has been sustained may be conventionally grouped under the following heads:

(1) Cases in which a sea peril was one of the direct causes of the collision, such as where a vessel had difficulty in seeing the other ship which she was approaching, as in a thick fog (The Bridgeport, 35 Fed. 159), on a dark night (Alliance Ins. Co. *v.* The Brig Morning Light, 2 Wall. (U. S.) 550, 17 L. ed. 862), where an intervening vessel or other object obstructed the view (The Steamship Java *v.* Judd Linseed, etc., Oil Co., 14 Wall. (U. S.) 189, 20 L. ed. 834), where heavy weather caused the vessel to drag her anchors (The Virgil, 2 W. Rob. 201), to part her moorings (The Juliet Erskine, 6 Notes Cas. (Eng.) 633), or an eddy in the tide prevented her being steered (The Lochlibo, 3 W. Rob. 310).

(2) Cases in which the collision was caused

care and skill employed by both vessels to prevent it have been sufficient to relieve them both from any charge of negligence.

by the fact of the vessel herself being unmanageable, either from some damage received in a previous collision (The Despatch, 3 L. T. Rep. N. S. 219, Lush. 98, 14 Moore P. C. 83, 15 Eng. Reprint 237), in which, for instance, her lights had been stove in (The Twenty-One Friends, 33 Fed. 190) or her anchor carried away (The Java, 1 Parsons Shipp. & Adm. 525 note. And see The Transfer No. 3, 91 Fed. 803), or she had been cast adrift (The Uhla, L. R. 2 A. & E. 29 note, 37 L. J. Adm. 16 note, 19 L. T. Rep. N. S. 89, 3 Mar. L. Cas. 148); or from some inherent latent defect of, for instance, the steering gear (The Thomas Powell *v.* The Cuba, 14 L. T. Rep. N. S. 603, 2 Mar. L. Cas. 344), or the jamming of the windlass (The Carrier Dove, Brown & L. 113, 2 Moore P. C. N. S. 243, 15 Eng. Reprint 893), or where the damage occurred from her having been ashore (The Pladda, 46 L. J. Adm. 61, 2 P. D. 34), or where she had been rendered unmanageable by a sudden gale (The Northampton, 1 Spinks 152), or because she was in the act of reefing (The City of Peking *v.* Compagnie Des Messageries Maritimes, 14 App. Cas. 40, 6 Aspin. 396, 58 L. J. P. C. 64, 61 L. T. Rep. N. S. 136); or was short-handed through sickness, for example, and thus unable to keep a proper lookout (The Balnaquith, 1 Pritchard Adm. Dig. 203).

(3) Cases in which the collision was caused by the embarrassing manœuvers of a third boat. The C. P. Raymond, 26 Fed. 281.

Collision caused by fog.— In those cases in which it is claimed that, owing to the denseness of the fog in which the vessels were navigating, the collision was an unavoidable accident, the defense will be sustained only where it appears that all the precautions prescribed by the regulations or suggested by good seamanship had been taken, or that the circumstances were such as to render a departure from the rules necessary. In The Itinerant, 2 W. Rob. 236, this vessel was held justified in carrying a press of sail in a dense fog, on the ground that it was necessary to make way against the tide to avoid being run into by vessels in her wake. So, notwithstanding the speed of the boat, the collision was held to have been an inevitable accident. In The Girolamo, 3 Hagg. Adm. 169, a thick fog having suddenly shut down while this boat was proceeding down the Thames in tow, she was held in fault for having proceeded at all in such weather. In The Ship Marpesia *v.* The Barque America, L. R. 4 P. C. 212, 1 Aspin. 261, 26 L. T. Rep. N. S. 338, 8 Moore P. C. N. S. 468, 17 Eng. Reprint 387, in which two large sailing ships, one in the act of going about and the other going free, sighted each other in a dense fog at a distance of less than three hundred yards and the collision occurred in less than one minute, it was held that the ship in stays was not in fault for not having hauled aft her head-sheets to assist her helm, although if she had done so the collision might have been averted. The collision was held to be a case of inevitable accident. In The Nacoochee, 22 Fed. 855, this steamer was going at about six knots in a thick fog off Cape May, and while steering N.½E. heard what were supposed to be cries of distress off her starboard beam and ported E.S.E. and then sighted a schooner three hundred yards off her starboard bow and immediately reversed full speed. Here it was held that the collision might have been avoided by the steamer's going slower, having a better lookout, and changing her helm when reversing. In Shaw *v.* The Bridgeport, 1 Ben. (U. S.) 65, 21 Fed. Cas. No. 12,717, this steamboat while going down the East river, a thick fog having suddenly shut down, made her course near the piers and ran into a ship moored alongside a pier. It was held that the accident might have been prevented by her keeping in the middle of the river. In The Sylph, 4 Blatchf. (U. S.) 24, 23 Fed. Cas. No. 13,711, in which two steamboats were running at the rate of five knots an hour in a fog in New York bay the court refused, in view of the custom of running boats in such thick weather, to hold that they were both or either in fault for so doing. See also The Rebecca Shepherd, 32 Fed. 926; Alliance Ins. Co. *v.* The Morning Light, 1 Fed. Cas. No. 246*b*, 246*c*.

Collision caused by the darkness of the night.— In the following cases in which no absence of due care or caution was shown it was held that the accident was inevitable. In The Bolina, 3 Notes Cas. (Eng.) 208, where this vessel in a heavy N.N.E. gale took refuge in the Humber, and the night being dark ran down a brig at anchor. In The Shannon, 1 W. Rob. 463, in which the steamer was rounding to to anchor and the other vessel, either not seeing her lights or baffled by their change of position and in consequence unable to make out her course, the night being dark, steered as if the steamer was coming toward her. In the following cases it was held that the collision might have been avoided if the vessel had shortened sail. The Juliet Erskine, 6 Notes Cas. (Eng.) 633; The Lochlibo, 3 W. Rob. 310; The Virgil, 2 W. Rob. 201. And see The Despatch, 3 L. T. Rep. N. S. 219, Lush. 98, 14 Moore P. C. 83, 15 Eng. Reprint 237. In The Twenty-One Friends, 33 Fed. 190, the court refused to sustain the defense of an inevitable accident, on the ground that there was not a sufficient lookout on a dark night. See also Pharo *v.* Smith, 19 Fed. Cas. No. 11,063, 17 Leg. Int. (Pa.) 381; Hersey *v.* The North America, 12 Fed. Cas. No. 6,429, 6 Hunt. Mer. Mag. 174.

Collision caused by sea perils.— In The Uhla, L. R. 2 A. & E. 29 note, 37 L. J. Adm. 16 note, 19 L. T. Rep. N. S. 89, 3 Mar. L. Cas. 148, a brig dragging her anchors in a heavy gale ran into and damaged a breakwater.

C. Inscrutable Fault — 1. DEFINITION. The case of inscrutable fault is one

It was held that the accident might have been avoided if the brig had slipped and made sail, as the tide would then have brought her into a place of safety. See The Thomas Powell *v.* The Cuba, 14 L. T. Rep. N. S. 603, 2 Mar. L. Cas. 344. In The Carrier Dove, Brown & L. 113, 2 Moore P. C. N. S. 243, 15 Eng. Reprint 893, this ship, while attempting to dock in squally weather, was driven by a violent squall against another vessel. It was held that the accident was not unavoidable, because it was imprudent to manœuver a ship in such weather. In the case of The Pladda, 46 L. J. Adm. 61, 2 P. D. 34, in which a vessel was driven from her moorings by another which came afoul of her in a gale of wind, she was held liable for collision with a third ship against which she drove, she having omitted to let go a second anchor. See also The Northampton, 1 Spinks 152. In The City of Peking *v.* Compagnie Des Messageries Maritimes, 14 App. Cas. 40, 6 Aspin. 396, 58 L. J. P. C. 64, 61 L. T. Rep. N. S. 136, under similar circumstances a vessel was held liable when she had no second anchor to let go. In the Balnaquith, 1 Pritchard Adm. Dig. 203, in which the B was driven from her anchorage by the violence of the weather for nearly three hours and brought up against the W, the B might have had the assistance of a tug to hold her to her anchor but the tug's services were refused, it was held that the defense of inevitable accident failed. In The Thornley, 7 Jur. 659, a brig, having been aground, escaping from a position of great danger, could not drop her anchor safely so as to avoid collision with a vessel at anchor near by. She was held not to blame for the collision. See The City of Cambridge, 1 Pritchard Adm. Dig. 203. In The Virgo, 3 Aspin. 285, 35 L. T. Rep. N. S. 519, 25 Wkly. Rep. 397, the sudden breaking down of her steering gear, in which there was an inherent and latent defect, was held to be an inevitable accident. In The Warkworth, 5 Aspin. 194, 53 L. J. P. 4, 49 L. T. Rep. N. S. 715, 9 P. D. 20, 32 Wkly. Rep. 479, a pin holding a screw nut in its place at the end of the spindle of the steering gear became displaced, and the nut having come unscrewed the valve fell from its proper position, thus allowing a rush of steam into the valve chest and, jamming the helm hard astarboard, thus caused the collision. It was held that the pin was not of proper construction and that the defense of inevitable accident was therefore not sustained. The case of The Aimo, 2 Aspin. 96, 29 L. T. Rep. N. S. 118, 21 Wkly. Rep. 707, was one in which a vessel close-hauled on the port tack was unable, owing to having lost her head-sails in a previous collision, to bear up upon meeting another vessel close-hauled on the starboard tack, the latter having kept her course. It was held an inevitable accident. In The John Buddle, 5 Notes Cas. (Eng.) 387, a brig brought up in the wind to reef, and while shaking and unmanageable ran into a schooner, which being close-hauled on the starboard tack had kept her course. It was held a pure accident. In The Steamship Russia, 3 Aspin. 290, 21 L. T. Rep. N. S. 440, the fact that the vessel was caught in an eddy which prevented her from obeying her helm was held to be no excuse, when the eddy was easily visible and well known. In The Kingston-by-Sea, 3 W. Rob. 152, a vessel having missed stays in a squall was held in fault for the collision resulting therefrom, it having appeared that after missing there was time for her to have paid off before the wind by squaring her mainyard. In The Southern Home, 16 Blatchf. (U. S.) 447, 22 Fed. Cas. No. 13,187, 8 Reporter 389, in which a vessel left port well manned but was prevented from maintaining a proper lookout by the illness of her crew, and the absence of the lookout led to the collision, the accident was held to be unavoidable. In The Steam Tug Clara Clarita *v.* Cox, 23 Wall. (U. S.) 1, 23 L. ed. 146, a steam-tug attempted to tow a burning ferry-boat from her slip. The hawser having burnt through a collision resulted from the ferry-boat breaking adrift. As it was in evidence that the tug might have procured a chain and used it for towing instead of the hawser, she was held in fault for the collision. See also The Olympia, 61 Fed. 120, 22 U. S. App. 69, 9 C. C. A. 393. In The C. P. Raymond, 26 Fed. 281, a collision between a bark in tow of a tug and a car float, the defense of inevitable accident was not sustained, the tug and bark being held in fault for proceeding in the wrong part of the channel. In The Plato *v.* The Perseverance, Holt Adm. 262, a bark anchored in a channel was run into by a barge, the latter claiming that she was rendered unmanageable by a sudden squall. She was held in fault for taking a course too near the bark. See Culbertson *v.* The Steamer Southern Belle, 18 How. (U. S.) 584, 15 L. ed. 493; The David Dows, 16 Fed. 154; The Energy, 10 Ben. (U. S.) 158, 8 Fed. Cas. No. 4,485; The Russia, 3 Ben. (U. S.) 471, 21 Fed. Cas. No. 12,168. In The Steam Tug R. L. Mabey *v.* Atkins, 14 Wall. (U. S.) 204, 20 L. ed. 881, the ship Helen Cooper, after starting from her slip in tow of a tug and while in the act of turning, was unexpectedly caught in a field of floating ice and driven against another ship at a pier. She was held in fault for attempting to go to sea in such weather. See Neel *v.* Blythe, 42 Fed. 457; The Atlanta, 41 Fed. 639; The Johannes, 10 Blatchf. (U. S.) 478, 13 Fed. Cas. No. 7,332; Bodin *v.* The Thule, 3 Woods (U. S.) 670, 3 Fed. Cas. No. 1,595. In The Brooklyn, 4 Blatchf. (U. S.) 365, 4 Fed. Cas. No. 1,939, 41 Hunt. Mer. Mag. 707, a ferry-boat trying to cross the East river on a winter night when the river was full of heavy ice was driven by the ice and tide against a schooner moored at a pier, it was held that notwithstanding the known danger of trying to make a landing with so much ice

in which there exists a reasonable doubt as to which vessel, or whether either of them, was at fault.[41]

2. When Considered an Inevitable Accident. In such cases where there is no evidence of any facts which would negative the theory of the collision having been the result of inevitable accident[42] the doubt is sufficient to raise the pre-

in the river the ferry-boat owed a duty to her passengers to do so and the defense of inevitable accident was sustained. And see The Mary J. Robbins, 100 Fed. 141.

Collision caused by a vessel being unmanageable.— The following examples show to what extent a collision resulting from a vessel being unmanageable may be excused under the plea of inevitable accident. In The Peerless, 29 L. J. Adm. 49, 2 L. T. Rep. N. S. 25, Lush. 30, this ship while getting under way was carried out by the tide. In attempting to pay out more chain so that she might be brought up a link of the chain became jammed in the windlass and she was carried against another steamer anchored near by. It was held that the pilot was at fault for not employing a steam-tug which was in attendance to assist. In The Emily, 1 Blatchf. (U. S.) 236, 8 Fed. Cas. No. 4,452, 6 N. Y. Leg. Obs. 340, in which a collision resulted from a failure to keep a proper lookout and from a mistaken order from the mate to the man at the wheel in connection with some derangement of the running rigging, the defense of inevitable accident was not sustained. And see The Protector, 113 Fed. 868, 51 C. C. A. 492; The Comet, 102 Fed. 702; The Transfer No. 3, 91 Fed. 803; The Iroquois, 91 Fed. 173, 62 U. S. App. 361, 33 C. C. A. 435; Gildersleeve *v.* New York, etc., R. Co., 82 Fed. 763; The M. R. Brazos, 10 Ben. (U. S.) 435, 17 Fed. Cas. No. 9,898; The Johannes, 10 Blatchf. (U. S.) 478, 13 Fed. Cas. No. 7,332.

Collision caused by the proximity of a third vessel.— In Lockwood *v.* The Schooner Grace Girdler, 7 Wall. (U. S.) 196, 19 L. ed. 113, a yacht beating down the East river was compelled to luff to avoid a ferry-boat coming up the river and thus threw herself across the course of a schooner also beating down. The latter did not have enough headway to avoid her. It was held to be an inevitable accident. See also The Mobile, 10 Moore P. C. 467, Swabey 69, 14 Eng. Reprint 568.

41. Marsden Coll. (3d ed.) 158.

42. 1 Pritchard Adm. Dig. 328. In The Maid of Auckland, 6 Notes Cas. (Eng.) 240, two sailing vessels approaching nearly end on struck starboard to starboard, each one alleging that she herself ported and the other starboarded. The weather was thick and cloudy and the night dark with some rain. The court could not come to a satisfactory conclusion as to which vessel was to blame and both actions were dismissed without costs. In Papayanni *v.* Russian Steam Nav., etc., Co., 9 Jur. N. S. 1160, 33 L. J. Adm. 11, 7 L. T. Rep. N. S. 164, 2 Moore P. C. N. S. 161, 3 New Rep. 219, 12 Wkly. Rep. 90, 15 Eng. Reprint 862, this vessel and the steamer Colchide were approaching nearly end on. The Colchide saw the red light of the Laconia four hundred yards off bearing six points on her starboard bow and the Colchide hard-astarboarded. The Laconia observed the Colchide approaching on the port bow as if under a starboard helm and hard-aported and stopped her engines. The owners of each boat libeled the other, but it was held that neither had proved their case and both libels were dismissed. See Peck *v.* Sanderson, 17 How. (U. S.) 178, 15 L. ed. 205. The case of The Steamboat Bayard *v.* The Steamboat Coal Valley, 3 Pittsb. (Pa.) 165, was a collision between two steamers navigating the Ohio river. The court entertained reasonable doubt as to which party was to blame and decided that the loss must be sustained by the one upon whom it had fallen. In The Breeze, 6 Ben. (U. S.) 14, 4 Fed. Cas. No. 1,829, 6 Am. L. Rev. 762, the schooner Breeze and the schooner Hazard were sailing up the East river free with the wind easterly. The contention of the Hazard that the Breeze crossed her bows from starboard to port striking the bowsprit was disproved, the court said, by the fact that the blow on the Breeze angled forward instead of aft, and the story of the Breeze that as she was about to anchor the Hazard instead of keeping to windward headed for her was disproved, the court held, by the fact that the Hazard, which had her boom to port, did not jibe before the collision. The court was unable to come to any decision as to what the facts of the case were at all and both libels were dismissed. In The Kallisto, 2 Hughes (U. S.) 128, 14 Fed. Cas. No. 7,600, it appeared that a schooner and the brig Kallisto were approaching end on and that the collision was due to false steering somewhere. The libel against the Kallisto was dismissed on the ground that the libellants had failed to prove beyond a reasonable doubt that the collision was due to fault on the part of the latter vessel. In The Worthington, 19 Fed. 836, a schooner at anchor in the river with her sails up was run into by another schooner in tow of a propeller. The propeller claimed that she did not see the anchor light on the schooner at anchor, and there was some doubt whether this was due to the fact that the anchor light was obscured by the sails or by a third vessel which had passed between them. It was held to be an inscrutable fault and the libel was dismissed without costs. See The Iroquois, 91 Fed. 173, 62 U. S. App. 361, 33 C. C. A. 435. See also The Centurion, 100 Fed. 663, 40 C. C. A. 634; The Mary J. Robbins, 100 Fed. 141.

See 10 Cent. Dig. tit. "Collision," § 20.

sumption that it was caused by sea peril and the case is treated as one of inevitable accident.

3. When Considered a Case of Mutual Fault. On the other hand where, although it is manifest that there must have been fault on both sides, no specific or particular fault can be attributed to either vessel,[43] the case is treated as one of mutual fault and the loss is divided.

III. Rules and Regulations For Preventing Collision.

A. Application of Rules and Regulations — 1. General Maritime Law. The general maritime law applies to cases not specifically covered by the statutory rules[44] and to collisions on the high seas with ships of foreign countries with whom no treaty for the adoption of regulations has been made.[45]

2. Local Usages. When any disputed question of navigation arises for which the statutory regulations have not made provision the evidence of experts as to the general usage regulating the matter is admissible.[46] A practice proved to be generally followed in a particular trade and to have become an established custom[47] is binding upon vessels engaged in that trade. If on the other hand the

43. In Lucas *v.* The Thomas Swann, 6 McLean (U. S.) 282, Newb. Adm. 158, 15 Fed. Cas. No. 8,588, 3 Am. L. Reg. 659, two steamboats attempted to pass each other in the Ohio river at a time when the night was not very dark. There was sufficient water for them to have passed in safety and yet they came into collision. It was clear that both boats were in fault, and yet from the conflict of evidence the court could not find the specific faults of each. It was held to be a case of mutual fault and the damages were divided. In The Tracy J. Bronson, 3 Ben. (U. S.) 341, 24 Fed. Cas. No. 14,131, this vessel was libeled by another schooner. It was held that it was impossible to tell from the pleadings and proofs what was the direction of the wind; whether the vessels were crossing or meeting; whether, as contended by the libellant, the schooner was close-hauled and the Bronson had the wind free. The court said that it was clear that one vessel was in fault and that it was probable that both were. It was held as a case of mutual fault and the damages were divided. In The Comet, 1 Abb. (U. S.) 451, 6 Fed. Cas. No. 3,050, 5 Am. L. Rev. 184, 2 Chic. Leg. N. 301, a full discussion of the subject will be found, many authorities and decisions being cited. This was a collision between the steamer Silver Spray and the propeller Comet on Lake Huron on a clear night and in fair weather. The court said that there was gross and culpable negligence on both vessels, and that the case would be disposed of as one of mutual fault, although it was not ascertained what were the specific faults of each boat.

44. The D. P. Kelley *v.* Thompson, 1 Lowell (U. S.) 124, 7 Fed. Cas. No. 4,056.

As to general maritime law with reference to collision see *supra*, II. As to its application in cases not included in the rules of the supervising inspectors see The Morning Star, 4 Biss. (U. S.) 62, 17 Fed. Cas. No. 9,817.

As to rules of supervising inspectors see *infra*, III, A, 4.

45. 1 Pritchard Adm. Dig. 251.

46. The Steamship City of Washington *v.* Baillie, 92 U. S. 31, 23 L. ed. 600.

As to the effect of custom or usage generally see Customs and Usages.

47. In The Steamship City of Washington *v.* Baillie, 92 U. S. 31, 23 L. ed. 600, this steamship was held to be bound by the custom and responsible for damage resulting from a breach thereof relating to the manœuvers of a steamship and pilot-boat, when the former was in the act of taking a pilot on board, and in not remaining without headway when the small boat came alongside after she had shown the white light over her lee side. In The Cambusdoon, 30 Fed. 704, it was held that the common practice when a pilot had been previously taken on board of answering another pilot's flash-light offering her services was only conventional courtesy and not a legal obligation. In The Pavonia, 23 Blatchf. (U. S.) 403, 26 Fed. 106, it was held under the twenty-fourth rule of the regulations of 1885 that a practice existing between two ferry-boats having adjoining slips was a law unto themselves, and one of them was in fault for departing from their established practice.

Usages of river navigation have been recognized and enforced in the following cases: In the Delaware river. The James Bowen, 52 Fed. 510. In the Hudson river. The Argus, Olc. Adm. 304, 1 Fed. Cas. No. 521. In the Mississippi river. Myers *v.* Perry, 1 La. Ann. 372. In the Ohio river. Williamson *v.* Barrett, 13 How. (U. S.) 101, 14 L. ed. 68 [*affirming* 4 McLean (U. S.) 589, 2 Fed. Cas. No. 1,051]. In the St. Mary's river. See The North Star, 108 Fed. 436.

In the state courts it has been held that the existence of such a custom and the duty of knowing it were questions for the jury. Knowlton *v.* Sanford, 32 Me. 148, 52 Am. Dec. 649; Boyce *v.* The Steamboat Empress, 1 Ohio Dec. (Reprint) 173, 3 West. L. J. 174.

As to usages with respect to tugs and tows see Towboat No. 1, Norfolk & Western, 74

practice or custom appears to be inconsistent with the regulations it is wholly disregarded by the courts, and will not be allowed as an excuse for not following the requirements of the law.[48]

3. State Statutes and Municipal Ordinances. The fact that certain waters are navigable and used by foreign vessels does not exclude legislative regulation by the state, if in fact congress has not legislated in regard to them; or, if such legislation has been had by congress, if the legislation of the state does not come in conflict with the congressional legislation and is not antagonistic to the rights conferred or granted thereby its validity will be sustained.[49] Ordinances of municipalities authorized by the legislatures of their respective states regarding the equipment, position, or management of vessels within their jurisdiction, when not in conflict with the federal rules, will be enforced.[50] In England the rule

Fed. 906, 21 C. C. A. 169; The Josephine B., 58 Fed. 813, 7 C. C. A. 495.

For other cases upon local usages see Drew *v.* The Steamboat Chesapeake, 2 Dougl. (Mich.) 33; The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106; The Echo, 3 Ware (U. S.) 289, 8 Fed. Cas. No. 4,264.

See 10 Cent. Dig. tit. "Collision," § 8.

Rules made by private agreement will be enforced. Moore *v.* Moss, 14 Ill. 106.

Rules of the New York Yacht Club as to position of yachts not in the race enforced for a reasonable distance beyond the finish. Clark *v.* Thayer, 14 N. Y. App. Div. 510, 43 N. Y. Suppl. 897.

48. In the following instances alleged customs have been condemned as being in conflict with the regulations: Under the act requiring ships to proceed upon the starboard side while navigating narrow channels a custom to the contrary will be no excuse for a failure to comply with the act. The Promise *v.* H. M. S. Topaze, Holt Adm. 165, 2 Mar. L. Cas. 38. It is no excuse for a vessel on the wrong side of the channel that she was keeping out of the strength of the tide. The Friends, 2 Notes Cas. (Eng.) 92, 1 W. Rob. 478; The Gazelle, 2 Notes Cas. (Eng.) 39, 1 W. Rob. 471. A custom to treat sailing ships in the trades as close-hauled when in fact they were sailing a point or two free is to be disregarded. The Earl Wemys, 6 Aspin. 407, 61 L. T. Rep. N. S. 289. Any usage of sailing vessels to run along the coast in daylight without a watch was held to be nugatory. The Rebecca, Blatchf. & H. Adm. 347, 20 Fed. Cas. No. 11,618. In The La Fayette Lamb, 20 Fed. 319, a custom of barges not carrying lights on the Mississippi was condemned. Custom with respect to navigation of steamers and ferry-boats in New York harbor disapproved. The Mohegan, 91 Fed. 810; The Pequot, 30 Fed. 839. For other instances in which a usage in conflict with the regulations has been condemned see The Ellen S. Terry, 7 Ben. (U. S.) 401, 8 Fed. Cas. No. 4,378; Wheeler *v.* Eastern State, 2 Curt. (U. S.) 141, 29 Fed. Cas. No. 17,494. And also Palmer *v.* New York, etc., Transp. Co., 76 Hun (N. Y.) 181, 27 N. Y. Suppl. 561, 57 N. Y. St. 307; Baker *v.* The Steamboat Hibernia No. 2, 1 Phila. (Pa.) 228, 8 Leg. Int. (Pa.) 130. And *compare* The North Star, 108 Fed. 436.

49. In Chicago, etc., R. Co. *v.* Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710, a state statute requiring railroads to fix and post their rates was held valid as a police regulation within the power of the state. In Cooley *v.* Philadelphia, 12 How. (U. S.) 299, 13 L. ed. 996, it was held that a state law establishing pilotage regulations, although they were regulations of commerce, was valid until superseded by an act of congress. In Green *v.* The Helen, 5 Hughes (U. S.) 116, 1 Fed. 916, it was held that an act of the legislature of Maryland declaring it unlawful to anchor within certain limits was not unconstitutional where there was no act of congress in conflict therewith. In The W. H. Beaman, 45 Fed. 125, a collision in the East river between a ferry-boat and a canal-boat towed by a tug, it was held that in the absence of any regulation on the subject by congress the law of New York relating to the navigation of the East river was valid. It would appear therefore that acts of the state legislatures regulating commerce are valid where they are not in conflict with an act of congress, but are invalid where they do conflict therewith. See 26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 30; U. S. Comp. Stat. (1901), p. 2871.

50. Culbertson *v.* The Steamer Southern Belle, 18 How. (U. S.) 584, 15 L. ed. 493; The City of Norwalk, 55 Fed. 98; The Clover, 1 Lowell (U. S.) 342, 5 Fed. Cas. No. 2,908; Vandewater *v.* Westervelt, 28 Fed. Cas. No. 16,846*a*; Lonan *v.* The C. H. Northram, 15 Fed. Cas. No. 8,473, 1 N. J. L. J. 99. See 10 Cent. Dig. tit. "Collision," § 7. The fact that a municipal regulation is rarely enforced will not cause it to be disregarded. It will be presumed to be in force until repealed. Culbertson *v.* The Southern Belle, Newb. Adm. 461, 6 Fed. Cas. No. 3,462. Cases in which city ordinances have not been sustained see The B. S. Sheppard, 1 Biss. (U. S.) 221, 4 Fed. Cas. No. 2,072; The Palmetto, 1 Biss. (U. S.) 140, 18 Fed. Cas. No. 10,699. As to extent of jurisdiction of municipal and state ordinances see Wiggins Ferry Co. *v.* Reddig, 24 Ill. App. 260; Swearingen *v.* Steamboat Lynx, 13 Mo. 519; The Plymothian, 63 Fed. 631.

Vessels upon which such state statutes are

seems to be that foreign municipal regulations as to ship's lights, and rules to be observed in navigating foreign waters, although they have not the force of law, may, as evidence of negligence, be of importance in determining the liability for a collision in such waters.[51]

4. RULES OF SUPERVISING INSPECTORS. Under the act of congress of June 7, 1897,[52] and under the provisions of previous acts of congress[53] rules have been adopted by the board of supervising inspectors of steam-vessels. The object of the rules established by the supervising inspectors under the authority of these acts has been to give more particular directions as to the navigation of steamers in harbors and narrow channels than are to be found in the statutes. These rules, so far as they have been found to be consistent with the statute, have been sustained in their validity by the courts, and vessels have been held in fault for not complying with them.[54] On the other hand where the rules have seemed to be inconsistent with the statute, or to take away the option existing of choosing one of several courses, they have been sometimes held to be invalid,[55] as being in

binding.— In Snow *v.* Hill, 20 How. (U. S.) 543, 15 L. ed. 1017, it was held that a statute of Louisiana with regard to the navigation of the Mississippi river was not applicable to a collision between a vessel bound to a foreign country and another engaged in interstate commerce. In The Steamboat New York *v.* Rae, 18 How. (U. S.) 223, 15 L. ed. 359, it was held that a law of New York state regarding the light on a ship at anchor was binding upon the courts of New York state, but could not regulate the decision of a federal court administering general admiralty law in the case of a foreign ship engaged in general commerce. In The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106, it was held that the ordinance of the city of Charleston prescribing a similar rule as to lights upon vessels at anchor in the harbor was binding upon a foreign vessel, on the ground that it was a local usage of which every vessel from any part of the world was bound to take notice; and it is to be noted in this case, which happened in 1856, that apart from the regulations of the local authorities the brig was in fault upon the established principles of maritime law, as she was anchored at a place where vessels were continually passing and she had no anchor light up at all; and stress was laid upon the fact that there was no act of congress in conflict with the city ordinance in question. In both of these two cases there were, however, strong dissenting opinions. In Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492, in the New York state court it was held that a steam-propeller licensed as a coaster going up the Hudson on a voyage from Philadelphia to Albany was bound to comply with the laws of the state through whose waters she was passing. In Green *v.* The Helen, 5 Hughes (U. S.) 116, 1 Fed. 916, in which the state regulation was enforced, neither of the vessels, it appears, was engaged in interstate or foreign commerce. In Halderman *v.* Beckwith, 4 McLean (U. S.) 286, 11 Fed. Cas. No. 5,907, it was held that the law of Louisiana relating to the navigation of the Mississippi was not binding upon vessels in interstate commerce. It appears from these decisions that a state or local regulation has been held to be binding upon vessels engaged in foreign commerce only upon the theory that such rules are to be regarded as local usages of which all vessels are bound to take notice.

51. Marsden Coll. (3d ed.) 216 [*citing* The Michelimo, Mitch. Mar. Reg. May 25, 1877].

52. 30 Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2875. This act established regulations relating to the navigation of all harbors, rivers, and inland waters of the United States except the Great Lakes and rivers emptying into the Gulf of Mexico.

The rules adopted by the board of supervising inspectors of steam-vessels Jan. 26, 1899, under the authority of this act are entitled "Rules and regulations for the government of pilots of vessels propelled by steam, gas, fluid, naphtha, or electric motors, or of other vessels propelled by machinery," etc. Three sets of such rules have been adopted for the navigation of (1) The harbors, rivers, and inland waters of the United States (except the Great Lakes and their connecting and tributary waters as far east as Montreal; the Red River of the North, and rivers emptying into the Gulf of Mexico, and their tributaries; (2) The Red River of the North and rivers whose waters flow into the Gulf of Mexico and their tributaries; (3) The Great Lakes and their connecting and tributary waters as far east as Montreal.

53. U. S. Rev. Stat. (1878), § 4412; U. S. Comp. Stat. (1901), p. 3020, § 4412. And see 14 U. S. Stat. at L. p. 411; 10 U. S. Stat. at L. p. 72.

54. In The Plymouth Rock, 26 Fed. 40, it was held that rule 8 with regard to navigation in Hell Gate had the force of a statute and both vessels were held in fault: one for assenting to a violation of the rule and the other for violating it. In The Britannia, 34 Fed. 546, rule 3 as to giving several short blasts of the whistle in cases of immediate danger was sustained. See also *In re* Central R. Co., 92 Fed. 1010.

55. In The American Eagle, 1 Lowell (U. S.) 425, 1 Fed. Cas. No. 301, a collision in Boston harbor, the question arose with reference to the rule giving the pilot of one boat the

conflict with the statute and thus beyond the authority conferred upon the inspectors.

5. REGULATIONS ENACTED BY CONGRESS — a. Summary. The statutory regulations now in force may be summarized as being those which are applicable: (1) To collisions upon the high seas and all waters connected therewith navigable by sea-going vessels. The regulations approved by the international marine conference and adopted by the act of congress of Aug. 19, 1890,[56] and various amendments thereto, were to go into effect at a time fixed by the president in a proclamation to be issued for that purpose. These regulations went into effect July 1, 1897, and are called "International Rules." (2) To collisions in the harbors, rivers, and inland waters of the United States excepting the Great Lakes and certain western rivers. The act of June 7, 1897, is substantially the same as the old regulations of April 29, 1864.[57] By this act all the former laws on this subject were repealed, except the section in the act of 1895 giving the secretary

right of deciding to go to the left and of compelling the other boat to follow this course by giving a premonitory signal of two whistles. It was held that the pilot who attempted to do this did so at his peril, as such a rule, in so far as it purported to authorize pilots to disregard the general law concerning vessels meeting end on, was void. In The Atlas, 4 Ben. (U. S.) 27, 2 Fed. Cas. No. 633, 3 Am. L. T. Rep. (U. S. Cts.) 89, a collision in the Kill von Kull between two steam-tugs with canal-boats in tow, it was held that rule 2 requiring a port helm in all cases was inconsistent with article 14 of the regulations and was therefore void. In the U. S. *v.* Miller, 26 Fed. 95, it was held that the subject of lights on barges in tow was not within the authority conferred upon the supervising inspectors by this act. See also to the same effect The F. & P. M. No. 2, 36 Fed. 264; The Metropolis, 17 Fed. Cas. No. 9,501. In The Grand Republic, 16 Fed. 424, it was held with reference to a collision in the Hudson river that rule 2, which required a steamer in the fifth situation, that is, having another steamer on her starboard bow, to go to the right was not in conflict with U. S. Rev. Stat. (1878), § 4233, rule 19, although it took away from a steamer in such a situation the option existing under section 4233 to go to the right or to the left. In The B. B. Saunders, 19 Fed. 118 [*reversed* in 23 Blatchf. (U. S.) 378, 25 Fed. 727], a collision in the North river between a tug and a tug with a tow, the rule requiring steamers in the so-called fifth situation to pass ordinarily to the right, but permitting vessels in peculiar situations to pass to the left upon sounding a signal of two whistles, was sustained in the lower court; but on appeal it was held that notwithstanding the inspectors' rules, the pilot of the Saunders was not bound to assent to the movements proposed by the other vessel, unless due regard to the particular circumstances of the situation required a departure from the ordinary rule.

See 10 Cent. Dig. tit. "Collision," § 6.

A rule adopted but not promulgated at the time of collision and therefore not known was held to be inapplicable. The Narragansett, 10 Blatchf. (U. S.) 475, 17 Fed. Cas. No. 10,018.

A rule, although not binding as such on a sailing vessel, may be recognized as a usage of the sea, and as such a vessel held in fault for breach thereof. The Eleanora, 17 Blatchf. (U. S.) 88, 8 Fed. Cas. No. 4,335, 8 Reporter 810.

56. 26 U. S. Stat. at L. p. 320, c. 802; U. S. Comp. Stat. (1901), p. 2863. See also *infra*, III, A, 5, f.

This act has been amended as follows:

28 U. S. Stat. at L. p. 82, c. 83, amended 26 U. S. Stat. at L. p. 320, c. 802, art. 7; and the president by proclamation (28 U. S. Stat. at L. p. 1250) fixed March 1, 1895, as the date when the act as amended should take effect.

28 U. S. Stat. at L. p. 281, c. 284, provided that 26 U. S. Stat. at L. p. 320, c. 802, should not govern lights for fishing-vessels; but 28 U. S. Stat. at L. p. 680, c. 127, and the proclamation issued in accordance therewith (28 U. S. Stat. at L. p. 1259) postponed the taking effect of 26 U. S. Stat. at L. p. 320, c. 802, to a date to be thereafter fixed by the president.

29 U. S. Stat. at L. p. 381, c. 401, amended 26 U. S. Stat. at L. p. 320, c. 802, art. 15, and provided that the latter statute as amended should take effect at a subsequent time to be fixed by the president's proclamation.

And on Dec. 31, 1896, the president issued his proclamation (29 U. S. Stat. at L. p. 885) fixing July 1, 1897, as the date on which 26 U. S. Stat. at L. p. 320, c. 802, as amended, should take effect.

57. 30 U. S. Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2875; U. S. Rev. Stat. (1878), § 4233. See also *infra*, III, A, 5, f.

These regulations are to be followed by all vessels navigating all harbors, rivers, and inland waters of the United States except the Great Lakes and their connecting and tributary waters as far east as Montreal, the Red River of the North, rivers emptying into the Gulf of Mexico, and their tributaries, and are hereby declared special rules made by local authority. 30 U. S. Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2875.

of the treasury authority to fix the division between the high seas and "any harbor, river, or inland water." [58] These regulations went into effect Oct. 7, 1897, and are entitled "Inland Rules." (3) To collisions upon the Great Lakes and their connecting and tributary waters as far east as Montreal, under the act of Feb. 8, 1895, repealing the act of 1864 so far as it applied to the Great Lakes and their connecting waters.[59] (4) To collisions in the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries. Vessels on these rivers are governed by the provisions of section 4233 of the Revised Statutes of the United States and the amendments thereto contained in the act of March 3, 1893, and the act of March 3, 1897,[60] and also by section 4412 of the Revised Statutes of the United States[61] authorizing the board of supervising inspectors to establish regulations for steam-vessels passing each other

b. Application to Foreign Vessels — (1) *Rule in England.* All maritime nations having adopted the regulations, and the courts of Great Britain being

Rules not inconsistent with this act to be observed by steam-vessels in passing each other may be made by the "supervising inspector-general" subject to the approval of the secretary of the treasury. 30 U. S. Stat. at L. p. 96, c. 4, § 2; U. S. Comp. Stat. (1901), p. 2884.

58. The division between the high seas and "any harbor, river, or inland water" is fixed by the secretary of the treasury under the authority of 28 U. S. Stat. at L. p. 672, c. 102. The dividing lines fixed up to the present time in various localities by this authority are given in U. S. Rev. Stat. (1878), pp. 604, 605 note.

59. U. S. Stat. at L. p. 645, c. 64; U. S. Comp. Stat. (1901), p. 2886. This act was passed Feb. 8, 1895, to take effect March 1, 1895.

60. U. S. Rev. Stat. (1878), § 4233; U. S. Comp. Stat. (1901), p. 2893; 27 U. S. Stat. at L. p. 563, c. 204; 29 U. S. Stat. at L. p. 687, c. 389, §§ 5, 12, 13.

61. U. S. Rev. Stat. (1878), § 4412; U. S. Comp. Stat. (1901), p. 3020.

To what waters applicable.— The question as to the waters in which the old and the new regulations were respectively applicable has been passed upon by the courts in the following cases growing out of collisions happening previous to the passage of the above acts: In The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 771 [*disapproving* Singlehurst *v.* La Compagnie General Transatlantique, 53 Fed. 293, 11 U. S. App. 693, 3 C. C. A. 539; The Aurania, 29 Fed. 98], a collision in September, 1893, in Gedney's channel, lower bay, New York harbor, was held to be governed by the rules applicable to harbors, rivers, and inland waters, and the court said that "the act of 1885 did not attempt to draw the line between the high seas and the coast waters of the United States, on the one hand, and the harbors and inland waters, on the other. . . . The real point aimed at by Congress was to allow the original Code to remain in force so far as it applied to pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot." The same rules had been previously applied to a collision in 1889 in the Columbia river below Portland in The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943. In The Ludvig Holberg, 157 U. S. 60, 15 S. Ct. 477, 39 L. ed. 620, a collision in 1887 in the lower bay of New York between a Norwegian bark and an American steamer was held to be governed by the supervising inspectors' rules applicable to harbors and inland waters. The same rules were applied in a collision in October, 1891, on the Canadian side of the Detroit river (The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126), to a collision in 1893 in the lower harbor of Boston (The Williamsport, 74 Fed. 653, 33 U. S. App. 505, 20 C. C. A. 589), and to a collision in 1897 in the Mississippi river below New Orleans (The Albert Dumois, 177 U. S. 240, 20 S. Ct. 595, 44 L. ed. 751). In The Plymothian, 63 Fed. 631, a collision in November, 1891, it was held that the Elizabeth river near Norfolk was within the coast waters under the International Regulations. In Singlehurst *v.* La Compagnie General Transatlantique, 53 Fed. 293, 11 U. S. App. 693, 3 C. C. A. 539, it was assumed by counsel and the court that the International Rules governed a collision in 1890 between a British and a French steamer in Gedney's channel. In The Britannia, 34 Fed. 546, a collision in November, 1886, between an English steamer and a French steamer in the East river, the case was treated as one governed by the old rules. In The Excelsior, 33 Fed. 554, a collision in the lower bay of New York, it was held that the waters below New York narrows were governed by the International Rules of 1885. The same view appears to have been followed in The Non Pareille, 33 Fed. 524. In The Greenpoint, 31 Fed. 231, a collision in the East river between the steamer Grand Republic and a tugboat, it was held that article 19 of the International Rules of 1885 was not applicable. In The Aurania, 29 Fed. 98, a collision in September, 1885, between the two British steamers Republic and Aurania, as they were about entering Gedney's channel to cross the bar, the new International Rules were applied, for the reason that the pilots and officers of each vessel apparently regarded themselves and the other vessel as sailing under such new International Rules.

required by the municipal law to apply the regulations to ships of all nations that have adopted them, the rule of the road is the same for all ships and is recognized alike by international, municipal, and maritime law.[62] Foreign ships, equally with British ships, are bound to know and observe local regulations for preventing collisions in force in various rivers and harbors of that country.[63]

(II) *Rule Under Decisions of United States Courts.* In an action brought in the courts of the United States growing out of a collision on the high seas the rule is that the general maritime law, as administered in our courts, shall be applied.[64] This rule has certain qualifications: (1) If both ships belong to the same foreign country, or if they belong to different nations whose maritime law is the same as respects any particular matter of liability or obligation, if shown to the court this law will be applied, although it differ from the law of the forum, for as respects the parties concerned it is the maritime law which they mutually acknowledge;[65] and (2) another qualification to the rule of applying the law of the forum is that neither ship will be open to blame for following the sailing regulations and rules of navigation prescribed by its own government for their direction on the high seas.[66]

62. Marsden Coll. (3d ed.) 216.

By 25 & 26 Vict. c. 63, § 58, authority was given to the queen whenever it was made to appear that any foreign country was willing that the rules of navigation in question should apply to ships of such country when beyond the limits of British jurisdiction, to direct by orders in council that such regulations, etc., should apply to the ships of the said foreign country, whether within British jurisdiction or not.

Previous to the Merchants' Shipping Amendment Act, which took effect June 1, 1863, it had been held in the English courts of admiralty that a foreigner could not set up against a British vessel with which his ship had collided, that the British vessel had violated the British Mercantile Marine Act on the high seas, for the reason as given, that the foreigner was not bound by it, it being beyond the power of parliament to make rules applicable to foreign vessels outside of British waters. The Saxonia, 8 Jur. N. S. 315, 31 L. J. Adm. 201, Lush. 410, 15 Moore P. C. 262, 10 Wkly. Rep. 431, 15 Eng. Reprint 493; The Zollverein, 2 Jur. N. S. 429, Swabey 96, 4 Wkly. Rep. 555; Cope *v.* Doherty, 4 Kay & J. 367; Williams *v.* Gutch, 4 L. T. Rep. N. S. 627, 14 Moore P. C. 202, 15 Eng. Reprint 281; The Dumfries, Swabey 63, 125.

Before the close of the year 1864 nearly all the commercial nations of the world had adopted these regulations, and they were recognized as having adopted them. Consequently since that time it has been held in the English courts that a collision happening between a British ship and a vessel belonging to one of these nations on the high seas or in foreign waters was governed by these regulations subject to local rules and to the municipal laws in foreign waters. Marsden Coll. (3d ed.) 216.

63. Marsden Coll. (3d ed.) 216; 25 & 26 Vict. c. 63, §§ 32, 57. And see The Fyenoord, Swabey 374.

64. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152. In Leonard *v.* Whitwill, 10 Ben. (U. S.) 638, 15 Fed. Cas. No. 8,261, 14 Am. L. Rev. 164, a collision between a foreign vessel and a United States vessel fifty miles off our coast, it was held that the foreign vessel could set up a failure on the part of the other to show a lighted torch as required by the regulations of congress. See also The Belle, 1 Ben. (U. S.) 317, 3 Fed. Cas. No. 1,269, 9 Leg. & Ins. Rep. 276.

65. The Scotland (National Steam Nav. Co. *v.* Dyer), 105 U. S. 24, 26 L. ed. 1001.

For an earlier decision to the contrary see Smith *v.* Condry, 1 How. (U. S.) 28, 11 L. ed. 35.

66. The following decisions show the extent to which these doctrines have been applied: In Sears *v.* The British Steamer Scotia, 14 Wall. (U. S.) 170, 20 L. ed. 822, a collision between the American ship Berkshire and the British steamer Scotia in mid-ocean, it was held that the rules of navigation adopted by the British orders in council, Jan. 9, 1863, and by act of congress, 1864, having been accepted by the principal commercial states of the world, were to be regarded, so far as related to these vessels, as the law applicable at the time when the collision took place. The Berkshire was held solely in fault, because she carried a white light on the anchor stock instead of green and red lights, as required by the regulations, and was thus mistaken for a steamer. In The Sarmatian, 2 Fed. 911, a collision between an American schooner and a British steamer in the Chesapeake bay, the failure on the part of the schooner to display a torch light to the overtaking steamer appeared to be the cause of the collision. It was claimed on her part that this not being required under the laws of Great Britain it was a rule which would not be binding upon a British vessel and therefore should not apply in a collision with a ship of that nation; and it was held that although the United States rules might not apply to a British vessel in our waters, still the local usages growing out of those rules were binding on foreign vessels when within the United States waters and under the charge of a pilot, who would naturally

c. To What Classes of Vessels Applicable. In the United States the ordinary rules of navigation to prevent collisions are intended to embrace all classes of vessels, including rafts, and are also binding on fishing-vessels while engaged at their fishing grounds as well as elsewhere.[67] In England the regulations apply to all sea-going ships and craft, whether large or small, or whether propelled by oars, sails, or steam.[68]

d. Application With Reference to Risk of Collision — (i) *Rule Stated.* Rules of navigation are obligatory on vessels when approaching each other from the time the necessity for precaution begins; and they continue to be applicable as the vessels advance so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision.[69] If a certain manœuver is made too late to avoid the collision the fact that it was the proper one under the circumstances is no excuse for its not having been performed more promptly.[70] The regulations do not become applicable until the

follow them himself and expect that they should be followed by other vessels, and on this view the steamer was held in fault. In National Steam Nav. Co. *v.* Dyer, 105 U. S. 24, 26 L. ed. 1001, a collision between a British steamer and the American ship Kate Dyer on the high seas, the British steamer, the Scotland, claimed a limitation of her liability under the United States statute, and it was held that notwithstanding the fact that the courts of Great Britain had previously refused to allow foreign vessels to obtain the benefit of their limited liability act, nevertheless the British steamer was entitled to it in our courts; that although owing to the peculiar terms of the British acts of parliament they might not apply to foreign ships, the United States statute was the maritime rule of the courts of the United States, and that by the terms of the statute it was not restricted to any nationality or domicile; that there was no demand for such a narrow construction as that of the British act, and that public policy required that the rules of the maritime law as accepted by the United States should apply to all alike, so far as it could properly be done. In Thommessen *v.* Whitwill, 118 U. S. 520, 6 S. Ct. 1172, 30 L. ed. 156, the question arose as between two foreign ships, each of a different nationality, what law should be applied in our courts, the collision being between the Norwegian bark Daphne and a British steamer Great Western, and it was held that no proof having been presented to the court that the laws of Sweden and Great Britain were the same on the subject, the only law applicable to the case was the law of the forum, which was the maritime law of this country. In The State of Alabama, 17 Fed. 847, it was held that the American law requiring the exhibition of a flash-light to an overtaking vessel was not applicable as the law of the forum in a collision between vessels belonging to two different foreign nations, neither of which required such a light according to its own maritime law.

67. The Summit, 2 Curt. (U. S.) 150, 23 Fed. Cas. No. 13,606; U. S. *v.* One Raft of Timber, 5 Hughes (U. S.) 404, 13 Fed. 796.

As to their application to vessels of war in time of peace see St. Louis, etc., Transp. Co. *v.* U. S., 33 Ct. Cl. 251.

68. *Ex p.* Ferguson, L. R. 6 Q. B. 280, 1 Aspin. 8, 40 L. J. Q. B. 105, 24 L. T. Rep. N. S. 96, 19 Wkly. Rep. 746; 25 & 26 Vict. c. 63, §§ 25, 27, 28; Marsden Coll. (3d ed.) 344.

As to their application in rivers and harbors to such craft as hulks and harbor lighters which were never intended to go to sea see The C. S. Butler, L. R. 4 A. & E. 238; European, etc., Mail Co. *v.* Peninsular, etc., Steam Nav. Co., 12 Jur. N. S. 909, 14 L. T. Rep. N. S. 704, 14 Wkly. Rep. 843.

69. Peters *v.* The Schooner Dexter, 23 Wall. (U. S.) 69, 23 L. ed. 84; Fraser *v.* The Propeller Wenona, 19 Wall. (U. S.) 41, 22 L. ed. 52; Brown *v.* Slanson, 7 Wall. (U. S.) 656, 19 L. ed. 157; Marsden Coll. (3d ed.) 351.

It is clear that the rules do not apply where vessels are sailing properly and there is no chance of collision. The Sylph, 2 Spinks 75.

70. The Steam Ferry-Boat America *v.* Camden, etc., R. Transp. Co., 92 U. S. 432, 23 L. ed. 724; Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302; The Steamboat Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382; The Steamboat Joseph Johnson *v.* McCord, 9 Wall. (U. S.) 146, 19 L. ed. 610; The Steamer C. Vanderbilt *v.* McKibbon, 6 Wall. (U. S.) 225, 18 L. ed. 823; The Steamship Fenham *v.* Wake, L. R. 3 P. C. 212, 23 L. T. Rep. N. S. 329, 6 Moore P. C. N. S. 501, 16 Eng. Reprint 815; The Stadacona, 5 Notes Cas. (Eng.) 371; Marsden Coll. (3d ed.) 356.

The delay in adopting the right measure in due season is dangerous not only because there may not be opportunity for doing so later but because the delay may lead the other vessel to suppose the former unable to comply with the rule, and the former may, by waiting until the collision is too imminent, frighten the other vessel into a wrong step,

facts are known, and a vessel should keep her course until she has ascertained what the strange vessel is and what course she is pursuing.[71] In the case of two vessels approaching so as to involve risk of collision if either the meeting or crossing rule applies at the time when there appears to be risk of collision the same rule continues to apply until the ships are clear, and no change of position will bring the other rule into operation.[72]

(II) *What Constitutes Risk of Collision.* Article 17 of the Washington Conference Regulations enacted in 1890 is as follows: "Risk of collision can, when circumstances permit, be ascertained by carefully watching the bearing of an approaching vessel. If the bearing does not appreciably change such risk should be deemed to exist." [73]

in which case the former would be responsible for the entire loss. Marsden Coll. (3d ed.) 356. And see *supra*, II, A, 3.

Ships have frequently been held in fault for a collision resulting from the fact that the helmsman trusted to being able to shave clear. The Benefactor, 14 Blatchf. (U. S.) 254, 3 Fed. Cas. No. 1,298; The John Brotherick, 8 Jur. 276.

71. It was held in The Vindomora, 14 P. D. 172, 38 Wkly. Rep. 69, that an alteration of the helm in a fog upon a guess as to the other ship, when her whistle only was heard, was not necessarily negligence. In The Libra, 4 Aspin. 429, 45 L. T. Rep. N. S. 161, 6 P. D. 139, it was held (under the Thames rules) that vessels rounding a point upon concentric circles of different diameters, and so that they would clear each other without further alteration of their helms than the course of the river required, are not in risk of collision. A greater or less risk of collision is required to bring some rules into operation than others, and the duty of acting promptly is greater in some cases than others; for example it requires a more imminent risk of collision to bring article 18, requiring a steamship to slacken or stop and reverse, into force than that which brings the other articles into operation. Marsden Coll. (3d ed.) 351. But see The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9,626, in which it was said that when vessels are passing in crowded or narrow channels there is always risk of collision. In The Steamer C. Vanderbilt *v.* McKibbon, 6 Wall. (U. S.) 225, 18 L. ed. 823, this steamer was coming up the Hudson near the city of Troy on the westerly side of the river and was held in fault for not changing her course and passing to the easterly side before entering a fog-bank. Her negligence was the cause of her coming into a collision with a tow of canal-boats that were slowly going down. As to whether the regulations are applicable not only in cases where there is actual risk of collision but also where there is probability or apprehension of risk see Marsden Coll. (3d ed.) 348. If a vessel is unable to answer or slow in answering her helm it is her duty to be prompt in obeying the regulations, and it is to be noted that it is not enough to show that the helm was altered, but a vessel must also prove that she answered her helm. The Test, 5 Notes Cas. (Eng.) 276. In Ocean Steamship Co. *v.* Apcar, 15 App. Cas. 37, 6 Aspin. 491, 59 L. J. P. C. 49, 62 L. T. Rep. N. S. 331, 38 Wkly. Rep. 481, a collision between two steam-ships in the night-time, A sighted B approaching showing all her lights. A ported, shutting in the green of B; B starboarded showing green again and A ported shutting it in, when B again starboarded showing green. A was held in fault for not then stopping and reversing. See The General U. S. Grant, 6 Ben. (U. S.) 465, 10 Fed. Cas. No. 5,320 (where a sailing lighter on a groundless apprehension of danger made a change of helm which brought her into a collision with a steam-tug, which, had she held her course, she would have avoided); The C. H. Seuff, 32 Fed. 237; The Aurania, 29 Fed. 98. The regulations continue to be applicable so long as means and opportunity to avoid the danger remain. Peters *v.* The Schooner Dexter, 23 Wall. (U. S.) 69, 23 L. ed. 84; Bentley *v.* Coyne, 4 Wall. (U. S.) 509, 18 L. ed. 457; New York, etc., U. S. Mail Steamship Co. *v.* Rumball, 21 How. (U. S.) 372, 16 L. ed. 144.

72. The Aurania, 29 Fed. 98; Marsden Coll. (3d ed.) 355. In The Titan, 23 Blatchf. (U. S.) 177, 23 Fed. 413, it was held that a vessel ordinarily has the right to assume that the other vessel will observe the rules, but this presumption must not be carried so far as to exonerate her from ordinary precautions or to excuse her from the consequences of a mistake, when by a slight exertion and without any peril to herself or the other vessel she could certainly avoid the hazard. In The Galileo, 24 Fed. 386, it was held that a vessel was not bound to use more than ordinary nautical skill and judgment in avoiding the consequences of another's fault. In Wells *v.* Armstrong, 29 Fed. 216, a vessel was held in fault for not allowing sufficient margin for the contingencies of navigation in undertaking to avoid another vessel. It seems that a vessel is not in fault for an alteration of her helm for greater safety in a case where there is no risk. The Sylph, Swabey 233; Marsden Coll. (3d ed.) 253. But see The Steam Propeller Corsica *v.* Schuyler, 9 Wall. (U. S.) 630, 19 L. ed. 804.

73. What constitutes risk of collision, it is said by Dr. Lushington, must be decided according to the circumstances of each particular case by men of nautical experience. The Stanmore, 5 Aspin. 441, 54 L. J. Adm.

e. Rules For Construing Regulations. In determining the intention of congress in enacting the regulations the rule is that the words of any particular section are to be construed, not as though it were a separate enactment, but as forming part of the entire act prescribing a body of rules having for their object the prevention of collisions at sea.[74] The terms used in the rules are to be

89, 53 L. T. Rep. N. S. 10, 10 P. D. 134; The Mangerton, Swabey 120; Marsden Coll. (3d ed.) 354.

Illustrations.— In the following instances it was held that the vessels were approaching so as to involve risk of collision: In Peters *v.* The Schooner Dexter, 23 Wall. (U. S.) 69, 23 L. ed. 84, in which two schooners were meeting end on; one ported while half a mile away and the other did nothing until quite near, and then in the confusion of the moment put her wheel in the wrong direction. The latter was held solely in fault. The case of The Steamboat Joseph Johnson *v.* McCord, 9 Wall. (U. S.) 146, 19 L. ed. 610, was a collision between a side-wheel steamboat coming down the East river and a canal-boat in tow of a tug going up. The steamer was held in fault for attempting, when the vessels were too near to do so with safety, by giving two whistles to bring about a departure from the regulations and for changing her course before she was certain her signal had been heard and understood. In Brown *v.* Slanson, 7 Wall. (U. S.) 656, 19 L. ed. 157, the schooner William O. Brown, heavily laden with coal and iron, bound up Lake Erie on a voyage from Buffalo to Chicago, and the bark A. P. Nichols, coming out from Detroit river early in the evening before the collision, bound down the lake to Buffalo, laden with a full cargo of corn, were meeting end on, each going six miles an hour and approaching a mile in five minutes, and when about two or three miles apart the schooner starboarded. She was held in fault for so doing. In The Steam Ferry-Boat America *v.* Camden, etc., R. Transp. Co., 92 U. S. 432, 23 L. ed. 724, a collision between a tugboat which was coming down the East river and a ferry-boat on her trip across, both boats were held in fault for not having done what they did do sooner, after the risk of collision became apparent. In Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302, a steam-tug drifting in Lake Huron at night waiting for a tow was run into by a bark, and the latter was held in fault for not having determined in time, after seeing the lights of the steam-tug, whether she was in motion or only drifting, and the tug was also held in fault for not having made any effort to ascertain the situation or the course of the approaching bark after she was sighted. In Bentley *v.* Coyne, 4 Wall. (U. S.) 509, 18 L. ed. 457, a bark sailing free on the port tack sighting a schooner close-hauled on the starboard tack in Lake Michigan at about seven o'clock in the evening, about two or three miles off, the bark was held solely in fault, the change of the course of the schooner being at the last moment to ease the blow. And see The Steamer Cayuga *v.* Hoboken Land, etc., Co., 14 Wall. (U. S.) 270, 20 L. ed. 828; The Steamboat Syracuse *v.* Langley, 12 Wall. (U. S.) 167, 20 L. ed. 382 (as to the duty of a tug with tow in rounding a bend where there might be risk of collision); The Aurania, 29 Fed. 98 (in which both vessels were held in fault for allowing themselves to get into a position in which there was danger of collision). In The Benefactor, 14 Blatchf. (U. S.) 254, 3 Fed. Cas. No. 1,298, a steamer attempting to pass a schooner in the open sea within a cable's length, seven hundred and twenty feet, was held in fault for a resulting collision. In The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9,626, a collision between two steamers in a crooked and narrow channel, one was held in fault for keeping her speed eleven miles until only a moment before a collision. See also Beal *v.* Marchais, L. R. 5 P. C. 316, 2 Aspin. 1, 28 L. T. Rep. N. S. 822, 21 Wkly. Rep. 653 (in which a steamer and a sailing ship distant two or three miles were meeting at a joint speed of seventeen knots, the steamer not being able to make out the course of the sailing ship but knowing that it was probably very nearly opposite her own); The Screw Steamship Jesmond *v.* The Screw Steamship Earl of Elgin, L. R. 4 P. C. 1, 1 Aspin. 150, 25 L. T. Rep. N. S. 514, 8 Moore P. C. N. S. 179, 17 Eng. Reprint 280 (in which two steamers were meeting on nearly opposite courses at a joint speed of eighteen or nineteen knots an hour and distant a mile and a half from each other); The Seaton, 5 Aspin. 191, 53 L. J. Adm. 15, 49 L. T. Rep. N. S. 747, 9 P. D. 1, 32 Wkly. Rep. 600 (in which a steamer was overtaking another upon a converging course and distant about three miles); The Franconia, 3 Aspin. 295, 35 L. T. Rep. N. S. 721, 2 P. D. 8, 25 Wkly. Rep. 197 (in which a steamer was sighted two points on the quarter of another and overtaking her when distant a mile or less). In The Banshee, 6 Aspin. 221, 57 L. T. Rep. N. S. 841, in which a steamer going seventeen knots was overtaking another going ten or twelve knots and eighteen yards ahead in Dublin bay and the rear ship was steering so as to pass within a ship's length, there was held to be no risk of collision, and the leading ship was held not in fault for keeping her course.

74. "The intention of the Legislature does not break itself into sections. It is to be drawn from the entire corpus of the Act and not from a single passage." Per Story, J., in The Harriet, 1 Story (U. S.) 251, 11 Fed. Cas. No. 6,099 [*cited* in U. S. *v.* One Raft of Timber, 5 Hughes (U. S.) 404, 13 Fed. 796, holding a raft liable to the penalty imposed by U. S. Rev. Stat. (1878), § 4234, for not carrying proper torch lights, although

construed in a nautical sense and must be applied as seamen are wont to apply them.[75]

f. The International and Inland Rules — (I) *Enacting Clause, Scope, and Penalty* — (A) *In General* — (1) Of International Rules. "Be it enacted, etc., That the following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by sea-going vessels;" and it is provided (article 30) that nothing in these rules is to interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters.[76]

(2) Of Inland Rules. "Be it enacted, etc., That the following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the Red River of the North and rivers entering into the Gulf of Mexico and their tributaries, and are hereby declared special rules duly made by local authority."[77]

(B) *Penalty* — (1) Imposed Upon Persons in Charge. Every pilot, engineer, mate, or master of any steam-vessel, and every master or mate of any barge or canal-boat, who neglects or refuses to observe the provisions of the act, or the regulations established in pursuance of section 2,[78] is liable to a penalty of fifty dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal; nothing in the act, however, relieves any vessel, owner, or corporation from any liability incurred by reason of such neglect or refusal.[79]

(2) Imposed Upon Vessel. Every vessel navigated without complying with

rafts are not specially named in that section but referred to in section 4233].

75. Per Brown, J., in The Aurania, 29 Fed. 98; The Dunelm, 5 Aspin. 304, 53 L. J. Adm. 81, 51 L. T. Rep. N. S. 214, 9 P. D. 164, 32 Wkly. Rep. 970; Marsden Coll. (3d ed.) 346. See also The Beryl, 5 Aspin. 321, 53 L. J. Adm. 75, 51 L. T. Rep. N. S. 554, 9 P. D. 137, 33 Wkly. Rep. 191; The Libra, 4 Aspin. 429, 45 L. T. Rep. N. S. 161, 6 P. D. 139; The Margaret, 9 P. D. 47.

Early cases are authorities upon the construction and effect of the present regulations excepting where they deal with rules which have been expressly abrogated by the present enactment. Where words used in an earlier set of regulations have once received a judicial construction the legislature must be taken in any subsequent enactments to have used them according to the meaning which a court of competent jurisdiction had given them. Marsden Coll. (3d ed.) 358.

76. 26 U. S. Stat. at L. p. 320, c. 802, [§ 1]; U. S. Comp. Stat. (1901), p. 2863.

As to application of statutes and municipal ordinances see *supra*, III, A, 3.

Prior rules of navigation relating to matters not embraced in the act still remain in force. The Schooner Sarah Watson *v.* The Steamer Sea Gull, 23 Wall. (U. S.) 165, 23 L. ed. 90.

The common law of the sea.— The statute specifies some of the precautions to be taken by navigators, and leaves others, equally obligatory, to the common law of the sea. The D. P. Kelley *v.* Thompson, 1 Lowell (U. S.) 124, 7 Fed. Cas. No. 4,056. And see The Sylvester Hale, 6 Ben. (U. S.) 523, 23 Fed. Cas. No. 13,712, 17 Int. Rev. Rec. 196; and *supra*, III, A, 1.

Article 30 is the same as article 25 of the former act of March 3, 1885, excepting that the expression "inland waters" is substituted for "inland navigation."

77. 30 U. S. Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2875.

The preamble of this act is: "Whereas the provisions of chapter eight hundred and two of the laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea, apply to all waters of the United States connected with the high seas navigable by sea-going vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one act: Therefore, Be it enacted by the Senate and House of Representatives of the United States," etc. 30 U. S. Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2875.

78. Inland Rules (30 U. S. Stat. at L. p. 102, c. 4, § 2; U. S. Comp. Stat. (1901), p. 2885).

79. Inland Rules (30 U. S. Stat. at L. p. 102, c. 4, § 3; U. S. Comp. Stat. (1901), p. 2885).

the provisions of the act is liable to a penalty of two hundred dollars, one half to go to the informer, for which sum the vessel so navigated is liable and may be seized and proceeded against by action in any district court of the United States having jurisdiction of the offense.[80]

(c) *Preliminary Definitions.* In both the International Rules and the Inland Rules every steam-vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam-vessel. [The word "steam-vessel" includes any vessel propelled by machinery. A vessel is "under way" within the meaning of these rules when she is not at anchor, or made fast to the shore, or aground.][81]

(II) *Lights and so Forth* — (A) *In General.* The word "visible" in the rules when applied to lights means visible on a dark night with a clear atmosphere. The rules concerning lights must be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights should be exhibited.[82]

80. Inland Rules (30 U. S. Stat. at L. p. 103, c. 4, § 4; U. S. Comp. Stat. (1901), p. 2885).

81. International Rules (26 U. S. Stat. at L. p. 320, c. 802; U. S. Comp. Stat. (1901), p. 2863); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2876). The above definitions correspond with article 1 of the act of March 3, 1885, excepting that the words "steam-vessel" are used in place of "steamship" and the words "sailing vessel" are used instead of "sailing ship," and with the further exception that the last two clauses in brackets [ ] are new.

A disabled steamship not under steam or sail and being towed was held not to be at fault for carrying her side-lights and no mast-head light. Union Steamship Co. *v.* The Aracan, L. R. 6 P. C. 127, 2 Aspin. 350, 43 L. J. Adm. 30, 31 L. T. Rep. N. S. 24, 22 Wkly. Rep. 927.

A steam-tug lying to with her machinery stopped and drifting with her rudder lashed to starboard was held not in fault for carrying the lights required for steamers under way. Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302. But it had been held in England under the former act that a steam-tug lying to under sail with engines idle and fires banked was under steam within the meaning of article 1 of that act. The Jennie S. Barker, L. R. 4 A. & E. 456, 3 Aspin. 42, 44 L. J. Adm. 20, 33 L. T. Rep. N. S. 318; The Esk, L. R. 2 A. & E. 350, 38 L. J. Adm. 33, 20 L. T. Rep. N. S. 587, 17 Wkly. Rep. 1064; The Byron, 2 New South Wales L. R. Adm. 1.

Ships propelled by electricity. — By 52 & 53 Vict. c. 46, § 5, ships propelled by electricity or other mechanical power are steamships within the meaning of the regulations. Marsden Coll. (3d ed.) 359.

82. International Rules (26 U. S. Stat. at L. p. 320, c. 802; U. S. Comp. Stat. (1901), p. 2863); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2876).

Maritime rules with respect to lights. — It appears that under the ancient maritime rules there was no obligation on a ship in motion to carry a light at night at her mast-head, or any other light, even whilst navigating a frequented channel. Ure *v.* Coffmann, 19 How. (U. S.) 56, 15 L. ed. 567; St. John *v.* Paine, 10 How. (U. S.) 557, 13 L. ed. 537; The Neptune, Olc. Adm. 483, 17 Fed. Cas. No. 10,120, 16 Hunt. Mer. Mag. 603, 5 N. Y. Leg. Obs. 293; The Blossom, Olc. Adm. 188, 3 Fed. Cas. No. 1,564, 1 Am. L. J. N. S. 354, 6 N. Y. Leg. Obs. 374; The Benares, 5 Aspin. 53, 14 Jur. 581, 48 L. T. Rep. N. S. 127, 7 Notes Cas. (Eng.) Suppl. 50; The Iron Duke, 4 Notes Cas. (Eng.) 94, 2 W. Rob. 377; The Rose, 2 W. Rob. 1; Lowndes Coll. 78. Not even in the case of ships at anchor was there any general obligation at night to carry or exhibit a light. The Lochlibo, 3 W. Rob. 310. The decisions show a gradual change in the direction of holding a vessel accountable for a collision resulting from the absence of lights. The Vivid, 7 Notes Cas. (Eng.) 127; The Ripon, 6 Notes Cas. (Eng.) 245; The Sylph, 2 Spinks 75; The Trident, 1 Spinks 217. In some of the earlier English cases it was held that it depended upon the darkness of the night and upon the circumstances of the case whether a light was necessary or not. The Victoria, 6 Notes Cas. (Eng.) 176, 3 W. Rob. 49; The Iron Duke, 4 Notes Cas. (Eng.) 94, 2 W. Rob. 377; The Londonderry, 4 Notes Cas. (Eng.) Suppl. xxxi. But see *contra*, per Dr. Lushington, The Saxonia, 8 Jur. N. S. 315, 31 L. J. Adm. 201, Lush. 410, 15 Moore P. C. 262, 10 Wkly. Rep. 431, 15 Eng. Reprint 493. Under the early American decisions it had been held that whether prudence demanded the carrying of a light depended upon the circumstances of the particular case and was to be determined by the jury. Innis *v.* The Steamer Senator, 1 Cal. 459, 54 Am. Dec. 305; Kelly *v.* Cunningham, 1 Cal. 365; New-Haven Steam-Boat, etc., Co. *v.* Vanderbilt, 16 Conn. 420; Carsley *v.* White, 21 Pick. (Mass.) 254, 32 Am. Dec. 259; 1 Parsons Shipp. & Adm. p. 550. A ship in motion, although not bound to carry a light, it was held, should on approach of another vessel show a sufficient light in order to give the other ship an opportunity to avoid her. The

(B) *Steam-Vessels — Masthead Light.* A steam-vessel when under way must carry on or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel [at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet],[83] a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.[84]

Thomas Martin, 3 Blatchf. (U. S.) 517, 23 Fed. Cas. No. 13,926, 35 Hunt. Mer. Mag. 446, 19 Law Rep. 379; The Olivia, 6 L. T. Rep. N. S. 398, Lush. 497; The Juliana, Swabey 20; Lowndes Coll. 79. This obligation was held to apply to a ship close-hauled on the starboard tack and entitled to hold her course. The Saxonia, 8 Jur. N. S. 215, 31 L. J. Adm. 201, 6 L. T. Rep. N. S. 6, Lush. 410, 15 Moore P. C. 262, 10 Wkly. Rep. 431, 15 Eng. Reprint 493. The master of a vessel without lights, who, as soon as he saw the light of a vessel, showed a light, was frequently held not in fault. The Clyde, 2 Spinks 27; Marsden Coll. (3d ed.) 360; 1 Parsons Shipp. & Adm. 550. In the case of ships at anchor, unless perhaps in a frequented thoroughfare, it had been held sufficient if a vessel exhibited a light upon the approach of another vessel; and the fact that she carried no fixed light was not a fault. The Lochlibo, 3 W. Rob. 310; Lowndes Coll. 80. In The Londonderry, 4 Notes Cas. (Eng.) Suppl. xxxi, a schooner was held not at fault for navigating a thronged thoroughfare on a dark night without lights. For cases holding that the vessel was at fault for neither carrying nor exhibiting a light see The Scioto, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12,508, 11 Law Rep. 16, 5 N. Y. Leg. Obs. 442; The Victoria, 6 Notes Cas. (Eng.) 176, 3 W. Rob. 49. A vessel at anchor in a harbor or a navigable river or in the path of vessels, it was held, must show a light, but not where the boat was fastened to the shore, especially at a place set apart for such boats (Tain *v.* The North America, 23 Fed. Cas. No. 13,853, 2 N. Y. Leg. Obs. 67; The Indiana, Abb. Adm. 330, 13 Fed. Cas. No. 7,020); and that she was in fault for their being obscured by her sails (Brainerd *v.* Steamer Worcester, 1 Parsons Shipp. & Adm. 551). As to the character of light required for a vessel at anchor see Nelson *v.* Leland, 22 How. (U. S.) 48, 16 L. ed. 269; The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106. A vessel at anchor in a track frequented by other ships was held in fault for a collision caused by the light which was in her port forerigging being partly obscured by the sails. Brainerd *v.* Steamer Worcester, 1 Parsons Shipp. & Adm. 551. As to the absence of a light being considered as negligence *per se* see Simpson *v.* Hand, 6 Whart. (Pa.) 311, 36 Am. Dec. 231. A vessel has been held in fault for being without a light in cases in which the other had a good lookout. The R. B. Forbes, 1 Sprague (U. S.) 328, 20 Fed. Cas. No. 11,598, 19 Law Rep. 544. It has been held that there was no obligation upon a schooner to carry a light upon a moonlight night, although the moon was sometimes obscured. The Steamer Louisiana *v.* Fisher, 21 How. (U. S.) 1, 16 L. ed. 29; Baker *v.* The City of New York, 1 Cliff. (U. S.) 75, 2 Fed. Cas. No. 765. In New York, etc., Steamship Co. *v.* Calderwood, 19 How. (U. S.) 241, 15 L. ed. 612, it was held that no inference was to be drawn from the fact that a vessel under one circumstance was not faulted for the absence of lights, that she would be excused under other circumstances for an omission of the same character. And see The City of Norwalk, 106 Fed. 982; The Rabboni, 81 Fed. 239, 26 C. C. A. 379; Hyland *v.* Tug No. 13, 50 Fed. 628; The Manhasset, 34 Fed. 408; Briggs *v.* Day, 21 Fed. 727; The Shakspeare, 4 Ben. (U. S.) 128, 21 Fed. Cas. No. 12,700; Hazlett *v.* Conrad, 1 Dill. (U. S.) 79, 11 Fed. Cas. No. 6,288.

See 10 Cent. Dig. tit. "Collision," § 105 *et seq.*

Further as to lights and signals see *supra*, II, A, 2, d.

Rules prior to 1863 and decisions thereunder.— In the United States: See Chamberlain *v.* Ward, 21 How. (U. S.) 548, 16 L. ed. 211; Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226, Wayne, J.; Foster *v.* The Miranda, 6 McLean (U. S.) 221, Newb. Adm. (U. S.) 227, 9 Fed. Cas. No. 4,977; The Santa Claus, Olc. Adm. 428, 21 Fed. Cas. No. 12,327; 14 U. S. Stat. at L. p. 227, c. 234; 10 U. S. Stat. at L. p. 72, c. 106, § 29; 9 U. S. Stat. at L. p. 382, c. 105, § 5; 5 U. S. Stat. at L. p. 306, c. 191, § 10; 1 Parsons Shipp. & Adm. 501, 555, 556.

In England: See 9 & 10 Vict. c. 100; Regulations of July 11, 1848; The Rob Roy, 17 Notes Cas. (Eng.) 280, 3 W. Rob. 190; Steam Navigation Act of 1851; Regulations of May 1, 1852; The Giraffe, Pritchard Adm. Dig. 234; Merchant Shipping Act of 1854, §§ 295–299; Regulations of Feb. 24, 1858; The Aurora, Lush. 327; The Livingstone, Swabey 519; The Calla, Swabey 465.

83. Words in brackets [ ] do not appear in the Inland Rules.

84. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 2 (a); U. S. Comp. Stat. (1901), p. 2863); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 2 (a); U. S. Comp. Stat. (1901), p. 2876).

(c) *Steam-Vessels — Side-Lights.* A steam-vessel when under way must carry on the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles; and on the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles. The said green and red side-lights must be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.[85]

(d) *Steam-Vessels — Range-Lights.* A [sea-going][86] steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a).[87] These two lights must be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights must be less than the horizontal distance.[88] [All steam-vessels (except sea-going vessels and ferry-boats), must carry in addition to green and red lights required by article 2 (b), (c),[89] and screens as required by article 2 (d),[90] a central range of two white lights; the after-light being carried at an elevation at least fifteen feet above the light at the head of the vessel. The head-light must be so constructed as to show an unbroken light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after-light so as to show all around the horizon.][91]

(e) *Steam-Vessels — When Towing.* A steam-vessel when towing another vessel must, in addition to her side-lights, carry two bright white lights in a

85. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 2, (b), (c), (d); U. S. Comp. Stat. (1901), p. 2863); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 2, (b), (c), (d); U. S. Comp. Stat. (1901), p. 2876).

Position and condition of lights.— Vessels have been held at fault for breach of the above rule, when the side-lights were obscured by the rigging or other objects. The Ping-On *v.* Blethen, 7 Sawy. (U. S.) 482, 11 Fed. 607 (where a steamer's lights were obscured by the smoke from her own furnaces); Carlton *v.* U. S., 10 Ct. Cl. 485; The Magnet, L. R. 4 A. & E. 417, 2 Aspin. 465, 44 L. J. Adm. 1, 23 Wkly. Rep. 598; The Tirzah, 4 Aspin. 55, 48 L. J. Adm. 15, 39 L. T. Rep. N. S. 547, 4 P. D. 33; The New Ed. *v.* The Gustav, Holt Adm. 28, 9 L. T. Rep. N. S. 547, 1 Mar. L. Cas. 407; The Louisa *v.* The City of Paris, Holt Adm. 15; The Duke of Buccleuch, 15 P. D. 86. In The Santiago de Cuba, 10 Blatchf. (U. S.) 444, 21 Fed. Cas. No. 12,333, a vessel was held to be in fault for having the screens of her side-lights so arranged that these lights could be seen across her bow. It has been held that although the lights are not in proper position if in fact they were as effective on the occasion of the collision it will not be a fault. The City of Carlisle, Brown & L. 363, 11 L. T. Rep. N. S. 33, 2 Mar. L. Cas. 91; The Emperor *v.* The Lady of the Lake, Holt Adm. 37, 202 (in which, although the screens were too short the side-lights were not in fact seen across the bows); Marsden Coll. (3d ed.) 363, 369. If, notwithstanding the wrong lights on one vessel, the other, if properly vigilant, might have avoided the collision both will be sometimes held in fault. New Haven Steam Transp. Co. *v.* The Steamboat Continental, 14 Wall. (U. S.) 345, 20 L. ed. 801.

86. The words in brackets [ ] do not appear in the International Rules.

As to the meaning of "sea-going" under the former act see The Louisa *v.* The City of Paris, Holt Adm. 15, in which it was held that the collision having actually taken place at sea, the tugboat was to be considered a sea-going steamer within the meaning of the act. See also Marsden Coll. (3d ed.) 370.

87. See *supra*, III, A, 5, f, (II), (B).

88. International rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 2 (e); U. S. Comp. Stat. (1901), p. 2864); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 2 (e), (f); U. S. Comp. Stat. (1901), p. 2877).

The object of providing a central range of two white lights in addition to the side-lights was to enable one to determine the angle at which a vessel was approaching. The Conoho, 24 Fed. 758.

89. See *supra*, III, A, 5, f, (II), (C).

90. See *supra*, III, A, 5, f, (II), (C).

91. The words in brackets [ ] do not appear in the International Rules.

vertical line one over the other, not less than [six][92] feet apart, and when towing more than one vessel must carry an additional bright white light [six][93] feet above or below such light, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights must be of the same construction and character, and must be carried in the same position as the white light mentioned in article 2 (a),[94] [excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull].[95] Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light must not be visible forward of the beam.[96]

(F) *Special Lights.* A vessel which from any accident is not under command[97] must carry at the same height as a white light mentioned in article 2 (a),[98] where they can best be seen, and if a steam-vessel in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all around the horizon at a distance of at least two miles; and must by day carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter. A vessel employed in laying or in picking up a telegraph cable must carry in the same position as the white light mentioned in article 2 (a),[99] and if a steam-vessel in lieu of that light, three lights in a vertical line one over the other not less than six feet apart. The highest and lowest of these

92. Read "three" instead of "six" in brackets [ ] for the Inland Rules.

93. Read "three" instead of "six" in brackets [ ] for the Inland Rules.

94. See *supra*, III, A, 5, f, (II), (B).

95. Substitute "or the after range-light mentioned in article 2 (f)," for words in brackets [ ] for the Inland Rules.

For provisions of article 2 (f) see *supra*, III, A, 5, f, (II), (D).

96. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 3; U. S. Comp. Stat. (1901), p. 2864); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 3; U. S. Comp. Stat. (1901), p. 2877).

A tug is bound to see that none of her lights are obstructed by the vessel she is towing so that they cannot be seen by all vessels over the range required by the rules. Briggs *v.* Day, 21 Fed. 727. In The Orange, 46 Fed. 411, it was held that if the tug's lights were obscured by the barge she was towing it was her duty to put another light on the outside of the barge. In The Seacaucus, 34 Fed. 68, it was held in the case of a tug navigating at a high speed in such a position to a ferry-boat in the Hudson river that her lights were obscured to vessels on the other side that the law requiring colored lights to be visible ten points around the horizon had not been complied with.

A tug with a tow is in fault for carrying lights that would lead other vessels to suppose that she did not have a tow. The U. S. Grant, 7 Ben. (U. S.) 195, 28 Fed. Cas. No. 16,803.

As to responsibility of a tug for a failure on the part of the vessel it was towing to exhibit proper lights see The Mary Hounsell, 4 Aspin. 101, 48 L. J. Adm. 54, 40 L. T. Rep. N. S. 368, 4 P. D. 204. And see also The Gorgas (1879), 10 Ben. (U. S.) 541, 10 Fed. Cas. No. 5,622; The C. F. Ackerman, 9 Ben. (U. S.) 179, 5 Fed. Cas. No. 2,563; The Alabama, 1 Ben. (U. S.) 476, 1 Fed. Cas. No. 122; The Jesse Williamson Jr., 17 Blatchf. (U. S.) 106, 13 Fed. Cas. No. 7,296.

97. As to the meaning of not under command.— In The George Arkle, Lush. 222, it was held that a vessel driven from her anchors by a gale and setting all sails to get out to sea, even if wholly unmanageable, was under way. In The Buckhurst, 4 Aspin. 184, 51 L. J. Adm. 10, 46 L. T. Rep. N. S. 108, 6 P. D. 152, 30 Wkly. Rep. 232, it was said that where a vessel parted from her anchors and drove over a sand in an unmanageable state, owing to her rudder being disabled, it would have been wrong for her to have exhibited her side-lights. The crew of a vessel would, in such a case, be naturally so engrossed in the effort to save her from becoming a wreck that in the hurry and confusion of the moment a failure to comply strictly with the regulations might be excused, and a collision resulting from such a cause be classed as inevitable so far as the vessel in question was concerned. In The Steamship Pennsylvania *v.* Troop, 19 Wall. (U. S.) 125, 22 L. ed. 148, a bark which was hove to with her helm lashed to leeward but with no sails aback and making way through the water about one mile per hour was held to be under way. In The Alfredo, 32 Fed. 240 [*affirmed* in 30 Fed. 842], it was held that a bark hove to with her sails aback and actually making no way through the water should follow the rule prescribed for vessels not under way, and in a fog ring a bell instead of blowing a horn. See also Naunton *v.* The Oregon, 17 Fed. Cas. No. 10,057, 1 Pac. L. Mag. 242.

98. See *supra*, III, A, 5, f, (II), (B).

99. See *supra*, III, A, 5, f, (II), (B).

lights must be red, and the middle light must be white, and they must be of such a character as to be visible all around the horizon, at a distance of at least two miles. By day she must carry in a vertical line, one over the other, not less than six feet apart, where they can best be seen, three shapes not less than two feet in diameter, of which the highest and lowest shall be globular in shape and red in color, and the middle one diamond in shape and white. The vessels referred to in this article, when not making way through the water, must not carry the side-lights, but when making way must carry them. The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and cannot therefore get out of the way.[1] These signals are not signals of vessels in distress and requiring assistance. . Such signals are contained in article 31.[2]

(G) *Lights For Sailing Vessels and Vessels in Tow.* A sailing vessel under way [and any vessel][3] being towed must carry the same lights as are prescribed by article 2 for a steam-vessel under way, with the exception of the white lights mentioned therein, which they must never carry.[4]

(H) *Lights For Ferry-Boats, Barges, and Canal-Boats in Tow.* The supervising inspectors of steam-vessels and the supervising inspector-general must establish such rules to be observed by steam-vessels in passing each other and as to the lights to be carried by ferry-boats and by barges and canal-boats when in tow of steam-vessels, not inconsistent with the provisions of the act, as they from time to time may deem necessary for safety, which rules when approved by the secretary of the treasury, are declared special rules duly made by local authority, as

1. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 4 (a), (b), (c), (d); U. S. Comp. Stat. (1901), p. 2864).

2. See *infra*, III, A, 5, f, (VIII).

3. Words in brackets [ ] do not appear in the Inland Rules.

4. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 5; U. S. Comp. Stat. (1901), p. 2865); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 5; U. S. Comp. Stat. (1901), p. 2877). In The Ontario, 2 Lowell (U. S.) 40, 18 Fed. Cas. No. 10,543, 7 Am. L. Rev. 754, a whale-ship in the Arctic ocean which had been twice refitted at San Francisco after the act of 1864 was passed, and which could have procured the colored lights required by that act at that port, was held in fault for not having them, although her master had never heard of the statute.

Sailing vessels have been held in fault for having their side-lights in bad condition (The Mary Morgan, 28 Fed. 333); for having insufficient lights (La Champagne, 43 Fed. 444); for exhibiting signals proper only for a pilot-boat (The Wisconsin, 23 Blatchf. (U. S.) 288, 25 Fed. 283); and for having their side-lights obscured by oil and smoke, so that their color could not be distinguished (The Narragansett, 20 Blatchf. (U. S.) 87, 11 Fed. 918).

As to the position in which the lights must be carried it has been held a fault when the green and red lights instead of being placed at the sides were fixed in the center of a schooner and separated only by a board (The Empire State, 2 Biss. (U. S.) 216, 8 Fed. Cas. No. 4,474, 1 Chic. Leg. N. 393), where the red light was placed aft near the taffrail and was obscured or improperly screened (The Johanne Auguste, 21 Fed. 134). It was held, however, in Fraser *v.* The Propeller Wenona, 19 Wall. (U. S.) 41, 22 L. ed. 52, to be immaterial if the signal-lights were not properly located on the schooner, if they were in fact seen by the steamer in time to avoid the collision. In New York, etc., Steamship Co. *v.* Calderwood, 19 How. (U. S.) 241, 15 L. ed. 612, it was held that where a steamer running out of her usual course had notice that a schooner, close-hauled, was before her and near her track the fact that the schooner had not proper lights did not excuse the steamer from running into her. See also The Duke of Buccleuch, 15 P. D. 86, where the lights were so fixed as to be partially obscured. The vessel was held not to have been in fault, if such obscuration could not possibly have caused the collision.

As to lights for sailing vessels under way see also Miller *v.* Morgan, 22 La. Ann. 625; The Alhambra, 4 Fed. 86; The Royal Arch, 22 Blatchf. (U. S.) 209, 22 Fed. 457; Baker *v.* The City of New York, 1 Cliff. (U. S.) 75, 2 Fed. Cas. No. 765; Ward *v.* The Fashion, 6 McLean (U. S.) 152, Newb. Adm. 8, 29 Fed. Cas. No. 17,154; The Delaware *v.* The Osprey, 2 Wall. Jr. (U. S.) 268, 7 Fed. Cas. No. 3,763, 1 Am. L. Reg. 15, 4 Am. L. J. N. S. 533, 27 Hunt. Mer. Mag. 589, 10 Phila. (Pa.) 358, 401, 9 Leg. Int. (Pa.) 82; Todd *v.* The James Adger, 23 Fed. Cas. No. 14,074*a*; Jones *v.* The Hanover, 13 Fed. Cas. No. 7,466, 9 N. Y. Leg. Obs. 232; The Falcon, 8 Fed. Cas. No. 4,619; Bedell *v.* The Potomac, 3 Fed. Cas. No. 1,215, 2 Int. Rev. Rec. 62; Hale *v.* The Buffalo, Newb. Adm. 115, 11 Fed. Cas. No. 5,927.

provided for in article 30 of chapter 802 of the laws of 1890.[5] Two printed copies of such rules must be furnished to such ferry-boats and steam-vessels, which rules shall be kept posted up in conspicuous places in such vessels.[6]

(I) *Lights For Small Vessels.* Whenever, as in the case of [small vessels][7] under way during bad weather, the green and red side-lights cannot be fixed, these lights must be kept at hand, lighted and ready for use; and must, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy the lanterns containing them must each be painted outside with the color of the light they respectively contain, and must be provided with proper screens.[8]

(J) *Lights For Small Steam and Sailing Vessels and Open Boats.* Steam-vessels of less than forty, and vessels under oars or sails of less than twenty tons gross tonnage, respectively, and rowing boats, when under way, are not to be required to carry the lights mentioned in article 2 (a), (b), and (c),[9] but if they do not carry them they must be provided with the following lights: First. Steam-vessels of less than forty tons must carry — (a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in article 2 (a),[10] and of such a character as to be visible at a distance of at least two miles. (b) Green and red side-lights constructed and fixed as prescribed in article 2 (b) and (c),[11] and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective sides. Such lanterns must be carried not less than three feet below the white light. Second. Small steamboats, such as are carried by sea-going vessels, may carry the white light at a less height than nine feet above the gunwale, but it must be carried above the combined lantern mentioned in subdivision 1 (b). Third. Vessels under oars or sails of less than twenty tons must have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, should be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side. Fourth. [Rowing boats, whether under oars or sail, must have ready at hand a lantern showing a white light which should be temporarily exhibited in sufficient time to prevent collision.][12] The vessels referred to in this article

5. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 30; U. S. Comp. Stat. (1901), p. 2871).

6. Inland Rules (30 U. S. Stat. at L. p. 90, c. 4, § 2; U. S. Comp. Stat. (1901), p. 2884).

Inspectors' rule 11.— Where a canal-boat being towed alongside a tug at night in a harbor failed to display a white light on her outboard bow, as required by inspectors' rule 11, both the tug and the canal-boat are chargeable with the fault; and the tug is not exonerated from liability for a collision resulting by the fact that her master ordered the master of the canal-boat to put out the light, but it was his further duty to see that his order was enforced. The Nettie L. Tice, 110 Fed. 461.

7. Substitute the words "vessels of less than ten gross tons" for the words in brackets [ ], for the Inland Rules.

8. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 6; U. S. Comp. Stat. (1901), p. 2865); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 6; U. S. Comp. Stat. (1901), p. 2877).

As to application of rule to a yacht not enrolled under the navigation laws see The Gazelle, 33 Fed. 301, a collision occurring in the harbor on a clear night, in which a steam-propeller was held in fault for not having made the light of a small yacht, a bright light on a pawl-post just forward of the mast, and she was held liable, notwithstanding the fact that the yacht did not carry the regulation lights.

9. See *supra*, III, A, 5, f, (II), (B), (C).

10. See *supra*, III, A, 5, f, (II), (B).

11. See *supra*, III, A, 5, f, (II), (C).

12. The words in brackets [ ] constitute the whole of article 7 of the Inland Rules. 30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 7; U. S. Comp. Stat. (1901), p. 2878.

are not to be obliged to carry the lights prescribed by article 4 (a)[13] and article 11, last paragraph.[14]

(K) *Lights For Pilot-Vessels.* Pilot-vessels when engaged on their station on pilotage duty must not show the lights required for other vessels, but must carry a white light at the masthead, visible all around the horizon, and must also exhibit a flare-up light or flare-up lights at short intervals, which must never exceed fifteen minutes. On the near approach of or to other vessels they must have their side-lights lighted, ready for use, and must flash or show them at short intervals, to indicate the direction in which they are heading, but the green light must not be shown on the port side, nor the red light on the starboard side. A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with green glass on the one side and red glass on the other, to be used as prescribed above. Pilot-vessels when not engaged on their station on pilotage duty must carry lights similar to those of other vessels of their tonnage.[15]

(L) *Lights, Etc., of Fishing-Vessels.* [Fishing-vessels of less than ten gross tons, when under way and when not having their nets, trawls, dredges, or lines in the water, are not obliged to carry the colored side-lights; but every such vessel must, in lieu thereof, have ready at hand a lantern with a green glass on one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern must be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.][16] All fishing-vessels and fishing-boats of ten gross tons or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, must carry and show the same lights as other vessels under way. All vessels, when trawling, dredging, or fishing with any kind of drag-nets or lines, must exhibit, from some part of the vessel where they can be best seen, two lights. One of these lights must be red and the other must be white. The red light must be above the white light, and must be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, must not be more than ten feet. These two lights must be of such a character and contained in lanterns of such construction as to be visible all round the horizon, the white light a distance of not less than three miles and the red light of not less than two miles.[17]

(M) *Lights For Rafts, or Other Craft, Not Provided For.* Rafts, or other

13. See *supra*, III, A, 5, f, (II), (F); and *infra*, III, A, 5, f, (II), (P).

14. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 7; U. S. Comp. Stat. (1901), p. 2865).

A steam-yacht licensed to proceed from port to port in the United States and by sea to foreign ports is required only to carry lights required by rule 3 for "ocean-going steamers and steamers carrying sail." Belden *v.* Chase, 150 U. S. 674, 14 S. Ct. 264, 37 L. ed. 1218 [*reversing* 117 N. Y. 637, 22 N. E. 963, 27 N. Y. St. 688].

A coasting steamer not carrying sails and navigating narrow channels is in fault for not carrying a central range or two white lights. The Conoho, 24 Fed. 758.

15. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 8; U. S. Comp. Stat. (1901), p. 2866); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 8; U. S. Comp. Stat. (1901), p. 2878). And see The Steamship City of Washington *v.* Baillie, 92 U. S. 31, 23 L. ed. 600; The Haverton, 31 Fed. 563; The New Orleans, 9 Ben. (U. S.) 303, 18 Fed. Cas. No. 10,180; The Wanata, 4 Ben. (U. S.) 310, 29 Fed. Cas. No. 17,138.

16. The words in brackets [ ], with the exception of the substitution of the words "twenty tons net registered tonnage" for the words "ten gross tons," constitute, under the International Rules, what relates to lights, etc., of fishing-vessels other than off European coasts. 26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 9; U. S. Comp. Stat. (1901), p. 2866 (International Rules), was repealed by the act of May 28, 1894, and article 10 of the act of March 3, 1885, was reënacted in part by that of Aug. 13, 1894 (28 U. S. Stat. at L. p. 281, c. 284; U. S. Comp. Stat. (1901), p. 2873).

17. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 9 (a), (b), (c); U. S. Comp. Stat. (1901), p. 2878), concerning small fishing-vessels and small fishing-boats.

water craft not herein provided for, navigating by hand power, horse power, or by the current of the river, must carry one or more good white lights, which must be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels.[18]

(N) *Lights For Fishing - Vessels Off European Coasts.* As to fishing-vessels and boats when in the sea off the coast of Europe lying near Cape Finisterre, the International Rules provide as follows: "All fishing-vessels and fishing-boats of twenty tons net registered tonnage or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way. All vessels when engaged in fishing with drift-nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet, and so that the horizontal distance between them, measured in a line with the keel of the vessel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character and contained in lanterns of such construction as to show all round the horizon, on a dark night, with a clear atmosphere, for a distance of not less than three miles. All vessels when trawling, dredging, or fishing with any kind of drag-nets shall exhibit, from some part of the vessel where they can be best seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and contained in lanterns of such construction as to be visible all round the horizon, on a dark night, with a clear atmosphere, the white light to a distance of not less than three miles, and the red light of not less than two miles. A vessel employed in line-fishing, with her lines out, shall carry the same lights as a vessel when engaged in fishing with drift-nets. If a vessel, when fishing with a trawl, dredge, or any kind of drag-net, becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog-signal for a vessel at anchor. Fishing-vessels may at any time use a flare-up in addition to the lights which they are by this article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag-net shall be shown at the after-part of the vessel, excepting that if the vessel is hanging by the stern to her trawl, dredge, or drag-net, they shall be exhibited from the bow. Every fishing-vessel when at anchor between sunset and sunrise shall exhibit a white light, visible all round the horizon at a distance of at least one mile. In a fog a drift-net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag-net, and a vessel employed in line-fishing with her lines out, shall, at intervals of not more than two minutes, make a blast with her fog-horn and ring her bell alternately.[19]"

(O) *Lights For Overtaken Vessel.*[20] A vessel which is being overtaken by another [except a steam-vessel with an after range-light showing all around the horizon][21] must show from her stern to such last-mentioned vessel a white light or a flare-up light.[22] [The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern must be so constructed, fitted, and screened that it shall throw an unbroken light

18. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 9 (d); U. S. Comp. Stat. (1901), p. 2879).

19. 28 U. S. Stat. at L. p. 281, c. 284; U. S. Comp. Stat. (1901), p. 2873. This statute reënacted the act of March 3, 1885, c. 354, § 1, art. 10.

20. **For the definition of an "overtaking vessel"** see *infra*, III, A, 5, f, (IV), (I).

21. The words in brackets [ ] do not appear in the International Rules.

22. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 10; U. S. Comp. Stat. (1901), p. 2879); International Rules (26

over an arc of the horizon of twelve points of the compass, namely, for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light must be carried as nearly as practicable on the same level as the side-lights.][23]

(P) *Anchor Lights.* A vessel under one hundred and fifty feet in length when at anchor must carry forward, where it can best be seen, but at a height not

U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 10; U. S. Comp. Stat. (1901), p. 2866).

23. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 10; U. S. Comp. Stat. (1901), p. 2866). In The City of Savannah, 41 Fed. 891, it was held that the fact that the schooner had a light in her cabin which might have been seen by a vigilant lookout did not excuse her from showing a flare-up light or a lantern to an overtaking steamer. Notwithstanding the omission of the sailing vessel to display a torch the steamer must show that she used all reasonable diligence to avoid her. The City of Merida, 24 Fed. 229. In The Stakesby, 6 Aspin. 532, 59 L. J. Adm. 72, 15 P. D. 166, 63 L. T. Rep. N. S. 115, 39 Wkly. Rep. 80, it was held that a prominent light fixed to the stern of the ship was a sufficient compliance with this article. See also The Robert Graham Dun, 107 Fed. 994, 47 C. C. A. 120; The F. & P. M. No. 2, 36 Fed. 264; The Columbia, 27 Fed. 238; The Rhode Island, 17 Fed. 554; The Golden Grove, 13 Fed. 700; The John H. Starin, 2 Fed. 100; The Parkersburgh, 5 Blatchf. (U. S.) 247, 18 Fed. Cas. No. 10,753, 2 Int. Rev. Rec. 63.

Words in brackets [ ] do not appear in the Inland Rules.

As to the application of this rule and the corresponding rule under the former act see *supra*, III, A, 5, and the following cases: The Oregon, 45 Fed. 62; The Stranger, 44 Fed. 815; The Saratoga, 37 Fed. 119; The A. M. Hathaway, 25 Fed. 926; The State of Alabama, 17 Fed. 847; The New Orleans, 9 Ben. (U. S.) 303, 18 Fed. Cas. No. 10,180. Under a former act (U. S. Rev. Stat. (1878), § 4324), requiring the display of a torch hy a sailing vessel to an approaching steamer a vessel was held to be approaching no matter from which direction she was coming, whether from astern or from forward of the beam, or ahaft the beam on either side. The Frank P. Lee, 34 Fed. 840 [*affirmed* in 30 Fed. 277]; The Caro, 23 Fed. 734; The Oder, 13 Fed. 272; The Samuel H. Crawford, 6 Fed. 906; The Narragansett, 3 Fed. 251; The Sarmatian, 2 Fed. 911. In The Steamship Tonawanda, 11 Phila. (Pa.) 516, 32 Leg. Int. (Pa.) 229, it was held that if the vessels were sailing red light to red light or green light to green light they could not be considered as approaching. It has been held a fault to display a torch light to another vessel which is not an overtaking vessel but which is approaching from some other direction. The Excelsior, 39 Fed. 393; The Algiers, 38 Fed. 526; The Wisconsin, 23 Fed. 831; The Merchant Prince, 5 Aspin. 520, 54 L. J. Adm. 79, 53 L. T. Rep. N. S. 914, 10 P. D. 139, 34 Wkly. Rep. 231. In The Excelsior, 39 Fed. 393, a schooner was held in fault for displaying a white light instead of a green, and so leading a steamer to suppose that she was sailing in the same direction. In The Algiers, 38 Fed. 526, it was held that the words "the lights mentioned and no others shall he carried" was intended to apply to the display of a torch light, that the word "carried" meant to carry or show, and that the effect of that article was to forbid a vessel to display a flare-up light to an approaching vessel, except when she was being overtaken by such vessel as provided for in the article corresponding to article 10.

The failure to display a torch light to a vessel either under the approaching or overtaking rules has been excused under the following circumstances: (1) When the approaching or overtaking vessel had not sufficient lights to indicate her presence to the other. The New Orleans, 9 Ben. (U. S.) 303, 18 Fed. Cas. No. 10,180. (2) When, on account of a fog or of the insufficient lookout on the approaching or overtaking vessel, it is evident that the torch would not have been seen, and that if it had been shown it would have been of no avail. The Oregon, 27 Fed. 751; The Steamship Oder, 8 Fed. 172. (3) Where the vessel's side-lights were so plainly visible to the approaching or overtaking vessel that the display of a torch would have conveyed no additional information. The Pennland, 23 Fed. 551.

The rule directing the display of a torch light involves keeping a sufficient watch over the stern or in whatever direction the vessel is approaching so as to enable the overtaking or approaching ship to he seen in time to display the torch. The Sarmatian, 2 Fed. 911.

The burden is always upon the sailing vessel that is being overtaken to satisfy the court beyond a reasonable doubt that no injury could have resulted from the omission. If it is sought to be excused on the ground that the torch could not possibly be seen by reason of the fog or other cause this must he shown. The Hercules, 17 Fed. 606. In The Algiers, 21 Fed. 343, it was held that the fact that the red light which was burning was not seen does not excuse the failure to display the torch, if this might have been seen further; and the burden is on the sailing vessel to show that it could not.

A sailing vessel at anchor in a proper place with anchor watch and proper anchor light is not required to display a lighted torch. The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943; The Avon, 22 Fed. 905. *Contra*, The Lizzie Henderson, 20 Fed. 524.

exceeding twenty feet above the hull, a white light, in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile. A vessel of one hundred and fifty feet or upwards in length, when at anchor, must carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light. The length of a vessel must be deemed to be the length appearing in her certificate of registry. [A vessel aground in or near a fair-way must carry the above light or lights and the two red lights prescribed by article 4 (a).][24]

(Q) *Special Signals.* Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show

24. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 11; U. S. Comp. Stat. (1901), p. 2867); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 11; U. S. Comp. Stat. (1901), p. 2879).

Words in brackets [ ] do not appear in the Inland Rules.

For article 4 (a) see *supra*, III, A, 5, f, (II), (F).

As to the meaning of the phrase "at anchor" see The Indian Chief, 6 Aspin. 362, 58 L. J. Adm. 25, 60 L. T. Rep. N. S. 240, 14 P. D. 24; Marsden Coll. (3d ed.) 378. In The Ant, 10 Fed. 294, a steamer aground, it was held, should exhibit the signal-light required for steamers at anchor.

It has been held that a vessel moored is not required to have a light under the following circumstances: Where the vessel was tied to a bank out of the line of navigation. Ure *v.* Coffman, 19 How. (U. S.) 56, 15 L. ed. 567. Where a barge was moored across the end of a wharf. Wetmore *v.* The Steamboat Granite State, 3 Wall. (U. S.) 310, 18 L. ed. 179. Where she was moored alongside other vessels attached to the shore of a creek. The Mischief, 39 Fed. 510. Where the boat lay wholly inside the end of the wharf. The Steamboat Bridgeport *v.* Shaw, 14 Wall. (U. S.) 116, 20 L. ed. 787. Where the pier to which she was moored extended far into the river and there were many boats attached to it. The J. H. Rutter, 35 Fed. 365. Where she was moored to a wharf out of the regular track of ships. Culbertson *v.* Steamer Southern Belle, 18 How. (U. S.) 584, 15 L. ed. 493.

A vessel moored has been held in fault for not carrying a light under the following circumstances: When she was moored to a boom anchored in a fair way. The Willard Saulsbury, 1 Parsons Shipp. & Adm. 564. When she was moored to a pier at which steamers made a landing with her stern projecting beyond it. Shields *v.* Mayor, etc., 18 Fed. 748. In The Lydia, 4 Ben. (U. S.) 523, 15 Fed. Cas. No. 8,614, a vessel was held in fault for being without a light while anchored inside the range of an open space between two piers. And see The Guyandotte, 39 Fed. 575; The Whisper, 37 Fed. 495. For cases in which vessels have been found in fault for having no anchor light while at anchor in harbors and channels see The J. R. P. Moore, 45 Fed. 267; The Westfield, 38 Fed. 366; The Drew, 35 Fed. 789; The Erastus Corning, 25 Fed. 572. The mere fact that the riding light is placed as prescribed by the regulations is not always in itself sufficient; care must also be taken that it is not obscured in any direction by masts, spars, sails, or rigging. Marsden Coll. (3d ed.) 378. In cases arising under the former act with respect to vessels at anchor, a "fair-way" has been defined as navigable water, on which vessels of commerce habitually moved, and, that it embraced water inside of buoys, where sail vessels of light draught usually navigate and not merely the ship channel. The Oliver, 22 Fed. 848. In The Alabama, 26 Fed. 866, arising under this rule it was held that a derrick-boat, moored to the pier of a bridge, although not in mid-channel and out of the usual course of passing vessels, was not relieved from the necessity of having a light. See also Case *v.* Perew, 46 Hun (N. Y.) 57 [*affirmed* in 122 N. Y. 665, 26 N. E. 753, 34 N. Y. St. 1014]; Rogers *v.* The Steamer St. Charles, 19 How. (U. S.) 108, 15 L. ed. 563; Culbertson *v.* The Steamer Southern Belle, 18 How. (U. S.) 584, 15 L. ed. 493; The A. P. Skidmore, 108 Fed. 972; The City of Dundee, 108 Fed. 679, 47 C. C. A. 581; The Arthur, 108 Fed. 557; Connolly *v.* The Brandywine Granite Co., 108 Fed. 99; The Minnie, 87 Fed. 780; The Le Lion, 84 Fed. 1011; The Martin Dallman, 70 Fed. 797, 25 U. S. App. 586, 17 C. C. A. 419; The Dimitri Donskoi, 60 Fed. 111; The St. John, 54 Fed. 1015, 13 U. S. App. 90, 5 C. C. A. 16; The Express, 48 Fed. 323; The Wm. N. Beach, 29 Fed. 303; The Isaac Bell, 9 Fed. 842; The Ville du Havre, 7 Ben. (U. S.) 328, 28 Fed. Cas. No. 16,943; The Austin, 3 Ben. (U. S.) 11, 2 Fed. Cas. No. 663; Beyer *v.* The Nurnberg, 3 Hughes (U. S.) 505, 3 Fed. Cas. No. 1,380; Larco *v.* The Martha and Elizabeth, 1 Sawy. (U. S.) 129, 14 Fed. Cas. No. 8,087; Lenox *v.* Winisimmet Co., 1 Sprague (U. S.) 160, 15 Fed. Cas. No. 8,248, 11 Law Rep. 80; Stiles *v.* The John Stephens, 23 Fed. Cas. No. 13,443, 1 Am. L. J. N. S. 385, 4 Pa. L. J. 281; Cohen *v.* The Mary T. Wilder, Taney (U. S.) 567, 6 Fed. Cas. No. 2,965.

As to a vessel moored showing lights and making signals when prudence required see The Kennebec, 108 Fed. 300, 47 C. C. A. 339.

a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.[25]

(R) *Naval Lights and Recognition Signals.* Nothing in the rules is to interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal-lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship-owners, which have been authorized by their respective governments and duly registered and published.[26]

(S) *Steam-Vessel Under Sail by Day.* A steam-vessel proceeding under sail only but having her funnel up must carry in daytime, forward, where it can best be seen, one black ball or shape two feet in diameter.[27]

(III) *Sound Signals in Fog, Etc.*—(A) *Preliminary.* All signals prescribed by article 15 of the rules for vessels under way must be given: First. By "steam-vessels" on the whistle or siren. Second. By "sailing vessels" and "vessels towed" on the fog-horn. The words "prolonged blast" used in this article mean a blast of from four to six seconds duration. A steam-vessel must be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog-horn to be sounded by mechanical means, and also with an efficient bell. [In all cases where the rules require a bell to be used a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small sea-going vessels.][28] A sailing vessel of twenty tons gross tonnage or upward must be provided with a similar fog-horn and bell. In fog, mist, falling snow, or heavy rain-storms, whether by day or night, the signals described in this article must be used as follows, namely: (a) [A steam-vessel having way upon her must sound, at intervals of not more than two minutes, a prolonged blast.][29] (b) [A steam-vessel under way, but stopped, and having no way upon her, must sound, at intervals of not more than two minutes, two prolonged blasts, with an interval of about one second between.][30] (c) A sailing vessel under way must sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession. (d) A vessel when at anchor must, at intervals of not more than one minute, ring the bell rapidly for about five seconds. (e) [A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuver as required by the rules, must, instead of the signals prescribed in subdivisions (a) and (c) of this article, at intervals of not more than two minutes, sound three blasts in succession, namely: One prolonged blast followed by two short blasts. A vessel towed may give this signal and she must not give any other.][31] [Sailing vessels and boats of less than twenty tons gross tonnage must not be obliged to give the

25. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 12; U. S. Comp. Stat. (1901), p. 2867); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 12; U. S. Comp. Stat. (1901), p. 2879). And see construing this rule The Maling, 110 Fed. 227; The Robert Graham Dun, 107 Fed. 994, 47 C. C. A. 120 [*affirming* 102 Fed. 652].

26. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 13; U. S. Comp. Stat. (1901), p. 2867); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 13; U. S. Comp. Stat. (1901), p. 2879).

27. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 14; U. S. Comp. Stat. (1901), p. 2867); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 14; U. S. Comp. Stat. (1901), p. 2879).

28. Words in brackets [ ] do not appear in the Inland Rules.

29. Substitute the words "a steam-vessel under way must sound at intervals of not more than one minute a prolonged blast" instead of the words in brackets [ ] for the Inland Rules.

30. Words in brackets [ ] do not appear in the Inland Rules.

31. Substitute the words: "A steam-vessel when towing must instead of the signals prescribed in subdivision (a) of this article at intervals of not more than one minute sound three blasts in succession, viz., one

above-mentioned signals, but, if they do not, they must make some other efficient sound signal at intervals of not more than one minute.][32] (f) [All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, must sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute.][33]

prolonged blast followed by two short blasts. A vessel towed may give this signal and she must not give any other," instead of the words in brackets [ ] for the Inland Rules.

32. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 15; U. S. Comp. Stat. (1901), p. 2867).

The words in brackets [ ] do not appear in the Inland Rules.

33. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 15; U. S. Comp. Stat. (1901), p. 2880). And see Chesley *v.* Nantasket Beach Steamboat Co., 179 Mass. 469, 61 N. E. 50; The George W. Roby, 111 Fed. 601, 49 C. C. A. 481 [*modifying In re* Lakeland Transp. Co., 103 Fed. 328]; Merchants', etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 48 C. C. A. 128; The Kennebec, 108 Fed. 300, 47 C. C. A. 339; The Hanson H. Keyes, 107 Fed. 537.

The words in brackets [ ] do not appear in the International Rules.

Sound signals in fog.— Fog-signals are required to be given by a vessel not only when she herself is actually enveloped in a fog, but also when she is so near it that her position should be known to any vessel that may happen to be within the fog-bank. So held with reference to a schooner where the masthead light of the steamer was visible from the schooner's deck; but her side-lights were shut out by the low-lying bank of fog. The Perkiomen, 27 Fed. 573. And see The Rocket, 1 Biss. (U. S.) 354, 20 Fed. Cas. No. 11,975, 3 West. L. Month. 7. The courts give more weight to affirmative evidence that the fog-horn was regularly blown than to negative testimony that it was not heard. So held in the case of The Negaunee, 20 Fed. 918, in which the fog was wet and dense and the fog-horn of one schooner was blown upon the windward side so that the sails tended to interrupt the waves of sound. The failure of fog-horns to be heard has been explained by different theories of acoustics. In The Leland, 19 Fed. 771, an attempt was made to show that the reason the fog-signals were not heard was because the atmosphere at the time was acoustically opaque, but the court did not think the evidence sufficient to sustain this theory. In The Lepanto, 21 Fed. 651, decided about the same time, it was, upon authorities being cited, accepted as an established fact that, owing to the liability of sound to be deflected from its original course by reflection, refraction, or defraction, it frequently happens that although the hearer locates correctly the direction of a sound as it comes to his ear, the source of a sound will be in a different quarter, and also that, owing to these causes, areas of inaudibility may exist distant a quarter of a mile only in front of the blasts of the most powerful steam siren, while further off in the same direction the sound may again become audible and loud and remain so for miles beyond. In this case the original and prime cause of the collision was the error on the part of one or both of the vessels in locating the other when her fog-signal was heard. It was held that an error of five points in locating the other vessel's position by the sound of her whistle was not a fault; and also that if the sound came apparently from a definite direction the steamer was justified in steering away from it, but if it seemed near she was bound at her peril to stop and reverse at once. For other cases under this article see The Martello, 153 U. S. 64, 14 S. Ct. 723, 38 L. ed. 637; The Chancellor, 4 Ben. (U. S.) 153, 5 Fed. Cas. No. 2,589; Ancon *v.* Thompson, 8 Sawy. (U. S.) 334, 17 Fed. 742; Morrison *v.* The Petaluma, 1 Sawy. (U. S.) 126, 17 Fed. Cas. No. 9,848; Brush *v.* The Plainfield, 4 Fed. Cas. No. 2,058, 2 N. J. L. J. 331.

See 10 Cent. Dig. tit. "Collision," § 157.

As to whether a sail vessel which is hove to in a fog shall ring a bell or blow a fog-horn.— In The Steamship Pennsylvania *v.* Troop, 19 Wall. (U. S.) 125, 22 L. ed. 148, a bark was hove to in a fog with her helm lashed to leeward, but with no sails aback, and was moving through the water about a mile an hour. She was held in fault for ringing a bell, the signal required for a vessel not under way. In The Alfredo, 32 Fed. 240 [*affirming* 30 Fed. 842], a schooner was hove to in a fog with sails aback and actually making no headway at all. She sounded a horn two blasts at a time, the signal for a vessel close-hauled on the port tack, and she was held solely in fault, on the ground that she should have been ringing a bell in her position at that time.

As to efficient means of giving signals see The Trave, 68 Fed. 390, 35 U. S. App. 321, 15 C. C. A. 485; The Parthian, 55 Fed. 426, 5 U. S. App. 314, 5 C. C. A. 171.

As to signals for steam-vessels under way see The Princeton, 67 Fed. 557, 35 U. S. App. 272, 14 C. C. A. 527; The Wyanoke, 40 Fed. 702.

As to signals for sail vessels under way see The Stafford, 37 Fed. 811; The Leo, 11 Blatchf. 225, 15 Fed. Cas. No. 8,254.

As to signals for vessels towing and in tow see Merchants, etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 48 C. C. A. 128: The Columbia, 104 Fed. 105; The Albany, 91 Fed. 805; The Columbian, 91 Fed. 801; Donnell *v.* Boston Towboat Co., 89 Fed. 757, 50 U. S. App. 435, 32 C. C. A. 331; The City of Alexandria, 31 Fed. 427; The Peshtigo, 25 Fed. 488.

(B) *Speed in Fog.* Every vessel must, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard for the existing circumstances and conditions.[34] A steam-vessel hearing, apparently forward of her beam,

As to defect in fog-horn see The Niagara 84 Fed. 902, 55 U. S. App. 445, 28 C. C. A. 528 [*affirming* 77 Fed. 329].

The meaning of a "fog" within the act of 1864 at night was defined as being whenever the weather was so thick that the fog-horn could be heard farther than the ordinary signal-light could be distinguished. The Monticello, 1 Lowell (U. S.) 184, 17 Fed. Cas. No. 9,739. See also The Ludvig Holberg, 36 Fed. 914.

As to a steamer slackening her speed or stopping or reversing in a fog see article 23, *infra*, note 55, p. 358.

As to what constitutes moderate speed in a fog see article 16, *infra*, note 35, p. 344.

Rules prior to 1863 and decisions thereunder relating to fog-signals see Rules of Supervising Inspectors of Oct. 15, 1857, in effect Jan. 1, 1858; 1 Parsons Shipp. & Adm. 566; Swabey vi; Regulations of 1858 made in pursuance thereof; Merchants Shipping Act of 1854.

34. The duty of going at a moderate speed in a fog, heavy snow or rain-storm on a dark night in a narrow channel, or in the track of crowded vessels, has always been insisted upon both with regard to steamers and sailing vessels (The S. Anderson, 27 Fed. 392; The Rhode Island, 17 Fed. 554; The Johns Hopkins, 13 Fed. 185); and even before the enactment of any regulations steamers and sailing vessels were held in fault for navigating at an unsafe speed under such circumstances (Lowndes Coll. (3d ed.) 69–73). With reference to the practice of the fast transatlantic steamers maintaining their full speed in a fog while in the open sea, attempts have been made to justify the same upon the ground that the time of exposure to risk was thereby lessened, and that if a collision did occur the chances of injury to the steamer were smaller. The Pennsylvania, 4 Ben. (U. S.) 257, 19 Fed. Cas. No. 10,947 [*reversed* on other grounds in 19 Wall. (U. S.) 125, 22 L. ed. 148]. The courts have taken the view that running at high speed in such cases, although perhaps safer to steamers, was full of danger to any smaller vessels that might be in their track, and that it should be therefore condemned. Clare *v.* Providence, etc., Co., 20 Fed. 535. To sustain the defense of inevitable accident in cases of collision in a fog it must appear that both parties have endeavored by all means in their power and by a proper display of nautical skill to prevent the collision. The Nacoochee, 22 Fed. 855. In collisions between a steamer and a sailing vessel resulting from too great speed on the part of the steamer, there are many cases holding the steamer solely in fault, notwithstanding the fact that the sailing vessel may have neglected to give proper signals or have been guilty of some injudicious manœuver in the peril of the moment. The City of New York, 15 Fed. 624; Appleby *v.* The Kate Irving, 5 Hughes (U. S.) 146, 2 Fed. 919; The Ancon *v.* Thompson, 8 Sawy. (U. S.) 384, 17 Fed. 742 [*affirming* 6 Sawy. (U. S.) 118, 1 Fed. Cas. No. 348]. A steamer has a right to presume that every vessel approaching will give such notice as the local usages of the place or the general rules of the sea require. Kennedy *v.* The Sarmatian, 5 Hughes (U. S.) 152, 2 Fed. 911. Upon a fog, haze, or snow-storm coming on the obligation to slacken speed immediately arises, and this duty continues so long as the thick weather lasts. The Pennland, 23 Fed. 551; The Leland, 19 Fed. 771. This obligation arises also when in the course of navigation it becomes difficult from other causes to see approaching vessels. In the East river, for instance, where the electric lights on the bridge dazzled the eyes of the pilots so that the lights of other boats could not be distinguished, it was held that the space so illuminated should be passed over at moderate speed. The A. Demerest, 25 Fed. 921. The case of a steamer leaving her course to rescue persons or a ship in distress, it seems, does not form an exception to the rule regarding moderate speed in a fog. The Nacoochee, 28 Fed. 462.

Meaning of the term "moderate speed."— The rate of speed intended by these regulations is not a fixed rate for all vessels on all occasions. It was said in The State of Alabama, 17 Fed. 847, that the term has reference to all circumstances which affect the ability of a steamer to keep out of the way of an approaching vessel. These include the circumstances external to the steamer and also the power and ordinary full speed of the vessel herself. Among the external circumstances to be considered are the density of the fog and the increased difficulty of discovering danger and also the risk of meeting other vessels. What would be moderate speed in mid-ocean would be unlawful and even criminal in a crowded harbor, narrow channel, or in the neighborhood of a port in waters frequented by other boats. The City of Atlanta, 26 Fed. 456, where it was said the term "moderate speed" has reference also to the power and ordinary full speed of the steamer herself, because a fast vessel with powerful engines can be handled more quickly, stopped sooner, backed faster, and got out of the way quicker going at a given speed than a steamer of less power going at the same rate. The final test of moderate speed is whether it is such as to enable a steamer to be stopped and reversed within the distance at which an approaching vessel can be seen, or at least within the distance at which her fog-signal could be heard. The Normandie, 43 Fed. 151; McCabe *v.* Old Dominion Steamship Co., 31 Fed. 234; The Lepanto, 21 Fed. 651; The Leland, 19 Fed. 771; The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9,626. Excuse is sometimes made that in order to

the fog-signal of a vessel the position of which is not ascertained must, so far as

diminish the speed it is necessary to lower the steam pressure, and it has been argued that a vessel proceeding at a greater speed, maintaining a high pressure, and having the full force of her engines to retard her upon reversing can check her headway within a shorter distance relatively than if she were proceeding slowly and maintaining a low pressure in her boilers. In The Hansa, 5 Ben. (U. S.) 501, 11 Fed. Cas. No. 6,037, 6 Am. L. Rev. 759, the court held that under such circumstances, since a steamer could be brought to a full stop more quickly when proceeding with the throttle valve only partly open and having the reserve force of steam, by simultaneously throwing the valve wide open and reversing than would be possible had she been proceeding under a full head of steam, it was her duty to so navigate. It is the duty of a steamer to avail herself of her boiler power to be ready to stop and reverse with power and efficiency in a fog, while at the same time she moderates her speed. On the other hand there is no arbitrary requirement that a steamer in a fog shall maintain in her boilers the utmost head of steam pressure, it being evident that a certain amount of reduction is necessary for mechanical reasons and for the safe working of the machinery under slow speed; and if a vessel maintains sufficient for rapid handling in an emergency it is all that is necessary. The Lepanto, 21 Fed. 651. In The Normandie, 43 Fed. 151, experiments were made to show that a vessel could be handled more readily under a speed of sixteen knots than under a speed of ten or twelve knots, but the court said that the question was not whether certain evolutions could be executed in less time, but whether the Normandie, when meeting a vessel suddenly in a fog, could as a rule more effectively avoid her under a speed of ten or twelve knots than when under a speed of six or seven knots, and the experiment showed that a ship stopped in less space and turned more within a given area under eight knots than under twelve knots. In the case of The Lepanto, 21 Fed. 651, it was held that this steamer's speed was sufficiently moderate, because the evidence showed that she could have been stopped within the limits referred to had not the Edam run within the Lepanto's share of that distance through her own immoderate speed. It has been held that if the fog is so thick, or the circumstances are such that a rate of speed only sufficient to maintain steerage way will not enable her to avoid other vessels, it is the duty of a steamer to stop from time to time and lie to. The Utopia, 1 Fed. 892. A steamship which was overtaken by a very dense fog in Liverpool bay and lay stern foremost with her engines stopped, driving toward Liverpool with the tide, was held not in fault for not having brought up. The Kirby Hall, 5 Aspin. 90, 52 L. J. Adm. 31, 48 L. T. Rep. N. S. 797, 8 P. D. 71, 31 Wkly. Rep. 658. See Marsden Coll. (3d ed.) 403. In The Catalonia, 43 Fed. 396, in which the fog was so dense that another vessel could hardly be seen a ship's length off, it was held to be negligence for a steamer to run at seven knots. In The John Pridgeon Jr., 38 Fed. 261, in a fog with some sea, it was held not to be negligence to run at five miles an hour. And see The Trave, 68 Fed. 390, 35 U. S. App. 321, 15 C. C. A. 485 [*affirming* 55 Fed. 117]; The Saale, 63 Fed. 478, 26 U. S. App. 164, 11 C. C. A. 302 [*affirming* 59 Fed. 716]; The Raleigh, 44 Fed. 781 [*affirming* 41 Fed. 527]; The Lehigh, 43 Fed. 597; The Andrew Hicks, 24 Fed. 653; The Pottsville, 12 Fed. 631; The City of Guatemala, 7 Ben. (U. S.) 521, 5 Fed. Cas. No. 2,747; The Hammonia, 11 Blatchf. (U. S.) 413, 11 Fed. Cas. No. 6,007; The Leo, 11 Blatchf. (U. S.) 225, 15 Fed. Cas. No. 8,254; The Colorado, Brown Adm. 393, 6 Fed. Cas. No. 3,028.

Instances of collision attributable to improper speed.— The following cases show what has been considered moderate speed under different circumstances: On the open sea, in The Utopia, 1 Fed. 892, eleven knots an hour in a fog so thick that a vessel could only be seen a quarter of a mile was held too great speed for a steamer. Seven to ten knots, being two thirds of the full speed, was held too great in a dense fog at night in the open sea in The Wyanoke, 40 Fed. 702. One-half her usual speed, that is, from six to seven knots, was held too great in The Nacoochee, 28 Fed. 462. Ten knots where one could see one eighth of a mile was held improper in The City of New York, 15 Fed. 624 [*affirmed* in 33 Fed. 604]. Moderate speed has always been held to mean reduced speed, therefore the usual speed, however slow it may be, is generally considered improper in a fog. The City of Atlanta, 26 Fed. 456. In The Normandie, 43 Fed. 151, for a vessel whose usual speed was sixteen knots, ten or twelve knots was held to be moderate. In The Lepanto, 21 Fed. 651, four and one-half knots was held to be moderate speed. Four or five knots, being one-half her usual speed, was held sufficiently moderate in The Lorenzo D. Baker, 24 Fed. 814. A steamer running one-half her usual speed, seven knots, in a snow-storm at night when lights were visible one-third or one-half mile distant, within which distance the steamer was able to stop, back, or slacken speed, was held moderate speed. The Allianca, 39 Fed. 476. See also The Mexico, 84 Fed. 504, 55 U. S. App. 358, 28 C. C. A. 472 [*affirming* 78 Fed. 563]; The Michigan, 63 Fed. 280, 25 U. S. App. 1, 11 C. C. A. 187 [*reversing* 63 Fed. 295]; The Fulda, 52 Fed. 400; Fabre *v.* Cunard Steamship Co., 53 Fed. 288, 1 U. S. App. 614, 3 C. C. A. 534 [*reversing* 40 Fed. 893]; The Bolivia, 49 Fed. 169, 1 U. S. App. 26, 1 C. C. A. 221 [*reversing* 43 Fed. 173].

Speed in frequented waters.— On Long Island sound a steamer going fifteen miles and a schooner going seven miles an hour were both held in fault for immoderate speed

the circumstances of the case admit, stop her engines, and then navigate with

in a fog. The Rhode Island, 17 Fed. 554. For a steamer running in the usual track of vessels approaching the harbor in a dense fog eight miles an hour was held to be too fast. The City of Panama, 5 Sawy. (U. S.) 63, 5 Fed. Cas. No. 2,764, 1 San Fran. L. J. 329. In a locality where constantly surrounded by sailing vessels seven miles an hour was held too fast in a fog. The Manistee, 7 Biss. (U. S.) 35, 16 Fed. Cas. No. 9,028. In the English channel nine or ten knots an hour was held too fast in a dense fog in The Westphalia, 4 Ben. (U. S.) 404, 29 Fed. Cas. No. 17,460, and it was said there that even seven knots could not be justified in such a place. In The Steamship Pennsylvania *v.* Troop, 19 Wall. (U. S.) 125, 22 L. ed. 148, two hundred miles from Sandy Hook in the track of outward and inward bound vessels in which the fog was such that objects could not be seen further than the length of the steamer seven knots was held to be immoderate, and it was said that if she could not maintain steerage way at less speed it was her duty to have laid to. For a vessel entering a fog-bank near Sandy Hook eleven or twelve knots was held immoderate speed. The City of Alexandria, 31 Fed. 427. For a steamer sailing near Scotland light ship seven miles an hour was held too fast. McCabe *v.* Old Dominion Steamship Co., 31 Fed. 234. In the Martello, 34 Fed. 71 [*affirmed* in 39 Fed. 505], in a dense fog near Sandy Hook for a vessel whose full speed was twelve knots the rate of five knots was held immoderate; and a sailing vessel going at the rate of four knots in the same place was held to be sailing too fast. In a frequented part of the ocean about thirty miles from the coast seven knots was held excessive in a fog so thick that the ship's hull and sails could hardly be seen the ship's length off. The Catalonia, 43 Fed. 396. See also La Normandie, 58 Fed. 427, 14 U. S. App. 655, 7 C. C. A. 285 [*affirming* 43 Fed. 151]; The City of New York, 8 Blatchf. (U. S.) 194, 5 Fed. Cas. No. 2,759; Wallamet R. T. Co. *v.* Oregon S. N. Co., 29 Fed. Cas. No. 17,106, 9 Chic. Leg. N. 73; McCloskey *v.* The Achilles, 15 Fed. Cas. No. 8,701, 5 Chic. Leg. N. 73, 23 Int. Rev. Rec. 368, 4 L. & Eq. Rep. 676, 13 Phila. (Pa.) 463, 34 Leg. Int. (Pa.) 384, 5 N. Y. Wkly. Dig. 241, 25 Pittsb. Leg. J. (Pa.) 49.

In narrow channels.— In The Luray, 24 Fed. 751, four and three-quarter miles an hour for one steamer going with the tide, being barely sufficient for steerage way, was held excessive. In the vicinity of the Chicago river nine miles an hour was held too great a speed for a steamer in a fog. The Peshtigo, 25 Fed. 488. In the Harlem river a speed of five knots was held to be excessive in the case of The Raleigh, 41 Fed. 527. In the most frequented waters of Lake Superior one steamer was held in fault for going ten knots and the other for going six in a dense fog. The Alberta, 23 Fed. 807. A steamer running through the harbor even at one-half her speed, it was held, must stop and reverse promptly upon risk of collision arising. The Stamford, 27 Fed. 227. In The Steamboat New York *v.* Rae, 18 How. (U. S.) 223, 15 L. ed. 359, a steamer with a large fleet of boats in tow passing down the North river in the night-time at a speed of eight or ten miles an hour was held to be going too fast. In The Johns Hopkins, 13 Fed. 185, three and one-half miles an hour for a steamer in a fog was held to be moderate, but twice that speed was held excessive for a sailing vessel. In Netherlands Steam Boat Co. *v.* Styles, 9 Moore P. C. 286, 297, 1 Spinks 378, 14 Eng. Reprint 305, the court said: "At whatever rate she was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate." In The Harton (1886), Marsden Coll. (3d ed.) 405, a steamship entering a fog-bank at a speed of eight knots was held in fault. The fact that a vessel is carrying the United States mail which she has a contract to deliver within a certain time is no defense to a claim for damages resulting from unusual and dangerous speed. The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; Rogers *v.* The Steamer St. Charles, 19 How. (U. S.) 108, 15 L. ed. 563; The James Adger, 3 Blatchf. (U. S.) 515, 13 Fed. Cas. No. 7,188, 35 Hunt. Mer. Mag. 453; The Northern Indiana, 3 Blatchf. (U. S.) 92, 18 Fed. Cas. No. 10,320, 16 Law Rep. 433. In cases where by putting the engines at full speed an imminent collision may be avoided such increased speed will be excused under article 23; but a belief on the part of the master that a danger may in a certain event arise in the future unless he gives the full-speed order is not the excuse permitted by this article. The Iberia, 40 Fed. 893. As to speed in the harbor see Sieward *v.* The Steamship Teutonia, 23 Wall. (U. S.) 77, 23 L. ed. 44; The Aleppo, 5 Ben. (U. S.) 554, 1 Fed. Cas. No. 157. And further as to speed in narrow channels see The Laurence, 54 Fed. 542, 8 U. S. App. 312, 4 C. C. A. 501; The Westphalia, 4 Ben. (U. S.) 404, 29 Fed. Cas. No. 17,460; The Blackstone, 1 Lowell (U. S.) 485, 3 Fed. Cas. No. 1,473.

Speed of sailing vessels.— A rate of speed in a fog which is excessive for a steamer would *a fortiori* be immoderate for a sailing vessel under similar circumstances. The Rhode Island, 17 Fed. 554. In the Johns Hopkins, 13 Fed. 185, a schooner was held solely at fault for a collision, in which she was going at twice the speed of the steamer, when the steamer stopped and reversed as soon as the light of the sailing vessel was seen. The Vesper, 9 Fed. 569, is also a case of a schooner in collision with a steamer being held at fault for excessive speed. In Gubert *v.* The George Bell, 3 Hughes (U. S.) 468, 11 Fed. Cas. No. 5,856, a sailing ship was faulted for carrying too much canvas in fishing waters in a fog, and thus running

caution until danger of collision is over.[35] [The duty of a steam-vessel to slacken speed and stop is regulated by article 23 (*infra*, III, A, 5, f, (IV), (H).]

into a fishing-vessel at anchor. In The S. Anderson, 27 Fed. 392, two schooners were both held in fault while sailing on crossing courses for manœuvering without slackening speed. In The Thomas Martin, 3 Blatchf. (U. S.) 517, 23 Fed. Cas. No. 13,926, 35 Hunt. Mer. Mag. 446, 19 Law Rep. 379, this vessel was held also to blame for a collision when she was sailing with all sails set on a rather dark night and was racing with another schooner. In The Dordogne, 5 Aspin. 328, 54 L. J. Adm. 29, 51 L. T. Rep. N. S. 650, 10 P. D. 6, 33 Wkly. Rep. 360, a sailing ship with her studding sails set in a thick fog; and in The Itinerant, 3 Notes Cas. (Eng.) 5, 2 W. Rob. 236, a sailing ship under a press of sail in a fog, were neither of them held in fault for the collision which occurred. In The Elysia, 4 Aspin. 540, 46 L. T. Rep. N. S. 840, a brig in the Atlantic carrying all plain sail and going five knots in a fog was held free from blame. In The Zadok, 5 Aspin. 252, 53 L. J. Adm. 72, 50 L. T. Rep. N. S. 695, 9 P. D. 114, 32 Wkly. Rep. 1003, a bark with nearly all the canvas set which she could carry going five knots or upwards in a fog in a frequented part of the English channel was held in fault for immoderate speed. In that case the court stated it to be the duty of a sailing ship to moderate her speed to the point at which she will just have sufficient power to control her movements. See also The Chattahoochee, 173 U. S. 540, 19 S. Ct. 491, 43 L. ed. 801 [*affirming* 74 Fed. 899, 33 U. S. App. 510, 21 C. C. A. 162]; The Mount Hope, 84 Fed. 910, 50 U. S. App. 282, 29 C. C. A. 365 [*affirming* 79 Fed. 119]; The David Crockett, 84 Fed. 698.

Speed and navigation in a fog for ferry-boats.— There appears to be a different view taken in this country with respect to the duty and responsibility of ferry-boats running in a fog, from that which pertains in England. In The Lancashire, L. R. 4 A. & E. 198, 2 Aspin. 202, 29 L. T. Rep. N. S. 927, the court doubted whether it was proper and right for a ferry-boat to cross the Mersey in a dense fog, but said that at any rate if the ferry steamer was justified in proceeding in such weather she assumed all the responsibility incidental thereto. In the United States the courts have held that ferry-boats being public necessities, negligence will not be imputed to them from the mere fact that they deliberately attempted to make a trip in a dense fog, and if they are managed with skill and judgment it is the duty of other vessels to do nothing to impede their passage. The Orange, 46 Fed. 408; The Exchange, 10 Blatchf. (U. S.) 168, 8 Fed. Cas. No. 4,593. On the other hand there is no rule which exempts ferry-boats from ordinary care in navigation. Hoffman *v.* Union Ferry Co., 68 N. Y. 385. In The Orange, 46 Fed. 408, a tug with a brig in tow was held in fault for making fast at the end of a pier with her bow angling out and putting herself in the way of a ferry-boat navigating in a dense fog, it being unnecessary for the tugboat to navigate at all in such weather. In The Relief, Olc. Adm. 104, 20 Fed. Cas. No. 11,693, a tugboat was held in fault for trying to cross the bows of a ferry-boat when she was within three hundred yards of her slip in a fog. In The Exchange, 10 Blatchf. (U. S.) 168, 8 Fed. Cas. No. 4,593, a schooner was held solely in fault for anchoring in the track of a ferry-boat and remaining there against the request of those in charge of the ferry-boat until, a dense fog coming on, the ferry-boat ran into her. In The Hudson, 5 Ben. (U. S.) 206, 12 Fed. Cas. No. 6,829, 14 Int. Rev. Rec. 36, a revenue cutter anchored in the track of a ferry-boat running between New York and Jersey City, refused to move away or to ring a bell, when requested, and was held solely in fault for a collision which took place during a fog. In The Sylph, 4 Blatchf. (U. S.) 24, 23 Fed. Cas. No. 13,711, a collision between two ferry-boats in New York bay in a dense fog, both of them going about five miles an hour, the court, in view of the custom of ferry-boats to run in such weather, refused to hold them either in fault, and decided that each should bear its own damages. In The Howard, 30 Fed. 280, a ferry-boat was held in fault for continuing at full speed in a dense fog after making the lights of her slip, it being shown that full speed was not necessary to enable her to enter the slip. In The Lydia, 4 Ben. (U. S.) 523, 15 Fed. Cas. No. 8,614, a ferry-boat while making a trip across the North river got nearly one-half mile out of her course in the fog and thus came into collision with a sloop. The ferry-boat was held in fault. Great care is required of steamers running in a dense fog near the piers where boats usually tie up, and the responsibility is upon them to go at such a speed as to be capable of being fully stopped within the distance at which boats lying there can be seen. The St. John, 29 Fed. 221.

35. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 16; U. S. Comp. Stat. (1901), p. 2868); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 16; U. S. Comp. Stat. (1901), p. 2880). And see The George W. Roby, 111 Fed. 601, 49 C. C. A. 481 [*modifying In re* Lakeland Transp. Co., 103 Fed. 328]; The West Brooklyn, 106 Fed. 751; The Ella Andrews, 105 Fed. 651, 44 C. C. A. 647; The Columbia, 104 Fed. 105; The West Brooklyn, 103 Fed. 691; The Providence, 100 Fed. 1004, 40 C. C. A. 686 [*affirming* 98 Fed. 133, 38 C. C. A. 670]; The Benjamin A. Van Brunt, 98 Fed. 131, 38 C. C. A. 668; The Cincinnati, 95 Fed. 302; Hughes *v.* Pennsylvania R. Co., 93 Fed. 510; The Cheruskia, 92 Fed. 683; The Patria, 92 Fed. 411; The Niagara, 84 Fed. 902, 55 U. S. App. 445, 28 C. C. A. 528

(IV) *Steering and Sailing Rules*—(A) *Preliminary.* Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.[36]

(B) *Sailing Vessels.* When two sailing vessels are approaching one another, so as to involve risk of collision, one of them must keep out of the way of the other, as follows, namely: (a) A vessel which is running free must keep out of the way of a vessel which is close-hauled.[37] (b) A vessel which is close-hauled on

[*affirming* 77 Fed. 329]; The Whitehall, 68 Fed. 1022; The Midland, 48 Fed. 331; Lane *v.* The Bedford, 14 Fed. Cas. No. 8,046, 38 Hunt. Mer. Mag. 711.

See 10 Cent. Dig. tit. "Collision," § 170 *et seq.*

Further as to speed see *supra,* II, A, 2, d.

36. International Rules (26 U. S. Stat. at L. p. 320, c. 802; U. S. Comp. Stat. (1901), p. 2869); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4; U. S. Comp. Stat. (1901), p. 2881).

The suggestion in the preliminary note to article 17 of the international navigation rules relating to sailing vessels approaching one another, that, if the compass bearing of an approaching vessel does not appreciably change as the two vessels draw nearer together, there should be deemed to be risk of collision, is not a rule of navigation, but merely a suggestion of one circumstance which denotes that there is danger of collision; and a steamer is not justified in assuming that there is no risk because there is an appreciable change in the compass bearing of the lights of a sailing vessel seen at night, which would manifestly be an unwarranted assumption under some circumstances. Wilder's Steamship Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473.

Further as to steering see *supra,* II, A, 2, d.

37. Of a vessel running free and one close-hauled.— See article 22, *infra,* note 54, p. 358, directing that the vessel which must keep out of the way shall avoid crossing ahead of the other. This has been frequently held to be the duty of the vessel running free. So in The Argus, Olc. Adm. 304, 1 Fed. Cas. No. 521, in which it was said that a vessel running free has no right to cross the bows of one that is beating, unless there is clearly room, or to come so close astern as to alarm her into changing her course. The vessel sailing free may keep out of the way of a vessel close-hauled in any way she thinks proper. She has, however, no right to embarrass the other, and if there are two courses open she is responsible if she accepts the more hazardous. Whitney *v.* The Empire State, 1 Ben. (U. S.) 57, 29 Fed. Cas. No. 17,586. In The David Dudley, 11 Fed. 522, a bark with the wind on the quarter came into collision with a schooner close-hauled on the starboard tack, the port bow of the schooner striking the port quarter of the bark, and the bark was held in fault for not putting her helm to starboard. In The North Star, 29 Fed. 151, a vessel sailing free was held in fault for attempting to cross the bows of one close-hauled and the latter was held in fault for not keeping her course. In cases in which neither vessel, strictly speaking, is close-hauled the vessel which is sailing very much more free than the other is held bound to keep out of the way. So in The Havilah, 33 Fed. 875, in which the wind was N.N.E. and the brig H heading W. one-half N. nine and one-half points off the wind was held in fault for not keeping out of the way of the schooner H A sailing full and on a course E. by N., being five points free. And see The Ella Warner, 30 Fed. 203; The John Stuart, 4 Blatchf. (U. S.) 444, 13 Fed. Cas. No. 7,427. If the close-hauled vessel by coming about when the other is attempting to go astern of her causes the collision she will be held in fault; and if the vessel on the wind changes her tack it is her duty, if other vessels are near, to go about and not to wear. The Richard R. Higgins, 1 Lowell (U. S.) 290, 20 Fed. Cas. No. 11,768. The vessel on the wind has the right to run out her tack, and the vessel approaching her before the wind must take the necessary precautions to avoid her. Abbott Nat. Dig. p. 167, § 22, and cases cited. In The Myrtle, 44 Fed. 779, the wind was somewhere S. of W. the schooner M heading N. by W. sighted the schooner L close-hauled on the starboard tack and heading S. one-half W. The schooner M put her helm to port, let go her main sheet and swung six or seven points to starboard. When five or six lengths off the schooner L starboarded and swung to port. The L was held solely in fault.

See 10 Cent. Dig. tit. "Collision," § 25.

Maritime law — Sailing vessel free meeting one close-hauled.— The law of the sea was that when two ships, one close-hauled and the other sailing free, met end on, the ship which was going free must make way for the other by porting her helm. The Woodrop-Sims, 2 Dods. 83; The Speed, 2 W. Rob. 225; Lowndes Coll. 16; 1 Parsons Shipp. & Adm. 566. But when the ship with the wind free was not meeting end on, but crossing the track of the close-hauled ship, the former must give way to the latter by going astern of her. The Gazelle, 5 Notes Cas. (Eng.) 101, 2 W. Rob. 515; The James Watt, 3 Notes Cas. (Eng.) 36, 2 W. Rob. 270; London Packet, 2 Notes Cas. (Eng.) 501, 2 W. Rob. 213; The Rose, 2 W. Rob. 1; Lowndes Coll. 16. This rule was first recognized by the courts in the time of Lord Erskine, about the year 1820. Marsden Coll. (3d ed.) 339. There appear, however, to have been some cases in which the court extended the rule in favor of a starboard-tacked ship so far as to hold that a port-tacked ship, although

the port tack must keep out of the way of a vessel which is close-hauled on the starboard tack.[38] (c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side must keep out of the way of

close-hauled, was bound to give way to a starboard-tacked ship going free. 1 Pritchard Adm. Dig. 263, note 363. In one case in which the collision happened in the middle of the Atlantic, an American vessel sailing on the port tack with the wind four points free was held in fault for porting and thus coming into collision with an English vessel on the starboard tack close-hauled. Williams *v.* Gutch, 4 L. T. Rep. N. S. 627, 14 Moore P. C. 202, 15 Eng. Reprint 281. In another case an English vessel on the port tack, which was run into by a foreign vessel with the wind free, might have avoided the collision by porting her helm. It was held that she was not in fault by the maritime law for not doing so, although by the English statute she should have ported in such a case. The Zollverein, 2 Jur. N. S. 429, Swabey 96, 4 Wkly. Rep. 555.

38. Of the duties of two vessels approaching close-hauled one on the starboard and the other on the port tack.— Under the common sea law the rule with respect to such cases appears to have been that the ship on the port tack should make way for the other by porting her helm, although it was sometimes held that if a ship close-hauled on the starboard tack could go a point or two nearer by porting and still remain under command, it was her duty to do so. Lowndes Coll. (3d ed.) 17, 19. The rule appears to have grown out of the custom of approaching vessels passing each other to port, the reason for favoring the starboard-tacked vessel being, of course, that she could usually not port without throwing herself in stays. The Seringapatam, 5 Notes Cas. (Eng.) 61, 2 W. Rob. 506. It is uncertain whether under the maritime law the ship on the port tack should always bear up and go under the stern of the other, or whether she was at liberty to keep out of the way by taking other steps. Marsden Coll. (3d ed.) 409. The port-tacked vessel may now keep out of the way of the other in any way she thinks fit. The Abby Ingalls, 12 Fed. 217; Williams *v.* Gutch, 4 L. T. Rep. N. S. 627, 14 Moore P. C. 202, 15 Eng. Reprint 281. The correlative duty is imposed upon the starboard-tacked vessel to keep her course. See article 21, *infra*, note 53, p. 355. This means keeping her course by the wind and the only excuse for departure from the rule is the necessity of avoiding immediate danger. Marsden Coll. (3d ed.) 412. In The Eliza S. Potter, 35 Fed. 220, the R on the starboard tack crossed the course of the P on the port tack, and the latter failing to fall off and give the former the right of way the former on finding the collision imminent starboarded her helm and let the main-sheet run and was held justified in so doing. But a vessel having the right of way is not justified in standing on obstinately where the collision may be avoided by altering her helm. She should only change her course, when the collision seems otherwise unavoidable. In Wilson *v.* Canada Shipping Co., 2 App. Cas. 389, 3 Aspin. 361, 36 L. T. Rep. N. S. 155, the vessels having sighted each other at so short a distance that it was not possible for the ship on the port tack to avoid the other if the latter stood on, it was held to be the duty of the latter to port her helm and let go her head-sheets. In The Aimo, 2 Aspin. 96, 29 L. T. Rep. N. S. 118, 21 Wkly. Rep. 707, the close-hauled vessel was unable to bear up owing to her head-gear being carried away, and the other ship in ignorance of this kept her course. The collision was held to be an inevitable accident. Where two ships were turning to windward and one while in stays was struck by the other while in stays both were held in fault. Wilson *v.* Canada Shipping Co., 2 App. Cas. 389, 3 Aspin. 361, 36 L. T. Rep. N. S. 155. And in The Schooner Ann Caroline *v.* Wells, 2 Wall. (U. S.) 538, 17 L. ed. 833, in which a ship being ahead and to windward could not bear up without risk of collision and could not go about because of a shoal, the ship on the starboard tack was held in fault for not keeping out of the way. See The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175. In Merrill *v.* The Schooner Mary Eveline, 16 Wall. (U. S.) 348, 21 L. ed. 501, in which two schooners close-hauled on the same tack met a sloop with the wind free running through a narrow channel against a strong tide close to the shore, the sternmost of the two schooners was held in fault for keeping on when under the stern of the leading schooner, so that when the latter was obliged to go about she ran into the sloop, which could not avoid her without going ashore. A difficulty often arises under this rule in cases in which a vessel goes about and is about to cross the track of another and the rule becomes unexpectedly applicable. Decisions of cases of this character: In The B. C. Terry, 30 Fed. 711, the N and T were both beating up the bay in a N.W. wind on the port tack and the N being to leeward came about and losing headway swung about and collided with the T on the leeward side. The T having starboarded, thinking that the N was going to leeward to anchor, the N was held solely in fault. In the Frank P. Lee, 34 Fed. 480, the schooners A and B were sailing on the starboard tack close-hauled with the B about one quarter of a mile astern; the B changed her course and ran under A's stern. Soon after the B again changed her course to cross A's bows and having missed stays came into collision with her. The B was held solely in fault. In the Cambusdoon, 30 Fed. 704, a pilot-boat close-hauled was held in fault in collision with a bark sailing free, she having twice crossed the bows of the bark.

See 10 Cent. Dig. tit. "Collision," § 26.

the other.[39] (d) When both are running free, with the wind on the same side, the vessel which is to the windward must keep out of the way of the vessel which is to the leeward.[40] (e) A vessel which has the wind aft[41] must keep out out of the

Maritime law — Of two sailing ships, both close-hauled, meeting.— When two ships, both close-hauled, met end on or nearly end on, the ship which was on the port tack had to make way for the other by porting her helm under the maritime law. The Baron Holberg, 3 Hagg. Adm. 244; The Shannon, 2 Hagg. Adm. 173; The Lady Anne, 15 Jur. 18; The Harriett, 1 Notes Cas. (Eng.) 325, 1 W. Rob. 182; The Alexander Wise, 2 W. Rob. 65; Lowndes Coll. 16. As to the origin of this rule see Marsden Coll. (3d ed.) 339. The practice of seamen in such cases appears to have been somewhat loose. Tain *v.* The North America, 23 Fed. Cas. No. 13,853, 2 N. Y. Leg. Obs. 67; The Indiana, Abb. Adm. 330, 13 Fed. Cas. No. 7,020. Whether the ship on the port tack was always required to bear up and go under the stern of the other, or whether she was at liberty to keep out of the way by taking other steps was uncertain. Carsley *v.* White, 21 Pick. (Mass.) 254, 32 Am. Dec. 259; Wetmore *v.* The Steamboat Granite State, 3 Wall. (U. S.) 310, 18 L. ed. 179; Ure *v.* Coffman, 19 How. (U. S.) 56, 15 L. ed. 567; Culbertson *v.* The Steamer Southern Belle, 18 How. (U. S.) 584, 15 L. ed. 493; The Stranger, 6 Notes Cas. (Eng.) 36; The George, 5 Notes Cas. (Eng.) 368; The Gazelle, 5 Notes Cas. (Eng.) 101, 2 W. Rob. 515; The Traveller, 2 Notes Cas. (Eng.) 476, 2 W. Rob. 197; The Dumfries, Swabey 63, 125; The Ann and Mary, 2 W. Rob. 189; The Rose, 2 W. Rob. 1. The rule was that the ship to which the other gives way should generally keep her course. The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106; Lowndes Coll. 17. If the ships were approaching end on and the close-hauled ship on the starboard tack could go a point or two nearer and still remain under command it was her duty to do so by porting. Nelson *v.* Leland, 22 How. (U. S.) 48, 16 L. ed. 269; Kilgour *v.* Alexander, 4 L. T. Rep. N. S. 489, Lush. 247, 14 Moore P. C. 172, 15 Eng. Reprint 271. If they were approaching at an angle under some circumstances it would be a fault for a starboard-tacked vessel to port, as she might disturb the manœuvers of the other ship. Stevens *v.* Gourley, 4 L. T. Rep. N. S. 157, Lush. 162, 14 Moore P. C. 92, 15 Eng. Reprint 240; Brainerd *v.* Steamer Worcester, 1 Parsons Shipp. & Adm. 551; Lowndes Coll. 19. The principle seems to have been that the starboard-tacked vessel was so far *prima facie* in the right in holding her course that the burden was on the other vessel to show that she would have been safe in deviating. Simpson *v.* Hand, 6 Whart. (Pa.) 311, 36 Am. Dec. 231; The Test, 11 Jur. 998; The Seringapatam, 10 Jur. 1064; Bates *v.* Sora, 10 Moore P. C. 467, Swabey 69, 127, 14 Eng. Reprint 568; The Dumfries, Swabey 63, 125; The Commerce, 3 W. Rob. 287; Lowndes Coll. 18. If both vessels were close-hauled on the same tack it was the duty of the vessel to windward to keep out of the way. 1 Parsons Shipp. & Adm. 568. Where two vessels were meeting, both on the port tack, the windward vessel was held not in fault for keeping her course where, if she had ported, she would have run into the other vessel and where she could not go about on account of the rocks. The Schooner Ann Caroline *v.* Wells, 2 Wall. (U. S.) 538, 17 L. ed. 833; The R. B. Forbes, 1 Sprague (U. S.) 328, 20 Fed. Cas. No. 11,598, 19 Law Rep. 544.

39. Of the duties of two vessels approaching, both running free with the wind on different sides.— This is the case in which, as mentioned above, the former rule of inland navigation has been modified. The maritime rule that when two sailing ships were meeting, both having the wind free, each was to port the helm appears to have applied only to cases in which they were meeting end on or nearly end on. Williams *v.* Gutch, 4 L. T. Rep. N. S. 627, 14 Moore P. C. 202, 15 Eng. Reprint 281; 1 Parsons Shipp. & Adm. 567; Lowndes Coll. 16. This did not preclude them from passing to starboard if the movement for that purpose was executed in ample season (The James Bowen, 10 Ben. (U. S.) 430, 13 Fed. Cas. No. 7,192); but where the two were meeting end on, if one of them starboarded she was usually held in fault (The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175). Under the present rule the ship with the wind on the port side must keep out of the way of the other one, and she may do so in any manner she deems best subject to article 22. It is the duty of the ship with the wind on the starboard side under article 21 to keep her course. Marsden Coll. (3d ed.) 411. There appears to have been no general rule founded on the common law of the sea with respect to sailing vessels, each having the wind free, crossing. Lowndes Coll. 20. Article 10 of the regulations of 1863 is supposed to have been declaratory of the nautical custom existing at that time with respect to such cases, to the same effect as article 17 (c).

See 10 Cent. Dig. tit. "Collision," § 26.

40. Of the duties of two sailing vessels approaching, both running free with the wind on the same side.— Under the maritime law if the two vessels were going the same way with the wind free, the rule was the same that the one to windward should keep out of the way of the other. Abbott Shipping 234; Flanders Maritime L. 307; 3 Kent Comm. 230; 1 Parsons Shipp. & Adm. 567, 568.

41. Of the duty of a ship with the wind aft.— Having the wind aft has been defined to be with the wind coming over the stern. In The Spring, L. R. 1 A. & E. 99, 12 Jur. N. S. 788, 14 Wkly. Rep. 975, a smack with

way of the other vessel.[42] [These are the rules of avoidance of risk where two sailing vessels are approaching one another.]

the wind from two to four points from dead aft was held to have the wind aft. The ship with the wind aft may adopt any course she prefers, either by going ahead or astern, in keeping out of the way, but if she selects the more hazardous she is responsible for the result. The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; Whitney *v.* The Empire State, 1 Ben. (U. S.) 57, 29 Fed. Cas. No. 17,586; The Nor, 2 Aspin. 264, 30 L. T. Rep. N. S. 576, 22 Wkly. Rep. Dig. 26. In The Privateer, 9 L. R. Ir. 105, a ship with the wind free was held in fault for approaching so close to two other vessels close-hauled that upon one of them going about a collision with the other was inevitable. A bark with the wind somewhere between dead aft and three points on the starboard quarter, it has been held, should keep out of the way of a bark with the wind on the port side about two points free. Bates *v.* Sora, 10 Moore P. C. 467, Swabey 69, 127, 14 Eng. Reprint 568. And see The William Churchill, 103 Fed. 690; The Margaret B. Roper, 103 Fed. 886.

See 10 Cent. Dig. tit. "Collision," § 27.

42. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 17; U. S. Comp. Stat. (1901), p. 2869); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 17; U. S. Comp. Stat. (1901), p. 2881).

The only practical difference between this article and the inland rules previously in force with respect to sailing ships is the abrogation of the so-called rule of the port helm, which was as follows: If two sail vessels are meeting end on, or nearly end on, so as to involve risk of collision the helms of both shall be put to port, so that each may pass on the port side of the other. This rule was subservient to the rule that a ship going free must keep out of the way of one which was close-hauled. The Sylvester Hale, 6 Ben. (U. S.) 523, 23 Fed. Cas. No. 13,712. As it could not happen that two vessels approaching each other close-hauled on different tacks, or running free with the wind on the same side, could be meeting end on, or nearly end on, the only case in which rule 16 would apply was one in which they were both running free with the wind on different sides now provided for by article 17. The result is therefore that in such a case instead of the helms of both being put to port as formerly, the ship with the wind on the port side must now keep out of the way of the other.

Definitions of "running free" and "close-hauled" respectively.— A ship which is not close-hauled must be running free. Marsden Coll. (3d ed.) 410. The term "running free" includes "going before the wind," "going off large," or "sailing with the wind abeam," and is defined as meaning having the wind free on either tack, because it is in her power to take a course to either side. Desty Shipp. & Adm. 384. "Going before the wind" is defined as being when the wind comes over the stern. Ward *v.* The Fashion, 6 McLean (U. S.) 152, Newb. Adm. 8, 29 Fed. Cas. No. 17,154. "Going off large" is defined as when the wind blows from some point abaft the beam or over the quarter of the ship. Hall *v.* The Buffalo, Newb. Adm. 115, 11 Fed. Cas. No. 5,927. The difficulty comes in determining how close to the wind a vessel may be sailing when she ceases to be running free and becomes close-hauled. Marsden Coll. (3d ed.) 411. A ship may be close-hauled, although she may luff, without throwing herself in stays. The Singapore *v.* The Hebe, Holt Adm. 124. A brig heading six points from the wind and a ship with foretopsail carried away heading seven and one-half points from the wind were both considered close-hauled. The Breadalbane, 4 Aspin. 505, 46 L. T. Rep. N. S. 204, 7 P. D. 186. In The Privateer, 7 L. R. Ir. 105, a ship with the wind about two points free was held to be close-hauled. In The Earl Wemys, 6 Aspin. 407, 61 L. T. Rep. N. S. 289, it was questioned whether a ship sailing a point and a half off the wind should be considered close-hauled. A ship hove to, even though making both headway and leeway, has been held to be close-hauled. The Eleanor *v.* The Alma, 2 Mar. L. Cas. 240. A schooner hove to on the port tack engaged in reefing the topsail was held in fault in collision with a schooner close-hauled on the starboard tack. The London, 6 Notes Cas. (Eng.) 29. A dandy-rigged smack hove to on the port tack was held in fault for a collision with a three-masted schooner close-hauled on the starboard tack. The Rosalie, 4 Aspin. 384, 50 L. J. Adm. 3, 44 L. T. Rep. N. S. 32, 5 P. D. 245. In The Transit, 3 Ben. (U. S.) 192, 24 Fed. Cas. No. 14,137, a pilot-boat which was hove to with her helm lashed a lee, forging ahead about one knot as she kept coming to and falling off, having come into collision with a schooner with the wind free, was held in fault for not keeping her course. The schooner was also held in fault. It was held to have been the duty of the pilot-boat to have got way on her so as to keep a steady course. In The Elizabeth Jones, 112 U. S. 514, 5 S. Ct. 468, 28 L. ed. 812, a schooner heading E. by N. with wind S. sighted the green light of a bark close-hauled on the port tack about one-half point off her starboard bow; the schooner starboarded one point and when about two miles off starboarded another point; she continued to see the green light until within a length when the bark opened her red light. The schooner put her helm hard to starboard and headed N.E.; the bark ported and her stem struck the starboard side of the schooner amid-ships at about a right angle. The bark was held solely in fault. The correlative duty of keeping her course (and speed) is imposed on the close-hauled by article 21, *infra*, p. 354. In The Martha Brower, 27 Fed. 513, in which the evidence raised the presumption that a small

(o) *Steam-Vessels*[43] — (1) THE INTERNATIONAL RULES. When two steam-vessels are meeting end on, or nearly end on, so as to involve risk of col-

schooner sailing close-hauled had several times changed her course, she was held in fault for a collision with a large schooner sailing free. If a ship close-hauled, by luffing, causes the collision with one sailing free she will be held alone in fault; but it is not a fault at the moment of collision to luff so as to receive a glancing blow.

43. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 18; U. S. Comp. Stat. (1901), p. 2881); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 18; U. S. Comp. Stat. (1901), p. 2869). This article is the same as article 15 of the act of 1885. The corresponding rule formerly in force in inland waters (U. S. Rev. Stat. (1878), § 4233, rule 18) reads as follows: "If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." The remaining clause of the present act beginning: "This article only applies," etc., did not exist in the former Inland Rules. This interpreting clause explaining the application of the article was first enacted in England by an order in council of July 30, 1868. Marsden Coll. (3d ed.) 420. It is said to have been made in consequence of the decision in The Cleopatra, Swabey 135, in which two vessels were approaching on parallel courses, green to green, each on the starboard bow of the other, and it was held that each should have ported her helm. Marsden Coll. (3d ed.) 420. The substitution of the words "each shall alter her course to starboard" for "the helm of both shall be put to port" is said to have been made with a view to a possible uniformity of system among the seamen of all nations as regards orders to the helm. Marsden Coll. (3d ed.) 420, note 1. With the steering devices now in use by most ships the term "porting the helm" has become almost obsolete. The amount of alteration of her course required by the rule is sufficient to pass clear if the other ship does not starboard; and where one starboarded too little and the other not at all they have both been held in fault. The Steam Ferry-Boat *v.* Camden, etc., R. Transp. Co., 92 U. S. 432, 23 L. ed. 724; The Screw Steamship Jesmond *v.* The Screw Steamship Earl of Elgin, L. R. 4 P. C. 1, 1 Aspin. 150, 25 L. T. Rep. N. S. 514, 8 Moore P. C. N. S. 179, 17 Eng. Reprint 280. For other cases under this article see Hunt *v.* Hoboken Land, etc., Co., 1 Hilt. (N. Y.) 161 (as to 1 Rev. Stat. p. 683, § 1); Lockwood *v.* Lashell, 19 Pa. St. 344; The Shackamaxon, 66 Fed. 75, 26 U. S. App. 694, 13 C. C. A. 335; The Oceanic, 61 Fed. 338; The Thingvalla, 48 Fed. 764, 1 U. S. App. 32, 1 C. C. A. 87 [*affirming* 42 Fed. 331]; The Eider, 37 Fed. 903; The City of Chester, 11 Fed. 924; The Bermuda, 11 Fed. 913 [*affirming* 10 Ben. (U. S.) 693, 3 Fed. Cas. No. 1,344]; The Electra, 7 Ben. (U. S.) 344, 8 Fed. Cas. No. 4,339; The Oceanus, 5 Ben. (U. S.) 545, 18 Fed. Cas. No. 10,414; The Mary Sandford, 3 Ben. (U. S.) 100, 16 Fed. Cas. No. 9,225; The Franz Sigel, 14 Blatchf. (U. S.) 480, 9 Fed. Cas. No. 5,062; The Manitoba, 2 Flipp. (U. S.) 241, 16 Fed. Cas. No. 9,029, 11 Chic. Leg. N. 25, 3 Cinc. L. Bul. 809; The Wenona, 8 Blatchf. (U. S.) 499, 29 Fed. Cas. No. 17,411; The Washington, 29 Fed. Cas. No. 17,223, 12 N. Y. Leg. Obs. 163.

See 10 Cent. Dig. tit. "Collision," § 33.

Of the meaning of the term "end on."— The interpreting clause of the act shows the relative positions with respect to each other at which two vessels approaching would be considered approaching "end on" within the meaning of the act. Previous to the interpreting order vessels upon parallel courses each with the other nearly right ahead, and vessels upon courses making with each other an angle of two or even three points were held to be meeting "nearly end on." The Fruiter *v.* The Fingal, 13 L. T. Rep. N. S. 611, 2 Mar. L. Cas. 291. In Dean *v.* Mark, 2 Moore P. C. N. S. 453, 15 Eng. Reprint 972, two vessels approaching, one heading W.N.W. and the other S.E. by E., courses within a point of being directly opposite, were held crossing and not meeting. Since the interpreting order two steamers sailing upon courses one and one-half points from being directly opposite S.S.W. and N.E. ½ N. were held not meeting end on. The Rona, 2 Aspin. 182. In Little *v.* Burns, 9 Sc. Sess. Cas. 4th Ser. 118, two vessels were held meeting end on when each was about one-half point on the starboard bow of the other. The rule does not apply to two ships rounding in opposite directions a promontory or a bend in a winding channel, when the red light of one is opposed to the green of the other. General Steam Nav. Co. *v.* Hedley, L. R. 3 P. C. 44, 39 L. J. Adm. 20, 21 L. T. Rep. N. S. 686, 6 Moore P. C. N. S. 263, 18 Wkly. Rep. 264, 16 Eng. Reprint 725. The fact that a steamer has one or more craft in tow does not exempt her in anywise from the obligation of this rule. New York, etc., Transp. Co. *v.* Philadelphia, etc., Steam Nav. Co., 22 How. (U. S.) 461, 16 L. ed. 397. It seems that where the rule is complied with, but too late to avoid a collision, the vessel which should have ported her helm sooner is responsible for the delay in so doing. The Steam Ferry-Boat America *v.* Camden, etc., R. Transp. Co., 92 U. S. 432, 23 L. ed. 724; The Steamboat Joseph Johnson *v.* McCord, 9 Wall. (U. S.) 146, 19 L. ed. 610. To justify a departure from this rule a steamer must show that she so signaled and that the signal was understood and accepted by the other. The Clarion, 27 Fed. 128. In The Galileo, 28 Fed. 469, a tug with bark in tow approaching a steamer turning to get under way blew one whistle to which the steamer replied by one whistle. The tug was held in

lision, each must alter her course to starboard, so that each may pass on the port side of the other. This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side-lights of the other. It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.[44]

(2) The Inland Rules — (a) Rule One. When steam-vessels are approaching each other head and head, that is, end on, or nearly so, it is the duty of each to pass on the port side of the other; and either vessel must give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel must answer promptly by a similar blast of her whistle, and thereupon such vessels must pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel must immediately give two short and distinct blasts of her whistle, which the other vessel must answer promptly by two similar blasts of her whistle, and they must pass on the starboard side of each other. The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in

fault for not stopping and reversing, as soon as it appeared that the steamer was not keeping her agreement and the danger of collision had become imminent. In The Alaska, 33 Fed. 527 [*affirmed* in 35 Fed. 555], the steamer M going up the East river behind the steamer S sheered to starboard in order to pass the S, and the steamer A coming down starboarded in order to let the steamer M break her sheer and recover her course, which the latter did not succeed in doing. The M was held solely in fault for the collision. For cases of similar circumstance see Thames Towboat Co. *v.* The Sarah Thorp, 44 Fed. 637; The Farragut, 35 Fed. 617.

Maritime law.— It was the rule of the sea that when two steamboats were approaching each other in such a direction that there was danger of collision each should go to the right. 1 Parsons Shipp. & Adm. 569, note 4. But this rule was held not to apply in cases in which if each vessel had kept her course there would have been no possibility of a collision. Ward *v.* The Ogdensburgh, 5 McLean (U. S.) 622, Newb. Adm. 139, 29 Fed. Cas. No. 17,158, 10 West. L. J. 433. With regard to steamers going on a customary route the rule was that they should generally keep in their usual track. The Steamer C. Vanderbilt *v.* McKibbon, 6 Wall. (U. S.) 225, 18 L. ed. 823; New York, etc., Steamship Co. *v.* Calderwood, 19 How. (U. S.) 241, 15 L. ed. 612; The Bay State, 3 Blatchf. (U. S.) 48, 2 Fed. Cas. No. 1,149; 1 Parsons Shipp. & Adm. 571.

Rules prior to 1863 and decisions thereunder. —Steering of steamers. Trinity House Regulations of Oct. 30, 1840; 1 Pritchard Adm. Dig. 271; 1 Parsons Shipp. & Adm. 584; The Gazelle, 10 Jur. 1065; The Friends, 2 Notes Cas. (Eng.) 92, 1 W. Rob. 478; The Rose, 2 W. Rob. 1; The Commerce, 3 W. Rob. 287. See also The George, 5 Notes Cas. (Eng.) 36; The Ann and Mary, 2 W. Rob. 189; Act of 9 & 10 Vict. c. 100, § 9; The Osmanli, 7 Notes Cas. (Eng.) 322, 3 W. Rob. 198; The Rob Roy, 7 Notes Cas. (Eng.) 280, 3 W. Rob. 190; The Leith, 7 Notes Cas. (Eng.) 137; Steam Navigation Act of 1851, 14 & 15 Vict. c. 79, § 27. See cases under this act discussed in 1 Parsons Shipp. & Adm. 586, notes 1–4, 587, notes 1–5. Merchant Repeal Act, 1854, c. 104, § 296; 1 Pritchard Adm. Dig. 271, note 403, 272.

Former United States statutes.— See 10 U. S. Stat. at L. p. 72, c. 106; 1 Parsons Shipp. & Adm. 588, 589, 590 (and Rules of Board of Supervising Inspectors of Oct. 15, 1857, in pursuance thereof); 14 U. S. Stat. at L. p. 227, c. 234; 14 U. S. Stat. at L. p. 411, c. 83.

44. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 18; U. S. Comp. Stat. (1901), p. 2869).

such a position as to see both the side-lights of the other. It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.[45]

(b) Rule Three. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt must immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle.[46]

(c) Rule Five. Whenever a steam-vessel is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steam-vessel approaching from the opposite direction cannot be seen for a distance of half a mile, such steam-vessel, when she shall have arrived within half a mile of such curve or bend, must give a signal by one long blast of the steam-whistle, which signal must be answered by a similar blast, given by any approaching steam-vessel that may be within hearing. Should such signal be so answered by a steam-vessel upon the farther side of such bend, then the usual signals for meeting and passing must immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly. When steam-vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they must give the same signal as in the case of vessels meeting at a bend, but immediately after clearing the berths so as to be fully in sight they must be governed by the steering and sailing rules.[47]

(d) Rule Eight. When steam-vessels are running in the same direction, and the vessel which is astern desires to pass on the right or starboard hand of the vessel ahead, she must give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she must put her helm to port; or if she desires to pass on the left or port side of the vessel ahead, she must give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, must put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she must immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances must the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead must signify her willingness by blowing the proper signals. The vessel ahead must in no case attempt to cross the bow or crowd upon the course of the passing vessel.[48]

(e) Rule Nine. The whistle signals provided in the rules under this article, for steam-vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal-lights. In fog, mist, falling snow, or heavy rain-storms, when vessels cannot see each other, fog-signals only must be given.[49]

(f) Supplementary Regulations. It is provided that the supervising inspectors of steam-vessels and the supervising inspector-general shall establish such rules to

45. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 18, rule i; U. S. Comp. Stat. (1901), p. 2881), relating to steam-vessels meeting end on, etc.

46. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 18, rule iii; U. S. Comp. Stat. (1901), p. 2882).

47. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 18, rule v; U. S. Comp. Stat. (1901), p. 2882).

48. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 18, rule viii; U. S. Comp. Stat. (1901), p. 2882).

49. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 18, rule ix; U. S. Comp. Stat. (1901), p. 2882).

be observed by steam-vessels in passing each other and as to the lights to be carried by ferry-boats and by barges and canal-boats when in tow of steam-vessels, not inconsistent with the provisions of this act, as they from time to time may deem necessary for safety, which rules when approved by the secretary of the treasury, are hereby declared special rules duly made by local authority, as provided for in article 30 of chapter 802 of the laws of 1890. Two printed copies of such rules must be furnished to such ferry-boats and steam-vessels, which rules must be kept posted up in conspicuous places in such vessels.[50]

(D) *Two Steam-Vessels Crossing.* When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side must keep out of the way of the other.[51]

50. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, § 2; U. S. Comp. Stat. (1901), p. 2884).

51. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 19; U. S. Comp. Stat. (1901), p. 2870); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 19; U. S. Comp. Stat. (1901), p. 2883). This rule is the same as article 16 of the act of 1885 (23 U. S. Stat. at L. p. 438) and the same as article 14 of the act of 1864 (13 U. S. Stat. at L. p. 58) which was reënacted in U. S. Rev. Stat. (1878), § 4233, as rule 19, excepting that the term "steam-vessels" has been substituted for "ships under steam." Previous to the act of congress of April 29, 1864, the so-called "rule of port helm" obtained in England and in this country. Abbott Shipp. (7th Am. ed.) 326, note 3; The Gazelle, 2 Notes Cas. (Eng.) 39, 1 W. Rob. 471. The English statute was known as the Trinity House rule of Oct. 30, 1840, and it was worded as follows: "When steam vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port so as always to pass on the larboard side of each other. Marsden Coll. (3d ed.) 535. The effect of this change in the rule has of course been to allow the ship with the other on the starboard side to avoid the latter by going either to port or to starboard and to require the latter in such a case to keep her course. The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; Marsden Coll. (3d ed.) 411.

Application of crossing and overtaking rules respectively.— The question of when a steamer is to be considered as crossing and when as overtaking another steamer, that is to say, whether article 19 or the rule as to an overtaking vessel, article 24, is to be applied is discussed under article 24 below. It is to be noted that if a steamer is both crossing and overtaking the overtaking rule prevails. The O. A. Crandall, 106 Fed. 86; The Delaware, 92 Fed. 931, 35 C. C. A. 91; The Zouave, 90 Fed. 440; The Seaton, 5 Aspin. 191, 53 L. J. Adm. 15, 49 L. T. Rep. N. S. 747, 9 P. D. 1, 32 Wkly. Rep. 600.

Duty of the vessel that is to keep out of the way of the other.— When the crossing position is unexpectedly brought about by one vessel trying to cross the bows of the other when they had been sailing on parallel courses this article does not apply. In The Talisman, 36 Fed. 600, in which a steamer going up the river and a tug with tow coming down were each on the starboard hand of the other and the steamer attempted to cross the tug's bows to make her slip, the steamer was held solely in fault for a collision resulting from this attempt. In The Gulf Stream, 43 Fed. 895, the steamer G S steering S. by W.¾W. made both lights of the steamer K steering N.E. by N.½N., one-half point on her starboard bow and starboarded until she shut out the red light, but the K having ported it reappeared when the G S hard-astarboarded. They were held to be on crossing courses, and the K in fault for porting and the G S in fault for not stopping and backing on seeing again the red light of the K. It has been held that the burden of clearing herself of fault is on the vessel whose duty it is to keep out of the way, e. g., she will be responsible for not seeing that a tugboat had a vessel in tow, even though it was hidden by a flotilla. The Emma Kate Ross, 41 Fed. 826; The Flushing, 32 Fed. 334. If the steamer which is to keep out of the way of the other wishes to pass to the left she must first obtain the consent of the other. The E. H. Coffin, 16 Blatchf. (U. S.) 421, 8 Fed. Cas. No. 4,310, 8 Reports 297. In The St. Johns, 42 Fed. 75, this steamboat coming up the river on the starboard of two tugs, the D and the R, which were crossing the river on parallel courses about three hundred feet apart, agreed by signals to cross the bow of the D and to pass under the stern of the R; but the R thinking the manœuver was impossible reversed her engine, and was held in fault for so doing.

As to the duty of the privileged vessel to keep her course see article 21, *infra*, note 53, p. 355.

Application of article 19 in winding rivers. — Where two ships are on opposite sides of a point and rounding the bend of a winding river, it seems that they are not bound to be considered for that reason alone crossing ships, and that it is the duty of each ship to keep her course round the point in the usual track, excepting in those rivers with reference to the navigation of which special rules have been enacted. General Steam Nav. Co.

(E) *Steam-Vessel Must Keep Out of Way of Sailing Vessel.* When a steam-vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam-vessel must keep out of the way of the sailing vessel.[52]

v. Hedley, L. R. 3 P. C. 44, 39 L. J. Adm. 20, 21 L. T. Rep. N. S. 686, 6 Moore P. C. N. S. 263, 18 Wkly. Rep. 264, 16 Eng. Reprint 725; Marsden Coll. (3d ed.) 427. See also Malcomson *v.* General Steam Nav. Co., L. R. 4 P. C. 519, 1 Aspin. 484, 27 L. T. Rep. N. S. 769, 9 Moore P. C. N. S. 352, 21 Wkly. Rep. 273, 17 Eng. Reprint 546; The Steamship Esk *v.* The Steamship Niord, L. R. 3 P. C. 436, 1 Aspin. 1, 24 L. T. Rep. N. S. 167, 7 Moore P. C. N. S. 276, 17 Eng. Reprint 105; General Steam Nav. Co. *v.* The Steamship Oceano, 3 P. D. 60.

52. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 20; U. S. Comp. Stat. (1901), p. 2870); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 20; U. S. Comp. Stat. (1901), p. 2870). And see Philadelphia, etc., R. Co. *v.* Kerr, 33 Md. 331; Mailler *v.* Express Propeller Line, 61 N. Y. 312; The Steamship Benefactor *v.* Mount, 102 U. S. 214, 26 L. ed. 157; The Schooner Sarah Watson *v.* The Steamer Sea Gull, 23 Wall. (U. S.) 165, 23 L. ed. 90; Wilder's Steamship Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473; The Devonian, 110 Fed. 588; Merchants', etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 48 C. C. A. 128; The City of Norwalk, 106 Fed. 982, 46 C. C. A. 63; Jacobsen *v.* Dalles, etc., Nav. Co., 106 Fed. 428; The Captain Weber, 89 Fed. 957, 61 U. S. App. 207, 32 C. C. A. 452; The Colorado, 59 Fed. 300, 19 U. S. App. 142, 8 C. C. A. 132; The Medusa, 46 Fed. 303; The Jessie Russell, 43 Fed. 928; The William Crane, 11 Fed. 436; The Belgenland, 9 Fed. 126 [*affirming* 5 Fed. 86]; Schooner Margaret *v.* The C. Whiting, 3 Fed. 870; The City of Norwich, 8 Ben. (U. S.) 206, 5 Fed. Cas. No. 2,763; The Alhambra, 2 Ben. (U. S.) 158, 1 Fed. Cas. No. 192, 7 Int. Rev. Rec. 75; The Delaware, 1 Biss. (U. S.) 110, 7 Fed. Cas. No. 3,760; The Kentucky, 4 Blatchf. (U. S.) 325, 14 Fed. Cas. No. 7,716, 41 Hunt. Mer. Mag. 75, 1 West. L. Month. 425; Lyle *v.* The Conestoga, 15 Fed. Cas. No. 8,622*a*, 4 Am. L. J. N. S. 183 [*reversing* 15 Fed. Cas. No. 8,622, 8 Leg. Int. (Pa.) 154, 5 Pa. L. J. Rep. 95]; The Empire State, 8 Fed. Cas. No. 4,475, 33 Hunt. Mer. Mag. 330, 12 N. Y. Leg. Obs. 259; The Dean Richmond, 7 Fed. Cas. No. 3,713, 1 Chic. Leg. N. 370; The Bartelson *v.* The Cynthia, 2 Fed. Cas. No. 1,067, 25 Int. Rev. Rec. 384, 14 Phila. (Pa.) 411, 36 Leg. Int. (Pa.) 462, 8 Reporter 773; The Washington Irving, Abb. Adm. 336, 29 Fed. Cas. No. 17,243, 7 N. Y. Leg. Obs. 4; Pope *v.* U. S., 34 Ct. Cl. 361. This is the same as article 17 of the act of March 3, 1885 (23 U. S. Stat. at L. p. 438), excepting that the latter begins with the following: "If two ships, one of which is a sailing ship and the other a steamship." U. S. Rev. Stat. (1878), § 4233, rule 20, being the corresponding rule to the above is the same as article 15 of the act of April 29, 1864 (13 U. S. Stat. at L. p. 58), and is the same as article 17 of the act of March 3, 1885, excepting that the word "vessel" is used instead of the word "ship."

See 10 Cent. Dig. tit. "Collision," §§ 34, 43.

Origin of the rule.— The reason of the rule is said to be that steamers are more completely under command than sailing ships and they have greater power of overcoming the wind and the tide. The Shannon, 2 Hagg. Adm. 173; The Arthur Gordon, 4 L. T. Rep. N. S. 563, Lush. 270, 14 Moore P. C. 103, 9 Wkly. Rep. 582, 15 Eng. Reprint 245; Marsden Coll. (3d ed.) 430. Some of the earlier writers state that a steamer is to be considered in the light of a sailing vessel sailing free. Ward *v.* Armstrong, 14 Ill. 283; The New Champion, Abb. Adm. 202, 18 Fed. Cas. No. 10,146; Lowndes Coll. 28. It appears, however, to have been held that the duty of a steamship was the same whether the sailing ship was close-hauled or free, or on the port or starboard tack. The Steamer Oregon *v.* Rocca, 18 How. (U. S.) 570, 15 L. ed. 515; The Osprey, 1 Sprague (U. S.) 245, 18 Fed. Cas. No. 10,606, 17 Law Rep. 384; Marsden Coll. (3d ed.) 430; 1 Parsons Shipp. & Adm. 570, note 2. It has been held in the United States that the fact that the steamer was carrying the mail did not relieve her in anywise from the obligation of this rule. The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 395; Rogers *v.* The Steamer St. Charles, 19 How. (U. S.) 108, 15 L. ed. 563; The James Adger, 3 Blatchf. (U. S.) 515, 13 Fed. Cas. No. 7,188; The Northern Indiana, 3 Blatchf. (U. S.) 92, 18 Fed. Cas. No. 10,320, 16 Law Rep. 433, 449; Haney *v.* The Louisiana, Taney (U. S.) 602, 11 Fed. Cas. No. 6,021. A steamship hove to under canvas, it seems, would be considered as "proceeding" within the meaning of this rule. Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302; Marsden Coll. (3d ed.) 430 [*citing* The Jennie S. Barker, L. R. 4 A. & E. 456, 3 Aspin. 82, 44 L. J. Adm. 20, 33 L. T. Rep. N. S. 318].

Duty of steamers as to precautions.— A steam-vessel is subject to a higher responsibility as to precautions than a sailing vessel. The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; Baker *v.* The City of New York, 1 Cliff. (U. S.) 75, 2 Fed. Cas. No. 765. She is bound from the moment the sailing vessel is in sight to watch with the greatest diligence the movements of the latter in order to adopt timely measures of precaution. The Schooner Mary H. Banks *v.* The Steamer Falcon, 19 Wall. (U. S.) 75, 22 L. ed. 98; The Steamer Lucille *v.* Respass, 15 Wall. (U. S.) 676, 21 L. ed. 247. It is a fault for her not to keep a safe margin, notwithstanding a change of course of the sailing vessel. The Raritan, 32 Fed. 847; The Laura *v.* Rose, 28 Fed. 104. The precaution and the vigilance of the steamer should be in-

(F) *Course and Speed.* Where, by any of these rules, one of two vessels is to keep out of the way the other must keep her course and speed. [Note.

creased in proportion to the difficulties of navigation and to the dangers of collision in particular localities. Culbertson *v.* The Southern Belle, Newb. Adm. 461, 6 Fed. Cas. No. 3,462.

How the steamer is to keep out of the way of sailing vessel.— The rule in England at one time, as adopted in 1854 by the Merchants' Shipping Act passed in that year (17 & 18 Vict. c. 104, p. 206), was that the steamer must avoid the sailing vessel by passing to the right (The City of London, 4 Notes Cas. (Eng.) 40); and the rule was so enforced in England and also in Canada (The Inga, 18 Law Rep. 285). There is a decision in the United States to the same effect. Haney *v.* The Louisiana, 6 Am. L. Reg. 422, 11 Fed. Cas. No. 6,020. This rule was afterward repealed in England. Ludwig *v.* The Propeller Free State, 91 U. S. 200, 23 L. ed. 299; The Steamer Louisiana *v.* Fisher, 21 How. (U. S.) 1, 16 L. ed. 29; The Huntsville, 8 Blatchf. (U. S.) 228, 12 Fed. Cas. No. 6,915; The Despatch, Swabey 138; Lowndes Coll. 44. It has been held that generally a steamer going on a customary route should keep in her usual track, but even in such a case she must of course turn aside to avoid a sailing vessel drifting or otherwise unable to get out of the way. Saune *v.* Tourne, 9 La. 428, 29 Am. Dec. 452; The Steamer C. Vanderbilt *v.* McKibbon, 6 Wall. (U. S.) 225, 18 L. ed. 823; Pearce *v.* Page, 24 How. (U. S.) 228, 16 L. ed. 623; New York, etc., Steamship Co. *v.* Calderwood, 19 How. (U. S.) 241, 15 L. ed. 612; The Bay State, 3 Blatchf. (U. S.) 48, 2 Fed. Cas. No. 1,149; Lowndes Coll. 34; 1 Parsons Shipp. & Adm. 571. Such a rule never was prescribed by statute in this country, and it does not appear that the courts here have ever enforced it excepting in the one case referred to. The rule that the steamer might avoid the sailing vessel by going either to port or starboard, as the occasion demanded, has prevailed in the United States and also in England since the repeal of the statute above referred to. The Steamer Oregon *v.* Rocca, 18 How. (U. S.) 570, 15 L. ed. 515; St. John *v.* Paine, 10 How. (U. S.) 557, 13 L. ed. 537; The Osprey, 1 Sprague (U. S.) 245, 18 Fed. Cas. No. 10,606, 17 Law Rep. 384. And see as to crossing ahead, article 22, *infra*, III, A, 5, f, (IV), (G). In cases of doubt her engines should be slowed, stopped, or reversed if necessary. Article 23, *infra*, III, A, 5, f, (IV), (H). The master of a steamer has a right to presume that a sailing vessel will pursue the customary track of vessels and hold her course, but if the sailing vessel changes her course it is the duty of the steamer to do so also to avoid the collision. Sears *v.* The British Steamer Scotia, 14 Wall. (U. S.) 170, 20 L. ed. 822; The Pilot, 1 Biss. (U. S.) 159, 19 Fed. Cas. No. 11,168; The Bridgeport, 6 Blatchf. (U. S.) 3, 4 Fed. Cas. No. 1,860. Steamers have been held in fault for running into a sailing ship as she was going about at the edge of the tide, although the sailing ship gave no notice of her intention to do so. The Palatine, 1 Aspin. 468, 27 L. T. Rep. N. S. 631. In The Friends, 7 Jur. 307, 1 W. Rob. 478, a steamer going up the river saw a schooner on the starboard bow and, believing that she would keep in mid-channel in the strength of the tide, starboarded. The steamer was held to blame.

Duty of a steamer on approaching a pilot-boat.— Steamers have been held in fault for adopting a veering course under such circumstances. The Columbia, 27 Fed. 704. They should come nearly to a stop and leave the rest to the pilot-boat. The Alaska, 33 Fed. 107. And see The Cambusdoon, 30 Fed. 704.

Duty of a sailing vessel to keep her course. — The steamer has a right to assume that the sailing vessel will keep her course. Golding *v.* The Steamship Illinois, 103 U. S. 298, 26 L. ed. 562; Ludwig *v.* The Propeller Free State, 91 U. S. 200, 23 L. ed. 299; Haney *v.* The Louisiana, Taney (U. S.) 602, 11 Fed. Cas. No. 6,021; The Saxonia, 8 Jur. N. S. 315, 31 L. J. Adm. 201, Lush. 410, 15 Moore P. C. 262, 10 Wkly. Rep. 431, 15 Eng. Reprint 493. And see Jacobsen *v.* Dalles, etc., Nav. Co., 106 Fed. 428. A sailing vessel may rightfully rely upon the steamer's using precautions to avoid her, even up to the last moment. The Sunnyside, Brown Adm. 227, 23 Fed. Cas. No. 13,620, 6 Am. L. T. Rep. 277, 3 Chic. Leg. N. 330, 14 Int. Rev. Rec. 103; The Narragansett, Olc. Adm. 246, 17 Fed. Cas. No. 10,019. A sailing vessel is therefore in the wrong if she changes her course unexpectedly or without necessity. The Scotia, 5 Blatchf. (U. S.) 227, 21 Fed. Cas. No. 12,512 [*affirmed* in 14 Wall. (U. S.) 170, 20 L. ed. 822]; The Neptune, Olc. Adm. 483, 17 Fed. Cas. No. 10,120, 16 Hunt. Mer. Mag. 603, 5 N. Y. Leg. Obs. 293; The William Young, Olc. Adm. 38, 30 Fed. Cas. No. 17,760. She has no right to anticipate a failure on the part of the steamer to perform her duty (Pentz *v.* The Steamer Ariadne, 13 Wall. (U. S.) 475, 20 L. ed. 542), nor should she deviate to avoid a collision unless in imminent danger (Lyman *v.* The Steamboat John L. Hasbrouck, 93 U. S. 405, 23 L. ed. 962; The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; Crockett *v.* The Steamboat Isaac Newton, 18 How. (U. S.) 581, 15 L. ed. 492; The Propeller Monticello *v.* Mollison, 17 How. (U. S.) 153, 15 L. ed. 68). If the change of course on the part of the sailing vessel, however, was made to avoid immediate danger of collision this is sufficient excuse (The Morrisania, 3 Fed. 925); but in order to justify such a change it must be the only obvious means of escape (Haight *v.* Bird, 26 Fed. 539), and a change of course made in cases of such imminent danger has been excused, even though it does not in fact prevent the collision (Waldorf *v.* The New York, 1 Flipp. (U. S.) 49, 3

When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also must take such action as will best aid to avert collision.][53]

West. L. Month. 249, 28 Fed. Cas. No. 17,057; Saunders *v.* The Hanover, 2 Quart. L. J. 1, 21 Fed. Cas. No. 12,374). It is not necessary for the sailing vessel, upon the approach of a steamer, either to remain in stays for the steamer to pass or to overreach longer than usual. The Renovator, 30 Fed. 194. She should beat out her tack and come about with proper despatch. Twibell *v.* The Steam Tug Keystone, 9 N. Y. Leg. Obs. 289; The Clara Davidson *v.* The Virginia, 24 Fed. 763; The W. C. Redfield, 4 Ben. (U. S.) 227, 29 Fed. Cas. No. 17,305; The Nereus, 3 Ben. (U. S.) 238, 18 Fed. Cas. No. 10,121; Whitney *v.* The Empire State, 1 Ben. (U. S.) 57, 29 Fed. Cas. No. 17,586. But after the sailing vessel has selected her course she is bound to keep it and cannot return to her former course in front of an approaching steamer. New York, etc., U. S. Mail Steamship Co. *v.* Rumball, 21 How. (U. S.) 372, 16 L. ed. 144; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058; The Free State, Brown Adm. 251, 9 Fed. Cas. No. 5,090, 6 Am. L. T. Rep. 401, 5 Chic. Leg. N. 373. The duty of holding her course applies equally to sailing vessels going free and on the wind. The Steamship Fannie *v.* The Schooner Ellen Forrester, 11 Wall. (U. S.) 238, 20 L. ed. 114; Liverpool, etc., Steamship Co. *v.* Simmons, 9 Wall. (U. S.) 634, 19 L. ed. 751; Bentley *v.* Coyne, 4 Wall. (U. S.) 509, 18 L. ed. 457. On the other hand a sailing vessel must not persist in her course so as to drive the steamer into danger or exposure to avoid her, particularly after being hailed by the steamer to change her course. Carter *v.* The Morrisania, 3 Fed. 925; The Cornelius C. Vanderbilt, Abb. Adm. 361, 6 Fed. Cas. No. 3,235. The rule as to a sailing vessel keeping her course does not come into operation until the danger of collision arises. 1 Parsons Shipp. & Adm. 570 [*citing* The Propeller Monticello *v.* Mollison, 17 How. (U. S.) 153, 15 L. ed. 68]. A change of course made before any danger of collision has arisen does not put a sailing vessel in fault (Fincke *v.* The Steamboat Fairbanks, 9 Wall. (U. S.) 420, 19 L. ed. 708), and if the change of course under any circumstances did not contribute to the collision it is immaterial. A sailing vessel is not required to put herself in danger by holding her course longer than prudent; as for example, when beating through a narrow channel. The Northern Warrior, 1 Hask. (U. S.) 314, 18 Fed. Cas. No. 10,325. In The Sylph, Swabey 233, a sailing vessel, seeing a steamer's green light between three and four points off her starboard how, starboarded, and afterward on seeing red light ported, and she was held justified in these manœuvers. In The Western Metropolis, 6 Blatchf. (U. S.) 210, 29 Fed. Cas. No. 17,440 [*cited* in 1 Parsons Shipp. & Adm. 571], the steamer gave one long whistle and starboarded her helm; the sailing vessel ported. The latter was held in fault for not keeping her course. In Sears *v.* The British Steamer Scotia, 14 Wall. (U. S.) 170, 20 L. ed. 822, the ship Berkshire, after sighting the steamer in mid-ocean, changed her course several times supposing that the steamer had not seen her. This manœuver was among the faults which were imputed to her for the collision.

Steamer towing and sailing ship meeting. — Prior to sea-collision rules a steamer, when she had a vessel in tow, was not considered to have the wind free to the same extent as when she was not towing. The Kingston-by-Sea, 3 W. Rob. 152. How far she was held in fault for a failure to keep out of the way of a sailing ship depended upon the state of the wind and weather, the direction in which the steamer was going, and the nature of the impediments she might meet with. The Arthur Gordon, 4 L. T. Rep. N. S. 563, Lush. 270, 14 Moore P. C. 103, 9 Wkly. Rep. 582, 15 Eng. Reprint 245; The Cleadon, 4 L. T. Rep. N. S. 157, Lush. 158, 14 Moore P. C. 92, 15 Eng. Reprint 240. Accordingly in a case in which a vessel close-hauled on the port tack and a steamer towing a large ship were standing so as to cross each other's bows, the steamer being on the lee beam of the sailing vessel, and neither gave way, it was held that both vessels were in fault. Laird *v.* Brownlie, 6 L. T. Rep. N. S. 736, 1 Moore P. C. N. S. 31, 15 Eng. Reprint 614; The Arthur Gordon, 4 L. T. Rep. N. S. 563, Lush. 270, 14 Moore P. C. 103, 9 Wkly. Rep. 582, 15 Eng. Reprint 245. See also New York, etc., Transp. Co. *v.* Philadelphia, etc., Steam. Nav. Co., 22 How. (U. S.) 461, 16 L. ed. 397; The William Hunter, Holt Adm. 163; 1 Parsons Shipp. & Adm. 569. The rule requiring a steam-vessel to keep out of the way of a sailing vessel includes a steamer with tow. So held in the following cases: The E. Luckenbach, 93 Fed. 841, 35 C. C. A. 628; The Marguerite, 87 Fed. 953; The Maverick, 84 Fed. 906, 55 U. S. App. 343, 28 C. C. A. 562 [*affirming* 75 Fed. 845].

The presumption is that the steamer was at fault, since it was her duty to keep out of the way (Merchants', etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 45 C. C. A. 128), and the burden rests upon the steamer to rebut such presumption (Wilder's Steamship Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473; Merchants', etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 48 C. C. A. 128).

53. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 21; U. S. Comp. Stat. (1901), p. 2870); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 21; U. S. Comp. Stat. (1901), p. 2883). See also articles 27, 29, *infra*, III, A, 5, f, (IV), (L), (N). The corresponding rule in the act of March, 1885, article 22 (23 U. S. Stat. at L. p. 438), is as follows: "Where by the

(G) *Crossing Ahead.* By article 22 of both the International and the Inland above rules one of two ships is to keep out of the way, the other shall keep her course." Article 23 of the act of 1864 (13 U. S. Stat. at L. p. 58), which is the corresponding article to the above, is as follows: "Where by rules 17, 19, 20, and 22 one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24."

See 10 Cent. Dig. tit. "Collision," §§ 37, 44, 48, *et seq.*

The note in brackets [ ] does not appear in the Inland Rules. And see The Patria, 107 Fed. 157, 46 C. C. A. 211 [*affirming* 92 Fed. 411], construing the act of congress of May 28, 1894, which amended the International Rules.

The reason for and the extent of the rule.— The reason for this rule is to enable the vessel which is to keep out of the way to be able, in shaping her course, to know with certainty what will be the movements of the boat she is to avoid. Pentz *v.* The Steamer Ariadne, 13 Wall. (U. S.) 475, 20 L. ed. 542. The change in the new regulations requiring a vessel to hold her course and speed expresses the obligation of a vessel in such cases, as it has been held in some of the decisions on the subject. The Waverly, 41 Fed. 607; The Beryl, 9 P. D. 4. It was so held in The Britannia, 34 Fed. 546 [*reversed* on other grounds in 42 Fed. 67]. The steamer Beaconsfield meeting this vessel in the East river reversed and came to a stop without giving any signal indication. The manœuver of the Britannia was such that she would have gone clear had the Beaconsfield kept on; as soon as the latter's stop was perceived the Britannia reversed full speed. The Beaconsfield was held in fault for not keeping her speed. The court said that as the vessel bound to keep out of the way must at her peril shape her course with reference to the speed as well as the heading of the other the latter, after an agreement between them is had, or after the other's manœuvers are known, has no right to change either her direction or speed to the other's prejudice. In The Eider, 37 Fed. 903, this vessel going up the North river stopped and reversed to let a ferry-boat pass, but the ferry-boat having stopped to let a tug and tow pass she was run into by the Eider. The Eider was held in fault for not keeping further out in the river and the ferry-boat in fault for not keeping her course and speed. Such was the view also in The St. Johns, 42 Fed. 75. Where the circumstances are such that it becomes the duty of the vessel which otherwise under the regulations should keep her course and speed to change her course, the obligation also arises of slackening her speed or stopping and reversing if necessary. So held in The Baltimore, 34 Fed. 660. Also in The Waverly, 41 Fed. 607, where this vessel having the other on her port hand was held excusable for slackening speed when her signals were not answered and the approaching vessel seemed to be swinging as though to cross her bows. For other applications of the rule see Tacoma Mill Co. *v.* The Ship Blue Jacket, 3 Wash. Terr. 581, 19 Pac. 151; The Adriatic, 107 U. S. 512, 2 S. Ct. 355, 27 L. ed. 497; The Willkommen, 103 Fed. 699; The Isaac H. Tillyer, 101 Fed. 478; The Columbian, 100 Fed. 991; The Queen Elizabeth, 100 Fed. 874; The Hustler, 100 Fed. 134; The Mary Manning, 98 Fed. 1000, 39 C. C. A. 377; The Emily B. Maxwell, 95 Fed. 999, 37 C. C. A. 658; The Paoli, 92 Fed. 940; The City of Macon, 92 Fed. 207, 63 U. S. App. 289, 34 C. C. A. 302 [*affirming* 85 Fed. 236]; The George L. Garlick, 88 Fed. 553; The John F. Gaynor, 88 Fed. 323; The Rochester, 84 Fed. 365, 53 U. S. App. 700, 28 C. C. A. 428; The General, 82 Fed. 830; The Harrisburg, 71 Fed. 894; The Dorian, 68 Fed. 1018; The Relief, 63 Fed. 169; The A. R. Keene, 60 Fed. 1022; The Allen Green, 60 Fed. 459, 20 U. S. App. 331, 9 C. C. A. 73 [*affirming* 53 Fed. 286]; The Brinton, 59 Fed. 714; The Rose Culkin, 52 Fed. 328; The Coe F. Young, 49 Fed. 167, 1 U. S. App. 11, 1 C. C. A. 219 [*affirming* 45 Fed. 505]; The Beta, 40 Fed. 899; The Pomona, 35 Fed. 921 [*affirming* 34 Fed. 919]; The John S. Smith, 27 Fed. 398; The Pennland, 23 Fed. 551; The Rosedale, 22 Fed. 737; The Vim, 12 Fed. 906; The Norwalk, 11 Fed. 922; The Mary Ann, 11 Fed. 336; The D. S. Stetson, 4 Ben. (U. S.) 508, 7 Fed. Cas. No. 4,104; The Lady Ellen, 4 Ben. (U. S.) 340, 14 Fed. Cas. No. 7,981; The Metis, 4 Ben. (U. S.) 120, 17 Fed. Cas. No. 9,499; The Farnley, 5 Hughes (U. S.) 298, 8 Fed. 629 [*reversing* 1 Fed. 631]; Red Bank Co. *v.* The John W. Gandy, 20 Fed. Cas. No. 11,626, 7 Am. L. Reg. 606, 41 Hunt. Mer. Mag. 577, 1 Phila. (Pa.) 149, 8 Leg. Int. (Pa.) 26, 8 Pa. L. J. Rep. 482; The Postboy, 19 Fed. Cas. No. 11,303, 10 N. Y. Leg. Obs. 65; The Ocean Queen, 18 Fed. Cas. No. 10,408*a*; Fagan *v.* The Pluto, 8 Fed. Cas. No. 4,605; Camden, etc., R. Co. *v.* The Thomas Wallace, 4 Fed. Cas. No. 2,337.

Meaning of keeping her course.— Keeping her course does not mean, it was held in General Steam Nav. Co. *v.* Hedley, L. R. 3 P. C. 44, 39 L. J. Adm. 20, 21 L. T. Rep. N. S. 686, 6 Moore P. C. N. S. 263, 18 Wkly. Rep. 264, 16 Eng. Reprint 725, that she is to continue going ahead pointing the same regardless of other circumstances, but that she is to continue the course she would pursue if the other vessel were not in sight. In The Steamship Esk *v.* The Steamship Niord, L. R. 3 P. C. 436, 1 Aspin. 1, 24 L. T. Rep. N. S. 167, 7 Moore P. C. N. S. 276, 17 Eng. Reprint 105, it was held that a vessel rounding a point in a river must continue rounding in the same way. In Whitney *v.* The Empire State, 1 Ben. (U. S.) 57, 29 Fed. Cas. No. 17,586, it was held that a sailing ship in a narrow channel must beat out her tack and come about with all proper despatch. A steamship in a narrow channel attempting to pass a sailing vessel going to

Rules it is provided that "Every vessel which is directed by these rules to keep

windward must be prepared for the latter's going about, and the latter need not give notice of such intention. She must not, however, go about close ahead of the steamship so as to make it difficult for the latter to keep out of her way. The Palatine, 1 Aspin. 468, 27 L. T. Rep. N. S. 631; The Newburgh, Holt Adm. 231; The Saucy Lass, Holt Adm. 205. As to what is considered keeping her course for a sailing vessel through a narrow channel see article 17 above. It has been held that it is not an infringement of the rule for a bark to wear so as to come to anchor (The Monsoon, Holt. Adm. 186, 13 L. T. Rep. N. S. 510, 2 Mar. L. Cas. 289. And see The Falkland, Brown & L. 204, 9 Jur. N. S. 1113, 1 Moore P. C. N. S. 379, 15 Eng. Reprint 744), for a vessel sailing close-hauled to luff a little if she does not lose headway (The Marmion, 1 Aspin. 412, 27 L. T. Rep. N. S. 255), nor for a vessel to alter her course so as to give the overtaking ship more room to pass (The Corsica *v.* Schuyler, 9 Wall. (U. S.) 630, 19 L. ed. 804; The Franconia, 3 Aspin. 295, 35 L. T. Rep. N. S. 721, 2 P. D. 8, 25 Wkly. Rep. 197). It was held in The Dentz, 29 Fed. 525, that it was the duty of an overtaken vessel to alter her course so as to give the overtaking vessel more room to pass, if it were necessary for safety. A vessel hove to with her helm lashed to leeward forging ahead as she comes to and falls off is not complying with this article. It is her duty in such cases to get a full on her and get under command without altering the course more than is necessary. The Transit, 3 Ben. (U. S.) 192, 24 Fed. Cas. No. 14,137; The General Lee, 19 L. T. Rep. N. S. 750, 3 Mar. L. Cas. 204, 17 Wkly. Rep. Dig. 19. In The Rosalie, 4 Aspin. 384, 50 L. J. Adm. 3, 44 L. T. Rep. N. S. 32, 5 P. D. 245, a schooner close-hauled on the starboard tack crossing a smack hove to with the helm lashed on the port tack were both held in fault for not bearing up in time to avoid the collision. It was held in The Steamer Commerce *v.* Woodland, 16 Wall. (U. S.) 33, 21 L. ed. 465, that in a calm a sailing ship required to keep her course could not be in fault. If the other vessel is a long distance off a slight alteration in the helm of the ship that is to keep her course is no infringement. It was so held in The Norma, 3 Aspin. 272, 35 L. T. Rep. N. S. 418, with reference to a sailing ship which was two miles' distant, and in The Franconia, 3 Aspin. 295, 35 L. T. Rep. N. S. 721, 2 P. D. 8, 25 Wkly. Rep. 197, with reference to a steamship which ported half a point when the overtaking steamship was a quarter of a mile astern on her port quarter.

When it is a vessel's duty to change her course.— It is a vessel's duty to change her course when the risk of collision is imminent and it is evident that the other vessel whose duty it is to avoid her is unable to do so. When two sailing vessels are meeting close-hauled, one on the port tack and the other on the starboard tack, it is the duty of the latter to change her course, when, owing to an unexpected occurrence or some danger of navigation, it is impossible for the schooner on the port tack to avoid her. So held in Merrill *v.* The Schooner Mary Eveline, 16 Wall. (U. S.) 348, 21 L. ed. 501; Wilson *v.* Canada Shipping Co., 2 App. Cas. 389, 3 Aspin. 361, 36 L. T. Rep. N. S. 155; The Anne Caroline, 2 Mar. L. Cas. 208. And see Lindblom *v.* The Amelia, 2 Aspin. 96, 29 L. T. Rep. N. S. 118, 21 Wkly. Rep. 707. In The Garden City, 19 Fed. 529, the overtaken vessel was held in fault for not changing her course so as to aid the other vessel to pass in a narrow channel. In The Susquehanna, 35 Fed. 325, this vessel being on the starboard hand of a ferry-boat running from Jersey City to New York was held in fault for running too near the latter's slip, and also for not stopping and sheering out when she saw the ferry-boat holding her course. In The City of Hartford, 7 Ben. (U. S.) 350, 5 Fed. Cas. No. 2,749, a schooner was held in fault for taking the steamship channel, although it was her course, when she might have avoided all risk by taking one of the other channels.

Circumstances under which a change of course is excusable.— Where the change of course was an error of judgment in a sudden emergency produced by the fault of the other ship, in cases in which it did not contribute to the collision and in cases in which the danger of collision was imminent and it was the only chance of safety, vessels have been excused for such an infringement of this rule. For instances of a change of course by error *in extremis* see *supra*, I, A, 3. As to a change of course being excused when the danger was so imminent that it offered the only chance of avoiding the collision see Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302; Marsden Coll. (3d ed.) 475 note. In such a case the vessel departing from the rule is bound to show that it was necessary to avoid imminent danger and that the course adopted was reasonably calculated to do so. The Propeller Ottawa *v.* Stewart, 3 Wall. (U. S.) 269, 18 L. ed. 165; The Eliza S. Potter, 35 Fed. 220; The Maria, Holt Adm. 105; The Brig Belle, 1 Parsons Shipp. & Adm. 581, note 1; The Agra *v.* The Elizabeth Jenkins, L. R. 1 P. C. 501, 36 L. J. Adm. 16, 16 L. T. Rep. N. S. 755, 4 Moore P. C. N. S. 435, 16 Wkly. Rep. 735, 16 Eng. Reprint 382. For instances of change of course by sailing vessel to ease the blow see Merchants', etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 48 C. C. A. 128; The Gladys, 35 Fed. 160.

Instances of change of course.— In The Virgo, 7 Ben. (U. S.) 495, 28 Fed. Cas. No. 16,975, a schooner mistaking the masthead light of a steamer for a light ashore hove to presenting her red light and the steamer ported. The schooner discovering her mistake got under way and crossed the course of

out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." [54]

(H) *Steam - Vessel Must Slacken Speed or Stop.* Every steam-vessel which is directed by these rules to keep out of the way of another vessel must, on approaching her, if necessary, slacken her speed or stop or reverse.[55]

the steamer showing her green light. The schooner was held solely in fault. In *In re* Dampskibsselskabet Thingvalla, 42 Fed. 331, the T seeing the G's red light ported helm and the G starboarded closing red and showing green. It was held that the T was not in fault for continuing under her port helm, supposing that the G would correct the error in starboarding. In The Steam Propeller Corsica *v.* Schuyler, 9 Wall. (U. S.) 630, 19 L. ed. 804, two steamers were approaching each other on crossing but nearly opposite courses, the Corsica being off the starboard bow of the America. The Corsica starboarded in order to help the America, whose duty it was to keep out of her way, to cross her bows. The America intended to pass ahead of the Corsica, but seeing that it was risky took the more prudent course of stopping and backing. The collision would not have happened but for the change of course by the Corsica, and she was held solely in fault.

54. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 22; U. S. Comp. Stat. (1901), p. 2870); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 22; U. S. Comp. Stat. (1901), p. 2883); Young *v.* Staten Island Rapid Transit R. Co., 8 Misc. (N. Y.) 460, 28 N. Y. Suppl. 669; The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 771; The Northfield, 154 U. S. 629, 14 S. Ct. 1184, 24 L. ed. 680 [*affirming* 4 Ben. (U. S.) 112, 18 Fed. Cas. No. 10,326]; The Britannia, 153 U. S. 130, 14 S. Ct. 795, 38 L. ed. 660; The E. A. Packer, 140 U. S. 360, 11 S. Ct. 794, 35 L. ed. 453; The Steam Propeller Corsica *v.* Schuyler, 9 Wall. (U. S.) 630, 19 L. ed. 804; The Mary Buhne, 95 Fed. 1002 (duty of vessel having right of way); The Hercules, 51 Fed. 452; The Transfer No. 4, 44 Fed. 303; The Knight, 43 Fed. 895; The Lagonda, 42 Fed. 304; The Emma Kate Ross, 41 Fed. 826; The Martello, 39 Fed. 505; The America, 37 Fed. 813; The Baltimore, 35 Fed. 613; The Newport, 5 Ben. (U. S.) 231, 18 Fed. Cas. No. 10,185, 14 Int. Rev. Rec. 37; The Cumbria, 3 Ben. (U. S.) 334, 6 Fed. Cas. No. 3,472; The Boston, Olc. Adm. 407, 3 Fed. Cas. No. 1,672.

See 10 Cent. Dig. tit. "Collision," §§ 35, 45.

55. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 23; U. S. Comp. Stat. (1901), p. 2870); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 23; U. S. Comp. Stat. (1901), p. 2883). And see Wilder's Steamship Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473. The corresponding rule, article 18, of the act of 1885 reads as follows: "Every steamship on approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary." The corresponding rule (U. S. Rev. Stat. (1878), § 4233, rule 21), being the same as article 16 of the act of 1864 (13 U. S. Stat. at L. p. 58) reads as follows: "Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed." The change in the position of the words "if necessary" has had the effect of making these words also qualify the term "slacken her speed."

Meaning of the term "when necessary."— The word "necessary" as used here means rather "prudent" or "expedient." Marsden Coll. (3d ed.) 435. In The Steamship Lebanon *v.* The Steamship Ceto, 14 App. Cas. 670, 684, 6 Aspin. 479, 62 L. T. Rep. N. S. 1, the expression is defined as meaning when "the circumstances are such as to convey to the mind of a skilled seaman that risk of collision is so imminent as to make it indispensable to stop and reverse."

The following are instances of cases in which the necessity of stopping and reversing arises: When it is apparent that there is another vessel approaching in a fog or on a dark night, but there is doubt as to her position and course (The Wyanoke, 40 Fed. 702), where a vessel suddenly finds herself in danger of collision in a crowded thoroughfare (The C. H. Seuff, 32 Fed. 237), in the path of a heavily laden vessel carried along by the tide (The Intrepid, 48 Fed. 327), or where she is approaching a point around which another vessel is turning, and it is difficult and dangerous for her to pass (The Canisteo, 47 Fed. 908). The fact that a vessel has the right of way does not supersede the obligation to stop and reverse when actual risk of collision is impending. The Steam Ferry-Boat America *v.* Camden, etc., R. Transp. Co., 92 U. S. 432, 23 L. ed. 724; Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302; The Aurania, 29 Fed. 98; The Columbia, 23 Blatchf. (U. S.) 268, 25 Fed. 844. A steamer has been held solely in fault for failure to comply with this rule notwithstanding some injudicious manœuvering on the part of the sailing vessel with which she came into collision. The Ancon *v.* Thompson, 8 Sawy. (U. S.) 334, 17 Fed. 742. The deck officer is bound to know the rate at which his vessel is going and the length of time necessary to reverse engines and arrest speed, and if he allows an appreciable time to elapse before ringing to slow engines his vessel will be held responsible for the delay. Prescott *v.* U. S., 19 Ct. Cl. 684. On the other hand a short time must be allowed for a man to exercise his judgment; but if the shortness of time was caused by want of a proper lookout it is no excuse for a failure to stop and reverse. Maclaren *v.* Compagnie

(1) *Overtaking Vessels.* Notwithstanding anything contained in these rules every vessel, overtaking any other, must keep out of the way of the overtaking

Française, etc., 9 App. Cas. 640, 5 Aspin. 216, 53 L. J. Adm. 43, 50 L. T. Rep. N. S. 372, 9 P. D. 81, 32 Wkly. Rep. 880. It appears that a failure to comply with this article will not be a fault unless the officer, but for the negligence of himself or the lookout, would have known that it was applicable. The Stoomvaart Maatschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 5 App. Cas. 876, 4 Aspin. 567, 52 L. J. Adm. 1, 42 L. T. Rep. N. S. 610, 29 Wkly. Rep. 173. The words "risk of collision" in this article apply only to evident danger, and the duty of slackening speed is not contemporaneous with the duty of changing her course. The Free State, Brown Adm. 251, 9 Fed. Cas. No. 5.090, 6 Am. L. T. Rep. 401, 5 Chic. Leg. N. 373; The Sunnyside, Brown Adm. 227, 23 Fed. Cas. No. 13,620, 16 Am. L. T. Rep. 277, 14 Int. Rev. Rec. 103, 3 Chic. Leg. N. 330. The duty to slacken speed usually does not arise until after it appears that a change of course will not be sufficient to avoid the collision. Where one of the vessels by changing her course determines the risk this article does not apply. The Screw Steamship Jesmond *v.* The Screw Steamship Earl of Elgin, L. R. 4 P. C. 1, 1 Aspin. 150, 25 L. T. Rep. N. S. 514, 8 Moore P. C. N. S. 179, 17 Eng. Reprint 280. In Ludwig *v.* The Propeller Free State, 91 U. S. 200, 23 L. ed. 299, it was held that if the sailing vessel had kept her course there would have been no danger of collision, and that consequently the obligation to slow, stop, or reverse did not arise. In deciding upon whether it is necessary to stop and reverse one vessel may assume that the other will pursue her ordinary and customary route according to the special circumstances of the case. The Servia, 30 Fed. 502. Unless it tends to avoid the danger of collision it is a fault to comply with this rule. So held in a case in which it was as dangerous to reverse as to go forward. The Franconia, 3 Aspin. 295, 35 L. T. Rep. N. S. 721, 2 P. D. 8, 25 Wkly. Rep. 197. When this rule once becomes applicable it does not cease to be so until the danger is past. The Wyanoke, 40 Fed. 702; Dowell *v.* General Steam Nav. Co., 5 E. & B. 195, 1 Jur. N. S. 800, 26 L. J. Q. B. 59, 3 Wkly. Rep. 492, 85 E. C. L. 195. If the master of a vessel has reason to believe there is another approaching and there is a doubt as to her character or her course it is his duty at once to slacken speed (The Steamer Louisiana *v.* Fisher, 21 How. (U. S.) 1, 16 L. ed. 29; The Illinois, 5 Blatchf. (U. S.) 256, 12 Fed. Cas. No. 7,002, 2 Int. Rev. Rec. 77; The Beryl, 5 Aspin. 321, 53 L. J. Adm. 75, 51 L. T. Rep. N. S. 554, 9 P. D. 137, 33 Wkly. Rep. 191; The Rona, 2 Aspin. 182; The General Lee, 19 L. T. Rep. N. S. 750, 3 Mar. L. Cas. 204, 17 Wkly. Rep. Dig. 19), and according to some of the decisions to stop and reverse before altering his helm (The Normandie, 43 Fed. 151; The Wyanoke, 40 Fed. 702); and a steamer is justified in reversing under such circumstances even if by going on she might have avoided the collision (The Phœnix, 50 Fed. 330). In The Love Bird, 4 Aspin. 427, 44 L. T. Rep. N. S. 650, 6 P. D. 80, a steamship going at the rate of three knots in a thick fog heard the blast of a fog-horn nearly ahead and did not stop her engines until the other vessel was seen about a length off. She was held in fault for not having stopped as soon as the fog-horn was heard. In The Kirby Hall, 5 Aspin. 90, 52 L. J. Adm. 31, 48 L. T. Rep. N. S. 797, 8 P. D. 71, 31 Wkly. Rep. 658, this vessel proceeding in a dense fog heard the whistle of another steamer twice on the port bow, the second blast being nearer than the first. The engines were not stopped until the whistle was heard the second time and the masthead light of the other vessel was seen nearly right ahead distant from one to two ships' lengths. The Kirby Hall was held in fault for not having stopped when the whistle was first heard. In The North Star, 43 Fed. 807, in which two steamers were approaching in a fog at sea and the signals indicated that they were drawing together, it was held to have been their duty to stop until their position was understood. In The Illinois, 5 Blatchf. (U. S.) 256, 12 Fed. Cas. No. 7,002, 2 Int. Rev. Rec. 77, a steamer having lost sight of the lights of an approaching sailing vessel it was held she should have stopped until she again discovered them. In the following cases the vessels were held at fault for not reversing as well as stopping upon hearing the approach of the other: Morton *v.* Hutchinson, L. R. 4 P. C. 529 (where this steamer when she first heard the other's whistle stopped her engines and did not reverse them until the red and masthead lights of the other were seen about a ship's length off a point on the starboard bow); The John McIntyre, 5 Aspin. 278, 53 L. J. Adm. 115, 51 L. T. Rep. N. S. 185, 9 P. D. 135, 33 Wkly. Rep. 190 (where this steamer hearing a whistle on her port bow slackened speed but did not stop and reverse until she heard the whistle a second time); The Dordogne, 5 Aspin. 328, 54 L. J. Adm. 29, 51 L. T. Rep. N. S. 650, 10 P. D. 6, 33 Wkly. Rep. 360 (in a fog so dense that vessels could not be seen by each other their own distance apart in the ocean, and the Dordogne heard three times the whistle of another but did not stop and reverse until the latter came into view); The Wyanoke, 40 Fed. 702 (in a dense fog at night in the open sea where the steamer going seven to ten knots an hour heard voices nearly ahead); The Britannic, 39 Fed. 395 (in a fog at sea in which this steamer heard the fog-signals of another vessel near and almost ahead within three quarters of a mile and changed her course without knowing the position and direction of the other); The Normandie, 43 Fed. 151 (in which this steamer heard the fog-horn of a schooner

vessel. Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the

ahead and near in a dense fog off Sandy Hook and slowed instead of reversing). The obligation to stop and reverse arises as soon as it is apparent that the alteration of her course will not enable her to clear the other vessel. Scicluna *v.* Stevenson, 8 App. Cas. 549, 5 Aspin. 114, 49 L. T. Rep. N. S. 210; The Stoomvaart Maatschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 5 App. Cas. 876, 4 Aspin. 360, 43 L. T. Rep. N. S. 610, 29 Wkly. Rep. 173; The Beryl, 5 Aspin. 321, 53 L. J. Adm. 75, 51 L. T. Rep. N. S. 554, 9 P. D. 137, 33 Wkly. Rep. 191. If by an alteration in the course of either or both of the steamships the risk is determined this article does not require either of them to stop and reverse; but if the course has in fact been altered but the risk still continues the engines must then be stopped and reversed. The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9,626; The Screw Steamship Jesmond *v.* The Screw Steamship Earl of Elgin, L R. 4 P. C. 1, 1 Aspin. 150, 25 L. T. Rep. N. S. 514, 8 Moore P. C. N. S. 179, 17 Eng. Reprint 280. If the omission to stop and reverse might by possibility have contributed to the collision the ship will be held in fault. The Stoomvaart Maatschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 7 App. Cas. 795, 5 Aspin. 360, 567, 52 L. J. Adm. 1, 47 L. T. Rep. N. S. 198. If owing to the fault of the other vessel through insufficient lights it does not become apparent to a steamer that there is imminent risk of collision the duty to stop and reverse does not arise. The Stoomvaart Maatschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 7 App. Cas. 795, 5 Aspin. 360, 567, 52 L. J. Adm. 1, 47 L. T. Rep. N. S. 198; Marsden Coll. (3d ed.) 436. In The Stoomvaart Maatschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 7 App. Cas. 795, 5 Aspin. 360, 567, 52 L. J. Adm. 1, 47 L. T. Rep. N. S. 198, these two vessels were approaching on parallel and opposite courses, green light to green light. The V ported showing her red light to the K. The K starboarded and in a minute and a half after that reversed her engines. In a minute and a half after reversing the collision occurred. It was held that the K should have stopped and reversed when the red light of the V came into view. When owing to a mistake in understanding or answering signals or to the unexpected force of the tide or narrowness of the channel it suddenly becomes evident that the courses of the two vessels are converging rapidly so that risk of collision is imminent the duty of both of them to immediately stop and reverse arises. The La Champagne, 47 Fed. 122; The Aurania, 29 Fed. 98. In The Reading, 38 Fed. 269, a steamer finding herself at night suddenly crossing the course of a schooner sailing on the port tack and about four lengths away attempted to avoid her by merely porting hard. She was held in fault for not also reversing. In The Breakwater, 39 Fed. 511, this steamer having a ferry-boat on her starboard side which she was bound to keep out of the way of, and knowing by the exchange of signals that the ferry-boat was crossing her bows, was held in fault for her delay in reversing engines. In Shaw *v.* The Reading, 38 Fed. 269, it was held that a steamer seeing that a tugboat approaching was turning in the same direction and that she was turning without answering her signals, should have immediately reversed engines. In The Orange, 46 Fed. 411, it was held that a tugboat, having the right of way and attempting to cross the bows of a ferry-boat but with notice from the fact that her signals were not answered, that they had not been heard, should have stopped at once. It was held in The Benares, 5 Aspin. 171, 53 L. J. Adm. 2, 49 L. T. Rep. N. S. 702, 9 P. D. 16, 32 Wkly. Rep. 268, that where the one chance of escaping collision is by keeping on at full speed it is the vessel's duty to do so under former article 23, and that this article 18 does not apply. *Compare* The State of California, 49 Fed. 172, 7 U. S. App. 20, 1 C. C. A. 224, in which a steamer sighting a sailing vessel two points off her starboard bow close-hauled on the starboard tack, and supposing that they were sailing on parallel courses continued her course and speed; when they were within three hundred yards of each other the schooner luffed into the wind, but the steamer kept on at full speed trying to cross the schooner's bows. The steamer was held in fault for not stopping and reversing. A steamship which is being overtaken by another is not approaching the overtaking ship within the meaning of this article and she should therefore keep her course and speed. The John King, 49 Fed. 469, 1 U. S. App. 64, 1 C. C. A. 319; The Franconia, 3 Aspin. 295, 35 L. T. Rep. N. S. 721, 2 P. D. 8, 25 Wkly. Rep. 197; Marsden Coll. (3d ed.) 541. The duty of slackening or stopping and reversing, as the circumstances may require, arises also in cases in which there is difficulty or danger in passing other ships; especially when entering a harbor or on suddenly sighting a vessel at anchor nearly ahead, and also when approaching a crowded thoroughfare. Liverpool, etc., Steamship Co. *v.* Simmons, 9 Wall. (U. S.) 634, 19 L. ed. 751; The Steam Propeller Corsica *v.* Schuyler, 9 Wall. (U. S.) 630, 19 L. ed. 804. In Hall *v.* The Buffalo, Newb. Adm. 115, 11 Fed. Cas. No. 5,927, a steam-propeller descending a river on a dark night at eight miles an hour discerned below her the lights of a number of vessels. She was held in fault for not slackening speed until she had passed them. In The Steamboat New York *v.* Rae, 18 How. (U. S.) 223, 15 L. ed. 359, the same obligation, it was held, arose where a steamer towing heavily laden barges, with wind and tide in her favor, was coming down a river encumbered with other vessels. See also The Santiago de Cuba *v.* The Scots Greys, 19 Fed. 213, and also

vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, must be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels can make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear. As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.[56]

Hancox *v.* The Steamboat Syracuse, 9 Wall. (U. S.) 672, 19 L. ed. 783, in which a steamer was approaching a number of smaller steamers embarrassed by tows at the rate of seventeen miles an hour. When approaching any difficult place of navigation the duty of slackening speed under this rule arises. So held in The Osceola, 50 Fed. 326, in which a towboat going against the tide and approaching a point where it would be difficult for her to pass another towboat coming down, it was held, should stop in safe water and let the other pass. The meaning of this article has been extended to include cases of damage to other vessels in which there was no actual collision if the damage has been caused by undue speed, as in The Morrisania, 13 Blatchf. (U. S.) 512, 17 Fed. Cas. No. 9,838, in which a steamer passed so near a pier and went so swiftly that the swell caused by her speed threw one vessel against the other and damaged the former. See also The Massachusetts, 10 Ben. (U. S.) 177, 16 Fed. Cas. No. 9,258, and also where the damage to a vessel moored in a slip was caused by the excessive speed of a steamer with a tow proceeding out of the slip. The Electra, 7 Ben. (U. S.) 344, 8 Fed. Cas. No. 4,339. As to the effect of reversing the screw upon a ship having headway through the water see Marsden Coll. (3d ed.) 453.

For other cases under this article see The Albert Dumois, 177 U. S. 240, 20 S. Ct. 595, 44 L. ed. 751 [*affirming* 87 Fed. 948]; The Victory, 168 U. S. 410, 18 S. Ct. 149, 42 L. ed. 519; The Gamma, 103 Fed. 703; The Republic, 102 Fed. 997; The Hustler, 100 Fed. 134; The Oregon, 92 Fed. 1021, 35 C. C. A. 167 [*affirming* 88 Fed. 324]; *In re* Central R. Co., 92 Fed. 1010; The Mary Powell, 92 Fed. 408, 34 C. C. A. 421; The George L. Garlick, 91 Fed. 920; The Livingstone, 87 Fed. 769; The Maverick, 84 Fed. 906, 55 U. S. App. 343, 28 C. C. A. 562; The Nymphaea, 84 Fed. 711; The Saginaw, 84 Fed. 705; The Newport News, 83 Fed. 522; The City of Chester, 78 Fed. 186, 42 U. S. App. 366, 24 C. C. A. 51; The Saratoga, 77 Fed. 224; The Imperator, 76 Fed. 879; The Energia, 66 Fed. 604, 35 U. S. App. 6, 13 C. C. A. 653 [*affirming* 56 Fed. 124]; The Havana, 54 Fed. 411; The Jesse W. Knight *v.* The Wm. R. McCabe, 45 Fed. 590; The Reading, 43 Fed. 815 [*affirming* 43 Fed. 398]; Hoben *v.* The Westover, 5 Hughes (U. S.) 133, 2 Fed. 91.

See 10 Cent. Dig. tit. "Collision," §§ 36, 38, 46, 47.

56. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 24; U. S. Comp. Stat. (1901), p. 2870); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 24; U. S. Comp. Stat. (1901), p. 2883). The corresponding rule, article 20 of the act of 1885, is as follows: "Notwithstanding anything contained in any preceding article, every ship, whether a sailing-ship or a steamship, overtaking any other shall keep out of the way of the overtaken ship." The corresponding rule, article 17 of the act of 1864, is as follows: "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel."

Reason for rule — What is an "overtaking vessel."— The rule that a vessel coming up astern of another from a direction more than two points abaft of her beam is an overtaking vessel was first suggested by Brett, L. J., in The Franconia, 3 Aspin. 295, 35 L. T. Rep. N. S. 721, 2 P. D. 8, 25 Wkly. Rep. 197, on the ground that if it were night the side-lights of the ship ahead would not be visible to a vessel approaching from such a direction. This was held to be the rule in The State of Alabama, 17 Fed. 847. In The Aurania, 29 Fed. 98, it was pointed out that the rule applicable must depend upon the actual situation at the time when the necessity for precaution begins, so that the mere fact that the faster vessel has a larger distance to travel to reach the point where their courses intersect is immaterial. In The Steamer Cayuga *v.* Hoboken Land, etc., Co., 14 Wall. (U. S.) 270, 20 L. ed. 828, one vessel was steering S.S.W. and the other S. by E., their courses converging at an angle of about three points, and it was held that the former was not an overtaking vessel, on the ground that at the actual time when the necessity for precaution arose the two vessels were nearly abreast. Among the previous cases defining the meaning of an overtaking vessel are: The Seaton, 5 Aspin. 191, 53 L. J. Adm. 15, 49 L. T. Rep. N. S. 747, 9 P. D. 1, 32 Wkly. Rep. 600 (in which this vessel and the P were proceeding on parallel courses S.W. by W. The P being abaft the starboard beam altered her course to S. ½ W., and it was held that she was an overtaking vessel); The Breadalbane, 4 Aspin. 505, 46 L. T. Rep. N. S. 204, 7 P. D. 186 (a ship on a course differing from that of the other one and one-half points E. by N. and N.E. by E. ½ E. was held to be overtaking); The Franconia, 3 Aspin. 295, 35 L. T. Rep. N. S. 721, 2 P. D. 8, 25 Wkly. Rep. 197 (this vessel was held to be an overtaking vessel when she was about two points on the port quarter of the S and was never in such a position that he could have seen the side-lights of the S had it been night); The Chanonry, 1 Aspin. 569, 42 L. J. Adm. 58, 28 L. T. Rep.

(J) *Narrow Channels.* By article 25 of both the International and the

N. S. 284 (a vessel heading W. by N. was held to be overtaking one heading W.N.W.). Sailing vessels have been held in fault for not keeping out of the way of a steamer which they were overtaking; as for example The Iris, 1 Lowell (U. S.) 520, 13 Fed. Cas. No. 7,062. In The D. M. Anthony, 10 Fed. 760, a tug with canal-boats on both sides going about two knots was steering N.E. and a schooner close-hauled on a course N. by E. ½ E. coming up astern at seven knots tried at first to go to windward, but being unable to do so ported her helm to go to leeward and came into collision with the tow right between the sterns of the two starboard boats. The schooner was held in fault. In The Helen Hasbrouck, 29 Fed. 463, the courses of a tug and schooner were both directly up the river and the schooner was held to be overtaking and in fault for not keeping out of the way.

The effect of the clause "Notwithstanding anything contained in any preceding article" is to make the overtaking and not the crossing rule prevail where there is any doubt. The Seaton, 5 Aspin. 191, 53 L. J. Adm. 15, 49 L. T. Rep. N. S. 747, 9 P. D. 1, 32 Wkly. Rep. 600. See also Robinson *v.* Detroit, etc., Steam Nav. Co., 73 Fed. 883, 43 U. S. App. 196, 20 C. C. A. 86; The Narragansett, 10 Blatchf. (U. S.) 475, 17 Fed. Cas. No. 10,018 [*affirming* 5 Ben. (U. S.) 255, 17 Fed. Cas. No. 10,016].

See 10 Cent. Dig. tit. "Collision," § 56 *et seq.*

Duty of the overtaking vessel.— The overtaking vessel may go ahead or astern or on either side of the other, as she thinks best. She is bound to select her time and place so as to pass in safety. The Oceanus, 12 Blatchf. (U. S.) 430, 18 Fed. Cas. No. 10,415; The Nor, 2 Aspin. 264, 30 L. T. Rep. N. S. 576, 22 Wkly. Rep. Dig. 226. In the case of two sailing vessels the hindmost vessel must look out and allow for the other's coming about. The Nellie D., 5 Blatchf. (U. S.) 245, 17 Fed. Cas. No. 10,097, 2 Int. Rev. Rec. 62. When they are on the same tack it is the duty of the overtaking vessel to keep off and pass to leeward; and it is the duty of the following ship, when the leading ship comes about, to do so also, if by keeping her course there would be risk of collision. French *v.* The Schooner Victoria, 10 Phila. (Pa.) 292, 31 Leg. Int. (Pa.) 293; The Peter Ritter, 14 Fed. 173; The Priscilla, L. R. 3 A. & E. 125, 1 Aspin. 468, 23 L. T. Rep. N. S. 566; The Eclipse, Holt Adm. 220. In the case of The Columbia, 9 Ben. (U. S.) 254, 6 Fed. Cas. No. 3,035, it was held that a steamer attempting to pass within fifteen feet of a sailing vessel took the risk of the latter's helmsman losing his presence of mind. In the case of The Osceola, 30 Fed. 383, it was held that a steamer having failed to signal her intention to pass could not allege as a defense that the sailing vessel sheered. If the vessel he is approaching is in stays the master of the overtaking vessel has no right to speculate on the chances of her coming completely about, getting under headway and avoiding him. The Coleman, etc., Brown Adm. 456, 6 Fed. Cas. No. 2,981. The rule requiring the overtaking ship to keep out of the way does not cease when the overtaking ship gets her nose in front of the other, but continues in operation until all danger of collision is past. The Narragansett, 10 Blatchf. (U. S.) 475, 17 Fed. Cas. No. 10,018. It is a fault for a steamer to attempt to pass in a narrow channel, if by waiting she could have passed in a wider place. The City of Paris, 1 Ben. (U. S.) 174, 5 Fed. Cas. No. 2,765 [*affirmed* in 9 Wall. (U. S.) 634, 19 L. ed. 751]. See 3 N. Y. Rev. Stat. (7th ed.) p. 1993, § 7, forbidding a steamboat going in the same direction with another ahead of it to pass the other boat within the distance of twenty yards, and forbidding the steamboat ahead to so navigate as to bring it within twenty yards of the steamboat following it. In The Saratoga, 1 Fed. 730, it was held that if a steamboat cannot safely pass on either side of a tow traveling in the same direction it is her duty to wait until they have reached a point where she can pass in safety, and that the fact that the tow was on the wrong side of the channel was not a justification for such a dangerous attempt. A steamer passing a tug and tow is liable for collision between the boats in tow caused by her swell, and she is bound to know the depth of the water and whether her swell will endanger the other boats. The C. H. Northam, 7 Ben. (U. S.) 249, 5 Fed. Cas. No. 2,689. The Alliance Ins. Co. *v.* The Brig Morning Light, 2 Wall. (U. S.) 550, 17 L. ed. 862, is an instance of an overtaking vessel being excused for her failure to keep out of the way of the other one because of her inability to see the vessel ahead through the darkness of the night. In The Stephen Bennett, 42 Fed. 336, a schooner overtaking another schooner was held in fault where she misstayed and ran into the other schooner for tacking so close, knowing that she was liable to misstay. In The Cephalonia, 32 Fed. 112, this steamer blew two whistles in time to enable a tug which she was overtaking to give way, and it appearing that the tug neither heard nor answered this signal the steamer was held in fault. In The Hackensack, 32 Fed. 800, this vessel going with the flood-tide in the East river and following another vessel was held at fault for approaching so near the vessel ahead as to be unable to avoid her when the leading vessel stopped to allow another to pass. For other cases under this article see Palmer *v.* New York, etc., Transp. Co., 8 N. Y. App. Div. 615, 40 N. Y. Suppl. 341; Aldridge *v.* Clausen, 42 Hun (N. Y.) 473; Kennedy *v.* American Steamboat Co., 12 R. I. 23; British Bark Latona *v.* McAllep, 3 Wash. Terr. 332, 19 Pac. 131; The Steamship Abbotsford *v.* Johnson, 98 U. S. 440, 25 L. ed. 168; Thorp *v.* Hammond, 12 Wall. (U. S.) 408, 20 L. ed. 419; The Steamer Spray *v.* Erlandson, 12 Wall. (U. S.)

Inland Rules, it is provided that "In narrow channels every steam-vessel shall,

366, 20 L. ed. 286; The Mesaba, 111 Fed. 215; The Doris, 108 Fed. 552; The North Star, 108 Fed. 436; *In re* Rogers, 93 Fed. 254; The Ohio, 91 Fed. 547, 33 C. C. A. 667; The City of St. Augustine, 68 Fed. 393, 35 U. S. App. 327, 15 C. C. A. 488 [*affirming* 52 Fed. 237]; Ueberweg *v.* La Compagnie Generale Transatlantique, 60 Fed. 461 [*reversing* 38 Fed. 853]; Milliken *v.* The Vandal, 59 Fed. 796; The Stephen Bennett, 54 Fed. 207, 14 U. S. App. 27, 4 C. C. A. 289 [*affirming* 42 Fed. 336]; The Chatham, 52 Fed. 396, 8 U. S. App. 104, 3 C. C. A. 161; The Santee, 48 Fed. 126; The City of Brockton, 42 Fed. 928; The Sylvan Grove, 29 Fed. 336; The Aurania, 29 Fed. 98; The Bay Queen, 27 Fed. 813; The Bermuda, 17 Fed. 397; The Ivanhoe, 7 Ben. (U. S.) 213, 13 Fed. Cas. No. 7,113; The Elm City, 6 Ben. (U. S.) 58, 8 Fed. Cas. No. 4,414; The Newport, 5 Ben. (U. S.) 231, 18 Fed. Cas. No. 10,185, 14 Int. Rev. Rec. 37; The Haugesund *v.* The Bowdoin, 11 Fed. Cas. No. 6,220, 25 Int. Rev. Rec. 386, 36 Leg. Int. (Pa.) 462; Brunsgaard *v.* The America, 4 Fed. Cas. No. 2,056, 1 Wkly. Notes Cas. (Pa.) 172.

See 10 Cent. Dig. tit. "Collision," § 57 *et seq.*

Duty of the overtaken vessel.— It is the duty of the overtaken vessel under article 2' (*supra*, III, A, 5, f, (IV), (F)) to keep her course. It seems, however, that a slight alteration of her course to give the other more room would be no departure from the rules. In The Commodore Jones, 25 Fed. 506, it was held that the presence of a tug and tow preventing an overtaking sloop from keeping off made it incumbent upon a sailing lighter being overtaken to go about at the same time that the sloop went about. In The Dentz, 29 Fed. 525, in which this tugboat with a tow in Hell Gate replied two whistles to a signal of two whistles from the steamer Plymouth Rock which was overtaking and desired to pass her, it was held that the meaning of such an agreement was that the Dentz should keep her course so far as she could consistently with the knowledge that the steamer intended to pass her on the port side, but she did not thereby agree to keep on the starboard side of the mid-channel if there was room on the port side for the steamer to pass. In the district court the Dentz was held also in fault because after assenting to her passing she did not aid her as she might have done. In the circuit court it was considered that the Plymouth Rock did have sufficient room and she was therefore held solely liable. In The C. H. Northam, 37 Fed. 238, it was held that a signal of two whistles having been given in reply to two whistles under similar circumstances it became the duty of the overtaken vessel to port her wheel if there was not sufficient room already for the other steamer to pass safely to port, provided the former could port without any danger to herself. In The Mischief, 32 Fed. 304, a tug being overtaken in a narrow channel was held in fault where, having slowed to let a tug and her tow pass, she started her engine again while they were passing and thereby ran against the tow forcing her against a dock. In The Fred Jansen, 44 Fed. 773, a schooner being overtaken by a tug while going through the East river passed out of slack water into the flood-tide and the wind failing was swung around by the tide four to six points. It was held that under the circumstances the pilot of the tug could not expect so large a sheer and the libel against her was dismissed. In The Switzerland, 38 Fed. 853, a steamer going down New York bay was held in fault for swinging to port through the carelessness of her wheelsman as another steamer was passing. In The Captain Miller, 33 Fed. 585, the rear boat signaled a desire to pass to starboard and the other boat signaled a desire to continue her course. As neither fully complied with the meaning of its signal both were held in fault. In The Garden City, 38 Fed. 860, a ferry-boat overtaking a tug going up the East river crowded her in near the piers at a place where the tug as she came up from the slack water suddenly met the cross currents of the ebb-tide which caused her bow to swing to starboard. The ferry-boat was held in fault for crowding the tug toward the shore, for forcing her into a situation of danger, for failure to keep out of the way under this rule, for breach of the New York statute as to passing within twenty feet, and for breach of the New York statute as to keeping in mid-river. Notwithstanding all these faults on the part of the ferry-boat the damages were divided because the tug did not stop in slack water for the ferry-boat to pass and did not put her helm sufficiently to starboard to overcome the effect of the cross currents. For other cases upon the duty of an overtaken vessel see Golding *v.* The Steamship Illinois, 103 U. S. 298, 26 L. ed. 562; The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Mesaba, 111 Fed. 215; Long Island R. Co. *v.* Killien, 67 Fed. 365, 14 C. C. A. 418 [*reversing* 63 Fed. 172]; The Whiteash, 64 Fed. 893; The Continental, 50 Fed. 142; The General William McCandless, 6 Ben. (U. S.) 223, 10 Fed. Cas. No. 5,321; The Hortensia, 2 Hask. (U. S.) 141, 12 Fed. Cas. No. 6,706; The St. Paul, 21 Fed. Cas. No. 12,243, 10 Chic. Leg. N. 252, 3 Cinc. L. Bul. 321.

See 10 Cent. Dig. tit. "Collision," § 62.

Maritime law in case of one vessel overtaking another.— The rule that an overtaking ship must keep out of the way of the ship she is overtaking was a rule of the maritime law and was merely formulated by the regulations. It was also the rule that an overtaken vessel must keep her course. Whitridge *v.* Dill, 23 How. (U. S.) 448, 16 L. ed. 581; Ward *v.* The Dousman, 6 McLean (U. S.) 231, Newb. Adm. 236, 29 Fed. Cas. No. 17,153; The Clement, 1 Sprague (U. S.) 257, 5 Fed. Cas. No. 2,880, 31 Hunt. Mer. Mag. 712, 17 Law Rep. 444 [*affirmed* in 2 Curt. (U. S.) 363, 5 Fed. Cas. No. 2,879]; The Governor, Abb. Adm. 108, 10 Fed. Cas. No. 5,645; The Rhode Island, Olc. Adm. 505, 20 Fed. Cas. No.

when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel." [57]

11,745, 6 N. Y. Leg. Obs. 12 [*affirmed* in 1 Blatchf. (U. S.) 363, 20 Fed. Cas. No. 11,743, 7 N. Y. Leg. Obs. 38]; Marsden Coll. (3d ed.) 460; 1 Parsons Shipp. & Adm. 568. In Alliance Ins. Co. *v.* The Brig Morning Light, 2 Wall. (U. S.) 550, 17 L. ed. 862, it was held that the vessel astern was not in fault, if the night was so dark that the vessel ahead could not be seen. The vessel attempting to pass the one ahead was held liable for a collision, even though it was caused by an unforeseen emergency, such as the vessel she was passing being caught in a sudden squall. So held in The Globe, 6 Notes Cas. (Eng.) 275.

57. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 25; U. S. Comp. Stat. (1901), p. 2870); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 25; U. S. Comp. Stat. (1901), p. 2883). And see The Victory, 168 U. S. 410, 18 S. Ct. 149, 42 L. ed. 519; Snow *v.* Hill, 20 How. (U. S.) 543, 15 L. ed. 1017; Goslee *v.* Shute, 18 How. (U. S.) 463, 15 L. ed. 462; The John H. Starin, 113 Fed. 419; The Devonian, 110 Fed. 588; The Acilia, 108 Fed. 975; The William E. Ferguson, 108 Fed. 973; The Carisbrook, 107 Fed. 999; The Newport News, 105 Fed. 389, 44 C. C. A. 541; The City of Augusta, 102 Fed. 991; The Yarmouth, 100 Fed. 667; The Centurion, 100 Fed. 663, 40 C. C. A. 634; The L. C. Waldo, 100 Fed. 502, 40 C. C. A. 517; The Transfer No. 9, 100 Fed. 136; The F. W. Devoe, 94 Fed. 1019; The Columbia, 92 Fed. 936; The Wm. J. Lipsett, 92 Fed. 522, 63 U. S. App. 293, 34 C. C. A. 513; The Spiegel, 84 Fed. 1002; The George S. Shultz, 84 Fed. 508, 55 U. S. App. 274, 28 C. C. A. 476; The New York, 82 Fed. 819, 55 U. S. App. 248, 27 C. C. A. 154; The Transfer No. 8, 82 Fed. 478 [*reversed* in 96 Fed. 253, 37 C. C. A. 462]; The Albany, 81 Fed. 966, 51 U. S. App. 507, 27 C. C. A. 28; The W. H. Beaman, 45 Fed. 125; The Baltic, 41 Fed. 603; The Pequot, 30 Fed. 839; The Rosedale, 22 Fed. 737; The Narragansett, 5 Ben. (U. S.) 255, 17 Fed. Cas. No. 10,016; The E. C. Scranton, 3 Blatchf. (U. S.) 50, 8 Fed. Cas. No. 4,273, 11 N. Y. Leg. Obs. 353; Shirley *v.* The Richmond, 2 Woods (U. S.) 58, 21 Fed. Cas. No. 12,795; St. Paul F. & M. Ins. Co. *v.* The Lake Superior, 21 Fed. Cas. No. 12,244, 7 Chic. Leg. N. 259, 5 Ins. L. J. 73; Bates *v.* The Natchez, Newb. Adm. 489, 2 Fed. Cas. No. 1,102; Sinnott *v.* The Dresden, Newb. Adm. 474, 22 Fed. Cas. No. 12,908; The Relief, Olc. Adm. 104, 20 Fed. Cas. No. 11,693. This is the same as article 21 of the act of 1885 (23 U. S. Stat. at L. p. 438). In the statutory rules adopted by the act of congress of 1864 as amended up to the time of the revision of the statutes in 1878 there was no regulation corresponding to the above. Previous to the act of 1885 the navigation of narrow channels by steam-vessels was governed by the rules adopted by the board of supervising inspectors, June 10, 1871, as authorized by the act of congress of Feb. 28, 1871, which took effect Jan. 1, 1872, reënacted by U. S. Rev. Stat. (1878), § 4412.

See 10 Cent. Dig. tit. "Collision," § 177 *et seq.*

For other rules and statutes see: Rules of Supervising Inspectors of Oct. 15, 1857, in effect Jan. 1, 1858; Trinity House Rules of 1840; 9 & 10 Vict.; Steam Navigation Act of 1851 (1 Parsons Shipp. & Adm. 589, 590). As to the state statutes regulating the manner in which steamboats in narrow channels should pass each other see 1 Parsons Shipp. & Adm. 582, 583. As to the navigation of the Hudson river see 3 N. Y. Rev. Stat. (7th ed.) p. 1992. As to application of such statutes see III, A, 3. As to the English statutes relating to narrow channels see Lowndes Coll. 46; Marsden Coll. (3d ed.) 463, 464. As to the meaning of narrow channels under English decisions see Marsden Coll. (3d ed.) 464.

Of the effect of local usages in the navigation of narrow channels see The Steamship Esk *v.* The Steamship Niord, L. R. 3 P. C. 436, 1 Aspin. 1, 24 L. T. Rep. N. S. 167, 7 Moore P. C. N. S. 276, 17 Eng. Reprint 105, where it was held that the customary track in tidal rivers of vessels going up to keep out of the tide, and vessels going down to keep in the tide was a practice which a ship was justified in following, and in assuming that the other would follow. In The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9,626, it was held that if there would be risk of collision unless each kept in the usual track, the regulations to the contrary did not apply. And see III, A, 2.

Meaning of words when "safe and practicable."— In The Unity, Swabey 101, it was held by Dr. Lushington that this clause should be construed to mean that where there was no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind or anything of that kind occurring, then the obligation continued of keeping to the starboard side and no consideration of convenience, no opportunity of accelerating speed could justify a disobedience of the statute. In this case a steamer coming down the river and seeing one light on the starboard bow and another on the port bow was held in fault for attempting to pass between instead of porting. Where a vessel is on the wrong side of a river she will be presumed to have been in fault for the collision. U. S. *v.* Quinn, 8 Blatchf. (U. S.) 48, 27 Fed. Cas. No. 16,110, 3 Am. L. T. Rep. (U. S. Cts.) 180, 12 Int. Rev. Rec. 151. So held in The La Plata, Swabey 220; The Hand of Providence, Swabey 107.

Duty of vessels meeting while rounding a bend.— It was held in General Steam Nav. Co. *v.* Headley, L. R. 3 P. C. 44, 39 L. J. Adm. 20, 21 L. T. Rep. N. S. 686, 6 Moore P. C. N. S. 263, 18 Wkly. Rep. 264, 16 Eng. Reprint 725, that two ships bound up and down a river and first sighting each other on opposite sides of a point of land round which the river turned were not crossing ships

(K) *Right of Way of Fishing-Vessel.* Sailing vessels under way must keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls.

within the meaning of the regulations, and that if they were on different sides of the river, the duty of each was to pursue her course as if the other were not in sight. It was held in The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9,626, that whether they are meeting end on is to be determined by their general course in the river and not by their compass course at a particular moment. In The Nautilus, 1 Ware (U. S.) 529, 17 Fed. Cas. No. 10,058, it was held that each was bound to take the right of the stream, and in the absence of evidence explaining why they met in the center of the narrow channel and winding part of the river both were held in fault. In Lyman *v.* The Steamboat John L. Hasbrouck, 93 U. S. 405, 23 L. ed. 962, it was held by the supreme court of the United States that the principle of the decisions on this point is that whether there is a risk and what rule is applicable depends upon the relative position of the two ships as to mid-channel, and upon the customary track of ships in a river more than upon the heading of the two ships at a particular moment. In Ludwig *v.* The Propeller Free State, 91 U. S. 200, 23 L. ed. 299, a sailing ship ascending a river on a northerly course and being overtaken by a steamship starboarded until her head was N.W. by N. in order to give the steamship more room to pass on her starboard hand, and crossing the river on the N.W. by N. course she sighted another steamship descending the river and preparing to pass the ascending steamship port side to port side. The sailing ship, after being passed by the ascending steamship, ported and attempted to follow in her wake so as to pass the descending steamship port side to port side; in doing so she came into collision with the latter. It was held by the supreme court that she was in fault for not keeping her N.W. by N. course. In The Oceanus, 12 Blatchf. (U. S.) 430, 18 Fed. Cas. No. 10,415, in which two steamships were rounding a bend in the same direction, the outside boat was held in fault for attempting to get in nearer the shore to cross the bows of the other. And *compare* The Transfer No. 9, 107 Fed. 533, 46 C. C. A. 450.

Duty of two vessels meeting, one going with, and the other against, the current.— According to the custom of some rivers a boat going with the current is generally required to keep in the middle of the stream while the ascending boat keeps close to either shore. 1 Parsons Shipp. & Adm. 583. In such cases it has been held that the boat going up against the tide is less bound to precaution than the one going down with the current. Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226; The Chester, 3 Hagg. Adm. 316. In The F. & P. M. No. 2, 44 Fed. 701, a propeller ascending a river and approaching a bend gave the signal required by rule 5 of the supervising inspectors, and receiving no answer proceeded. The descending steamer not hearing the signal but believing that the ascending boat was coming up the bend proceeded on her course and shortly after signaled that she desired to pass on the south side, which signal was promptly answered by assenting signals. At this time the ascending boat had entered so far into the bend that it would have been dangerous to return and she proceeded. The descending steamer was held in fault. It was held that the assenting signal was not an invitation to proceed, but merely an indication that the steamer's desire to pass on the south side of the river was known and acquiesced in. In the case of The Rescue, 24 Fed. 44, it was held that a towboat encumbered with a tow descending the Ohio river and passing through a narrow channel had the right of way, and it was the duty of an ascending boat to remain below the narrow channel until the descending boat had emerged therefrom. The descending boat was held not in fault for not warning the ascending boat against entering the channel, both being in plain sight of each other. In The City of Springfield, 26 Fed. 158, it was held that the rule that a boat going against the tide should wait until the boat going with it has emerged before entering the channel had no application where, as in Hell Gate, there were two or three channels available.

Rules applicable to navigation of rivers generally.— In The Unity, Swabey 101, it was held that a steamer coming down the river and seeing one light on the starboard bow and another on the port bow was in fault for attempting to pass between them. She should have ported. In The Steamboat Mollie Mohler *v.* Home Ins. Co., 21 Wall. (U. S.) 230, 22 L. ed. 485, a vessel was held in fault in collision with a bridge pier for attempting to pass it in a high wind. In Lyman *v.* The Steamboat John L. Hasbrouck, 93 U. S. 405, 23 L. ed. 962, cited above, it was held that a vessel may make such variation in her course as is necessary to avoid obstructing the navigation. In Germania Ins. Co. *v.* The Steamboat Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499, it was held that the owner of a steamer was bound to know the difficulties of navigation. As to the duties and responsibility of a vessel endeavoring to pass another in a narrow channel see article 24, *supra*, III, A, 5, f, (IV), (I).

Rules for special localities — Navigation of the East river.— As to the New York statute in relation to the navigation of the East river directing that it shall be navigated as near as possible in the center of the river and that the speed shall not exceed ten miles an hour see 3 N. Y. Rev. Stat. (7th ed.) p. 1998. This act and also the act cited above requiring all steamers within the jurisdiction of the state to pass each other to starboard have been held to be valid and obligatory. The E. C. Scranton, 4 Ben. (U. S.) 127, 8 Fed. Cas. No. 4,272 [*reversed* in 3 Blatchf. (U. S.) 50, 8 Fed. Cas. No. 4,273, 11 N. Y.

This rule does not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing-vessels or boats.[58]

(L) *General Prudential Rule.* In obeying and construing these rules due regard must be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.[59]

Leg. Obs. 353]; The George Law, 3 Ben. (U. S.) 456, 10 Fed. Cas. No. 5,337; Shaw *v.* The Bridgeport, 1 Ben. (U. S.) 65, 21 Fed. Cas. No. 12,717. It was held in The Britannia, 34 Fed. 546, that as neither of these statutes had any sanction annexed to it, the mere fact that the vessel was on the wrong side of the river did not make her liable if there was ample time and space for the vessels to avoid each other by the use of ordinary care. In The W. H. Beaman, 45 Fed. 125, and The Baltic, 41 Fed. 603, tugboats were held liable for a collision under the above act resulting from running within three hundred feet of the New York shore while rounding the Battery. In The Rosedale, 22 Fed. 737, it was held that this act did not apply above the southerly end of Blackwell's island and that the course of a steamer close to the westerly shore there was prudent and justifiable. In The Relief, Olc. Adm. 104, 20 Fed. Cas. No. 11,693, it was held that a steam-vessel is bound to special watchfulness not to interfere with the course or impede the passage of ferry-boats plying between New York and Brooklyn, and that it was culpable to run a steam-tug along near the ends of the piers instead of out in the stream. In The E. C. Scranton, 3 Blatchf. (U. S.) 50, 8 Fed. Cas. No. 4,273, 11 N. Y. Leg. Obs. 353, it was held that a steam ferry-boat ascending the East river had no right to keep close to the shore as against a sailing vessel coming down the river so as to make the latter change her course. In The Narragansett, 5 Ben. (U. S.) 255, 17 Fed. Cas. No. 10,016, it was held that the mere fact that two boats of large size going in the same direction were in Hell Gate at the same time raised a presumption of fault and that the one chargeable for their being there was responsible in the case of collision. In The Pequot, 30 Fed. 839, it was held that any custom which permitted Sound steamers to claim exemption from article 16 (now article 19) when approaching ferries in the East river on the ebb-tide was opposed to law and could not prevail.

Mississippi river.— The following customs have been upheld with reference to this river: That the ascending boat should keep near the right bank and the descending boat in the middle of the river. Snow *v.* Hill, 20 How. (U. S.) 543, 15 L. ed. 1017; Goslee *v.* Shute, 18 How. (U. S.) 463, 15 L. ed. 462; Bates *v.* The Natchez, Newb. Adm. 489, 2 Fed. Cas. No. 1,102. That the ascending boats should run the points and the descending boats the bends. Shirley *v.* The Richmond, 2 Woods (U. S.) 58, 21 Fed. Cas. No. 12,795. That the descending boat should run down the bend where she finds the strongest current and the deepest water, and that the ascending boat should hug the bar as close as she could with safety in order to avoid the resistance of the current. Sinnott *v.* The Dresden, Newb. Adm. 474, 22 Fed. Cas. No. 12,908. It was held in St. Paul F. & M. Ins. Co. *v.* The Lake Superior, 21 Fed. Cas. No. 12,244, 7 Chic. Leg. N. 259, 5 Ins. L. J. 73, that rule 3 of the supervising inspectors applied only to the navigation of narrow channels and in fogs; it was not applicable to the main channel of the Mississippi. As to navigation of Mississippi see Jakobsen *v.* Springer, 87 Fed. 948, 31 C. C. A. 315.

Further as to narrow channels see *supra*, II, A, 2, d.

As to docks and harbors, mooring and anchoring see *supra*, II, A, 2, d.

58. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 26; U. S. Comp. Stat. (1901), p. 2871); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 26; U. S. Comp. Stat. (1901), p. 2883).

59. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 27; U. S. Comp. Stat. (1901), p. 2871); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 27; U. S. Comp. Stat. (1901), p. 2884).

History and application of this rule.—This rule is the same as article 23 of the act of 1885 with the addition of the words "and collision" so that the clause reads "all dangers of navigation and collision." U. S. Rev. Stat. (1878), § 4233, rule 24, the rule corresponding to this article being article 19 of the act of 1864, is the same as the above article in the act of 1885 down through the word "circumstances." The remainder of the rule is as follows: "Which may exist in any particular cases rendering a departure from them necessary in order to avoid immediate danger." In England 36 & 37 Vict. § 17, as to the presumption of fault arising from an infringement of the regulations, contains a clause "unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary," which had a meaning similar to this article. Marsden Coll. (3d ed.) 488. A vessel is not justified in departing from the rules because she fears that the other boat will not comply with them. The Superior, 6 Notes Cas. (Eng.) 607; The Test, 5 Notes Cas. (Eng.) 276. *Compare* The Friends, 7 Jur. 307, 1 W. Rob. 478. A vessel will not be justified in an infringement of the regulations because she thinks that the manœuver which has been agreed upon between her and another vessel is impossible. The St. Johns, 42 Fed. 75. In The Steam Propeller Corsica *v.* Schuyler, 9 Wall. (U. S.) 630, 19 L. ed. 804, a steamer was held in fault for starboarding

(v) *Sound Signals For Passing Steamer*[60]—(a) *The International*

in order to help another steamer whose duty it was to keep out of her way to cross her bows. It has been held that convenience is no excuse for a departure from the regulations. General Iron Screw Co. *v.* Moss, 15 Moore P. C. 122, 15 Eng. Reprint 439 [*cited* in Marsden Coll. (3d ed.) 493]. The fact that if the other vessel had obeyed the law the collision would not have happened is no excuse for an infringement. So in The Steam Ferry-Boat America *v.* Camden, etc., R. Transp. Co., 92 U. S. 432, 23 L. ed. 724, in which two steamships were meeting end on and the collision would not have occurred if either had put her helm to port, both were held in fault. A departure from the rules is justified where the collision is imminent and it is the only chance of safety. So in The Eliza S. Potter, 35 Fed. 220. *Compare* The Benares, 5 Aspin. 53, 48 L. T. Rep. N. S. 127, in which a steamer was held justified in keeping on at full speed when it appeared that that was the one chance of escaping collision. In all these cases it is to be noted that the necessity of a departure from the rules must be clearly established and also that the step taken was the right step. 1 Parsons Shipp. & Adm. 594. In The Memnon, 6 Aspin. 317, 59 L. T. Rep. N. S. 289, 62 L. T. Rep. N. S. 84, the steamer S was approaching this vessel on the starboard bow and taking no steps to keep out of the way, and the speed of the latter was such that under the existing circumstances she would finally have passed safely along the former's bows. The Memnon was held in fault for not stopping her engines, although, had the S kept her course, the risk of collision would have been increased and not diminished by the M slackening her speed. In The Concordia, L. R. 1 A. & E. 93, 12 Jur. N. S. 77, 14 L. T. Rep. N. S. 896, in which two steamships were meeting in the Thames end on and one starboarded in order, as was alleged, to clear a barge, it was held that, in the absence of proof that the starboarding was necessary, she was in fault for the collision. When it is evident that one vessel is not able to comply with the rules it becomes the duty of the other to depart from the regulations if a collision can thus be avoided. So held in Wilson *v.* Canada Shipping Co., 2 App. Cas. 389, 3 Aspin. 361, 36 L. T. Rep. N. S. 155, where two sailing vessels close-hauled met so unexpectedly that the time was too short for the ship on the port tack to keep out of the way. In The Schooner Ann Caroline *v.* Wells, 2 Wall. (U. S.) 538, 17 L. ed. 833, in which the port-tacked ship could not bear up without risk of collision and could not go about because of a shoal, the ship on the starboard tack was held in fault for not keeping out of the way. In The Rosalie, 4 Aspin. 384, 50 L. J. Adm. 3, 44 L. T. Rep. N. S. 32, 5 P. D. 245, a schooner on the starboard tack was held in fault for doing nothing before she came into collision with a smack hove to on the port tack. In The Eider, 37 Fed. 903. a bark close-hauled on the starboard tack was held solely in fault for a collision with a bark that had just been in stays and had not gathered way on the port tack. In The Lady Anne, 15 Jur. 18, this vessel close-hauled on the starboard tack might have avoided the collision with a ship close-hauled on the port tack by putting her helm down at the last moment and easing off her sheets. She was held in fault for not doing so. *Compare* Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302. If an adherence to the rules would drive the other ship into danger it is the duty of a vessel to depart from them. A sailing vessel, for example, must not persist in her course so as to drive the steamer into danger or exposure to avoid her, particularly after being hailed by the steamer to change her course. As to the duty of an overtaken vessel in a narrow channel to change her course if there was not sufficient room for the other to pass see The C. H. Northam, 37 Fed. 238; The Dentz, 29 Fed. 525. It is the duty of a vessel to depart from the regulations when she would put herself in a position of danger by adhering to them. So in The Orwell, 6 Aspin. 309, 57 L. J. Adm. 61, 59 L. T. Rep. N. S. 312, 13 P. D. 80, 36 Wkly. Rep. 703. See The Schooner Ann Caroline *v.* Wells, 2 Wall. (U. S.) 538, 17 L. ed. 833, cited under article 17. As to the special circumstances requiring a departure from the regulations in the navigation of narrow channels see article 25, *supra*, III, A, 5, f, (IV), (J). In The Warrior, L. R. 3 A. & E. 553, 1 Aspin. 400, 27 L. T. Rep. N. S. 101, 21 Wkly. Rep. 82, it was held that the fact that a steam-tug had a heavy ship in tow and a strong wind and tide against her was not a special circumstance which justified her departing from the rule requiring her to keep out of the way of an approaching sailing ship.

For other cases under this article see Cooper *v.* Eastern Transp. Co., 75 N. Y. 116; MacMahon *v.* Brooklyn, etc., Ferry Co., 10 N. Y. App. Div. 376, 41 N. Y. Suppl. 1026, 75 N. Y. St. 1394; The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943; The Ludvig Holberg, 157 U. S. 60, 15 S. Ct. 477, 39 L. ed. 620; The Blue Jacket, 144 U. S. 371, 12 S. Ct. 711, 36 L. ed. 469; The F. W. Vosburgh, 107 Fed. 539; The Patria, 107 Fed. 157, 46 C. C. A. 211; Squires *v.* Parker, 101 Fed. 843, 42 C. C. A. 51; The Patria, 92 Fed. 411; The Friesland, 76 Fed. 591; The Chicago, 71 Fed. 537; Bigelow *v.* Nickerson, 70 Fed. 113, 34 U. S. App. 261, 17 C. C. A. 1, 30 L. R. A. 336 [*affirming* 59 Fed. 200]; The George W. Childs, 67 Fed. 269; The Mary Augusta, 55 Fed. 343; The New York, 53 Fed. 553; The Iron Chief, 53 Fed. 507; The Chatham, 52 Fed. 396, 8 U. S. App. 104, 3 C. C. A. 161 [*affirming* 44 Fed. 384]; Lane *v.* The A Denike, 3 Cliff. (U. S.) 117, 14 Fed. Cas. No. 8,045; Crockett *v.* Riley, 6 Fed. Cas. No. 3,402*a*.

60. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 28; U. S. Comp.

Rules. The words "short blast" used in this article mean a blast of about one second's duration. When vessels are in sight of one another, a steam-vessel

Stat. (1901), p. 2871); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 28; U. S. Comp. Stat. (1901), p. 2884).

History and application of this rule.— This is the same as article 19 of the act of 1885 (23 U. S. Stat. at L. p. 438) with the addition of the first sentence and the words "or siren" after "whistle" in the second sentence and the substitution of the word "shall" for "may" in the clause "shall indicate," etc., and the substitution of the words "my engines are" for the words "I am," in the last sentence. The corresponding rule for inland waters is contained in article 16. It had been held under the former act that this rule did not apply to harbors in merely local navigation. The Greenpoint, 31 Fed. 231. Such waters being governed by the rules adopted by the board of supervising inspectors. Under the rules of the supervising inspectors it has been held as follows: That the same signal should be given when a vessel is in an unusual or dangerous position as if she were unmanageable. The Manhasset, 34 Fed. 408. That the signal of one whistle may be used in reply to a signal of two whistles to signify a vessel's unwillingness to accede to the request for a departure from the rules conveyed by the signal of two whistles. The Garden City, 19 Fed. 529. As to the signal of two whistles to be used when the steamers are so far on the starboard side of each other as not to be considered by pilots as meeting head and head see The George L. Garlick, 20 Fed. 647. It is a pilot's duty to signal when approaching within half a mile. It is a fault to change her course before receiving an answer. The Josephine B., 45 Fed. 909; The Hudson, 14 Fed. 489. It is the duty of a vessel hearing such a signal to reply promptly, and if the signal be two whistles, the response should be given before other manœuvers are taken, when no reason for delay appears. The B. B. Saunders, 19 Fed. 118. In The Bridgeport, 35 Fed. 224, a tug with a tow going through the East channel toward the Sound answered with one whistle the signal of one whistle by a steamboat approaching in the opposite direction; but assuming that the steamboat intended to go around by the West channel, the tug failed to keep to the starboard side of the channel, and the tug was held in fault for a collision on the ground that her one whistle under the circumstances required her to keep to the starboard side of the channel, and that it was no fault in the steamboat, under the circumstances, after giving one signal to take the easterly channel. In The Galileo, 24 Fed. 386, this vessel lying off quarantine and backing and filling in order to turn around signaled one whistle to a tug with tow coming down the channel, and the tug replied with one whistle; but owing to a delay on the part of the steamer in ordering full speed ahead in accordance with her signal, she came into collision with the vessel in tow of the tug, and the steamer was held solely in fault. In The Garden City, 19 Fed. 529, in which one steamer tried to pass to the left of the other without receiving the assenting signal, she was held in fault, and the other boat was also held in fault for not answering promptly her non-assenting signal and thus preventing embarrassment. In The D. Newcomb, 16 Fed. 274, a steamer was held in fault for a failure to respond to one astern of her, which had signaled her desire to pass. In The Franconia, 3 Fed. 397, in which a tug having a steamer on her port hand blew two whistles and attempted to cross the latter's course without receiving an assenting signal, she was held in fault for this and the steamer also in fault for not answering. In The Hudson, 14 Fed. 489, this steamer was held in fault for giving two whistles and immediately making a strong sheer to port without waiting for any signals of assent. In The B. B. Saunders, 19 Fed. 118, the tug O crossing the North river on the port bow of the S signaled two whistles and the S gave orders to slow without first answering; and then the O sounded one whistle, which the S replied to with one and signaled full speed ahead. The S was held in fault for manœuvering in accordance with the signal of O without first answering it. An assenting response of two whistles to a previous signal of two whistles imposes no duty on the answering boat to pull away to the left, or to keep out of the way; it is merely an announcement to the other vessel that her intention is known and an agreement to do nothing to thwart her, but when the collision becomes imminent both are bound to do all they can to prevent it, whether the previous signal was one or two whistles. The Admiral, 39 Fed. 574; The Nereus, 23 Fed. 448; The Wm. H. Payne, 20 Fed. 650. In The City of Chester, 24 Fed. 91, a tug hearing two whistles from a ferry-boat gave one in reply and proceeded, but afterward observing the ferry-boat continue her course the tug backed. She was held not in fault for so doing. In The Susquehanna, 35 Fed. 320, in which a signal of two whistles intended for one boat was taken by another as intended for her and was answered by two whistles, the first having repeated her signal on hearing the answer of the other was estopped from denying that it was intended for the latter. A steamer cannot by means of signals dictate to the other a departure from the regulations. In order to excuse such a departure she must show that her signal to that effect was given in due season and that it was assented to before she proceeded to take the course proposed. The Pegasus, 15 Fed. 921; The Mary Shaw, 5 Hughes (U. S.) 266, 6 Fed. 918; The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9,626. In The Garden City, 19 Fed. 529, this ferry-boat going down the East river approaching the ferry-boat Republic, which was on the starboard bow and going across the

under way, in taking any course authorized or required by these rules, must indicate that course by the following signals on her whistle or siren, namely: One short blast to mean, "I am directing my course to starboard." Two short blasts to mean, "I am directing my course to port." Three short blasts to mean, "My engines are going at full speed astern." [61]

(B) *The Inland Rules.* When vessels are in sight of one another a steam-vessel under way whose engines are going at full speed astern must indicate that fact by three short blasts on the whistle.[62]

(VI) *PRECAUTION.* Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.[63]

river, gave two whistles and starboarded her helm without waiting for a reply from the Republic. The Garden City then, after going a length, repeated her signal and at the same time stopped and reversed her engines. The Republic on hearing the first two whistles of the Garden City stopped her engines, and on the Garden City stopping the Republic blew one whistle and started ahead. It was held that as there was no necessity for the Garden City going to the left, and the signal of two whistles being too late for the expression of a positive right, the signal was lawful only as a proposition or request to the Republic to be allowed to pass to the left by the latter's aid and consent; and the Garden City was held in fault for undertaking to pass to the left and cross the bows of the Republic without the assenting signal. The Republic was also held in fault for not answering the signal promptly and thereby preventing embarrassment and confusion. The case of The Nereus, 23 Fed. 448, is an example of an original signal by one steamer given simultaneously with the signal of another being understood by the latter as an answer, and of a collision resulting from this misunderstanding and confusion.

As to duty to proceed in accordance with signals see The St. John, 154 U. S. 586, 14 S. Ct. 1170, 20 L. ed. 645; The Des Moines, 154 U. S. 584, 14 S. Ct. 1168, 20 L. ed. 821; The Mary McWilliams, 47 Fed. 333; The Bridgeport, 35 Fed. 224; Sinnott *v.* The Dresden, Newb. Adm. 474, 22 Fed. Cas. No. 12,908.

Upon the duty to give and answer signals see The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126 [*reversing* 82 Fed. 819, 55 U. S. App. 248, 27 C. C. A. 154]; The Genevieve, 96 Fed. 859; The New York, 86 Fed. 814, 56 U. S. App. 146, 30 C. C. A. 628; The A. Crossman, 58 Fed. 808; The Ice King, 52 Fed. 894; The Louise, 52 Fed. 885, 8 U. S. App. 138, 3 C. C. A. 330 [*affirming* 49 Fed. 84]; The Roslyn, 22 Fed. 687; The City of Greenville, 22 Fed. 347; U. S. *v.* Keller, 19 Fed. 633; The Wm. H. Beaman, 18 Fed. 334; The James M. Thompson, 12 Fed. 189.

Upon the effect of signals as to right of way see The North Star, 108 Fed. 436; The Transfer No. 9, 107 Fed. 533, 46 C. C. A. 450; The Archey Crossman, 106 Fed. 984; The J. B. King, 106 Fed. 980; The Lansdowne, 105 Fed. 436; The City of Macon, 100 Fed. 139; The Ohio, 91 Fed. 547, 33 C. C. A. 667; The Eldorado, 89 Fed. 1015, 45 U. S. App. 755, 32 C. C. A. 464; The M. Vandercook, 88 Fed. 559; The Baltimore, 56 Fed. 127; The Rescue, 51 Fed. 927; The C. R. Stone, 49 Fed. 475; The F. & P. M. No. 2, 44 Fed. 701; The William Fletcher, 38 Fed. 156; The Dentz, 29 Fed. 525; The Bay Queen, 27 Fed. 813; The Plymouth Rock, 26 Fed. 40; The Frostburg, 25 Fed. 451; The Nereus, 23 Fed. 448; The Quickstep, 2 Biss. (U. S.) 291, 20 Fed. Cas. No. 11,509, 2 Chic. Leg. N. 285; The Mary Shaw, 5 Hughes (U. S.) 266, 6 Fed. 918.

As to signals before rounding bend see The Zouave, 90 Fed. 440; *In re* Saville, 86 Fed. 800; The R. H. Waterman, 82 Fed. 478.

For other cases under this article see The Victory, 168 U. S. 410, 18 S. Ct. 149, 42 L. ed. 519 [*modifying* 63 Fed. 631 and *reversing* 68 Fed. 395, 25 U. S. App. 271, 15 C. C. A. 490]; Occidental, etc., Steamship Co. *v.* Smith, 74 Fed. 261, 44 U. S. App. 351, 20 C. C. A. 419 [*affirming* 61 Fed. 338]; The Lowell M. Palmer, 58 Fed. 701; The Parthian, 55 Fed. 426, 5 U. S. App. 314, 5 C. C. A. 171; The Titan, 49 Fed. 479, 1 U. S. App. 123, 1 C. C. A. 324; The Volunteer, 49 Fed. 477; The Reading, 38 Fed. 269; The Farragut, 35 Fed. 617; The R. W. Burrowes, 7 Blatchf. (U. S.) 374, 21 Fed. Cas. No. 12,180; Western Ins. Co. *v.* The Goody Friends, 1 Bond (U. S.) 459, 29 Fed. Cas. No. 17,436.

61. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 28; U. S. Comp. Stat. (1901), p. 2871).

62. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 28; U. S. Comp. Stat. (1901), p. 2884). And see article 18 *supra*, III, A, 5, f, (IV), (C), (2).

63. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 29; U. S. Comp. Stat. (1901), p. 2871); Inland Rules (30 U. S. Stat. at. L. p. 96, c. 4, [§ 1], art. 29; U. S. Comp. Stat. (1901), p. 2884). And see The George W. Roby, 111 Fed. 601, 49 C. C. A. 481 [*modifying In re* Lakeland Transp. Co., 103 Fed. 328]; Merchants', etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 48 C. C. A. 128; The Kennebec, 108 Fed. 300, 47 C. C. A. 339; The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138; The Hanson H. Keyes, 107 Fed. 537.

History and effect of this rule.— This is

(VII) *Lights on United States Naval Vessels and Revenue Cutters.* The exhibition of any light on board of a vessel of war of the United States or a revenue cutter may be suspended whenever, in the opinion of the secretary of the navy, the commander-in-chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.[64]

(VIII) *Distress Signals*[65]—(A) *The International Rules.* When a vessel is in distress and requires assistance from other vessels or from the shore the following are the signals to be used or displayed by her, either together or separately, namely:

In the daytime: First. A gun or other explosive signal fired at intervals of about a minute. Second. The international code signal of distress indicated by N C. Third. The distance signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball. Fourth. A continuous sounding with any fog-signal apparatus.

At night: First. A gun or other explosive signal fired at intervals of about a minute. Second. Flames on the vessel (as from a burning tar barrel, oil barrel, and so forth). Third. Rockets or shells throwing stars of any color or description, fired one at a time, at short intervals. Fourth. A continuous sounding with any fog-signal apparatus.[66]

(B) *The Inland Rules.* When a vessel is in distress and requires assistance from other vessels or from the shore the following are the signals to be used or displayed by her, either together or separately, namely:

In the daytime: A continuous sounding with any fog-signal apparatus, or firing a gun.

At night: First. Flames on the vessel as from a burning tar barrel, oil barrel, and so forth. Second. A continuous sounding with any fog-signal apparatus, or firing a gun.[67]

B. Presumption of Fault Arising From Breach of Regulations —1. Rule in the United States — a. In Federal Courts. The rule in the federal courts is that where a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions the burden is upon her[68] of showing that her fault could not have been a contributory cause of the collision.

the same as article 24 of the act of 1865. There is no rule corresponding to this contained in the act of 1864, nor in the United States Revised Statutes of 1878. It does not appear that the enactment of this rule has altered in any respect the duties and obligations of the masters and owners, or that it has had any effect whatever.

As to the "neglect" referred to in this article see *supra*, II, A.

Further as to lights and signals see *supra*, III, A, 5, f, (II), (III).

Further as to lookout see *supra*, II, A, 2, d.

64. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 30; U. S. Comp. Stat. (1901), p. 2884). And *compare* International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 13; U. S. Comp. Stat. (1901), p. 2867, *supra*, note 26, p. 339.

65. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 21; U. S. Comp. Stat. (1901), p. 2871); Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 31; U. S. Comp. Stat. (1901), p. 2884).

As to lights of steamers when aground see The Maurice B. Grover, 92 Fed. 678, 63 U. S. App. 162, 34 C. C. A. 616.

As to lights of schooner not under command see The Cheruskia, 92 Fed. 683.

66. International Rules (26 U. S. Stat. at L. p. 320, c. 802, [§ 1], art. 31; U. S. Comp. Stat. (1901), p. 2871).

67. Inland Rules (30 U. S. Stat. at L. p. 96, c. 4, [§ 1], art. 31; U. S. Comp. Stat. (1901), p. 2884).

68. There seems to have been a gradual change in the direction of a stricter enforcement of the rules and regulations in the United States courts during the past fifty years. In The Santa Claus, Olc. Adm. 428, 435, 21 Fed. Cas. No. 12,327, Judge Betts speaking of the rules of maritime law and also of the regulations says: "They are employed as standards by which Courts of Admiralty regulate, in a general sense, their appreciation of the care, skill or fidelity with which the respective vessels have performed their duties in case of a collision." In Kelly *v.* Thompson, U. S. D. C. 1867 [*cited* in 1 Parsons Shipp. & Adm. 597], Judge Lowell says: "The statute only defines in some particulars what measures and precautions are to be observed and these are no more or otherwise obligatory than those which are established by the unwritten law." In Clark *v.* The Steamer Admiral Farragut, 10 Wall. (U. S.) 334, 19 L. ed. 946, the absence of a special lookout was held not to be *prima facie*

b. In the State Courts. In the state courts it has been held that a non-compliance with the legal rules of navigation authorizes a presumption in the absence of evidence to the contrary that the collision was probably due to such non-compliance.[69]

2. Rule in England. In England the effect of an infringement of the regulations is prescribed by acts of parliament.[70] In the cases arising under these acts the rule appears to be identical with that of our federal courts.[71]

evidence of negligence unless it had something to do with the happening of the accident. But in the case of The Steamship Pennsylvania *v.* Troop, 19 Wall. (U. S.) 125, 22 L. ed. 148, the court held that the burden of proof was upon the infringing vessel to show not merely that her fault might not have been one of the causes of the collision or that it probably was not but that it could not have been. This was a collision at sea between a bark and a steamer and the steamer was found in fault for not moderating her speed in the fog and the bark for ringing a bell instead of sounding a fog-horn. The bark was hove to and moving through the water about a mile an hour and there was evidence in the case that the bell could have been heard as far as a fog-horn, but the court held that it was impossible to rebut the presumption that the breach of the regulation was a contributory cause of the collision. In England in a libel arising out of the same collision by owners of the bark against the steamer it had been held that the bark was solely in fault. The Pennsylvania, 23 L. T. Rep. N. S. 55. Since this case the current of decisions appears to be that in order to rebut the presumption of fault arising from a breach of the regulations, it is necessary to show conclusively, or at least beyond a reasonable doubt, that such violation could not have contributed to the collision. Desty Shipp. & Adm. § 387; Myers Fed. Dec. tit. Maritime Law, § 6244. As in the case of a failure to answer signals promptly in accordance with inspector's rules (The Garden City, 19 Fed. 529; The B. B. Saunders, 19 Fed. 118), to keep a proper lookout (McCabe *v.* Old Dominion Steamship Co., 31 Fed. 234; The Leland, 19 Fed. 771), to exhibit lights (The Steamship City of Washington *v.* Baillie, 92 U. S. 31, 23 L. ed. 600; The State of Alabama, 17 Fed. 847; The Ariadne, 2 Ben. (U. S.) 472, 1 Fed. Cas. No. 524; Haney *v.* The Louisiana, 11 Fed. Cas. No. 6,020, 6 Am. L. Reg. 422), or to stop and reverse in accordance with rule 21 (The Alaska, 22 Fed. 548; The Jay Gould, 19 Fed. 765). So also in the case of a failure to show a lighted torch. The Oregon, 27 Fed. 751, 758, where the court said in effect that nothing short of an absolute certainty that it could do no good, to be established by proof on the trial, could excuse such a breach, even though the side-lights were burning brightly and could have been seen by a competent lookout. See also The Frank P. Lee, 30 Fed. 277; The Algiers, 21 Fed. 343. And where a vessel displayed a flare-up light when she was not being overtaken in violation of article 2 she was held in fault in the absence of proof that this could not have contributed to the collision. The Algiers, 38 Fed. 526. In the act of March, 1849, regarding lights to be carried upon vessels navigating the Lakes there was a provision that the owners of vessels neglecting to comply with the regulation should be liable to the injured party for all loss or damage resulting from said neglect. This act, it has been held, did not prevent the wrong-doing vessel recovering half of her damages from the other where the latter was also in fault. Chamberlain *v.* Ward, 21 How. (U. S.) 548, 16 L. ed. 211.

69. So held in a case in which it was left to a referee to decide whether the lack of a proper lookout did in fact contribute to the collision. Blanchard *v.* New Jersey Steamboat Co., 59 N. Y. 292. In a case in which the collision took place on a moonlight night when the vessel herself could be seen two miles, it was held that the absence of side-lights did not constitute contributory negligence. Whitehall Transp. Co. *v.* New Jersey Steamboat Co., 51 N. Y. 369. To the same effect see Hoffman *v.* Union Ferry Co., 47 N. Y. 176, 7 Am. Rep. 435.

70. Marsden Coll. (3d ed.) 64 note.

By 36 & 37 Vict. c. 85, s. 17, it is enacted that if it is proved to the court that any of the regulations have been infringed the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary. This section has been construed to refer only to a regulation which was in the circumstances applicable. The Stoomvaart Mattschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 5 App. Cas. 876, 4 Aspin. 567, 52 L. J. Adm. 1, 42 L. T. Rep. N. S. 610, 29 Wkly. Rep. 173.

71. It imposes upon the vessel that has infringed the burden of proving that such infringement could not by any possibility have contributed to the collision. The Fanny M. Carvill *v.* The Peru, 13 App. Cas. 455 note, 2 Aspin. 565, 44 L. J. Adm. 34, 32 L. T. Rep. N. S. 646, 24 Wkly. Rep. 62. Where the breach clearly did not contribute to the collision this section will not apply. As there was not a proper lookout on one vessel it was held that the absence of lights on the other could not have contributed to the collision. The Englishman, 3 Aspin. 506, 47 L. J. Adm. 9, 27 L. T. Rep. N. S. 412, 3 P. D. 18. And see The Chusan, 5 Aspin, 476, 53 L. T. Rep. N. S. 60. In a case in which the binnacle light was plainly visible over the stern the fact of her not showing a white light or flare to an overtaking vessel was held to be immaterial. The Breadalbane, 4 Aspin. 505, 46

3. Failure to Stand By After Collision. It is provided by statute that if the master of any vessel in collision fails to stand by to render assistance and to give the name of his vessel, her ownership, registry, etc., to the other vessel, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.[72]

IV. Rights and Liabilities Growing Out of Collision.

A. Liability For Damage Caused by Collision — 1. Liability of Ship and Her Owners — a. In General. The distinction between the liability of the ship

L. T. Rep. N. S. 204, 7 P. D. 186. To the same effect see The Fanny M. Carvill *v.* The Peru, 13 App. Cas. 455 note, 2 Aspin. 565, 44 L. J. Adm. 34, 32 L. T. Rep. N. S. 646, 24 Wkly. Rep. 62.

Where a ship is unable to comply through inability resulting from previous negligence, section 17 has been held not to apply. The Chilian, 4 Aspin. 478, 45 L. T. Rep. N. S. 623; The Calypso [*cited* in Marsden Coll. (3d ed.) 44, note *d*].

The burden is on the ship infringing to show that the infringement was unavoidable. Emery *v.* Cichero, 9 App. Cas. 136, 5 Aspin. 219, 53 L. J. P. C. 9, 50 L. T. Rep. N. S. 305; The Memnon, 6 Aspin. 317, 59 L. T. Rep. N. S. 289, 62 L. T. Rep. N. S. 84; The Vera Cruz, 5 Aspin. 270, 53 L. J. Adm. 33, 51 L. T. Rep. N. S. 104, 9 P. D. 88, 32 Wkly. Rep. 783; The Hibernia, 2 Aspin. 454, 31 L. T. Rep. N. S. 803, 24 Wkly. Rep. 60.

Section 17 of this act, it seems, does not apply where the breach is an involuntary act caused by the imminence of the peril and the fault of the other ship. Marsden Coll. (3d ed.) 56. Nor where it was the one chance of safety, even though the manœuver was not successful. The Benares, 5 Aspin. 171, 53 L. J. Adm. 2, 49 L. T. Rep. N. S. 702, 9 P. D. 16, 32 Wkly. Rep. 268. Nor where the collision is from the first inevitable. The Buckhurst, 4 Aspin. 84, 51 L. J. Adm. 10, 46 L. T. Rep. N. S. 108, 6 P. D. 152, 30 Wkly. Rep. 232. Nor where there was no opportunity of complying with it. Baker *v.* The Theodore H. Rand, 12 App. Cas. 247, 6 Aspin. 122, 56 L. J. Adm. 65, 56 L. T. Rep. N. S. 343, 35 Wkly. Rep. 781; The Emmy Haase, 5 Aspin. 216, 53 L. J. Adm. 43, 50 L. T. Rep. N. S. 372, 9 P. D. 81, 32 Wkly. Rep. 880. But it has been held to apply in inland navigation (The Germania [*cited* in Marsden Coll. (3d ed.) 60, note *y*]; The Owl, 9 Sc. Sess. Cas. (4th S.) 118), but not to rules made under a local act which did not contain the penal clause (The Harton, 53 L. J. Adm. 25, 9 P. D. 44).

For other cases decided in England under this section see China Merchants' Steam Nav. Co. *v.* Bignold, 7 App. Cas. 512, 5 Aspin. 39, 51 L. J. Adm. 92, 47 L. T. Rep. N. S. 485, 31 Wkly. Rep. 303; The Hermod, 6 Aspin. 509, 62 L. T. Rep. N. S. 670; The Duke of Buccleuch, 6 Aspin. 471, 62 L. T. Rep. N. S. 94, 15 P. D. 86; The Imbro, 6 Aspin. 392, 58 L. J. Adm. 49, 60 L. T. Rep. N. S. 936, 37 Wkly. Rep. 559; The Main, 6 Aspin. 37, 55 L. J. Adm. 70, 55 L. T. Rep. N. S. 15, 11 P. D. 132, 34 Wkly. Rep. 678; The Love Bird, 4 Aspin. 427, 44 L. T. Rep. N. S. 650, 6 P. D. 80.

For previous English acts of parliament upon the infringement of the statutory rules of navigation and the cases decided thereunder see 14 & 15 Vict. c. 79, § 28; 17 & 18 Vict. c. 104, § 298; 25 & 26 Vict. c. 63, § 29; Beal *v.* Marchais, L. R. 5 P. C. 316, 2 Aspin. 1, 28 L. T. Rep. N. S. 822, 21 Wkly. Rep. 653; The Fenham, L. R. 3 P. C. 212, 23 L. T. Rep. N. S. 329, 6 Moore P. C. N. S. 501, 16 Eng. Reprint 815; Tuff *v.* Warman, 2 C. B. N. S. 740, 26 L. J. C. P. 263, 5 Wkly. Rep. 685, 89 E. C. L. 740; Morrison *v.* General Steam Nav. Co., 8 Exch. 733, 22 L. J. Exch. 233; The Pyrus, Holt Adm. 40, 2 Mar. L. Cas. 288; The Milan, 31 L. J. Adm. 105, 5 L. T. Rep. N. S. 590, Lush. 388; The Aurora, Lush. 327; Churchward *v.* Palmer, 10 Moore P. C. 472, Swabey 88, 4 Wkly. Rep. 504, 755, 14 Eng. Reprint 570; The Swanland, 2 Spinks 107; The Telegraph, 1 Spinks 427; The Fairy, 1 Spinks 298; The Aliwal, 1 Spinks 96; The Juliana, Swabey 20; The Palestine, 13 Wkly. Rep. 111.

And in Canada see 31 Vict. c. 58, § 6; 43 Vict. c. 29; The Charles Chaloner, 19 L. C. Jur. 197; The Eliza Keith, 3 Quebec 143; The Germany, 2 Stuart Adm. (L. C.) 158; The Arabian, 2 Stuart Adm. (L. C.) 72; The Aurora, 2 Stuart Adm. (L. C.) 52.

72. 36 & 37 Vict. c. 85, § 16.

For cases arising under this section see The Magnet, L. R. 4 A. & E. 417, 2 Aspin. 478, 32 L. T. Rep. N. S. 129; The Valleyo, Adm. Div. April 27, 1887; The Emmy Haase, 5 Aspin. 216, 53 L. J. Adm. 43, 50 L. T. Rep. N. S. 372, 9 P. D. 81, 32 Wkly. Rep. 880; The Adriatic, 3 Aspin. 16, 33 L. T. Rep. N. S. 102; Reg. *v.* Keyn, 2 Ex. D. 63, 46 L. J. M. C. 17, 25 Wkly. Rep. Dig. 87; The British Princess [*cited* in Marsden Coll. (3d ed.) 61, note *d*]. See *Ex p.* Ferguson, L. R. 6 Q. B. 280, 1 Aspin. 8, 40 L. J. Q. B. 105, 24 L. T. Rep. N. S. 96, 19 Wkly. Rep. 746 (decided under 25 & 26 Vict. c. 63, § 33); The Queen, L. R. 2 A. & E. 354, 38 L. J. Adm. 39, 20 L. T. Rep. N. S. 855; The Hannibal, L. R. 2 A. & E. 53, 37 L. J. Adm. 12.

26 U. S. Stat. at L. p. 425, took effect Dec. 15, 1890, and was held to merely put upon the vessel failing to stand by the burden of showing that she was not responsible for the collision. The Hercules, 80 Fed. 998, 42 U. S. App. 431, 26 C. C. A. 301. See also The Robert Graham Dun, 70 Fed. 270, 33 U. S. App. 297, 17 C. C. A. 90; Kalt *v.* The Kenilworth, 64 Fed. 890. As to the rule with reference to

as a *res* and that of her owner seems to be that, whereas the maritime lien attaches to the ship in all cases of damage inflicted by her in the course of her ordinary and lawful employment through the wrongful act of those in charge,[73] the liability of the owner exists not *qua* owner, but only as master and employer, and he is not liable merely because he is the owner, unless it is also shown that those navigating were his servants.[74] In other words to sustain a libel against the ship it is only necessary to show that the wrongful act of the captain or crew was one within the scope of their employment, whereas to hold the owner liable it must also appear that between him and the captain and crew there existed the relation of master and servant.[75]

b. For Acts of Master and Crew. The ship and her owners are liable for the wilful as well as the negligent acts of the master and crew committed within the scope of their employment. This is the rule in the federal and state courts. In England it has been held that there is no liability upon the ship or her owners for wilful wrong-doing of the master or crew.[76] Where no voluntary action on the

standing by before the passage of the above act see Weaver *v.* The Ormst, 2 Fed. 811.

73. The origin of the maritime lien (*infra*, IV, B), which under the admiralty law the collision impresses upon the wrong-doing vessel, is supposed by some writers to be found in the English law of Deodand or the noxal action of the civil law, where the offending thing was surrendered to the party injured thereby; but it appears to be the better opinion that the right to attach the ship has arisen simply as a ready and effectual means to compel the wrong-doer to appear and defend. The Steamship China *v.* Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67; The Lemington, 2 Aspin. 475, 32 L. T. Rep. N. S. 69, 23 Wkly. Rep. 421.

The person primarily liable for damage caused by collision is he by whose wrongful act the collision took place, that is, the master or crew of the offending vessel. Stort *v.* Clements, Peake 107; Marsden Coll. (3d ed.) 66. It is owing to the usual inability of such person to respond by payment of damages that the law has provided a remedy against the ship-owner and also one against the ship. Marsden Coll. (3d ed.) 67.

As to the personal liability of the master it seems that he is not liable for collision caused by fault of pilot. 3 Kent Comm. 176; Marsden Coll. (3d ed.) 67.

As to liability of master when not on board at time of collision see De Harde *v.* The Magdalena, 24 La. Ann. 267. The master is responsible for the negligence of the crew, but the crew, it has been held, are liable to third persons only for wilful defaults. The City of New York, 25 Fed. 149.

Where the master is part owner and has exclusive control he is liable to coöwners. Williams *v.* Hays, 143 N. Y. 442, 38 N. E. 449, 62 N. Y. St. 451, 42 Am. St. Rep. 743, 26 L. R. A. 153.

74. The primary ground of the liability of a ship-owner for such damage is the responsibility of a master for the misconduct of his servants while in his employ. Abbott Shipp. (12th ed.) 573; Lowndes Coll. 7; 1 Parsons Shipp. & Adm. 528.

75. Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill (N. Y.) 480; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; The Emily, 67 L. T. Rep. N. S. 214; Marsden Coll. (3d ed.) 69.

For further cases distinguishing between the liability of the ship in rem and of her owners in personam see The Steam Tug Clara Clarita *v.* Cox, 23 Wall. (U. S.) 1, 23 L. ed. 146; Sturgis *v.* Clough, 21 How. (U. S.) 451, 16 L. ed. 188; Taylor *v.* Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028; The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182, 15 L. ed. 341; Harmony *v.* U. S., 2 How. (U. S.) 210, 11 L. ed. 239; The R. L. Maybey, 4 Blatchf. (U. S.) 88, 20 Fed. Cas. No. 11,870; The Edwin *v.* Naumkeag Steam Cotton Co., 1 Cliff. (U. S.) 330, 8 Fed. Cas. No. 4,301, 23 Law Rep. 277; Simpson *v.* Thompson, 3 App. Cas. 279, 3 Aspin. 567, 38 L. T. Rep. N. S. 1; River Wear Com'rs *v.* Adamson, 2 App. Cas. 743, 3 Aspin. 521, 46 L. J. Q. B. C. P. & Exch. 82, 37 L. T. Rep. N. S. 543, 24 Wkly. Rep. 872; The Lemington, 2 Aspin. 475, 32 L. T. Rep. N. S. 69, 23 Wkly. Rep. 421; Hodgkinson *v.* Fernie, 2 C. B. N. S. 415, 3 Jur. N. S. 818, 26 L. J. C. P. 217, 89 E. C. L. 415; The Cumberland, Stuart Adm. (L. C. 1858) 75.

76. Gates *v.* Miles, 3 Conn. 64 (a case of sudden luffing which might have been wilful); Reynolds *v.* Toppan, 15 Mass. 370, 8 Am. Dec. 110; Ralston *v.* The State Rights, Crabbe (U. S.) 22, 20 Fed. Cas. No. 11,540 (where a libel was sustained against a vessel for wilfully and maliciously running into another, the court holding that it was within the scope of the master's employment to direct the ship to be steered at his pleasure). And see Sturgis *v.* Clough, 21 How. (U. S.) 451, 16 L. ed. 188; The Florence, 2 Flipp. (U. S.) 56, 9 Fed. Cas. No. 4,880, 4 Centr. L. J. 249, 2 Cinc. L. Bul. 60, 23 Int. Rev. Rec. 105; Dias *v.* The Revenge, 3 Wash. (U. S.) 262, 7 Fed. Cas. No. 3,877. The owners are not responsible for crimes committed by the master. Gabrielson *v.* Waydell, 135 N. Y. 1, 31 N. E. 969, 47 N. Y. St. 848, 31 Am. St. Rep. 793, 17 L. R. A. 228.

In England.— See The Druid, 1 W. Rob. 391, where a tug was held not liable to arrest, the master having wilfully driven her against the vessel she had been towing.

part of the vessel contributed to the collision, as where the connection of the vessel with the collision was wholly passive, there is no liability.[77]

2. Liability of Owners and Charterers. Where the vessel is under charter and the charterers have appointed their own master and crew the owners are not liable in a personal action for the damage caused by collision. The liability in such cases is upon the charterer.[78] If, however, the crew have been appointed by the owners, it seems that the owners would be liable, notwithstanding that the crew are paid by the charterer and are subject to his orders.[79] The presumption is that those in charge of a ship are in the employment of her owners and also that the registered owner is the real owner, but these presumptions may be rebutted by competent evidence.[80]

B. Maritime Lien[81] Arising From Collision — 1. Its Character. The general maritime law gives a lien for a maritime tort upon the offending vessel, and

Wilfully casting vessel adrift.— In The Ida, Lush. 6, in which a libel was dismissed against a vessel whose master wilfully cast another adrift, a distinction was drawn between general malice and particular malice, and it was said that the owner would be liable where the master of a steamer wilfully entered a crowded roadstead at full speed on a dark night.

Assisting another vessel in distress has been held to be within the scope of a master's employment. The Thetis, L. R. 2 A. & E. 365, 38 L. J. Adm. 42, 22 L. T. Rep. N. S. 276, 3 Mar. L. Cas. 357. See also The Princess Royal, L. R. 3 A. & E. 41, 39 L. J. Adm. 43, 22 L. T. Rep. N. S. 39; Fletcher *v.* Braddick, 2 B. & P. N. R. 182, 9 Rev. Rep. 633; The Dundee, 1 Hagg. Adm. 109.

77. As for example where one vessel was thrown against another by the swell caused by a passing steamer. Kissam *v.* The Albert, 21 Law Rep. 41, 14 Fed. Cas. No. 7,852. Where one vessel ran into another and caused the latter to come into collision with a third, the same rule was applied with reference to the second vessel. The Moxey, Abb. Adm. 73, 17 Fed. Cas. No. 9,894.

78. U. S. Rev. Stat. (1878), § 4286; The Barnstable, 181 U. S. 464, 21 S. Ct. 484, 45 L. ed. 954; Thorp *v.* Hammond, 12 Wall. (U. S.) 408, 20 L. ed. 419 (where the vessel was chartered to one of several coöwners by whom she was exclusively managed); Marsden Coll. (3d ed.) 74. It has also been held that the owners were not liable *in personam* when the vessel was run by the master on shares and he employed and paid her crew. Gulzoni *v.* Tyler, 64 Cal. 334, 30 Pac. 981; Somes *v.* White, 65 Me. 542, 20 Am. Rep. 718; Webster *v.* Disharoon, 64 Fed. 143. It has been held that the owner was not liable while the vessel was in charge of a selling agent who had employed his own servants to move her. Scott *v.* Scott, 2 Stark. 438, 20 Rev. Rep. 711, 3 E. C. L. 479. Also so held in case of a transport chartered to the government and in command of officers of the navy. Hodgkinson *v.* Fernie, 2 C. B. N. S. 415, 3 Jur. N. S. 818, 26 L. J. C. P. 217, 89 E. C. L. 415. The ship would be liable *in rem*, in such a case. The Utopia *v.* The Primula, [1893] A. C. 492, 7 Aspin. 408, 62 L. J. P. C. 118, 70 L. T. Rep. N. S. 47, 1 Reports 394; Morgan *v.* The Steamship Castlegate, [1893] A. C. 38, 7 Aspin. 284, 62 L. J. P. C. 17, 68 L. T. Rep. N. S. 99, 1 Reports 97, 41 Wkly. Rep. 349; The Tasmania, 6 Aspin. 305, 57 L. J. Adm. 49, 59 L. T. Rep. N. S. 263, 13 P. D. 110; The Parlement Belge, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 5 P. D. 197, 28 Wkly. Rep. 642; The Lemington, 2 Aspin. 475, 32 L. T. Rep. N. S. 69, 23 Wkly. Rep. 421; Hole *v.* Sittingbourne, etc., R. Co., 6 Hurl. & N. 488, 30 L. J. Exch. 81, 3 L. T. Rep. N. S. 750, 9 Wkly. Rep. 274; The Emily, 67 L. T. Rep. N. S. 214; The Ruby Queen, Lush. 266; Quarman *v.* Burnett, 6 M. & W. 499, 4 Jur. 969.

79. So held in England. Fenton *v.* Dublin Steam Packet Co., 8 A. & E. 835, 8 L. J. Q. B. 28, 1 P. & D. 103, 35 E. C. L. 867; Fletcher *v.* Braddick, 2 B. & P. N. R. 182, 9 Rev. Rep. 633; Dalyell *v.* Tyrer, E. B. & E. 899, 96 E. C. L. 899. A stipulation that the crew of a vessel under charter should obey the orders of those in command of a steamer by whom she was being towed, it seems, does not relieve the owners from their liability as such. The Ticonderoga, Swabey 215.

As to liability of partners see Marsden Coll. (3d ed.) 74.

The fact that the crew have been appointed by the master held not to relieve the owners from liability for their negligence. Steel *v.* Lester, 3 Aspin. 537, 3 C. P. D. 121, 47 L. J. C. P. 43, 37 L. T. Rep. N. S. 642, 26 Wkly. Rep. 212. See The Phebe, 1 Ware (U. S.) 265, 19 Fed. Cas. No. 11,064; Burnard *v.* Aaron, 31 L. J. C. P. 334.

As to English act holding owner liable for damage to piers, etc., by persons other than his servants see 10 Vict. c. 27, § 74; Marsden Coll. (3d ed.) 73.

80. So held in England. Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396; Hibbs *v.* Ross, L. R. 1 Q. B. 534, 9 B. & S. 655, 12 Jur. N. S. 812, 35 L. J. Q. B. 193, 15 L. T. Rep. N. S. 67; Chesteauneuf *v.* Capeyron, 7 App. Cas. 127, 4 Aspin. 489, 51 L. J. P. C. 37, 46 L. T. Rep. N. S. 65; Joyce *v.* Capel, 8 C. & P. 370, 34 E. C. L. 785; Marsden Coll. (3d ed.) 68. See also, generally, Evidence; Master and Servant.

81. See, generally, Maritime Liens.

this lien travels with the ship into whosesoever hands she may go.[82] The proceeding *in rem* to enforce such a lien is not a process nor is it a remedy only, but is the enforcement of a proprietary interest.[83]

2. How Divested. The lien is not divested by a sale to a *bona fide* purchaser without notice where there has been no laches by the injured party, unless the sale takes place by virtue of a judicial proceeding *in rem*.[84] A transfer within a jurisdiction where the offending vessel is not subject to seizure works no exception to this rule.[85] Laches or delay in the enforcement of the lien will under proper circumstances constitute a defense.[86] No arbitrary or fixed period of time has been established, but the delay which will defeat such a suit must in every case depend upon the peculiar equitable circumstances of the particular case.[87]

3. The Priority of Such Lien. The lien arising from collision has precedence over all liens prior in time arising upon contract, including liens for repairs to the negligent vessel, seamen's wages, pilotage, and towage, and is to be preferred to a bottomry loan made upon the same voyage prior to the happening of the collision.[88]

C. Division of Loss — 1. In Cases of Inevitable Accident. It is now the settled law in England and in the United States that in cases of collision caused by inevitable accident each party shall bear his own loss,[89] and provisions to

82. Galena, etc., Packet Co. *v.* The Rock Island R. Bridge, 6 Wall. (U. S.) 213, 18 L. ed. 753; Hale *v.* Washington Ins. Co., 2 Story (U. S.) 176, 11 Fed. Cas. No. 5,916, 5 Law Rep. 200; The America, 1 Fed. Cas. No. 288, 29 Hunt. Mer. Mag. 459, 16 Law Rep. 264, 2 West. L. Month. 279; The Avon, Brown Adm. 170, 18 Int. Rev. Rec. 165, 2 Fed. Cas. No. 680, 6 Chic. Leg. N. 41; Harmer *v.* Bell, 7 Moore P. C. 267, 13 Eng. Reprint 884.

83. The Arcturus, 18 Fed. 743; The Avon, Brown Adm. 170, 18 Int. Rev. Rec. 165, 2 Fed. Cas. No. 680, 6 Chic. Leg. N. 41.

84. Verderwater *v.* Mills, 19 How. (U. S.) 82, 15 L. ed. 554; Edwards *v.* The Robert F. Stockton, Crabbe (U. S.) 580, 8 Fed. Cas. No. 4,297; The Paragon, 1 Ware (U. S.) 326, 18 Fed. Cas. No. 10,708.

85. The Champion, Brown Adm. 520, 5 Fed. Cas. No. 2,583, 1 Am. L. T. Rep. N. S. 493, 7 Chic. Leg. N. 1; The Avon, Brown Adm. 170, 12 Fed. Cas. No. 680, 6 Chic. Leg. N. 41, 18 Int. Rev. Rec. 165.

86. Where the lien is to be enforced to the detriment of a purchaser for value without notice of the lien the defense of laches will be held valid under shorter time than when the claimant is the owner at the time the lien accrued. Young *v.* The Steamboat Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896.

87. Young *v.* The Steamboat Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896.

Illustrations.— Where the vessel had been in collision in December, 1848, and was not arrested until August, 1849, the lien was enforced, although she had been sold in June, 1849. Harmer *v.* Bell, 19 L. T. Rep. N. S. 435, 7 Moore P. C. 267, 3 W. Rob. 220, 2 Eng. L. & Eq. 536, 13 Eng. Reprint 884. Where the collision took place in December, 1849, and suit was brought in February, 1860, but the vessel was not arrested until January, 1863, she having been advertised and sold in November, 1861, it was held that there was no laches and that the lien was not lost. Dean *v.* Richards, Brown & L. 89, 2 Moore P. C. N. S. 1, 15 Eng. Reprint. 803. Where the libel had not been filed until more than twenty months after the collision and in the meantime the vessel had been sold, she was held not to be subject to arrest. The Admiral, 1 Fed. Cas. No. 84, 18 Law Rep. 91. Where the libel was not filed until four years after the collision and the vessel had in the meantime been at various ports of the state where libellant lived and had been sold to parties who were ignorant of the collision, the libel was dismissed. The D. M. French [*cited* in 1 Parsons Shipp. & Adm. 532]. Where the vessel passed into the hands of innocent purchasers, who tried, two years after the collision, to ascertain the existence of any liens, it was held that a libel thereafter filed could not be enforced. The Bristol, 20 Fed. 800. See also McBride *v.* The Atlas, 28 Int. Rev. Rec. 130.

88. Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585; The John G. Stevens, 40 Fed. 331, Blatchford, J. [*affirming* 38 Fed. 515, *disapproving* The Amos D. Carver, 35 Fed. 665, and *distinguishing* The Samuel J. Christian, 16 Fed. 796; The Frank G. Fowler, 21 Blatchf. (U. S.) 410, 17 Fed. 653]; The M. Vandercook, 24 Fed. 472; The Maria & Elizabeth, 12 Fed. 627; The Pride of the Ocean, 7 Fed. 247; The Benares, 14 Jur. 581, 7 Notes Cas. (Eng.) Suppl. 50; The Linda Flor, 4 Jur. N. S. 172, Swabey 309, 6 Wkly. Rep. 197; The Elin, 8 P. D. 39; The Aline, 1 W. Rob. 111; Abbott Shipp. (11th ed.) 621; Maclachlan Shipp. (2d ed.) 653.

As to lien for damage by negligent towage see The Glen Iris, 78 Fed. 511; The Gratitude, 42 Fed. 299; The Samuel J. Christian, 16 Fed. 796.

89. *Delaware.* — Smyrna, etc., Steamboat Co. *v.* Whildin, 4 Harr. (Del.) 228.

Kentucky.—Broadwell *v.* Swigert, 7 B. Mon. (Ky.) 39, 45 Am. Dec. 47.

Louisiana.— Edgel *v.* Barataria, etc., Canal Co., 6 La. Ann. 425; Myers *v.* Perry, 1 La.

this effect are contained in the codes of most of the maritime states of Europe.[90]

2. In Cases of Inscrutable Fault. In cases of collision due to so-called inscrutable fault, in which there exists a reasonable doubt as to which vessel, or whether either of them, was to blame, the principle in the United States appears to be as follows: Where there is no evidence of any facts which would negative the theory of the collision having been the result of inevitable accident, the doubt is sufficient to raise the presumption that it was due to the perils of the sea, and the case is treated as one of inevitable accident and each party bears his own loss.[91] On the other hand where, although it is manifest that there must have been fault on both sides, no specific or particular fault can be attributed to either vessel, the case is treated as one of mutual fault and the loss is divided.[92]

Ann. 372; Brickell *v.* Frisby, 2 Rob. (La.) 204; Virginia Mar. Ins. Co. *v.* Millaudon, 11 La. 114.

Ohio.— Boyce *v.* The Steamboat Empress, 1 Ohio Dec. (Reprint) 173, 3 West. L. J. 174.

Texas.— The Veruma *v.* Clark, 1 Tex. 30.

United States.— Lockwood *v.* The Schooner Grace Girdler, 7 Wall. (U. S.) 196, 19 L. ed. 113; Stainback *v.* Rae, 14 How. (U. S.) 532, 14 L. ed. 530; The Worthington, 19 Fed. 836; Jerome *v.* Floating-Dock, 3 Hughes (U. S.) 508, 13 Fed. Cas. No. 7,291; Ward *v.* The Fashion, 6 McLean (U. S.) 152, Newb. Adm. 8, 29 Fed. Cas. No. 17,154; The Scioto, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12,508, 11 Law Rep. 16, 5 N. Y. Leg. Obs. 442; The Nautilus, 1 Ware (U. S.) 529, 17 Fed. Cas. No. 10,058; The Moxey, Abb. Adm. 73, 17 Fed. Cas. No. 9,894; The Eliza and Abby, Blatchf. & H. Adm. 435, 8 Fed. Cas. No. 4,349.

England.— The Woodrop-Sims, 2 Dods. 83; Marsden Coll. (3d ed.) 128.

90. As authorities for the doctrine that in collision caused by inevitable accident each vessel should bear its own loss may be cited: 1 Bell Comm. Laws Scotland 582; Boulay-Paty; French Code de Commerce, art. 407; Jacobsen Sea Laws 235; Pardessus Droit Com., tome 3, p. 652. See also Admiralty, 1 Cyc. 806, note 7.

Exceptions to this rule.— In Denmark, it seems, both ships join in making good the damage, according to arbitration. 1 Pritchard Adm. Dig. 234. According to the Dutch Code, art. 540, and the Russian Law, arts. 455, 456, 457, when the collision is caused by "*force majeure*," or when there is no proof of fault, if one of the two vessels is lying at anchor the damage is divided between the parties. Report Special Commission Paris Conference (1901), p. 5. As to the Roman law in such cases see Flanders Shipp. 291. Under the early English decisions from 1670 to 1824 in cases of collision caused by inevitable accident the loss was divided between the two vessels. Marsden Coll. (3d ed.) 154. Among the mediæval codes and earlier writers the following were in favor of a division of the loss between the two vessels in cases of collision caused by inevitable accident: Black Book Adm. (dating from Edw. III to Hen. VIII); Danish Code (1507); Consolato del Mare (1494), contained in the collection of maritime laws of Pardessus; Laws of Oleron (1266), Laws of Wisby (13th century), and Ordonnance de la Marine, of Louis XIV (1681), all three of which are contained in the appendixes to Peters' Admiralty Reports, from which they are reprinted in 30 Fed. Cas. p. 1171 *et seq.*; 2 Valin Comm. 178. See also Admiralty, 1 Cyc. 706, note 7.

91. Bayard *v.* Steamboat Coal Valley, 3 Pittsb. (Pa.) 165; Shepherd *v.* The Schooner Clara, 102 U. S. 200, 26 L. ed. 145; The Worthington, 19 Fed. 836; The Breeze, 6 Ben. (U. S.) 14, 4 Fed. Cas. No. 1,829, 6 Am. L. Rev. 762; The Kallisto, 2 Hughes (U. S.) 128, 14 Fed. Cas. No. 7,600; 1 Pritchard Adm. Dig. 328.

In England the rule is stated as follows: "Where a ship, or each of the two ships, alleges negligence on the part of the other, and it is manifest that the collision was caused by fault somewhere, but the evidence does not satisfy the Court on which side the fault lies, no damages can be recovered, and each ship bears her own loss." Marsden Coll. (3d ed.) 2 [*citing* The Catherine of Dover, 2 Hagg. Adm. 145; Papayanni *v.* Russia Steam Nav., etc., Co., 2 Moore P. C. N. S. 161, 15 Eng. Reprint 862]; The Maid of Auckland, 6 Notes Cas. (Eng.) 240.

92. The Comet, 1 Abb. (U. S.) 451, 6 Fed. Cas. No. 3,050, 5 Am. L. Rev. 184, 2 Chic. Leg. N. 301; The Tracy J. Bronson, 3 Ben. (U. S.) 341, 24 Fed. Cas. No. 14,131; Lucas *v.* The Thomas Swann, 6 McLean (U. S.) 282, Newb. Adm. 158, 15 Fed. Cas. No. 8,588, 3 Am. L. Reg. 659; The Scioto, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12,508, 11 Law Rep. 16, 5 N. Y. Leg. Obs. 442.

Early English cases.— The Catherine of Dover, 2 Hagg. Adm. 145; Marsden Coll. (3d ed.) 152.

In Canada if the cause of the collision is unknown or it is impossible to determine by whose fault it is caused the damages are borne in equal proportions by both vessels. Commerce Code, art. 2526; 1 Pritchard Adm. Dig. 320.

In France the loss on ships it seems is divided "lorsqu'il est impossible de préciser par la faute de qui le dommage est arrivé." Abordage Nautique, Caumont § 151; Marsden Coll. (3d ed.) 158. As to the loss on cargoes: "Le doute suffit pour faire presumer la fortune de la mere plutot que la

3. In Cases of Mutual Fault — a. Rule at Common Law. Under the common law as administered in the state courts of the United States if both vessels are in fault neither of them can recover from the other, but each party must bear his own loss.[93]

b. Rule in Admiralty[94] — (I) *Division of Loss to the Two Vessels.*

faute." "Il faudra donc établir une faute à l'encontre de la personne que l'on prétend rendre responsable." Code International de l'Abordage Maritime, by F. C. Autran (1890), p. 124.

In Holland, if neither fault nor fortuitousness can be proved and therefore the cause of collision is dubious, the damages sustained by both vessels and their cargoes is added together and divided ratably according to the value of the respective vessels and cargoes. Commercial Code, art. 838.

In Portugal the rule is the same as in Holland. Commercial Code, art. 1670.

In St. Lucia the rule is the same as in Canada. Commercial Code, art. 2360.

In Italy and Spain it seems that where the plaintiff is unable to prove that the collision was attributable to the fault of either party, each party bears one-half the damage. Report Special Commission Paris Conference (1901), p. 5.

Among the medieval codes and earlier writers.— The Roman law was against the division of loss in such cases. Abbott Shipp. (7th Am. ed.) 322. Under the laws of Oleron the loss was borne in equal shares. 1 Bell Comm. (5th ed.) 581. Under the laws of Wisby there was a ratable contribution to the damage. 1 Bell Comm. (5th ed.) 581. Under the code of the Hanse towns it was borne in equal shares. 1 Bell Comm. (5th ed.) 581. It seems it was borne in equal shares also under the rule of the Ordonnance de la Marine of Louis XIV. Code de Commerce, art. II, tit. 13, No. 487. The Ordinance of Rotterdam (1721), §§ 255, 256, prescribed an equal division in all cases except where the collision was caused by design or remarkable fault. 3 Kent Comm. 231. The Ordinance of Hamburg (1731), tit. 8, assessed the loss as common average on vessels, freight, and cargoes. 3 Kent Comm. 231. This rule of division of loss is supported by Stypmanus, Kuricke, and Loccenius. The Comet, 1 Abb. (U. S.) 451, 6 Fed. Cas. No. 3,050, 5 Am. L. Rev. 184, 2 Chic. Leg. N. 301. Emerigon on Insurance (Meredith's ed.) 332, 333, contains the statement that if the collision has not happened from casualty, although it is impossible to know by whose fault, it is then a case for dividing the disaster and making each of the vessels bear one-half the damages. This rule has been strongly recommended by modern writers. 1 Bell Comm. (5th ed.) 581; 1 Conkling Adm. (2d ed.) 378; Flanders Mar. Law, §§ 357, 358; 3 Kent Comm. 231; 1 Parsons Shipp. & Adm. 527; Story Bailm. § 609.

93. *Alabama.*— The Farmer *v.* McCraw, 26 Ala. 189, 72 Am. Dec. 718.

Arkansas.— Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

California.— Kelly *v.* Cunningham, 1 Cal. 365.

Louisiana.— Myers *v.* Perry, 1 La. Ann. 372.

Maine.— Lord *v.* Hazeltine, 67 Me. 399.

Missouri.— Galena, etc., Packet Co. *v.* Vandergrift, 34 Mo. 55.

New York.—New York Harbor Towboat Co. *v.* New York, etc., R. Co., 148 N. Y. 574, 42 N. E. 1086; Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221; Rathbun *v.* Payne, 19 Wend. (N. Y.) 399.

Ohio.— Boyce *v.* The Steamboat Empress, 1 Ohio Dec. (Reprint) 173, 3 West. L. J. 174.

Virginia.— Union Steamship Co. *v.* Nottingham, 17 Gratt. (Va.) 115, 91 Am. Dec. 378.

See also, generally, Negligence.

94. For the history of the rule of division of loss in England see the following early cases: The Adventure, Mars. Adm. 288; The Jeremiah, Mars. Adm. 282; The Hopewell, Mars. Adm. 280; The Little Betty, Mars. Adm. 270; The Mary of Poole, Mars. Adm. 264; The Lamb, Mars. Adm. 251 (in which the collision was held to have been accidental); The Mary, Mars. Adm. 290 (in which "on account of the impossibility of determining what proportion of the damage suffered by the plaintiff ship was properly attributable to the fault of the other," the loss was divided); The Petersfield, Mars. Adm. 332; The Friends Goodwill, Mars. Adm. 328; Hay *v.* Le Neve, 2 Shaw Sc. App. 395; The Monarch, 1 W. Rob. 21. And this rule of equal division has been the law ever since in England. Morton *v.* Hutchinson, L. R. 4 P. C. 529; Cayzer *v.* Carron Co., 9 App. Cas. 873, 5 Aspin. 371, 54 L. J. Adm. 18, 52 L. T. Rep. N. S. 361, 33 Wkly. Rep. 281; The Rona, 2 Aspin. 182; The Celt, 3 Hagg. Adm. 321; The Linda, 4 Jur. N. S. 146, 30 L. T. Rep. N. S. 234, Swabey 306; The Aurora, Lush. 327; The Seringapatam, 5 Notes Cas. (Eng.) 61, 2 W. Rob. 506; The Bernina, 12 P. D. 58; Marsden Coll. (3d ed.) 156. And see The Morgengry, [1900] P. 1, 8 Aspin. 591, 69 L. J. P. 3, 81 L. T. Rep. N. S. 417, 48 Wkly. Rep. 121. In this case the owners of a steamer sued the owners of a bark and the owners of its tug in one action for damages sustained in a collision between all three vessels. Against the owners of the bark judgment was recovered by default for the whole amount of the damage sustained, and the bark was sold and the proceeds paid into court. Against the owners of the tug judgment was recovered for half the damage, this sum exceeding the proceeds of the bark. It was held that the owners of the steamer were entitled to recover half the damages from the owners of the tug, without giving credit for the proceeds of the bark.

The rule in admiralty, when both vessels are in fault, is to divide the damage equally between them, and to make a decree for one-half the difference between their respective losses in favor of the one who has suffered most, so as to equalize the burden. The obligation to pay this difference is the legal liability growing out of the transaction.[95] In England the admiralty rule of dividing the loss

In France, where both vessels are in fault, it is only the loss on the vessels which is divided (Ce sera donc le dommage causé aux navires et aux navires seuls qui sera reparé a frais commun. Les Regles due droit commun reprennent leur empire lorsqu'ils s'agira de réparer le dommage causé aux cargaisons. Code International de l'Abordage Maritime, by F. C. Autran (1890), p. 123). This rule, according to continental writers, was justified by the difficulty of determining the degree of negligence on each side, or of proving the exact amount of damage resulting from the fault of each ship. Maclachlan Shipp. (4th ed.) 318.

Among the medieval codes the following authorities support the rule of the common law that each party should bear his own loss where both are in fault. Dominion of the Sea (published in London in 1705); Jugemens de damme ou Lois de West Capelle; Laws of Wisby; Maritime Laws of Berghen; Rhodian Laws [*cited* in 1 Pritchard Adm. Dig. 204 note]; Maclachlan Shipp. (3d ed.) 307, 309.

Among the early authorities in favor of the admiralty rule of dividing equally the loss when both are to blame may be mentioned Cleirac in his work, Us et Coutume de la Mer; Kuricke; Grotius, whose celebrated work, De Jure Belli ac Pacis, was published in Paris in 1625; Van der Linden; Emerigon, whose work, Traite des Assurances et des Contrats a la Grosse, was published in Marseilles in 1783; Pardessus in his collection, Des Lois Maritimes; Boulay-Paty and Pailliet; the French Code de Commerce; Leoni Levi in his Commentary on International Law; Bynkershoek and Vander Keysel. According to Valin, Emerigon and Boulay-Paty, there should be no recovery against either of the ships for damage to cargo without proving which of the two occasioned the damage; but according to Kuricke, Vinnius, and Van der Linden, the loss on the cargo should be treated as general average; but Valin, Emerigon, and Cleirac thought this unjust for the reason previously stated, that the freighters neither contributed to produce the damage nor shared in any common advantage, as they would in the case of general average from this particular loss involuntarily sustained. Maclachlan Shipp. (3d ed.) 309.

Among the provisions of the codes of other maritime states on the subject may be mentioned the following:

Austria, Belgium, Denmark, France, Norway, and Sweden.— If the fault on one side is slight and on the other serious, the judges apportion the damage in proportion to the gravity of the faults, insignificant differences being disregarded. This rule was unanimously indorsed by the Antwerp and London conferences and recommended by the International Law Association at the Brussels conference of 1895 and approved by the chambers of shipping of the United Kingdom. Report of Special Commission Paris Conference (1901), p. 7.

Canada.— It is to be equally divided. 1 Pritchard Adm. Dig. 320.

Germany.— Neither has a claim against the other. 1 Pritchard Adm. Dig. 333.

Holland, Italy, and Portugal.— Each bears his own loss. Pritchard Adm. Dig. 334, 337, 339.

St. Lucia.— The damages are to be borne in equal portions by both. Pritchard Adm. Dig. 340.

Turkey, Egypt.— It is apportioned in proportion to the value of the vessels and cargoes. Report of Special Commission Paris Conference (1901), p. 7.

95. The North Star, 106 U. S. 17, 1 S. Ct. 41, 27 L. ed. 91; The Mariska, 107 Fed. 989, 47 C. C. A. 115; The Hanson H. Keyes, 107 Fed. 537; Jacobsen *v.* Dalles, etc., Nav. Co., 106 Fed. 428. See also The B. & C., 18 Fed. 543; The Magenta, 2 Abb. (U. S.) 495, 16 Fed. Cas. No. 8,946; The Kolon, 9 Ben. (U. S.) 197, 14 Fed. Cas. No. 7,923; The Santiago de Cuba, 4 Ben. (U. S.) 264, 21 Fed. Cas. No. 12,332; The Monitor, 3 Biss. (U. S.) 24, 17 Fed. Cas. No. 9,711, 3 Chic. Leg. N. 353, 14 Int. Rev. Rec. 70; Cannon *v.* The Potomac, 3 Woods (U. S.) 158, 5 Fed. Cas. No. 2,386.

Where the respondent sets up no claim before the final decree that there were any other damages than those which the libellant had sustained, he cannot make such a claim first in the supreme court. So in The Ship Sapphire *v.* Napoleon III, 18 Wall. (U. S.) 51, 21 L. ed. 814. See also The Manitoba, 122 U. S. 97, 7 S. Ct. 1158, 30 L. ed. 1095; The Paoli, 92 Fed. 944, 35 C. C. A. 97; The Oregon, 45 Fed. 62.

Rule applied.— In The Oneida, 84 Fed. 716, it was held that where two steamers were racing, and as a result one of them ran ashore, the latter was entitled to recover one-half her damages from the former and one-half the sum expended in good faith to ascertain the extent of the injury. In The Brothers, 2 Biss. (U. S.) 104, 4 Fed. Cas. No. 1,969, 1 Chic. Leg. N. 1, in which a tug, her tow, and a propeller in collision with the tow were each held in fault, the loss was divided equally among the three. In The Steamboat Potomac *v.* Cannon, 105 U. S. 630, 26 L. ed. 1194, in which both vessels were at fault and the underwriters had paid to one libellant two-thirds of her damage and had released and assigned to the other their rights against the latter arising out of such payment, held that the

where both vessels are in fault is by act of parliament applied in all the courts[96] and to all collisions, whatever the nationality of the ships and wherever the collision occurs.[97] In Canada by a recent statute the rule of dividing the loss where both vessels are at fault applies in the common law as well as admiralty courts.[98]

(II) *Division of Loss on Cargo*—(A) *Rule in England, and in United States Previous to Harter Act.* When both vessels are in fault for the collision, the owner of the cargo, provided he is not the owner of the vessel, can proceed against either of the two vessels and recover his whole damage, if her value is sufficient; or he can proceed against each of the offending vessels for a moiety of his loss.[99] If the cargo-owner proceeds against one of the vessels for the whole of

decree should be for one-half the excess of the damage sustained by the P less one-third the sum paid by the underwriters. And for other applications see Brickell *v.* Frisby, 2 Rob. (La.) 204; Puget Sound Commercial Co. *v.* The Barkentine C. L. Taylor, 2 Wash. Terr. 93, 3 Pac. 840; Schuyler's Steam Tow-Boat Line *v.* Caleb, 103 U. S. 710, 26 L. ed. 467; The Ship Civilta *v.* Perry, 103 U. S. 699, 26 L. ed. 599; The Schooner Stephen Morgan *v.* Good, 94 U. S. 599, 24 L. ed. 266; U. S. *v.* The Steamship Juniata, 93 U. S. 337, 23 L. ed. 930; The Steamer Alabama *v.* De las Casas, 92 U. S. 695, 23 L. ed. 763; Miner *v.* The Bark Sunnyside, 91 U. S. 208, 23 L. ed. 302; Sieward *v.* The Steamship Teutonia, 23 Wall. (U. S.) 77, 23 L. ed. 44; Atlee *v.* Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619 (a collision between a barge and a pier); New Haven Steam Transp. Co. *v.* The Steamboat Continental, 14 Wall. (U. S.) 345, 20 L. ed. 801; Pentz *v.* The Steamer Ariadne, 13 Wall. (U. S.) 475, 20 L. ed. 542; The Steamboat George Washington *v.* Ann Cavan, 9 Wall. (U. S.) 513, 19 L. ed. 787; Pfister *v.* Greening, 9 Wall. (U. S.) 505, 19 L. ed. 741; Chamberlain *v.* Ward, 21 How. (U. S.) 548, 16 L. ed. 211; Rogers *v.* The Steamer St. Charles, 19 How. (U. S.) 108, 15 L. ed. 563; The Schooner Catharine *v.* Dickinson, 17 How. (U. S.) 170, 15 L. ed. 233; The Monticello, 15 Fed. 474; The Ant, 10 Fed. 294; The Phœnix, 3 Blatchf. (U. S.) 273, 19 Fed. Cas. No. 11,111; Memphis, etc., Packet Co. *v.* H. C. Yaeger Transp. Co., 3 McCrary (U. S.) 259, 10 Fed. 395; The J. S. Neil, 3 McCrary (U. S.) 177, 8 Fed. 713. See *contra*, the following cases in which the principle of apportioning the damages according to the degree of fault was applied: The Mary Ida, 20 Fed. 741; The Rival, 1 Sprague (U. S.) 128, 20 Fed. Cas. No. 11,867, 9 Law Rep. 28, 4 West. L. J. 89. In The Anerly, 58 Fed. 794, two entangled barges drifted upon an anchored vessel, which made no effort to avoid them. It was held that the anchored vessel should pay one-half the damage and the other half should be divided between the barges. In The Victory, 68 Fed. 395, 25 U. S. App. 271, 15 C. C. A. 490 [*modifying* 63 Fed. 631], the steamer V was on the wrong side of the channel and the steamer P took no precaution to avoid the collision. It was held that the V was grossly in fault, that the P was guilty of an act of omission, and that the liability of each vessel should be measured by its degree of fault. The loss on the vessels and cargoes was apportioned accordingly. In The Chattahoochee, 74 Fed. 899, 33 U. S. App. 510, 21 C. C. A. 162, the court said that apportionment according to degree of fault, if ever applicable, was certainly inapplicable where the fault of each vessel was of the same character. In Thompson *v.* The Steamer Great Republic, 23 Wall. U. S. 20, 23 L. ed. 55, it was held that the fault of a small and slow steamer in not blowing her whistle in time, when she was being overtaken by a large and fast one, bore so little proportion to the many faults of the pursuing one that the former should not share the loss.

96. 36 & 37 Vict. c. 66, § 25, subd. 9, being the Judicature Act of Aug. 5, 1873, it is provided that in any cause or proceeding for damages arising from collision where both vessels are in fault the rules in admiralty, when at variance with the rules of the common law, shall prevail.

97. Marsden Coll. (3d ed.) 134.

Applied where both ships were British: see The Vera Cruz, 5 Aspin. 270, 53 L. J. Adm. 33, 51 L. T. Rep. N. S. 104, 9 P. D. 88, 96, 32 Wkly. Rep. 783; The R. L. Alston, 5 Aspin. 43, 48 L. T. Rep. N. S. 469, 8 P. D. 5; The Margaret, 9 P. D. 47.

Applied where both ships were foreign: see Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., 10 Q. B. D. 521, 5 Aspin. 65, 47 J. P. 260, 52 L. J. Q. B. 220, 48 L. T. Rep. N. S. 546, 31 Wkly. Rep. 445; The Washington, 5 Jur. 1067; The North American, Lush. 79, Swabey 358; The Monarch, 1 W. Rob. 21.

Applied where one was British and one foreign: see The Stoomvaart Maatschappy Nederland *v.* Peninsular, etc., Steam Nav. Co., 7 App. Cas. 795, 5 Aspin. 360, 567, 52 L. J. Adm. 1, 47 L. T. Rep. N. S. 198.

Applied in foreign waters: see Hay *v.* La Neve, 2 Shaw Sc. App. 395.

98. Marsden Coll. (3d ed.) 134; 43 Vict. c. 29, § 8 (Canada).

99. The Steam-Tug Virginia Ehrman *v.* Curtis, 97 U. S. 309, 24 L. ed. 890; Phœnix Ins. Co. *v.* The Steamboat Atlas, 93 U. S. 302, 23 L. ed. 863.

In England the rule is the same excepting that if judgment is recovered against one part owner it seems that no action can be brought against the other, although the judgment is unsatisfied. Marsden Coll. (3d ed.) 103 [*cit-*

his loss, or against each of the two for a moiety thereof, and one of the vessels is not of value sufficient, the other is liable for the amount of the deficiency.[1] If the owner of one of the offending vessels is also the owner of the cargo, his claim against the other vessel as cargo owner is only for one-half the loss on the cargo.[2] If the owner of the cargo recovers his whole damage from one of the two vessels in fault the vessel sued may set off, in another suit between the owners of the two vessels, the half of the damage to the cargo which ought to be paid by the other vessel.[3]

(B) *As Modified by Harter Act.* The object of the "Harter Act," which was enacted by congress Feb. 13, 1893,[4] was to modify the relations existing between a vessel and her cargo and to relieve the ship-owner from his liability for loss of cargo in certain cases.[5] Section 3 of this act regarding the navigation and management of the vessel is the part which bears upon the subject of collision.[6] The act was not intended to affect the liability of one vessel to another

ing Brinsmead *v.* Harrison, L. R. 7 C. P. 547, 41 L. J. C. P. 190, 27 L. T. Rep. N. S. 99, 20 Wkly. Rep. 784; Mitchell *v.* Tarbutt, 5 T. R. 649, 2 Rev. Rep. 684].

If a collision occurs between two ships belonging to the same owner his only remedy is against the actual wrong-doer. Marsden Coll. (3d ed.) 104.

See 10 Cent. Dig. tit. "Collision," § 296 *et seq.*

1. The Steamboat City of Hartford *v.* Rideout, 97 U. S. 323, 24 L. ed. 930; The Steamer Alabama *v.* De las Casas, 92 U. S. 695, 23 L. ed. 763; The Steamboat George Washington *v.* Ann Cavan, 9 Wall. (U. S.) 513, 19 L. ed. 787. If the value of each vessel is equal or more than equal to a moiety of the damages, interest, and costs found due the libellant, the decree should be for a moiety of the same against each of the offending vessels, with a provision that if either party is unable to pay his moiety of the damage, interest, and costs the libellant shall have his remedy over against the other vessel. So held in The Steamboat City of Hartford *v.* Rideout, 97 U. S. 323, 24 L. ed. 930 [*citing* Phœnix Ins. Co. *v.* The Steamboat Atlas, 93 U. S. 302, 23 L. ed. 863].

2. The Bristol, 29 Fed. 867.

3. The Doris Eckhoff, 41 Fed. 156; The Canima, 17 Fed. 271. In a libel against a steamer for the loss of a schooner and cargo in a collision resulting from the fault of both vessels, it was held that the steamer was entitled to deduct one-half the value of the cargo from what would be due the owners of the schooner for her loss. The Hercules, 20 Fed. 205 [*citing In re* Leonard, 14 Fed. 53]. In Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279 [*citing* The C. H. Foster, 1 Fed. 733], a collision between a bark and a steamer resulting from the fault of both, in which a libel *in personam* against the owners of the steamer by an insurer for the loss of the cargo and pending freight on the bark, which he had paid, and a suit *in rem* by the owners of the bark against the steamer for loss of the bark, cargo, and freight, were tried together. The owners of the steamer having set up their loss in the answer it was held that the amount recovered by the libellants in the suit *in personam* for the loss of the vessel and freight be first applied and paid in satisfaction of their own share of the loss of the owners of the cargo, or of their representatives, the insurers — the libellants in the suit *in personam* — and credited upon that claim. Should one-half the loss of the cargo for which the owners of the bark were answerable exceed the amount recoverable for the loss of the bark from the steamer, the libellants, it was held, would be entitled to a decree against the respondents *in personam* for the difference and the latter, for their own indemnity, would be entitled to a decree against the libellants in the suit *in rem* for such excess. In The Gulf Stream, 64 Fed. 809, 26 U. S. App. 409, 12 C. C. A. 613 [*affirming* 58 Fed. 604], it was held that on a libel for the loss of a vessel and cargo by collision, if a division of damages was decreed on the ground of mutual fault the parties stood in the position of sureties toward each other as respects claims of owners of cargo lost by collision, and where, pending suit, one of the parties had purchased claims of such cargo owners at less than the value of the goods lost the other was responsible only for his proportion of the amount paid with interest.

4. 27 U. S. Stat. at L. p. 445, c. 105; U. S. Comp. Stat. (1901), p. 2946.

5. The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 77. In Flint *v.* Chrystall, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130, it was held that the ship-owner was not entitled to a general average contribution for sacrifices in saving cargo after a negligent stranding. And see The George W. Roby, 111 Fed. 601, 49 C. C. A. 481.

6. 27 U. S. Stat. at L. p. 445, c. 105, § 3, reads: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be

in case of collision;[7] nor does it include exemption from all claims against the vessel or her owner arising from faults of navigation, such as damage to other vessels and their cargoes through collision.[8] It applies to all vessels, domestic or foreign, engaged in transporting cargo to a United States port, whether hailing from a domestic or a foreign port.[9] As to the incidence of loss on cargo it has been held that it was not the intention of congress to relieve the carrier vessel at the expense of the other vessel in collision cases; that is to increase the liability of the latter beyond her former liability under like circumstances, nor to affect the relative rights of the vessel and cargo-owners or claimants against the second vessel for the damages caused by the collision. So much of the cargo loss as would previously have been charged against the carrier vessel is now borne by the cargo in cases in which the act applies, but the cargo owner has a superior lien upon the fund available for reparation.[10] The rules of apportionment in force prior to the act are to be observed as closely as possible.[11]

held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies," etc.

Meaning of "due diligence" and "seaworthy, and properly manned, equipped, and supplied."— In The Silvia, 64 Fed. 607 [*affirmed* in 68 Fed. 230, 35 U. S. App. 395, 15 C. C. A. 362, and in 171 U. S. 462, 19 S. Ct. 7, 43 L. ed. 241], it was held that an owner who equips his vessel with proper ports and iron covers is not responsible for damage resulting from a failure to close the latter by the officers of the vessel. In The Mary L. Peters, 68 Fed. 919, a cargo of sugar was damaged by leaks in the deck and it was held that no such "due diligence" was shown as would excuse her owners under the Harter Act. See also to the same effect The Flamborough, 69 Fed. 470, where some of the vessel's plates were worn out and the loss resulted therefrom. In The Niagara, 84 Fed. 902, 55 U. S. App. 445, 28 C. C. A. 528, it was held that the failure to have a mechanical fog-horn in good condition for use at the commencement of a voyage showed want of due diligence in equipping the vessel and was not a fault in her management so as to excuse the owners from liability under the Harter Act. And see Knott *v.* Botany Worsted Mills, 179 U. S. 69, 12 S. Ct. 30, 45 L. ed. 90.

7. The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 771.

8. The Viola, 59 Fed. 632, 60 Fed. 296.

9. Knott *v.* Botany Worsted Mills, 179 U. S. 69, 12 S. Ct. 30, 45 L. ed. 90; The Chattahoochee, 173 U. S. 540, 19 S. Ct. 491, 43 L. ed. 801.

10. The Niagara, 77 Fed. 329; The Viola, 60 Fed. 296. Section 3 of this act, exempting the owner from liability for faults or errors in navigation where his vessel was properly manned, supplied, and equipped, does not affect the operation of the equitable rule, which gives priority to the claim of the innocent cargo owners over that of the vessel owner against the fund available for the payment of damages sustained through a collision for which both vessels have been adjudged in fault. The George W. Roby, 111 Fed. 601, 49 C. C. A. 481 [*modifying In re* Lakeland Transp. Co., 103 Fed. 328].

See 10 Cent. Dig. tit. "Collision," § 22.

11. The Viola, 59 Fed. 632, 60 Fed. 296, holding that the damages sustained by the two vessels, including loss of personal effects, which were to be treated as part of the vessel, were first to be made even. In The Chattahoochee, 74 Fed. 899, 33 U. S. App. 510, 21 C. C. A. 162 [*affirmed* in 173 U. S. 540, 19 S. Ct. 491, 43 L. ed. 801], there was a collision between a schooner and a steamer. The schooner and her cargo were totally lost and the steamer was uninjured. They were both held in fault, and after deducting one-half the value of the cargo from one-half the value of the sunken schooner a decree for the balance was rendered against the steamer. It was contended that the exemptions of the act were not intended for the benefit of any other vessel, but for the benefit of the carrying vessel alone, and that the amount paid by recoupment from the just claim of the schooner against the steamer was paid as effectually as it would be by a direct action by the owners of the cargo against the schooner. It was held that the sunken vessel was not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel until the amount of such liability had been fixed upon the principle of an equal division of damages, and that the relations of two colliding vessels remained unaffected by the act, notwithstanding one or both of such vessels were laden with cargo. See *contra*, *dictum* of Brown, J., in The Viola, 59 Fed. 632, 60 Fed. 296, to the effect that either vessel whose cargo has been damaged cannot be charged directly or indirectly with any part of the loss suffered by her own cargo, nor can any offset against the carrying vessel's claim for her own damage be made by the other vessel on account of what the latter must pay for the carrying vessel's cargo; but the claim of the cargo of the carrying vessel must be reduced by the amount which would before the passage of the above act have been charged against such carrying vessel or against the moneys payable to her. In The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126, it was held that the fault of one vessel would not preclude the underwriters on her cargo,

(III) *Division of Loss in Cases of Personal Injuries.* The rule of division of damages where both parties are in fault is applicable to all cases of marine tort founded upon negligence and prosecuted in admiralty. In a libel against a vessel for personal injuries caused partly by the fault of libellant he is entitled to a decree for one-half his damages.[12] If the master or one of the crew of one of the vessels is injured in a collision caused by the fault of both vessels he can proceed against the other vessel for one-half his damages.[13] If such injuries resulting from the fault of both vessels are paid to her master or crew by the owner of one vessel he is entitled to contribution from the other.[14] Passengers injured, or the personal representatives of passengers lost in a collision resulting from the fault of both vessels, can recover their full damages from either vessel; but the owner of a vessel so proceeded against can recoup one-half such damages from the one-half damages to his ship awarded to the owner of the other vessel.[15]

(IV) *Division of Loss of Personal Effects of Master and Crew.* In a collision caused by the fault of both vessels the seamen on one vessel can recover one-half the value of their personal effects from the other vessel without liability over to contribute for the loss of cargo. The master being responsible equally with the owners for the loss of cargo without reference to any personal fault of his own must contribute one-half the amount recovered for his loss to make up the ship's share of the loss of cargo.[16]

c. Forced Intervention. Where several vessels are alleged to be in fault in causing a collision by which the property of a third person is injured, in a libel by the latter to recover his damages all the vessels should be proceeded against as defendants in order to avoid a multiplicity of suits and to enable the damage to be justly apportioned among those liable according to the law in admiralty, and if in such a suit the libel proceeds against one vessel only it is competent for the district court to award its further process in the cause upon the petition of the vessel sued for the arrest of the other vessel to answer for her share of the damage.[17]

who had paid this loss, from recovering the full amount of their damage caused by the collision from another vessel which was also in fault for the collision.

12. So held in The Max Morris *v.* Curry, 137 U. S. 1, 11 S. Ct. 29, 34 L. ed. 586, in which a longshoreman who was loading coal on a steamship and who was injured partly through his own negligence and partly through the negligence of the officers of the vessel was held entitled to recover one-half his damages from the steamship. See also Marsden Coll. (3d ed.) 106.

If the owner of one of two vessels which were both in fault was on board his own ship at the time of the collision and received personal injuries resulting from the collision he is entitled to recover one-half his damage from the other vessel. U. S. *v.* The Steamship Juniata, 93 U. S. 337, 23 L. ed. 930. In Robinson *v.* Detroit, etc., Steam Nav. Co., 73 Fed. 883, 43 U. S. App. 190, 20 C. C. A. 86, it was held that the other vessel was not liable for the death of the owner of a tug who was killed in a collision caused by lack of proper lookout resulting from the tug's being short-handed, of which the owner was presumed to have known. See also The Ilos, Swabey 100; Marsden Coll. (3d ed.) 106.

13. The Job T. Wilson, 84 Fed. 204; Taylor *v.* Dewar, 5 B. & S. 58, 33 L. J. Q. B. 141, 10 L. T. Rep. N. S. 267, 12 Wkly. Rep. 579, 117 E. C. L. 58; The Borodino, 5 L. T. Rep. N. S. 291.

14. Briggs *v.* Day, 21 Fed. 727.

15. So in Jakobsen *v.* Springer, 87 Fed. 948, 31 C. C. A. 315. See The George and Richard, L. R. 3 A. & E. 466, 1 Aspin. 50, 24 L. T. Rep. N. S. 717, 20 Wkly. Rep. 246; Mills *v.* Armstrong, 13 App. Cas. 1, 6 Aspin. 257, 52 J. P. 212, 57 L. J. Adm. 65, 58 L. T. Rep. N. S. 423, 36 Wkly. Rep. 870.

16. The Job T. Wilson, 84 Fed. 204; The City of New York, 25 Fed. 149; The Limerick, 3 Aspin. 206, 34 L. T. Rep. N. S. 708, 1 P. D. 411; Nicholson *v.* Mouncey, 15 East 384, 13 Rev. Rep. 501. And see The Queen, 40 Fed. 694; Quinn *v.* New Jersey Lighterage Co., 23 Blatchf. (U. S.) 209, 23 Fed. 363; The Cumberland, 5 L. T. Rep. N. S. 496; Marsden Coll. (3d ed.) 106.

17. Statement in the text is from the opinion of Fuller, J., in *Ex p.* New York, etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246 [*citing* with approval decision of Brown, J., in The Hudson, 15 Fed. 162]. This decision was announced Feb. 7, 1883, and established a new rule in admiralty practice and awarded a remedy which had never before been enjoyed in this country; and March 29, 1883, rule 59 in admiralty, prescribing the proceedings to be followed in such cases, was promulgated by the United States supreme court (112 U. S. 743, Appendix).

D. Limitation of Liability — 1. Origin of the Rule. The rule or custom under which the liability of ship-owners is limited is said to have originated in the maritime usages of the middle ages, and more particularly in the Mediterranean, where commerce first acquired activity and extension after the fall of the western empire.[18] No trace of such a rule is to be found in the digests of the Roman law, in the maritime legislation of the eastern empire, in the compilation of codes, which goes under the name of the Rhodian Law, or in the Laws of Oleron.[19] It is believed that the rule first appears in the Consolato del Mare, a compilation of the early Mediterranean sea laws said to have been published in the twelfth century.[20] The custom of limitation of liability is said to be derived from the contract of commande, or joint adventure of ship-owners and merchants.[21] Whatever may have been the origin of the rule of limitation of liability it appears to have existed in the maritime laws in force among most of the nations in Europe.[22]

2. Distinction Between the Rule in England and in the United States. The theory pervading the English statutes limiting the liability of ship-owners and the objects sought to be accomplished by them, as well as their explicit provisions, are essentially different from the continental rules and from the United States

The same practice was followed in The Alert, 40 Fed. 836 [*affirmed* in 61 Fed. 113, 26 U. S. App. 63, 9 C. C. A. 390], in which a chartered ship was sued *in rem* for negligent damage to cargo by the breaking of her tackle while discharging under the charterers. Her owners in their answer set up that the tackle was furnished either by the shipper or by the charterers under a special agreement between them and not by the ship, and they moved that the charterers be made co-defendants, which was done. See also The Barnstable, 181 U. S. 464, 21 S. Ct. 484, 45 L. ed. 954; The New York, 108 Fed. 102, 47 C. C. A. 232.

In common law suits.— The introduction of third persons in such cases is in the ordinary course of procedure in common law suits. Benecke *v.* Frost, 1 Q. B. D. 419; Carshore *v.* North Eastern R. Co., 29 Ch. D. 344; Coles *v.* Civil Service Supply Assoc., 26 Ch. D. 529; The Cartsburn, 49 L. J. Adm. 14, 5 P. D. 35; Fowler *v.* Knoop, 36 L. T. Rep. N. S. 219.

18. Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; The Rebecca, 1 Ware (U. S.) 187, 20 Fed. Cas. No. 11,619, 6 Am. Jur. 5.

19. Per Ware, J., in The Phebe, 1 Ware (U. S.) 265, 19 Fed. Cas. No. 11,064; 3 Kent Comm. 218; Laws of Oleron, art. 15; Marsden Coll. (3d ed.) 162.

20. Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; Boucher Translation, c. 34.

21. The Rebecca, 1 Ware (U. S.) 187, 20 Fed. Cas. No. 11,619, 6 Am. Jur. 5; Fremery-Études de Droit Commercial, c. 27; Marsden Coll. (3d ed.) 163; 6 Pardessus Lois Maritimes, tit. Commande; Statute of Marseilles (1253), c. 19–25.

The principle of this contract appears to have been that under it the owner bound himself to his agent or commandatory so far as the capital which he advanced with all its increase from profits of the trade, but nothing further. Consolato del Mare, c. 244.

This contract never reached England owing to the insulation of the British Islands. On the continent it was afterward superseded by a limited partnership or what was called Société en Commandite. In France this was known as the Contrat de Pacotille. 1 Valin Comm. 682–686, tit. 3, art. 4.

22. It is found in the Ordonnance of Peter III of Aragon for the regulation of the consular jurisdiction of Valentia. The Rebecca, 1 Ware (U. S.) 187, 20 Fed. Cas. No. 11,619, 6 Am. Jur. 5.

The law of Holland always limited the responsibility of owners from all present liability upon their abandoning their interest in the ship to the creditors. Grotius de Jure Belli ac Pacis, lib. 2, c. 2, § 13; Marsden Coll. (3d ed.) 163.

The law of Sweden is explicit that if the owners choose to abandon the ship the creditors can demand nothing more. This appears from the maritime code of Charles II in 1667. The same limit appears to be established by statute of Hamburg of 1603, Kuricke de Jus. Marit. Haus. tit. 6, art. 2, p. 766. According to Emerigon such was the established jurisprudence of the north of Europe. Contrats a la Grosse, c. 4, § 11.

In the celebrated Ordonnance of Louis XIV it is ordered that the proprietors of vessels shall be responsible for the acts of the master; but that they shall be discharged by abandoning the ship and freight; this was said by Cleirac to be merely an affirmation of preëxisting law. Cleirac Navigation des Rivieres, art. 15, p. 502.

Valin held that it only applied to obligations resulting from the fault and negligence of the master, but Emerigon and Pothier held that it applied both to obligations *ex contractu* and *ex delicto*. Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; Contrats a la Grosse, c. 41, § 11; Contrats Maritimes, No. 51; Des Obligations, No. 452.

statutes.[23] The essential differences consist in this, viz., that under the commercial codes in force among continental nations and under our statutes the interest of the owner in the ship, to which his liability is limited, is considered to be her value after the accident has happened, or rather on the termination of the voyage during which the accident happened, whereas in England the value is taken immediately before the accident.[24] Consequently, on the continent and in this country the ship-owner can at any time, by abandoning his interest in the vessel and her freight, relieve himself from any further liability, and so if his vessel is lost in the collision, or if it is lost before the end of the voyage in which the collision takes place, that ends the matter; the theory and the provisions of the act being that the owners may discharge their liability by a surrender of all that the collision has left them. But in England whether his own vessel incur great or slight injury in the collision does not affect at all the amount of the owner's liability for damage to the other, nor can he free himself from further responsibility by abandoning his vessel to the parties having claims against it; and if two separate collisions take place on the same voyage the owner is separately liable for the damage incurred in each collision to an amount not exceeding the value of his ship before each collision, and this, it seems, would be so, even if his vessel were totally lost in the second collision.[25] This value of the vessel was defined to be the sum for which she could have been sold, and under the earlier English acts it was ascertained by a valuation appraisement, but the difficulty of determining what was the value of the ship and her freight immediately before the collision was a fruitful source of litigation and expense.[26] To obviate this the English statute of 25 & 26 Vict. was passed, under which a rough average value for all ships was struck and fixed at fifteen pounds per ton for loss of life or personal injuries by collision, and eight pounds per ton for damages or loss to goods arising from the same cause.[27]

3. ENGLISH ACTS. The owners of any ship, whether British or foreign, must not, in cases where all or any of the following events occur without their actual fault or privity, that is to say: (1) Where any loss of life or personal injury is caused to any person being carried in such ship; (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; (3) Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat; be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships and in the case of steamships the gross tonnage, without deduction on account of engine-room.[28]

23. *In re* Norwich, etc., Transp. Co., 17 Blatchf. (U. S.) 221, 18 Fed. Cas. No. 10,362 [*affirmed* in 13 Wall. (U. S.) 104, 20 L. ed. 585]; 2 Parsons Shipp. & Adm. 125.

24. Wilson *v.* Dickson, 2 B. & Ald. 2, 20 Rev. Rep. 331; Dobree *v.* Schroder, 2 Myl. & C. 489, 14 Eng. Ch. 489; The Mary Caroline, 3 W. Rob. 101; Lowndes Coll. 174.

25. The Normandy, L. R. 3 A. & E. 152, 39 L. J. Adm. 48, 23 L. T. Rep. N. S. 631, 18 Wkly. Rep. 903; Brown *v.* Wilkinson, 16 L. J. Exch. 34, 15 M. & W. 391; Marsden Coll. (3d ed.) 167, 174 [*citing* 17 & 18 Vict. c. 104, § 506; 25 & 26 Vict. c. 63, § 54]; 2 Parsons Shipp. & Adm. 129; U. S. Rev. Stat. (1878), § 4285.

26. Leycester *v.* Logan, 4 Kay & J. 725, 6 Wkly. Rep. 849; Marsden Coll. (3d ed.) 167.

27. Marsden Coll. (3d ed.) 167; 25 & 26 Vict. c. 63, § 54.

28. 25 & 26 Vict. c. 63, § 54, repealing 17 & 18 Vict. c. 104, § 504.

History of the English acts limiting liability of ship-owners.— Previous to 1734 the liability of ship-owners in England both by the common law and the admiralty law as ad-

4. United States Statutes[29] — a. Liability of Owner Not to Exceed His Interest — (I) *In General.* The liability of the owner of any vessel for any loss by collision without the privity or knowledge of such owner is in no case to exceed the amount of the interest of such owner in such vessel and her freight then pending.[30]

(II) *Meaning of "Amount or Value of the Interest of Such Owner."* In the United States the value to be taken is the value of the ship after the collision or at the termination of the voyage on which the collision took place.[31] If the ship is lost at sea or the voyage is otherwise broken up before arriving at a port of destination the voyage is then terminated for the purpose of fixing the owner's liability.[32] If a vessel is sunk either by collision or before the termination of the voyage on which the collision takes place, her value in her wrecked condition is the measure of the owner's liability, and this is not increased by any additional value arising from the vessel having been raised and repaired.[33]

ministered there was unlimited. 7 Geo. II, c. 15, which was passed in the year 1734 limiting ship-owners' liability on loss of cargo by the theft of the master or crew to the value of the ship and freight, was passed in consequence of the decision in Boucher *v.* Lawson, Cas. t. Hardw. 85, by which the ship-owners were held liable for the loss of a cargo of bullion taken on board at Portugal and afterward stolen by the master. Marsden Coll. (3d ed.) 165. By 26 Geo. III, c. 86, this limitation of liability was extended to cases of theft by persons other than the crew and to cases of loss by fire, and this relief was not extended to cases of collision until 53 Geo. III, c. 159, which fixed the limit of liability of ship-owners for damage to their ships and to the cargo on board either of two ships in collision to the value of the ship sued and the freight she was earning or under contract to earn. Marsden Coll. (3d ed.) 166. And by 17 & 18 Vict. c. 104, §§ 504, 505, the same limit was fixed for damages recoverable for loss of life or personal injury, with a provision that in such cases the value of the ship should be taken at not less than fifteen pounds per ton.

29. History of legislation in the United States limiting liability of ship-owners.—The beginning of the legislation in this country on the subject was Mass. Acts (1818), c. 122, which was based on 7 Geo. II. Me. Acts (1821), c. 14, §§ 8–10, is merely a copy of the Massachusetts statute. In 1836 the statute of Massachusetts was revised (Mass. Rev. Stat. c. 32, pars. 1–4) and was reënacted in 1860 (Mass. Gen. Stat. c. 52, §§ 18–21). In 1840 the Maine statute was revised to correspond with the act as contained in the Revised Statutes of Massachusetts (Me. Rev. Stat. (1840), c. 47, §§ 8–11; Me. Rev. Stat. (1857), c. 35, §§ 5, 6). The act of congress of 1851 was taken from 26 Geo. III and from Me. Rev. Stat. (1840), c. 47; section 3 is nearly the same as Me. Rev. Stat. (1840), c. 7, but the words "or for any loss, damage, or injury by collision" are not found in the statute of Maine or Massachusetts, nor are they found in these words in any English statute; and section 4 is nearly the same as section 9 of the Maine statute down to the last clause. The passage of the act of 1851 in this country which is contained in U. S. Rev. Stat. (1878), § 4283 *et seq.*, is said to have been due to the decision in New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465, where it was held that in admiralty as at common law the owners of a steamboat were liable *in personam* for the loss by fire of specie carried by their boat. Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134, per Bradley, J.; 2 Parsons Shipp. & Adm. 121–125.

30. U. S. Rev. Stat. (1878), § 4283; U. S. Comp. Stat. (1901), § 4283.

31. The Scotland (Dyer *v.* National Steam Nav. Co.), 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153; Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585; Wattson *v.* Marks, 29 Fed. Cas. No. 17,296, 2 Am. L. Reg. 157, 5 Pa. L. J. Rep. 254. This would seem to follow from the alternative contained in U. S. Rev. Stat. (1878), § 4285, giving the owner the power to relieve himself from further liability by transferring his interest in the vessel and freight to a trustee for the benefit of claimants against her. For an earlier decision to the contrary see Walker *v.* Boston Ins. Co., 14 Gray (Mass.) 288. But see *In re* Norwich, etc., Transp. Co., 17 Blatchf. (U. S.) 221, 18 Fed. Cas. No. 10,362.

See 10 Cent. Dig. tit. "Collision," § 21.

32. Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134.

33. Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134. In The U. S. Grant, 45 Fed. 642, it was held that the price of the wreck realized at the marshal's sale was *prima facie* but not conclusive evidence of value for which a bond would be required. Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134. In Thommessen *v.* Whitwill, 118 U. S. 520, 6 S. Ct. 1172, 30 L. ed. 156, this vessel, after having been in collision, was afterward, and before arriving at her destination, stranded and sunk by the negligence of her crew, the subsequent disaster in no way resulting from the former collision; and it was held that her owners' liability was lim-

If any salvage charges are incurred after the collision to save the vessel or if any cargo is jettisoned or other sacrifice is made for that object the ship's proportion of the salvage charges and her share of the general average charges are deducted from her value after being saved.[34] If any freight is earned this must be paid in full by the owner without deducting any expenditures for provisions or for the wages of the crew excepting those expenses, if any, which were incurred after the collision for the purpose of earning the freight, which latter may be deducted from the gross freight earned to arrive at the value of the freight within the meaning of the act.[35] Interest on the value thus obtained is also to be paid by the owner from the date of the decree but not from the date of the loss.[36] Insurance is no part of the owner's interest in ship or freight within the meaning of the act and does not enter into the amount for which the owner is liable.[37] The damages recoverable from another vessel or her owners for loss of a vessel in collision stand in the place of the vessel itself and are included in the interest of the owner which must be surrendered.[38]

b. General Average Losses. When any loss is suffered by several owners of goods on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they are to receive compensation from the owner of the vessel in proportion to their respective losses.[39]

c. Transfer of Interest of Owner to Trustee. It is to be deemed a sufficient compliance with the act if the owner shall transfer his interest in such vessel and freight for the benefit of such claimants to a trustee, and from and after such transfer all claims and proceedings against the owner shall cease.[40]

d. Remedies Reserved. The remedy is reserved against the master, officers, or seamen for any loss arising from their negligence, etc.[41]

e. What Vessels Are Included Within the Act. The act applies to all sea-going vessels and also to all vessels used on lakes or rivers or in inland navigation, includ-

ited to the value of the vessel after she was stranded with the pending freight, and that their liability was not affected by the fact that the vessel was then abandoned to the underwriters; and further that the amount realized by the underwriters from the sale of the wreck was the proper measure of the value of the ship for the purpose of the act.

34. The Abbie C. Stubbs, 28 Fed. 719. The ship-owner is not liable to owner of cargo for the amount of bottomry bond paid to redeem portion of goods transshipped by another vessel and arriving in safety from lien of bond. Miller *v.* O'Brien, 35 Fed. 779.

35. The José E. Moré, 37 Fed. 122. And see Wilson *v.* Dickson, 2 B. & Ald. 2, 20 Rev. Rep. 331.

The word "freight" includes fare for passengers. The Main *v.* Williams, 152 U. S. 122, 14 S. Ct. 486, 38 L. ed. 381, holding that the word also includes freight prepaid.

Claim for unearned freight paid in advance is not within the class of claims protected by the act. *In re* Liverpool, etc., Steamship Co., 3 Fed. 168.

Freight pending does not include salvage earned during the voyage. *In re* Meyer, 74 Fed. 881. And see The Jane Gray, 99 Fed. 582, where the owner was held not entitled to deduct from gross freight and passage-money pending expenses of voyage. But it is to be noted that the earnings of the vessel in transporting the goods of her owners is also to be included in the freight then pending. Allen *v.* Mackay, 1 Sprague (U. S.) 219, 1 Fed. Cas. No. 228, 16 Law Rep. 686.

36. The court is not bound to allow interest on the proceeds of a wreck but may in its discretion allow interest or not. The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175; Dyer *v.* National Steam Nav. Co., 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153.

37. The Great Western (Thommessen *v.* Whitwill), 118 U. S. 520, 6 S. Ct. 1172, 30 L. ed. 156; Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; The City of Columbus, 22 Fed. 460.

38. O'Brien *v.* Miller, 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469 [*reversing* 67 Fed. 605, 35 U. S. App. 138, 14 C. C. A. 566, and *affirming* 59 Fed. 621]. A barge carrying freight and a tug, both having the same owner, held one vessel for the purposes of the voyage and that the owner was not entitled to limit his liability for damage caused by the negligence of the crew of either without surrendering both. Short *v.* The Columbia, 73 Fed. 226, 19 C. C. A. 436 [*reversing* 67 Fed. 942, 15 C. C. A. 91].

39. U. S. Rev. Stat. (1878), § 4284, as amended by 19 U. S. Stat. at L. p. 251, c. 69, § 1; U. S. Comp. Stat. (1901), § 4284.

40. U. S. Rev. Stat. (1878), § 4285; U. S. Comp. Stat. (1901), § 4285.

41. U. S. Rev. Stat. (1878), § 4287; U. S. Comp. Stat. (1901), § 4287.

ing canal-boats, barges, and lighters.[42] In determining how far the operation of the act should extend[43] the courts seem to have been influenced by the consideration that it was not only a regulation of interstate and foreign commerce, but also a declaration and adoption of the maritime law in its application to the jurisdiction and decision of courts of admiralty, and that therefore it should extend to all waters within the jurisdiction of the United States admiralty courts and to all vessels engaged in commerce, unless the same were particularly excepted by the terms of the act itself, or by the limits of the power of congress under the constitution.

f. Liability of Owners For Debts Limited. The individual liability of a ship-owner is limited to the proportion of any or all debts or liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending. Provided that this provision shall not affect the liability of any owner incurred previous to the passage of this act, or prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners.[44]

5. What Injuries or Losses Embraced. The liability of ship-owners can be limited only as to such losses or damage as occurred on the last voyage preceding the filing of the petition, or on the voyage on which the vessel was lost.[45] The

42. U. S. Rev. Stat. (1878), § 4289, as amended by 24 U. S. Stat. at L. p. 80, c. 421; U. S. Comp. Stat. (1901), § 4289.

43. Lord *v.* Goodall, etc., Steamship Co., 102 U. S. 541, 26 L. ed. 224; *In re* Long Island, etc., Transp. Co., 5 Fed. 599; *In re* Norwich, etc., Transp. Co., 17 Blatchf. (U. S.) 221, 18 Fed. Cas. No. 10,362; Wheeler Carr. 39. *Contra*, Spring *v.* Haskell, 14 Gray (Mass.) 309.

U. S. Rev. Stat. (1878), § 4289 (the act of 1851), as originally enacted, was as follows: "The provisions of this title relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal-boat or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation. In 1886 section 4289 was amended by 23 U. S. Stat. at L. p. 80, c. 421, § 4, so as to apply to all sea-going vessels and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters.

Cases arising under the act of 1851.— The act did not apply to a vessel engaged exclusively in river navigation, although plying between ports of different states with reference to the Mississippi river. The War Eagle, 6 Biss. (U. S.) 364, 29 Fed. Cas. No. 17,173. With reference to the Hudson river see The Sears, 8 Fed. 365. The East river, New York harbor, is in reality an arm of the sea. The Garden City, 26 Fed. 766. So is Long Island sound. *In re* Long Island, etc., Transp. Co., 5 Fed. 599. Commerce between different states upon the Great Lakes is not inland navigation. Moore *v.* American Transp. Co., 24 How. (U. S.) 1, 16 L. ed. 674. A tugboat employed in towing vessels engaged in interstate commerce is herself therein engaged and subject to the act. *In re* Vessel Owners' Towing Co., 26 Fed. 169. A steam yacht running in and out of the port of Detroit was held to be within the exception of U. S. Rev. Stat. (1878), § 4289, and her owner was not entitled to limit his liability. The Mamie, 5 Fed. 813 [*affirmed* in 8 Fed. 367].

Cases arising under acts of 1886 and 1884. —In The Katie, 40 Fed. 480, 7 L. R. A. 55, upon the constitutionality of the act of June 19, 1886, it was held that there was a distinction between inland navigation and internal commerce, and that if the act did affect the internal commerce of a state it was incidental only to the main purpose of the act. In *Ex p.* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631, it was held that since navigable rivers, although tideless, were subject to the maritime law and admiralty jurisdiction of the United States, the act of June 19, 1886, extending the Limited Liability Act to them, was constitutional and valid. The fact that the vessel is a wreck and incapable of propulsion shall not deprive her owner of the right to invoke the law limiting his liability if she continue to exist as a vessel and be in condition to injure other property. Craig *v.* Continental Ins. Co., 26 Fed. 798. An excursion barge without motive power is included within the act. *In re* Myers Excursion, etc., Co., 57 Fed. 240 [*affirmed* in The Republic, 61 Fed. 109, 20 U. S. App. 561, 9 C. C. A. 386]. The question raised in the case of Chappell *v.* Bradshaw, 35 Fed. 923, was whether the act of congress of 1884 acted as an amendment to U. S. Rev. Stat. (1878), § 4289, which limited it, but it was held that it did not. The acts of June 26, 1884, and of 1851, were held to apply to different states of facts and that each was to be construed according to its terms. Warner *v.* Boyer, 74 Fed. 873.

44. 23 U. S. Stat. at L. p. 57, c. 121, § 18; U. S. Comp. Stat. (1901), p. 2945.

45. The Alpena, 10 Biss. (U. S.) 436, 8 Fed. 280. And see Thommessen *v.* Whitwill, 118 U. S. 520, 6 S. Ct. 1172, 30 L. ed. 156;

statute of limited liability includes damage by collision to other vessels and cargoes as well as to the vessel's own cargo; claims for personal injuries and loss of life sustained and any damage inflicted by collision upon another object, whether the thing injured was situated on the water or on the land.[46]

6. WHO ARE INCLUDED UNDER TERM "OWNERS." Section 4286[47] of the Revised Statutes of the United States provides that the charterer of a vessel, in case he should man, victual, and navigate such vessel at his own expense or by his own procurement, shall be deemed the owner of such vessel within the meaning of the act.[48] If the master be a part owner so that the right of action exists against

Dyer *v.* National Steam Nav. Co., 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153; Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; Gokey *v.* Fort, 44 Fed. 364. In The Alpena, 10 Biss. (U. S.) 436, 8 Fed. 280, this steamer having been lost, the court refused to entertain proceedings to limit her owner's liability for damage by collision to a schooner occurring three weeks before the beginning of the voyage on which she foundered. And it was held that the act of June 26, 1884 (23 U. S. Stat. at L. p. 53), contemplates only liabilities incurred during the last or pending voyage, allowing a reasonable time after knowledge of the liability within which to surrender the vessel, provided it is in practically the same condition as at the close of such voyage. The Puritan, 94 Fed. 365.

Under the English statute providing that the owner's liability shall be limited to eight pounds per ton for damage caused on any occasion, where the offending vessel ran into one ship and then immediately afterward, in consequence of the same act of improper navigation, ran into another, it was held that the loss to both vessels was caused substantially at the same time and on the same occasion. The Rajah, L. R. 3 A. & E. 539, 1 Aspin. 403, 41 L. J. Adm. 97, 27 L. T. Rep. N. S. 102, 21 Wkly. Rep. 14.

In France it has been held that an owner can limit his liability for loss occurring on a previous voyage, where no suit had been brought until after the termination of the intermediate voyage. Wheeler Carr. 42, note 4.

46. As to what is included under the term "merchandise" see Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585; The Garden City, 26 Fed. 766.

Baggage delivered by purchaser of ticket and placed on wharf-boat to which the steamer was moored was "shipped" within the meaning of the provisions of the act. So held in *In re* Louisville, etc., Packet Co., 95 Fed. 996.

As to personal injuries see The City of Columbus, 22 Fed. 460.

As to damages for loss of life see Butler *v.* Boston Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017; The Amsterdam, 23 Fed. 112.

Injuries to passengers are within the act, notwithstanding provisions of U. S. Rev. Stat. (1878), § 4493, declaring owners responsible for damages to passengers through violation of the inspection laws or through known defect in the steaming apparatus. The Annie Faxon, 75 Fed. 312, 44 U. S. App. 591, 21 C. C. A. 366 [*modifying* 66 Fed. 575].

As to collision with a bridge pier see Memphis, etc., Packet Co. *v.* Overman Carriage Co., 93 Fed. 246. See Gokey *v.* Fort, 44 Fed. 364.

As to damage to an object on land see *In re* Vessel Owners' Towing Co., 26 Fed. 172. And *compare Ex p.* Phenix Ins. Co., 118 U. S. 610, 7 S. Ct. 25, 30 L. ed. 274.

Contracts made by the owner personally are not affected by section 18 of the act of congress of June 26, 1884. So held in The Amos D. Carver, 35 Fed. 665.

Direct personal contracts, such as agreements to insure cargo, are not affected by limited liability acts. So held in Laverty *v.* Clausen, 40 Fed. 542.

47. U. S. Rev. Stat. (1878), § 4286; U. S. Comp. Stat. (1901), § 4286.

48. As to the justice of holding a carrier who participates in the earnings of a vessel forming part of a through line and who has the right to contract for transportation on her as the owner *pro hac vice* and within the equity of the act see Wheeler Carr. 36; Hughes *v.* Sutherland, 7 Q. B. D. 160, 4 Aspin. 459, 46 J. P. 6, 50 L. J. Q. B. 567, 45 L. T. Rep. N. S. 287, 29 Wkly. Rep. 867; The Spirit of the Ocean, Brown & L. 336, 34 L. J. Adm. 74, 12 L. T. Rep. N. S. 239, 2 Mar. L. Cas. 192; Marsden Coll. (3d ed.) 171.

Charterers owners pro hac vice.— It has been held that the right of the owners to proceed was not defeated because they had so let the vessel that the charterers became owners *pro hac vice.* Quinlan *v.* Pew, 56 Fed. 111, 5 U. S. App. 382, 5 C. C. A. 438.

Railroad company.— Under the English act it has been held that a railroad company owning a ship can take advantage of the act. London, etc., R. Co. *v.* James, L. R. 8 Ch. 241, 1 Aspin. 526, 42 L. J. Ch. 337, 28 L. T. Rep. N. S. 48, 21 Wkly. Rep. 151. In the United States, however, it has been held that a railroad company which, in pursuance of a contract of shipment, delivered to a steamship company goods which were destroyed by fire on one of its ships was not to be considered as the owner or charterer of the vessel and as such entitled to the benefit of the provisions of the act. Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Rice *v.* Ontario Steamboat Co., 56 Barb. (N. Y.) 384.

him it does not deprive the other part owners of the benefit of the statute,[49] but he is himself liable for full damages.[50] The right of limitation of liability may be availed of by any one of the part owners.[51]

7. Meaning of Words "Without the Privity or Knowledge of Such Owner."[52] The words "privity or knowledge" have been defined as a personal participation of the owner in some fault or an act of negligence causing or contributing to the loss or some personal knowledge or means of knowledge of which he is bound to avail himself of a contemplated loss or of a condition of things likely to produce or contribute to the loss without adopting appropriate means to prevent it.[53] Where the owner of a vessel is a corporation it appears that only the privity or knowledge of an actual officer of the corporation would be the privity

49. *In re* Leonard. 14 Fed. 53; Wilson *v.* Dickson, 2 B. & Ald. 2, 20 Rev. Rep. 331; The Spirit of the Ocean, Brown & L. 336, 34 L. J. Adm. 74, 12 L. T. Rep. N. S. 239, 2 Mar. L. Cas. 192; Marsden Coll. (3d ed.) 172. 53 Geo. III, § 4, provided that the act should not take away the responsibility of the master, although he might be part owner. 2 Parsons Shipp. & Adm. 140.

50. U. S. Rev. Stat. (1878), § 4287; U. S. Comp. Stat. (1901), § 4287. To hold him liable in such a case he must be sued as master in the first instance. The Volant, 1 W. Rob. 383; Marsden Coll. (3d ed.) 172. As to what constitutes fault or privity on the part of the master see The Obey, L. R. 1 A. & E. 102, 12 Jur. N. S. 817; Kidson *v.* McArthur, 5 Sc. Sess. Cas. (4th S.) 936.

51. The S. A. McCaulley, 99 Fed. 302; 23 U. S. Stat. at L. p. 57, c. 121, § 18; U. S. Comp. Stat. (1901), p. 2945.

Applies in favor of part owners who had committed the management to another part owner in respect to debts for coal furnished at the instance of the latter and without their previous knowledge. Warner *v.* Boyer, 74 Fed. 873.

If the owner of the vessel is not the owner of the freight the freight does not contribute. Walker *v.* Boston Ins. Co., 14 Gray (Mass.) 288.

Where the owner of cargo is not the owner of the vessel and her owners succeed in limiting their liability he is entitled to recover the entire value of his cargo from the other vessel. *In re* Leonard, 14 Fed. 53.

52. In the English statute the words have been changed so as to read "without their actual fault or privity." 25 & 26 Vict. 63, § 54.

53. Per Sawyer, J., in Lord *v.* Goodall, etc., Steamship Co., 4 Sawy. (U. S.) 292, 301, 15 Fed. Cas. No. 8,506, 12 Am. L. Rev. 391, 5 Centr. L. J. 325, 1 San Fran. L. J. 52 [*affirmed* in 102 U. S. 541, 26 L. ed. 224], where it is also said: "It is the duty of the owner, however, to provide the vessel with a competent master and a competent crew; and to see that the ship, when she sails, is in all respects seaworthy. He is bound to exercise the utmost care in these particulars — such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity within the meaning of the act. But the owner, under this act, is not an insurer. If he exercises due care in the selection of the master and crew, and a loss afterward occurs from their negligence, without any knowledge or other act or concurrence on his part, he is exonerated by the statute from any liability, beyond the value of his interest in the ship and the freight pending. So, also, if the owner has exercised all proper care in making his ship seaworthy, and yet some secret defect exists, which could not be discovered by the exercise of such due care, and the loss occurs in consequence thereof, without any further knowledge or participation on his part, he is in like manner exonerated." As to the distinction between the words "unless such fire is caused by the design or neglect of such owner" contained in U. S. Rev. Stat. (1878), § 4282; U. S. Comp. Stat. (1901), § 4282, regarding loss by fire and the words "without the privity or knowledge of the owner" contained in this section see the opinion of Bradley, J., in Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. ed. 1038, where it is said: "They [the owners] may not be able under the 1st section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect; whilst they may be very confident of showing, under the 3d section, that it happened without their 'privity or knowledge.' The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different." *Contra*, see *dictum* of Peckham, J., in Knowlton *v.* Providence, etc., Steamship Co., 53 N. Y. 76, to the effect that the meaning of the two expressions is nearly or quite synonymous. For a discussion as to what constitutes negligence of shipowners in analogous cases see Wheeler Carr. 30–32.

In England see Wilson *v.* Dickson, 2 B. & Ald. 2, 20 Rev. Rep. 331; The Spirit of the Ocean, 1 Brown & L. 336, 34 L. J. Adm. 74, 12 L. T. Rep. N. S. 239, 2 Mar. L. Cas. 192; The Volant, 1 W. Rob. 383.

In France it was held in the court of cassation in 1870 that the owner has no right to limit his liability for a loss occasioned by the intrinsic weakness or insufficiency of the ship itself, and that this was his personal fault in respect to which his right to abandon the vessel did not exist. Wheeler Carr.

of knowledge of the corporation within the meaning of the statute.[54] If the owner has selected competent men to build, inspect, or repair the vessel, a loss arising from some defect in her hull or equipment will not be within his knowledge or privity.[55]

8. In Cases of Division of Loss. When both vessels are in fault the rule is to divide the damage equally between them and to make a decree for one-half the difference between their respective losses[56] in favor of the one who has suffered most so as to equalize the burden. The obligation to pay this difference is the legal liability growing out of the transaction. The statute of limitation of liability is not to be applied until the balance of damage has been struck and then the party against whom the decree passes may have the benefit of the statute, if he is otherwise entitled to it in respect to the balance which he is decreed to pay.[57]

E. Measure of Damages—1. In General. The party who has sustained a

34 [*quoting* 1 Conder Dict. de Droit Commercial, note 413, tit. Armateur, § 75, as follows: "Il faut egalement rattacher au même principe la solution que decide que le proprietaire respond indefinement des conséquences du vice propre du navire, il y a la, en effet un fait personnel, au regard duquel la faculté d'abandon n'existe point"].

54. So held in Craig *v.* The Continental Ins. Co., 26 Fed. 798. This was an action by the administrator of an engineer against an insurance company whose agent, a wrecking master, attempted to take a vessel, which had been stranded on Lake Huron and abandoned to the underwriters in her damaged condition across the lake and engaged an engineer to assist him. The vessel was lost and the engineer was drowned. It was held that the knowledge and privity of the wrecking master was not that of the insurance company, so as to prevent the company obtaining the benefit of the statute. In The Annie Faxon, 75 Fed. 312, 44 U. S. App. 591, 21 C. C. A. 366 [*modifying* 66 Fed. 575], where the owner of the vessel was a railroad corporation, it was held that it was not necessary to show that the officers of such corporation had no knowledge of the condition of the vessel. In *In re* Meyer, 74 Fed. 881, it was held that a part owner who had knowledge of an unjustifiable deviation was liable for his proportion of a loss on cargo occurring subsequently, but that the other joint owners were not. It was also held that in the absence of evidence the court would presume that the captain was a licensed pilot. In The Maria & Elizabeth, 12 Fed. 627, a part owner was on board and had taken part in the navigation of the vessel, but he was asleep at the time of the negligence which caused the injury, it not being his watch, and there being nothing which called for special vigilance. It was held that the loss was not incurred with his privity or knowledge. See The Ohey, L. R. 1 A. & E. 102, 12 Jur. N. S. 817.

55. In The Warkworth, 5 Aspin. 326, 53 L. J. Adm. 65, 51 L. T. Rep. N. S. 558, 9 P. D. 145, 33 Wkly. Rep. 112, a collision was caused by the steam steering gear failing to act at the critical moment, owing to a certain pin not being in its place. The pin had worked or fallen out of its socket, owing to its not being, as it should have been, a "split" pin. Here it was held that the owner could limit his liability. The defect, it seems, was not in the original construction. If the defect had been in the ship when she was constructed, but was latent and not discoverable before the accident, the ship-owner in the opinion of the master of rolls would not have been liable at all irrespective of the statute. In Quinlan *v.* Pew, 56 Fed. 111, 5 U. S. App. 382, 5 C. C. A. 438, in which a sailor was injured by an accident resulting from the bull's eye on a jib pennant being cracked before the voyage, it was held that as a master had been employed to put the vessel in condition the occurrence was without the privity or knowledge of the owner. In The Annie Faxon, 75 Fed. 312, 44 U. S. App. 591, 21 C. C. A. 366 [*modifying* 66 Fed. 575], where the explosion of the boiler was due to a defect not apparent to an unskilled person, it was held that the owner, having selected competent men to repair it, was entitled to limit his liability, although there had been negligence in inspection and repair. In The Strathdon, 89 Fed. 374, in which the cargo was injured by fire caused by heat from the flue of an engine, it was held that the vessel having been constructed by competent builders and in accordance with the best designs the owners were not chargeable with knowledge of the defect. See The Anna, 47 Fed. 525. *Contra*, as to the presumption that the owner is cognizant of the unseaworthiness of the vessel see *In re* Sinclair, 22 Fed. Cas. No. 12,895, 8 Am. L. Reg. 206; 1 Parsons Shipp. & Adm. 139. But see The Republic, 61 Fed. 109, 9 C. C. A. 386 [*affirming* 57 Fed. 240], in which it appeared that the unseaworthy condition of an excursion barge would have been shown by a proper examination and her owners were held chargeable with a knowledge thereof. And *compare* The Hadji, 20 Fed. 875.

56. If this sum, "one half of the differ, ence between the amounts of their respective losses," is more than the value of the vessel which is entitled to limitation of liability, that value becomes the limit of the decree. The Manitoba, 122 U. S. 97, 7 S. Ct. 1158, 30 L. ed. 1075.

57. In The North Star, 103 U. S. 17, 1 S. Ct. 41, 27 L. ed. 91, where both vessels were in fault; the W was sunk and the North Star was much damaged. The owners of the W

damage by collision is entitled to be put, so far as practicable, in the same condition as if the injury had not been suffered.[58] The rules as to what damages are recoverable are the same at common law and in admiralty.[59]

2. Loss and Injuries to Vessel — a. Vessel Lost or Destroyed — (i) *When Total Loss Is Allowed.* The owner cannot abandon a vessel injured by collision, which can be raised and repaired.[60] If a vessel sunk in a collision be raised and repaired at an expense greater than her value only her value will be allowed.[61] There is no obligation upon an owner to raise a ship sunk at sea by a collision.[62] If he elects to raise her, and it turns out upon a survey that she is not worth repairing, he is entitled to recover as damages the expense of raising and docking her, less her value in the dock.[63] If acting as a prudent owner he elects not to repair and sells her, he is entitled to recover her value at the time of collision, less the proceeds of sale, together with interest from the date of collision.[64]

claimed under the act an entire exoneration from liability and a decree for one-half their damage without deducting the damage of the North Star, but this claim was disallowed by the supreme court on the ground that the law of limitation of liability can only be applied to the balance decreed to be paid, and that it was not against the W but in her favor.

If the owner of the vessel is also the owner of the cargo he can limit his liability without abandoning the cargo. The Bristol, 29 Fed. 867. In this case the Bristol and the Bessie Rogers were both in fault. The bark Bessie Rogers and also her cargo were owned by the same person. It was held that the claim of the Bristol and her cargo was against the bark, but not against her cargo, although they were both owned by the same person. In this case, as the Bessie Rogers had been sunk by the collision, the amount of recovery against her was limited to the value of the stripping of the wreck. It was held that the cargo of the bark Bessie Rogers could only recover one-half its damage from the Bristol less the net salvage on the bark Rogers, being affected by the fact that the loss was partly caused by the negligence of the master, who, being from his position as master the agent of the ship-owner, was thus also the agent of the owner of the cargo in this case, as they were owned by the same person. The same principle had been applied in the case of U. S. *v.* The Steamship Juniata, 93 U. S. 337, 23 L. ed. 930, in which the owner of one of two vessels which were both in fault was on board his own ship at the time of the collision and received severe personal injuries. He was held to be entitled to recover but half his damage.

58. The Steamer Baltimore *v.* Rowland, 8 Wall. (U. S.) 377, 19 L. ed. 463; The Minnie, 26 Fed. 860; The Bristol, 10 Blatchf. (U. S.) 537, 4 Fed. Cas. No. 1,892; Swift *v.* Brownell, Holmes (U. S.) 467, 23 Fed. Cas. No. 13,695; Per Dr. Lushington in The Clarence, 3 W. Rob. 283. And see The Iron Master, Swabey 441; H. M. S. Inflexible, Swabey 200; The Clyde, Swabey 23; The Columbus, 3 W. Rob. 158; The Gazelle, 2 W. Rob. 279 [*cited* by Sir R. Phillimore in The Halley, L. R. 2 A. & E. 3, 37 L. J. Adm. 1, 17 L. T. Rep. N. S. 329, 16 Wkly. Rep. 284]. *Compare* The Albert H. Ellis, 107 Fed. 303, 46 C. C. A. 297.

See 10 Cent. Dig. tit. "Collision," § 280 *et seq.*

59. So in The Argentino, 13 P. D. 191. The owner was held entitled to recover the cost of repairs, for which being bankrupt he had not paid. The Endeavour, 6 Aspin. 511, 62 L. T. Rep. N. S. 840; Marsden Coll. (3d ed.) 111. And see The Homer, 109 Fed. 572, 48 C. C. A. 465 [*modifying* 99 Fed. 795]; and, generally, Admiralty; Damages.

Exemplary damages are not recoverable in a suit *in rem* against a vessel for a collision. The William H. Bailey, 111 Fed. 1006, 50 C. C. A. 76 [*affirming* 103 Fed. 799].

60. The Dininny *v.* Myers, 68 Fed. 943; Scott *v.* Cornell Steamboat Co., 59 Fed. 638; The Havilah, 50 Fed. 331, 1 C. C. A. 519 [*reversing* 33 Fed. 875]; The Thomas P. Way, 28 Fed. 526; Marsden Coll. (3d ed.) 114 [*citing* The Thuringia, 1 Aspin. 283, 41 L. J. Adm. 44, 26 L. T. Rep. N. S. 446, in which it was held that as the ship remained afloat three hours and might have been taken into an adjacent port her owner could only recover what it would have cost to make the damage good]. In The Linda, 4 Jur. N. S. 146, 30 L. T. Rep. N. S. 234, Swabey 306, it was held upon an unjustifiable abandonment that neither the value of the ship nor the salvage payable upon her being brought into port could be recovered. In The Blenheim, 1 Spinks 285, it was held that the prospect of endangering the lives of the crew would justify an abandonment. But they must exhibit ordinary courage in standing by the vessel. The Hannah Park, Holt Adm. 61, 213, 14 L. T. Rep. N. S. 675, 2 Mar. L. Cas. 345. In The Hansa, 6 Aspin. 268, 58 L. T. Rep. N. S. 530, it was held that the owner could not recover the cost of raising a vessel which might and ought to have been beached.

61. The Ernest A. Hamill, 100 Fed. 509; The Havilah, 50 Fed. 331, 1 C. C. A. 519 [*reversing* 33 Fed. 875]; The Venus, 17 Fed. 925; The Thuringia, 1 Aspin. 283, 41 L. J. Adm. 44, 26 L. T. Rep. N. S. 446; The Empress Eugênie, Lush. 138.

62. Marsden Coll. (3d ed.) 116 [*citing* The Columbus, 3 W. Rob. 158].

63. The Empress Eugéne, Lush. 138; Marsden Coll. (3d ed.) 117.

64. The South Sea, Swabey 141; Marsden Coll. (3d ed.) 117.

(II) *Elements of Value.* The value of a vessel lost is what she could have been sold for in the open market in her condition immediately preceding the collision.[65]

b. Vessel Damaged — (I) *Cost of Repairs.* The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired; and if the necessary consequence of this is that the value of the ship is increased, so that the owner receives more than an indemnity for his loss, he is entitled to that benefit. No deduction is made from the damages recoverable on account of the increased value of the ship or the substitution of new for old materials.[66]

(II) *Permanent Depreciation.* No additional allowance for permanent depreciation will be made unless positive proof thereof be presented.[67]

3. Loss of Freight. Freight which the injured ship is, at the time of the collision, engaged in earning or under contract to earn, less the charges which would have been incurred in earning it, is always allowed.[68] Where, in consequence of the collision, a vessel loses the benefit of a charter, damages are allowed for the loss of the charter-party in addition to demurrage.[69]

65. The Laura Lee, 24 Fed. 483 (holding that for each year of use a deduction should be made of twenty per cent of its value in the case of a Mississippi steamboat); The Ant, 13 Fed. 91; The Iron Master, Swabey 441; The Clyde, Swabey 23; The Clarence, 3 W. Rob. 283; The Columbus, 3 W. Rob. 158. In Guibert *v.* The George Bell, 5 Hughes (U. S.) 172, 3 Fed. 581, it was held that the value of a French fishing brig was her regular building and market price in France with interest from date of collision. Where she had been engaged three quarters of the season, one quarter of the value of her outfit was allowed.

As to money spent on a vessel and the cost of building a new one see The Gazelle, 33 Fed. 301.

The ability to earn bounty is an element of value if the vessel be lost, but no allowance can be made for loss of bounty. The Umbria, 166 U. S. 404, 17 S. Ct. 610, 41 L. ed. 1053 [*affirming* 53 Fed. 288, 3 C. C. A. 534 (*reversing* 40 Fed. 893, 46 Fed. 301)].

The cost of construction is competent evidence where no market value is ascertainable, but the whole cost should not be given when a vessel could be duplicated for less and the cost testified to includes changes and improvements. The City of Alexandria, 40 Fed. 697.

The original price and condition at the time of the loss is to be considered. The H. F. Dimock, 77 Fed. 226, 33 U. S. App. 647, 23 C. C. A. 123.

66. The Fannie Tuthill, 17 Fed. 87; The Bernina, 6 Aspin. 65, 55 L. T. Rep. N. S. 781; The Pactolus, Swabey 173, 5 Wkly. Rep. 167; The Gazelle, 2 W. Rob. 279; Marsden Coll. (3d ed.) 111. And see The Star of India, 3 Aspin. 261, 45 L. J. Adm. 102, 35 L. T. Rep. N. S. 407, 1 P. D. 466, 25 Wkly. Rep. 377.

He is not entitled to recover the increased cost of repairing unsound parts opened up. The Providence, 98 Fed. 133, 38 C. C. A. 670. In The John R. Penrose, 86 Fed. 696, in which the parts injured were rotten and unfit for use only one-half the cost of replacing them was allowed.

Excessive cost of repairs arising from the bad judgment of the owner not allowed. The Venus, 17 Fed. 925. In The Henry M. Clark, 22 Fed. 752, it was held that if the repairs were made at different times and after intervening voyages and their cost was thus increased a deduction should be made.

The reasonable cost and not contract-price where only one bid. The Mattie Newman, 68 Fed. 1017. The contract-price is not conclusive, although no more than the sum actually expended will be allowed. The Fannie Tuthill, 17 Fed. 87.

Cost of superintending repairs should not be allowed where master could have done it. Commissions on money disbursed in repairs not allowed. The Glencairn, 78 Fed. 379.

67. Coffin *v.* The Osceola, 34 Fed. 921; The Excelsior, 17 Fed. 924. In The Helgoland, 79 Fed. 123, where a new and valuable boat had received a permanent twist, permanent depreciation was allowed. In The Georgiana *v.* The Anglican, 21 Wkly. Rep. 280, in which it was proved that the market value of a yacht sunk in a collision was diminished, the difference between her market value before and after the collision was allowed in addition to the cost of repairs.

68. The La Champagne, 53 Fed. 398; The Utopia, 16 Fed. 507; The Golden Grove, 13 Fed. 674; The Northumbria, L. R. 3 A. & E. 6, 39 L. J. Adm. 3, 21 L. T. Rep. N. S. 681, 18 Wkly. Rep. 188; Heard *v.* Holman, 19 C. B. N. S. 1, 11 Jur. N. S. 544, 34 L. J. C. P. 239, 12 L. T. Rep. N. S. 455, 13 Wkly. Rep. 745, 115 E. C. L. 1; Marsden Coll. (3d ed.) 118.

As to expenses from port of departure to place of collision and back, where there was no loss of freight see The Memphis, etc., Packet Co. *v.* The H. C. Yaeger, 2 McCrary (U. S.) 165, 4 Fed. 927.

As to allowance of freight when the vessel was carrying the owner's goods see The Beatrice Havener, 50 Fed. 232.

Where a vessel was run down on a voyage to Norway freight was allowed on the cargo which she was engaged to bring home. The Yorkshireman, 2 Hagg. Adm. 30 note.

69. The Belgenland, 36 Fed. 504 (where it was held that if the charter is lost and an-

4. Loss of and Injury to Cargo. If the cargo is lost the measure of damages is its value at place of shipment or its cost, including expenses, charges, insurance, and interest.[70] The market price at the port of destination and all profits or probable benefits are to be excluded.[71] If the cargo is damaged the difference between the market value of the goods uninjured and their value in damaged condition should be allowed.[72]

5. Loss of Personal Effects of Crew and Personal Injuries. If the personal effects of the crew are lost their value should be allowed.[73] In case of personal injuries compensation only for the actual damage sustained and consequent loss of employment should be allowed.[74]

6. Expenses Incurred in Consequence of Collision. If the injured ship sinks in consequence of the collision the expenses of raising and docking her are recoverable as damages.[75] Salvage or towage expenses, whether incurred by the owner or paid by him to salvors, are recoverable as damages, if they are incurred properly, and are in consequence of injury received in the collision.[76]

other is necessarily taken at lower rates for the residue of the time the ship-owner can recover the difference of values up to the time of the expiration of the original charter and the pay of the crew during detention); The Star of India, 3 Aspin. 261, 45 L. J. Adm. 102, 35 L. T. Rep. N. S. 407, 1 P. D. 466, 25 Wkly. Rep. 377; The Argentino, 13 P. D. 191 [*affirmed* in 14 App. Cas. 519, 6 Aspin. 433, 59 L. J. Adm. 17, 61 L. T. Rep. N. S. 706]; Marsden Coll. (3d ed.) 120.

Illustrations.— A fishing smack was allowed her expected earnings. The Gleaner, 3 Aspin. 582, 38 L. T. Rep. N. S. 650. *Contra*, The City of Rome [*cited* in Marsden Coll. (3d ed.) 120]. In The C. P. Raymond, 28 Fed. 765, it was held that reasonable efforts to secure fresh cargo were required before the vessel could recover dead freight. In The Freddie L. Porter, 8 Fed. 170 [*affirming* 5 Fed. 822], it was held that the net freight for the unexpired time of a definite time charter was to be allowed, although the charter was parol. In The City of Alexandria, 40 Fed. 697, it was held that the rule of allowing profits on an existing charter does not apply to profits on a personal contract on which any other fit vessel might be used. In The Umbria, 166 U. S. 404, 17 S. Ct. 610, 41 L. ed. 1053 [*affirming* 40 Fed. 893 and *reversing* 53 Fed. 288], it was held that there should be no allowance for the probable profits of a further voyage, for which the charter had been signed at the time of collision. As to damages allowed where there had been a decline in charter rates see The Glencairn, 78 Fed. 379. See also The North Star, 44 Fed. 492; Guibert *v.* The George Bell, 5 Hughes (U. S.) 172, 3 Fed. 581.

Where a vessel is sunk in collision, and damages are awarded the owner on the basis of her total loss, he is not entitled to recover in addition for the loss of earnings under an unexpired time charter. The George W. Rohy, 111 Fed. 601, 49 C. C. A. 481 [*modifying In re* Lakeland Transp. Co., 103 Fed. 328].

70. The Umbria, 59 Fed. 489, 11 U. S. App. 612, 8 C. C. A. 194 [*reversing* 40 Fed. 893]; The George Bell, 3 Fed. 581. In The Umbria, 46 Fed. 927, it was held that the rent of a house on the Euphrates river necessarily hired by the year, although used only for six weeks in picking dates to be shipped, was part of their cost. In The City of New York, 23 Fed. 616, the invoice value of a cargo of sugar at port of shipment was allowed without any deduction for loss in weight, although the collision took place near the destination. In The Energia, 66 Fed. 604, 35 U. S. App. 6, 13 C. C. A. 653 [*affirming* 56 Fed. 124, 61 Fed. 222], the average charges arising out of a collision in American waters were allowed as assessed under foreign law at the port of destination.

71. Smith *v.* Condry, 1 How. (U. S.) 28, 11 L. ed. 35; The George Bell, 3 Fed. 581 (where there was allowed the market value at near-by port of fish caught at the place of collision); Dyer *v.* National Steam Nav. Co., 14 Blatchf. (U. S.) 483, 8 Fed. Cas. No. 4,225, 24 Int. Rev. Rec. 198; Marsden Coll. (3d ed.) 122 [*citing* The Notting Hill, 5 Aspin. 241, 53 L. J. Adm. 56, 51 L. T. Rep. N. S. 66, 9 P. D. 105, 32 Wkly. Rep. 764; The Parana, 3 Aspin. 399, 36 L. T. Rep. N. S. 388, 2 P. D. 118, 25 Wkly. Rep. 596].

72. The Umbria, 59 Fed. 489, 11 U. S. App. 612, 8 C. C. A. 194 [*reversing* 40 Fed. 893], holding that a rebate of duty obtained on account of condition of goods was immaterial.

73. The Minnie, 26 Fed. 860.

74. The Queen, 40 Fed. 694.

75. The Fletcher, 42 Fed. 504; The Fannie Tuthill, 17 Fed. 87; The Empress Eugénie, Lush. 138; Marsden Coll. (3d ed.) 119.

76. The La Champagne, 53 Fed. 398 (holding that a reasonable amount paid in settlement of a salvage suit when not collusive was to be allowed); The Diana, 2 Aspin. 366, 31 L. T. Rep. N. S. 202; The Linda, 4 Jur. N. S. 146, 30 L. T. Rep. N. S. 234, Swabey 306; The Williamina, 3 P. D. 97; H. M. S. Inflexible, Swabey 200; Marsden Coll. (3d ed.) 119.

Reasonable amount agreed in good faith for getting off vessel beached after collision allowed, although it might have been done for less. The Alaska, 44 Fed. 498.

Salvage paid to recover boats cast adrift by collision allowed. The Cepheus, 24 Fed. 507.

Towage to home port instead of to port of temporary repairs when rigging carried away

7. Losses Resulting From Collision. When the ship is damaged but not sunk in the collision and she afterward receives further injury or is totally lost the presumption ordinarily is that the subsequent injury or loss was caused by the defendant's negligence, and the burden is upon the wrong-doer in the collision to prove that it was not so caused.[77] Damages for loss occurring during or after and in consequence of the collision, but caused partly by negligence of the plaintiff, cannot be recovered as having resulted entirely from the defendant's negligence which caused the collision.[78] If part of the damage was clearly attributable to the wrong-doer, and it is impossible to say how much, the wrong-doer must make good the whole loss; but where the damage occasioned by the collision can be easily discriminated, defects disclosed in consequence of the collision, although existing prior to it, cannot be charged against the defendant.[79]

8. Demurrage — a. When Allowed. Where the owners suffer loss by the enforced idleness of their ship, which has been injured in a collision, demurrage is allowed by way of damages whilst the necessary repairs are being effected.[80]

allowed when incurred with reason. The Benjamin F. Hunt, Jr., 34 Fed. 816.

Towage to place of repairs and survey and interest on items of damage allowed. The Bulgaria, 83 Fed. 312 [*affirming* 74 Fed. 898].

The following cases illustrate what expenses are allowed if incurred in consequence of the collision:

Costs in a salvage action. The Legatus, Swabey 168, 5 Wkly. Rep. 154. See Tindal *v.* Bell, 12 L. J. Exch. 160, 11 M. & W. 228. *Contra*, The British Commerce, 5 Aspin. 335, 53 L. J. Adm. 72, 51 L. T. Rep. N. S. 604, 9 P. D. 128, 33 Wkly. Rep. 200.

Expense of detaining ship's officers during repairs. H. M. S. Inflexible, Swabey 200.

Expense of detaining crew after collision. Hoffman *v.* Union Ferry Co., 68 N. Y. 385.

Expense of rescue, support, and return to land of crew of vessel sunk allowed. Leonard *v.* Whitwill, 19 Fed. 547.

Wages of crew necessarily kept during repairs allowed. The Switzerland, 67 Fed. 617; New Haven Steam-Boat Co. *v.* New York, 36 Fed. 716. But not the wages and provisions of part of the crew unnecessarily detained. The Sarah Thorp, 46 Fed. 816.

Expenses of owner in coming back to look after the wreck allowed. The Alaska, 44 Fed. 498.

Not services of part owner overseeing repairs when not shown to be necessary. The State of California, 54 Fed. 404, 7 U. S. App. 652, 4 C. C. A. 393.

Expense of surveys to ascertain damage allowed. The Switzerland, 67 Fed. 617; The Alaska, 44 Fed. 498. See The Golden Rule, 20 Fed. 198.

Not the traveling expenses of surveyor paid by underwriters. The Venus, 17 Fed. 925.

Superintendence of repairs allowed. New Haven Steam-Boat Co. *v.* New York, 36 Fed. 716.

Unloading, storage, and reloading of cargo of vessel obliged to put back but not agency commission allowed. The City of New York, 23 Fed. 616.

Wharfage and necessary commissions and interest allowed. The Jas. A. Dumont, 34 Fed. 428.

Readjustment of compasses, new rating at Lloyd's, master's protest in foreign port allowed. The Belgenland, 36 Fed. 504.

Not expense of convoy unless necessity shown. The Alaska, 44 Fed. 498.

Not expense of rating when repaired in different manner, nor allotment notes recoverable as advances to crew, when freight and demurrage allowed. Gilkey *v.* The Beta, 44 Fed. 389.

Not expenses in replacing certain papers lost. Jacobsen *v.* Dalles, etc., Nav. Co., 93 Fed. 975.

Not expenses of identifying colliding vessel. The Dimitri Donskoi, 60 Fed. 111.

77. The Leland, 19 Fed. 771; Johanssen *v.* The Eloina, 4 Fed. 573; The Maid of Kent, 4 Aspin. 476, 50 L. J. Adm. 71, 45 L. T. Rep. N. S. 718, 6 P. D. 178, 29 Wkly. Rep. 897; The Despatch, 3 L. T. Rep. N. S. 219, Lush. 98, 14 Moore P. C. 83, 15 Eng. Reprint 237; The Linda, 4 Jur. N. S. 146, 30 L. T. Rep. N. S. 234, Swabey 306; The Pensher, Swabey 211; The Mellona, 3 W. Rob. 7; The Govino, 5 Quebec 57; Marsden Coll. (3d ed.) 112.

78. The Wilkesbarre, 50 Fed. 581; The Beta, 44 Fed. 389; The Reba, 22 Fed. 546; The Margaret, 4 Aspin. 375, 50 L. J. Adm. 67, 44 L. T. Rep. N. S. 291, 6 P. D. 76, 29 Wkly. Rep. 533; The Massachusetts, 1 W. Rob. 371; Marsden Coll. (3d ed.) 117. See also Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600, 12 Jur. N. S. 727, 35 L. J. C. P. 321, 14 Wkly. Rep. 893; H. M. S. Flying Fish, Brown & L. 436, 34 L. J. Adm. 113, 12 L. T. Rep. N. S. 619, 3 Moore P. C. N. S. 77, 15 Eng. Reprint 29. And *compare* The Scotia, 6 Aspin. 541, 63 L. T. Rep. N. S. 324.

79. The Sam Gaty, 5 Biss. (U. S.) 190, 21 Fed. Cas. No. 12,276; The Bernina, 6 Aspin. 65, 55 L. T. Rep. N. S. 781; The Princess, 5 Aspin. 451, 52 L. T. Rep. N. S. 932; The Albert Edward, 44 L. J. Adm. 49, 24 Wkly. Rep. 179; The Egyptian, 10 L. T. Rep. N. S. 910, 2 Mar. L. Cas. 56; Marsden Coll. (3d ed.) 117.

80. The Armonia, 81 Fed. 227; The Star of India, 3 Aspin. 261, 45 L. J. Adm. 102, 35 L. T. Rep. N. S. 407, 1 P. D. 466, 25 Wkly. Rep. 377; The City of Buenos Ayres, 1 Aspin. 169, 25 L. T. Rep. N. S. 672; H. M. S. In-

Demurrage also runs whilst the ship is detained for the transaction of business connected with the collision.[81]

b. Amount to Be Allowed. The amount to be allowed for the detention of the vessel is the value of her use. This is to be calculated upon her average earnings for that period, or the amount she might reasonably be expected to earn.[82] Where there is no other satisfactory evidence of the earning capacity of a vessel than is shown by the charter under which she was employed at the time, and the charter contemplates her employment for a long period, the average daily earnings under the charter may be taken as the criterion.[83]

9. INTEREST. If a vessel earning freight is totally lost in a collision her owner is entitled to recover the estimated value of the ship at the end of the voyage, together with the freight she would have earned, less the cost of completing the voyage, and interest on the whole from the probable end of the voyage.[84]

flexible, Swabey 200; The Clarence, 3 W. Rob. 283; Marsden Coll. (3d ed.) 119.

Demurrage for delay in making repairs not allowed if owner suffered no pecuniary loss. The Saginaw, 95 Fed. 703. *Compare* The Columbia, 109 Fed. 660, 48 C. C. A. 596.

But the fact that the owner has another vessel by which she is replaced does not prevent demurrage. The Providence, 98 Fed. 133, 38 C. C. A. 670; The State of California, 54 Fed. 404, 7 U. S. App. 652, 4 C. C. A. 393. Even though the substituted boat be without employment. New Haven Steam-Boat Co. *v.* New York, 36 Fed. 716; Coffin *v.* The Osceola, 34 Fed. 921. *Contra,* The City of Peking *v.* Compagnie des Messageries Maritimes, 15 App. Cas. 438, 6 Aspin. 572, 59 L. J. P. C. 88, 63 L. T. Rep. N. S. 722, 39 Wkly. Rep. 177. *Compare* The Mediana, [1900] A. C. 113, 9 Aspin. 41, 69 L. J. P. 35, 82 L. T. Rep. N. S. 95, 48 Wkly. Rep. 398.

If the vessel is sold in her damaged condition interest and not demurrage will be allowed. Sewall *v.* La Champagne, 53 Fed. 398. And see The Columbus, 3 W. Rob. 158.

81. Marsden Coll. (3d ed.) 119. Demurrage should be allowed only for minimum time required for repairs (The Fannie Tuthill, 17 Fed. 87) and for detention in putting back (Wells *v.* Armstrong, 29 Fed. 216); not for delay caused by lack of skill in making repairs (The Melvina, 43 Fed. 77), for delay arising from fall of water in river (The George Lysle *v.* The Joseph Nixon, 2 Fed. 259), for time lost in getting to dry-dock caused by ice (The Mina A. Read, 30 Fed. 287), or for subsequent detention by storm after repairs were made (The John H. May, 53 Fed. 664).

82. The Steamboat Potomac *v.* Cannon, 105 U. S. 630, 26 L. ed. 1194; Williamson *v.* Barrett, 13 How. (U. S.) 101, 14 L. ed. 68; The Risoluto, 5 Aspin. 93, 52 L. J. Adm. 46, 48 L. T. Rep. N. S. 909, 8 P. D. 109, 31 Wkly. Rep. 657; The Gleaner, 3 Aspin. 582, 38 L. T. Rep. N. S. 650; The Clarence, 3 W. Rob. 283; Marsden Coll. (3d ed.) 121.

This may be calculated on average daily earnings for six months before and after collision, upon condition of trade and expert testimony. The Bulgaria, 83 Fed. 312 [*affirming* 74 Fed. 898]; The State of California, 54 Fed. 404, 7 U. S. App. 652, 4 C. C. A. 393.

As to opinion of expert witnesses upon the value of the use of a vessel see Satchwell *v.* Williams, 40 Conn. 371; Parker *v.* Lowell, 11 Gray (Mass.) 353; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641.

As to demurrage in case of a barge in tow of a tug see The Cayuga, 59 Fed. 483, 16 U. S. App. 577, 8 C. C. A. 188.

The amount of demurrage allowed should bear some proportion to the value of the vessel. The Venus, 17 Fed. 925.

Wharfage and necessary commissions and interest are proper items to be included. The Jas. A. Dumont, 34 Fed. 428.

83. The Margaret J. Sanford, 37 Fed. 148 [*citing* The Mayflower, Brown Adm. 376, 16 Fed. Cas. No. 9,345, 5 Am. L. T. Rep. (U. S. Cts.) 367]; The Excelsior 17 Fed. 924; The Argentino, 13 P. D. 191 [*affirmed* in 14 App. Cas. 519, 6 Aspin. 433, 59 L. J. Adm. 17, 61 L. T. Rep. N. S. 706].

But the rate of demurrage specified in the charter-party is not evidence in favor of the ship-owner. The Margaret J. Sanford, 37 Fed. 148; The Jas. A. Dumont, 34 Fed. 428 [*citing* The Hermann, 4 Blatchf. (U. S.) 441, 12 Fed. Cas. No. 6,408]. *Contra,* The Silica *v.* The Lord Warden, 30 Fed. 845; The America, 4 Fed. 337.

Where the owners of a vessel under charter hired another boat the cost of substitution and not the value of the charter is to be taken. The Emma Kate Ross, 50 Fed. 845, 3 U. S. App. 171, 2 C. C. A. 55 [*modifying* 46 Fed. 872].

84. The Hamilton, 95 Fed. 844; Marsden Coll. (3d ed.) 112.

In other cases the allowance of interest seems to be in the discretion of the court. Dyer *v.* National Steam Nav. Co., 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153; The North Star, 44 Fed. 492. No interest on repairs where vessel made more valuable. The Syracuse, 97 Fed. 978; The Alaska, 44 Fed. 498.

As to the allowance of interest up to the time of trial see The Oregon, 89 Fed. 520; The Illinois, 84 Fed. 697.

As to the allowance of interest where there is a delay in bringing the cause to trial see The Rabboni, 53 Fed. 948; The Celestial Empire, 11 Fed. 761.

Interest allowed on demurrage see The Natchez, 78 Fed. 183, 41 U. S. App. 708, 24

F. Evidence — 1. Burden of Proof. The burden is on the plaintiff or libellant to make out a *prima facie* case. Having made out a *prima facie* case of negligence on the part of the defendant the burden of proof is shifted and the defendant will be liable unless he proves that his negligence in no way contributed to the loss.[85] If negligence on the one side has been established, fault on the part of the other must be shown with equal clearness in order to hold the latter liable.[86] If the libellant fails to satisfy the court that the collision took place, or by whose fault it occurred, or if the court is convinced that the testimony on both sides is intentionally false the libel will be dismissed.[87] The burden of proof is on the vessel bound to keep out of the way of the other to show that the collision was due to the fault of the other vessel.[88] It having been shown that a rule of navigation has been violated the burden is upon the vessel infringing of proving that the breach did not contribute to the collision.[89]

2. Presumptions. A presumption that the vessel has been guilty of negligence causing the collision arises not only from the breach of a rule of navigation,[90] but from any deficiency shown in the management or equipment of the vessel.[91] The same presumption arises in favor of a vessel at anchor as against one running

C. C. A. 49. *Contra*, Johanssen *v.* The Eloina, 4 Fed. 573.

As to interest where vessel sold see The La Champagne, 53 Fed. 398.

85. The Mexico, 84 Fed. 504, 55 U. S. App. 358, 28 C. C. A. 472 [*affirming* 78 Fed. 653]; Morten *v.* Five Canal-Boats, 24 Fed. 500; The Joseph W. Gould, 19 Fed. 785; The David Dows, 16 Fed. 154; The Amanda Powell, 14 Fed. 486; Bergen *v.* The Joseph Stickney, 1 Fed. 624; The Benmore, L. R. 4 A. & E. 132, 43 L. J. Adm. 5, 22 Wkly. Rep. 190; The Ship Marpesia *v.* The America, L. R. 4 P. C. 212, 1 Aspin. 261, 26 L. T. Rep. N. S. 338, 8 Moore P. C. N. S. 468, 17 Eng. Reprint 387; The Abraham, 2 Aspin. 34, 28 L. T. Rep. N. S. 775; The Albert Edward, 44 L. J. Adm. 49, 24 Wkly. Rep. 179; Morgan *v.* Sim, 11 Moore P. C. 307, Swabey 245, 306, 4 Wkly. Rep. 78, 14 Eng. Reprint 712; The Bolina, 3 Notes Cas. (Eng.) 208; The Carron, 1 Spinks 91; Marsden Coll. (3d ed.) 30.

See 10 Cent. Dig. tit. "Collision," §§ 31, 41, 54, 259 *et seq.*

86. The John H. Starin, 113 Fed. 419; The Ludvig Holberg, 157 U. S. 60, 15 S. Ct. 477, 39 L. ed. 620 [*affirming* 43 Fed. 117]; The Minnie, 100 Fed. 128, 40 C. C. A. 312; The D. H. Miller, 76 Fed. 877, 22 C. C. A. 597 [*applying* The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943]; The Athabasca, 45 Fed. 651; The J. R. P. Moore, 45 Fed. 267; The Clarion, 27 Fed. 128.

87. The Joseph Stickney, 56 Fed. 156, 14 U. S. App. 366, 5 C. C. A. 457 [*affirming* 50 Fed. 624]; Barbour *v.* The Wioma, 55 Fed. 338, 5 C. C. A. 122; The Annex No. 3, 35 Fed. 560; The Amanda Powell, 14 Fed. 486; The A. R. Gray, 12 Fed. 206; The Leversons, 5 Hughes (U. S.) 351, 10 Fed. 753; Marsden Coll. (3d ed.) 30.

Libel was dismissed where the identity of colliding vessel was not established by a preponderance of evidence. The Newport, 28 Fed. 658; The Annex No. 3, 27 Fed. 516; The City of Chester, 18 Fed. 603. Also where there had been great delay in filing suit and doubt of any substantial damage. The S. O. Pierce, 40 Fed. 767.

88. Sears *v.* The British Steamer Scotia, 14 Wall. (U. S.) 170, 20 L. ed. 822; The Steamboat Carroll *v.* Green, 8 Wall. (U. S.) 302, 19 L. ed. 392; New York, etc., U. S. Mail Steamship Co. *v.* Rumball, 21 How. (U. S.) 372, 16 L. ed. 144; The Gypsum Prince, 67 Fed. 612, 35 U. S. App. 573, 14 C. C. A. 573 [*reversing* 57 Fed. 859]; The Bessie Morris, 13 Fed. 397; The Baltic, 2 Ben. (U. S.) 452, 2 Fed. Cas. No. 823; The Beaver, 2 Ben. (U. S.) 118, 3 Fed. Cas. No. 1,199; The Otter, L. R. 4 A. & E. 203, 2 Aspin. 208, 30 L. T. Rep. N. S. 43, 22 Wkly. Rep. 557; The Indus, 6 Aspin. 105, 56 L. J. Adm. 88, 56 L. T. Rep. N. S. 376, 12 P. D. 46, 35 Wkly. Rep. 490; The Annot Lyle, 6 Aspin. 50, 55 L. J. Adm. 62, 55 L. T. Rep. N. S. 576, 11 P. D. 114, 34 Wkly. Rep. 647; The Bothnia, Lush. 52; The Telegraph, 1 Spinks 427. As where a vessel at anchor was run down. The City of Peking *v.* Compagnie des Messageries Maritimes, 14 App. Cas. 40, 6 Aspin. 396, 58 L. J. P. C. 64, 61 L. T. Rep. N. S. 136. *Contra*, where one vessel is bound to keep out of the way and the other to keep her course. Marsden Coll. (3d ed.) 32 [*citing* Inman *v.* Reck, L. R. 2 P. C. 25, 37 L. J. Adm. 25].

89. Marsden Coll. (3d ed.) 38–60. And see *supra*, III, B.

90. Wilder's Steamship Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473; Merchants', etc., Transp. Co. *v.* Hopkins, 108 Fed. 890, 48 C. C. A. 128. And see *supra*, III, B.

91. Marsden Coll. (3d ed.) 32–37.

Such presumption may be rebutted by showing that the defect was latent or that reasonable care was used. The Albert Dumois (1900), 177 U. S. 240, 20 S. Ct. 595, 44 L. ed. 751 (where the fact that the vessel was short-handed was held to raise such a presumption); The Genevieve, 96 Fed. 859 [*affirming* Jakobsen *v.* Springer, 87 Fed. 948, 31 C. C. A. 315]; The Nellie E. Rumball, 81 Fed. 239, 26 C. C. A. 379 [*reversing* The Rabboni, 53 Fed. 952]; The Olympia, 61 Fed. 120,

into her.[92] The same presumptions as at common law arise against a party from the non-production of witnesses under his control.[93]

3. Admissibility. The ordinary rules have been applied to the admissibility of evidence in collision cases, and the cases in the note show the view of the courts as to the admissibility of certain classes of evidence.[94]

4. Comparative Weight of Evidence. As a rule more weight is to be given to witnesses who testify as to the movements of their own vessel than to witnesses on other moving vessels or onlookers,[95] and more weight is to be given to witnesses testifying to a positive fact which they saw than to witnesses testifying as to a negative fact, even though the latter be disinterested.[96] The positive testimony of eye-witnesses is to be taken in preference to demonstrations from bearings and angles or to calculations based upon the assumed positions of the vessels.[97]

22 U. S. App. 69, 9 C. C. A. 393 [*affirming* 52 Fed. 985, in which the collision resulted from the breaking of a tiller-rope, and it was held that the presumption might be rebutted by showing that it was unavoidable].

92. Phinney *v.* The Le Lion, 84 Fed. 1011; The Marcia Tribou, 2 Sprague (U. S.) 17, 16 Fed. Cas. No. 9,062; Hay *v.* Le Neve, 2 Shaw Sc. App. 395; The Batavier, 2 W. Rob. 407; The Dura, 5 Ir. Jur. N. S. 384, 1 Pritchard Adm. Dig. (3d ed.) 289; Marsden Coll. (3d ed.) 35.

93. The State of California, 54 Fed. 404, 7 U. S. App. 652, 4 C. C. A. 393; The Fred M. Lawrence, 15 Fed. 635; The Sandringham, 5 Hughes (U. S.) 316, 10 Fed. 556; The Swanland, 2 Spinks 107; Marsden Coll. (3d ed.) 37.

94. The Utopia, 1 Fed. 892.

Engine-room dial inadmissible to prove that vessel could have run at less than half speed. The Lisbonense, 53 Fed. 293, 3 C. C. A. 539 [*reversing* 47 Fed. 122].

The result of proceedings at a collateral inquiry are inadmissible. The Charles Morgan *v.* Kouns, 115 U. S. 69, 5 S. Ct. 1172, 7 S. Ct. 1172, 29 L. ed. 316; The Mangerton, Swabey 120; Marsden Coll. (3d ed.) 309.

Ship's log is not evidence for the ship (The Earl of Dumfries, 5 Aspin. 342, 54 L. J. Adm. 7, 51 L. T. Rep. N. S. 906, 10 P. D. 31, 33 Wkly. Rep. 568; The Malta, 2 Hagg. Adm. 158; The Europa, 13 Jur. 856; Marsden Coll. (3d ed.) 309), although the mate who wrote it is dead (The Henry Coxon, 4 Aspin. 18, 47 L. J. Adm. 83, 38 L. T. Rep. N. S. 819, 3 P. D. 156, 27 Wkly. Rep. 263. *Contra*, The Singapore *v.* The Hebe, L. R. 1 P. C. 378, 4 Moore P. C. N. S. 271, 16 Eng. Reprint 319), although admissible against the ship (Marsden Coll. (3d ed.) 309).

Protest inadmissible except on cross-examination, although the master has died since making it. Marsden Coll. (3d ed.) 310. And see The Frostburg, 25 Fed. 451.

Entries in official journals of lighthouses and the like relating to the weather are admissible. The Queen Elizabeth, 100 Fed. 874; Marsden Coll. (3d ed.) 310.

Statements by master as to matters in issue are admissible to prove the facts stated against the owner. Bedell *v.* The Steamship Potomac, 8 Wall. (U. S.) 590, 19 L. ed. 511; The Solway, 5 Aspin. 482, 54 L. J. Adm. 83, 53 L. T. Rep. N. S. 680, 10 P. D. 137, 34 Wkly. Rep. 232; The Midlothian, 15 Jur. 806; The Europa, 13 Jur. 856; The Manchester, 1 W. Rob. 62.

A statement by the captain of what he intended to convey by his signals inadmissible. The Lisbonense, 53 Fed. 293, 3 C. C. A. 539 [*reversing* 47 Fed. 122].

Statements by other officers, seamen, or pilot inadmissible. The Foyle, Lush. 10; The Lord Seaton, 2 W. Rob. 391; Marsden Coll. (3d ed.) 310. And see The Great Eastern, Holt Adm. 169. But admitted as part of *res gestæ* when made at moment of collision. The Mellona, 10 Jur. 992; The Schwalbe, Swabey 521. See The City of Augusta, 80 Fed. 297, 50 U. S. App. 39, 25 C. C. A. 430; The Roman, 14 Fed. 61 [*reversing* 12 Fed. 219]; The Hope, 4 Fed. 89.

Statement of owners in another suit not admissible against coöwners. The New Orleans, 106 U. S. 13, 1 S. Ct. 90, 27 L. ed. 96.

The conduct of the owner of a canal-boat sunk at a dock by the swell from a passing steamer, in taking no measures to raise her, and in making no claim against the steamer for two years thereafter, is a matter which may be properly considered as casting suspicion on the merit of the claim that the loss was due to the steamer's negligence. The New York, 109 Fed. 909.

95. The Natchez, 78 Fed. 183, 41 U. S. App. 708, 24 C. C. A. 49; Towboat No. 1, Norfolk & Western, 74 Fed. 906, 21 C. C. A. 169; The Sam Sloan, 65 Fed. 125; The Philadelphian, 61 Fed. 862, 21 U. S. App. 239, 10 C. C. A. 127; The Havana, 54 Fed. 411; The Alexander Folsom, 52 Fed. 403, 3 C. C. A. 165 [*reversing* 44 Fed. 932]; The Alberta, 23 Fed. 807; The Hunter No. 2, 22 Fed. 795; The Hope, 4 Fed. 89.

Where all upon one vessel were lost it was held that the narration of those on the other was to be received with caution. The Alaska, 130 U. S. 201, 9 S. Ct. 461, 32 L. ed. 923 [*affirming* 27 Fed. 704].

96. Brownell *v.* The General, 82 Fed. 830; The Horace B. Parker, 71 Fed. 989, 33 U. S. App. 389, 18 C. C. A. 406; The Sammie, 69 Fed. 847, 14 U. S. App. 711, 13 C. C. A. 686; The Lizzie Henderson, 20 Fed. 524.

And to those witnesses who were in a better position to see what was going on see The John M. Chambers, 24 Fed. 383.

97. The Mary Buhne, 95 Fed. 1002; The John Craig, 66 Fed. 596; The Newport, 36

But where the evidence is conflicting and evenly balanced the testimony of a disinterested witness on a third boat is entitled to great weight.[98] The court should be governed by the undeniable and leading facts of the case if such exist, and by the probabilities.[99]

COLLISTRIGIUM. A PILLORY,[1] *q. v.*

COLLOCATION. The order in which the creditors are placed and paid.[2]

COLLOQUIUM. See LIBEL AND SLANDER.

COLLUSION.[3] In general, a secret agreement and co-operation for a fraudulent purpose;[4] a secret or dishonest arrangement in fraud of the rights of another;[5] the secret concert of action, between two or more for promotion of some fraudulent object;[6] an agreement for a wrongful purpose; a secret agreement by two or more persons to obtain an unlawful object.[7] In law,[8] a deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third person of his right; a secret understanding between two parties who plead or proceed fraudulently against each other to the prejudice of a third person;[9] a secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them, by deceiving a court or its officers;[10] an agreement between two or more persons unlawfully to defraud a

Fed. 910; Wolf *v.* The Bertie Calkins, 2 Fed. 793.

98. The Charles H. Trickey, 66 Fed. 1020, 33 U. S. App. 35, 14 C. C. A. 225; The Annie J. Pardee, 25 Fed. 155 [*reversing* 25 Fed. 153].

99. The Genevieve, 106 Fed. 989, 46 C. C. A. 87 [*affirming* 96 Fed. 859]; The City of Cleveland, 56 Fed. 729.

For instances of evidence held to be sufficient see The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Margaret B. Roper, 111 Fed. 623, 49 C. C. A. 503 [*affirming* 103 Fed. 886]; The Mesaba, 111 Fed. 215; The Thomas B. Garland, 110 Fed. 687; The New York, 109 Fed. 909; The Acilia, 108 Fed. 975.

Superior credit is to be given to those witnesses who are sustained by collateral evidence on subsidiary points. The Florence P. Hall, 14 Fed. 408.

1. Wharton L. Lex.

2. Wharton L. Lex.

3. Collusion is nearly allied to covin. Baldwin *v.* New York, 45 Barb. (N. Y.) 359, 369, 30 How. Pr. (N. Y.) 289 [*quoting* Burrill L. Dict.; Tomlin L. Dict.].

Collusion is synonymous with conspiracy. Standard Dict. [*quoted* in Miller *v.* Bayer, 94 Wis. 123, 125, 68 N. W. 869].

More than one mind must be involved to constitute collusion. Builders,' etc., Supply Co. *v.* Montgomery First Nat. Bank, 123 Ala. 203, 219, 26 So. 311. And *compare* Belt *v.* Blackburn, 28 Md. 227, 235.

"Collusion" does not necessarily imply fraud. Batterbury *v.* Vyse, 2 H. & C. 42, 46, 9 Jur. N. S. 754, 32 L. J. Exch. 177, 8 L. T. Rep. N. S. 283, 11 Wkly. Rep. 283. And see Gill *v.* Continental Union Gas Co., L. R. 7 Exch. 332, 337, 41 L. J. Exch. 176, 27 L. T. Rep. N. S. 428, 21 Wkly. Rep. 111, where it is said: "The word 'collusion' only signifies that the defendant and the company agreed together."

"Collusion is equally possible in a good case, though it is less frequently practiced, the temptation being wanting. For, however just a cause in itself may be, if parties corruptly collude in the management of it before the tribunal, so that in reality both are plaintiffs, while by the record the one appears as plaintiff, and the other as defendant, this, in reason, and it is believed also in authority, will, as collusion, bar the proceeding." Belz *v.* Belz, 33 Ill. App. 105, 108 [*quoting* Bishop Marr. & Div. § 28*a*].

4. Webster Dict. [*quoted* in Baldwin *v.* New York, 45 Barb. (N. Y.) 359, 369, 30 How. Pr. (N. Y.) 289; Griswold *v.* Griswold, 14 How. Pr. (N. Y.) 446, 448; Miller *v.* Bayer, 94 Wis. 123, 125, 68 N. W. 869; Batterbury *v.* Vyse, 2 H. & C. 42, 46, 9 Jur. N. S. 754, 32 L. J. Exch. 177, 8 L. T. Rep. N. S. 283, 11 Wkly. Rep. 283].

5. Detroit Sav. Bank *v.* Burrows, 34 Mich. 153, 162.

6. Belt *v.* Blackburn, 28 Md. 227, 235.

7. Standard Dict. [*quoted* in Miller *v.* Bayer, 94 Wis. 123, 125, 68 N. W. 869]. And see Comer *v.* Heidelbach, 109 Ala. 220, 223, 19 So. 719.

8. Collusion in judicial proceedings appears to be of two kinds: (1) When the facts put forward as the foundation of the sentence of the court do not exist; and (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the sentence. Wharton L. Lex.

9. Webster Dict. [*quoted* in Baldwin *v.* New York, 45 Barb. (N. Y.) 359, 369, 30 How. Pr. (N. Y.) 289].

10. Black L. Dict.; Rapalje & L. L. Dict. [*quoted* in Carey *v.* Houston, etc., R. Co., 52 Fed. 671, 675].

person of his rights by the forms of law, or to obtain an object forbidden by law.[11] In divorce proceedings, an agreement between husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce; also connivance or conspiracy in initiating or prosecuting the suit, as where there is a compact for mutual aid in carrying it through to a decree.[12] In the settlement of decedents' estates it means any intermeddling with the executor or the assets of the testator, by which the executor is guilty of a violation of his duty.[13] (Collusion: Generally, see FRAUD. In Criminal Prosecutions, see CRIMINAL LAW. In Divorce Proceedings, see DIVORCE. In Procuring Judgment, see JUDGMENTS. To Confer Jurisdiction, see COURTS. To Defraud Creditor, see FRAUDULENT CONVEYANCES.)

COLLYBUM. In the civil law, exchange.[14]

COLONEL MAZUMA. A modern provincialism, probably emanating from the daily press, and used with reference to the corrupt application of money in the accomplishment of certain ends.[15]

COLONIAL. Pertaining or belonging to a COLONY,[16] *q. v.* (Colonial: Grant, see PUBLIC LANDS. Laws, see COLONIAL LAWS.)

COLONIAL LAWS. In America, this term designates the body of law in force in the thirteen original colonies before the Declaration of Independence. In England, the term signifies the laws enacted by Canada and the other British colonies.[17] (See, generally, COMMON LAW.)

COLONY.[18] A dependent political community, consisting of a number of citizens of the same country who have emigrated therefrom to people another, and remain subject to the mother country.[19] (See, generally, STATES.)

It is the collusion and fraudulent use that is attempted to be made of the processes of the court in such cases, so opposed to the whole spirit and policy of the statutes, which the law abhors and denounces. Comer *v.* Heidelbach, 109 Ala. 220, 223, 19 So. 719 [*quoted* in Builders', etc., Supply Co. *v.* Montgomery First Nat. Bank, 123 Ala. 203, 219, 26 So. 311]. See also Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264.

11. Warren *v.* Union Bank, 157 N. Y. 259, 270, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 743, 16 U. S. App. 196, 7 C. C. A. 471 [*quoting* Jessop *v.* Jessop, 7 Jur. N. S. 609, 30 L. J. Mat. 193, 4 L. T. Rep. N. S. 308, 2 Sw. & Tr. 301, 9 Wkly. Rep. 640]; Bouvier L. Dict. [*quoted* in Baldwin *v.* New York, 45 Barb. (N. Y.) 359, 369, 30 How. Pr. (N. Y.) 289; Miller *v.* Bayer, 94 Wis. 123, 125, 68 N. W. 869; Carey *v.* Houston, etc., R. Co., 52 Fed. 671, 675].

It may be, among other things, the keeping back evidence of what would be a good answer, or by agreeing to set up a false case. Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 743, 16 U. S. App. 196, 7 C. C. A. 471 [*quoting* Jessop *v.* Jessop, 7 Jur. N. S. 609, 30 L. J. Mat. 193, 4 L. T. Rep. N. S. 308, 2 Sw. & Tr. 301, 9 Wkly. Rep. 640].

12. Black L. Dict. [*citing* Cal. Civ. Code, § 114]. See also Beard *v.* Beard, 65 Cal. 354, 4 Pac. 229; and, generally, DIVORCE.

13. Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 623, 19 Am. Dec. 537.

"Collusion with the administrator," implies *ex vi termini* the presence of someone with whom the administrator could collude. Belt *v.* Blackburn, 28 Md. 227, 235. And *compare* Builders', etc., Supply Co. *v.* Montgomery First Nat. Bank, 123 Ala. 203, 219, 26 So. 311.

14. Burrill L. Dict.

15. People *v.* Stokes, 103 Cal. 193, 199, 37 Pac. 207, 42 Am. St. Rep. 102, where it is also said: "The term 'Colonel Mazuma' not only does not indicate some gentleman with a military title, but it does not even refer to a person at all."

16. Century Dict.

17. Black L. Dict.

18. Plantations or colonies, in distant countries, are either (first) such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or (second) where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. 1 Bl. Comm. 107, 110.

19. Black L. Dict.

"Colony" is distinguished from "dependency" in U. S. *v.* The Nancy, 3 Wash. (U. S.) 281, 287, 27 Fed. Cas. No. 15,854, where it is said: "It is not a colony, because it is not settled by the citizens of the sovereign, or mother state; but it is lawfully acquired or held, and the people are as much subjects of the state which has thus obtained it, as if they had been born in the principal state, and had emigrated to the dependent territory."

Colonies are acquired either (1) by conquest, (2) by cession under treaty, (3) by

COLOR. Guise, appearance, pretense;[20] semblance, show, pretense, appearance, and implies in the language of the law that the thing to which it is applied has not the real character imputed to it.[21] (Color: In Pleading, see PLEADING. Of Law, see COLOR OF LAW. Of Office, see COLOR OF OFFICE. Of Sugar, see COLOR OF SUGAR. Of Title, see ADVERSE POSSESSION; QUIETING TITLE.)

COLORABLE. That which has or gives color; that which is in appearance only, and not in reality, what it purports to be.[22] (Colorable: Alteration, see COPYRIGHT. Imitation, see TRADE-MARKS AND TRADE-NAMES. Title, see COLORABLE TITLE.)

COLORABLE TITLE. In appearance title, but in fact not.[23] (See ADVERSE POSSESSION.)

COLORATION. The act or practice of coloring, or the state of being colored.[24]

COLORED PERSONS. Not a phrase of art,[25] but often applied to black people,[26]

occupancy, as Newfoundland, New South Wales, and Van Dieman's Land, and (4) by hereditary descent. Wharton L. Lex. [*citing* Clark Col. Law].

"**Upon the outbreak of war between the South American colonies and Spain,** upon a special message of President Madison to congress upon the subject, the words 'or of any colony, district, or people' were added to the description of both parties contemplated, — both that one into whose employment the vessel was to enter and that one against whom the hostilities were contemplated." The Three Friends, 78 Fed. 175, 176, construing U. S. Rev. Stat. (1878), § 5283.

When the laws of England depend upon circumstances that are peculiar to England, and which do not apply to the colonies also, then these particular laws do not hold good in the colonies, e. g., the Law of Mortmain in the Island of Grenada. Brown L. Dict. And see Atty.-Gen. *v.* Stewart, 2 Meriv. 143, 16 Rev. Rep. 162.

20. Webster Dict. [*quoted* in McElhaney *v.* Gilleland, 30 Ala. 183, 187].

21. Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 503, 20 N. W. 779.

"**Color**" **as a modifier in legal parlance** means appearance as distinguished from reality. Kinney L. Dict. [*quoted* in McCain *v.* Des Moines, 174 U. S. 168, 175, 19 S. Ct. 644, 43 L. ed. 936]. And to same effect see Bouvier L. Dict. [*quoted* in Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 503, 20 N. W. 779].

"**Color**" **in law means** not the thing itself, but only an appearance thereof. Broughton *v.* Haywood, 61 N. C. 380, 383.

"**Color**" **primarily signifies** any appearance, pretext or pretence: thus, a person is said to have no color of title when he has not even a *prima facie* title. Sweet L. Dict.

22. Black L. Dict.

23. Dickens *v.* Barnes, 79 N. C. 490, 491. And see Tate *v.* Southard, 10 N. C. 119, 121, 14 Am. Dec. 578, where it is said: "The words, 'or otherwise,' and 'other colourable title,' mean title of the like kind."

24. McCann *v.* Com., 198 Pa. St. 509, 511, 48 Atl. 470.

25. **It is not a term or phrase of art,** having any peculiar or technical signification. Johnson *v.* Norwich, 29 Conn. 407, 408. And see Hopkins *v.* Bowers, 111 N. C. 175, 16 S. E. 1, where it is said that while the terms "colored person" and "mixed blood" might not be accurate in an indictment, yet where they have been used by a witness on the trial, and no objection thereto interposed so as to give witness an opportunity to correct his language, it will be assumed that the jury understood the words in their usual signification.

The act of February 27th, 1866, to legalize the marriage of colored persons living together as husband and wife at the time the act was passed, includes and applies to colored persons so living together though they were born free. Francis *v.* Francis, 31 Gratt. (Va.) 283.

The term "colored child" includes those born during slavery, under section 4 of the act of December 21st, 1865; and children born between the emancipation and the date of the passage of the law under consideration would be embraced within the terms "every colored child" used in the Act of 1865, as they would be descendants of freedmen and freedwomen, that is, descendants of some of those persons named in the "Act preliminary to the legislation induced by the emancipation of slaves," as coming with the terms "persons of color," to which class of persons the Act in question is confined. Davenport *v.* Caldwell, 10 S. C. 317, 351, per McIver, A. J., in dissenting opinion. And see Van Camp *v.* Board of Education, 9 Ohio St. 406, 418.

26. "**The word 'black' may include all negroes,** but the term 'negro' does not include all black persons. By the use of this term in this connection, we understand it to mean the opposite of 'white,' and that it should be taken as contradistinguished from all white persons." People *v.* Hall, 4 Cal. 399, 403, 404, where it is also said: "We are of the opinion that the words 'white,' 'negro,' 'mulatto,' 'Indian,' and 'black person,' wherever they occur in our Constitution and laws, must be taken in their generic sense, and that, even admitting the Indian of this continent is not of the Mongolian type, that the words 'black person,' in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."

The word "black" is well understood to mean the negro; and the word "mulatto" is

Africans,[27] or their descendants, mixed or unmixed;[28] persons of African descent or negro blood;[29] persons of the negro race;[30] persons who have any perceptible admixture of African blood.[31] (See, generally, CITIZENS; CIVIL RIGHTS; CONSTITUTIONAL LAW; ELECTIONS; MARRIAGE; MISCEGENATION.)

COLORE OFFICII. By COLOR OF OFFICE,[32] *q. v.*

COLOR OF LAW. Mere semblance of legal right.[33]

COLOR OF OFFICE.[34] In general, a pretense of official right to do an act made

equally well understood to denote the offspring of a white person and a negro, and as not expressive of any other class of persons. Per Sutliff, J., in dissenting opinion in Van Camp *v.* Board of Education, 9 Ohio St. 406, 420.

27. **"Colored person" is synonymous with "African."** Clark *v.* Board of Directors, 24 Iowa 266, 275.

28. Webster Dict. [*quoted* in Van Camp *v.* Board of Education, 9 Ohio St. 406, 411].

The term embraces not only all persons descended wholly from African ancestors, and therefore of pure and unmixed African blood, but those who have descended in part only from such ancestors, and have a distinct, visible admixture of African blood. Johnson *v.* Norwich, 29 Conn. 407, 408.

29. Black L. Dict.

In relation to the phrase "persons of color," as used in a statute, it is said: "It has, however, acquired quite as definite a meaning as negro, mulatto, &c.; and at all events is the chosen phrase of the statute, which we cannot reject, and the indictment is not bound to avoid or to define it." U. S. *v.* La Coste, 2 Mason (U. S.) 129, 141, 26 Fed. Cas. No. 15,548.

30. State *v.* Union Dist. School Trustees, 46 N. J. L. 76, 79.

The term "negro" is identical in signification with the term "colored person," as defined by Va. Code (1873), c. 103, § 2, that is, "a person with one-fourth, or more, of negro blood." Jones *v.* Com., 80 Va. 538, 544, where it is said: "If his mother was a yellow woman with more than half of her blood derived from the white race, and his father a white man, he is not a negro. If he is a man of mixed blood he is not a negro, unless he has one-fourth at least of negro blood in his veins, and this must be proved by the commonwealth as an essential part of the crime, without which it cannot exist."

31. Van Camp *v.* Board of Education, 9 Ohio St. 406, 412, where it is said: "In affixing the epithet 'colored' we do not ordinarily stop to estimate the precise shade, whether light or dark; though where precision is desired, they are sometimes called "light-colored,' or 'dark-colored,' as the case may be." And see Panska *v.* Daus, 31 Tex. 67, 74 (where it is said: "There are various shades of color among the human race in this country, and there is no legal technical signification to the phrase 'colored men' which the courts are bound judicially to know. A man of pure Caucasian blood, in the freaks of nature and the idiosyncrasies of families, is sometimes impressed with a dye much deeper than falls to the common lot of his race"); McPherson *v.* Com., 28 Gratt. (Va.) 939, 940 [*quoted* in Jones *v.* Com., 80 Va. 538, 544, where it is said: "It appears that less than one-fourth of her blood is negro blood. If it be but one drop less, she is not a negro]."

Distinction between "white" and "black." —In Gray *v.* State, 4 Ohio 353, 354, the question was, whether a person "of a shade of color between the mulatto and white," was to be regarded as a "white person," within the meaning of a statute; and the question was resolved affirmatively. The court say, in that case: "Three descriptions of persons are designated by name, in the statute, white, black, and mulatto — and these three are well known by the same terms, in common life. . . . We are unable to set out any other plain and obvious line, or mark between the different races. Color alone is insufficient. . . . We are of opinion, that a party of such blood, [is] entitled to the privileges of whites, partly because we are unwilling to extend the disabilities of the statute further than its letter requires, and partly from the difficulty of defining and of ascertaining the degree of duskiness which renders a person liable to such disabilities." In Van Camp *v.* Board of Education, 9 Ohio St. 406, 413, per Sutliff, J., in dissenting opinion [*quoting* Gray *v.* State, 4 Ohio 353, 354], it is said: "There is no margin between white and colored; and all that are not white are colored."

32. Burrill L. Dict.

33. Kinney L. Dict. [*quoted* in McCain *v.* Des Moines, 174 U. S. 168, 175, 19 S. Ct. 644, 43 L. ed. 936].

34. In Richardson *v.* Crandall, 48 N. Y. 348, 361, it is said: "The acts described by Tomlin are such as are condemned as done by color of office; but the definition of the term is not broad enough to include all cases, as there are many cases in the books where acts done by color of office have been condemned, although not grounded upon any actual corruption; yet the law may impute a corrupt character to them as done in violation of law."

"Colore officii" is distinguished from "virtute officii" in the following cases:

New York.— People *v.* Schuyler, 4 N. Y. 173, 192 (dissenting opinion); Winter *v.* Kinney, 1 N. Y. 365, 368; Seeley *v.* Birdsall, 15 Johns. (N. Y.) 267, 269 [*citing* Griffith *v.* Walker, 1 Wils. C. P. 336].

North Carolina.— Broughton *v.* Haywood, 61 N. C. 380, 383.

Oregon.— Feller *v.* Gates, 40 Oreg. 543, 546, 67 Pac. 416, 56 L. R. A. 630 [*citing* People

by one who has no such right;[35] the mere semblance, shadow or false appearance of official authority; the dissembling face of the right of office; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act;[36] an act evilly done, by the countenance of an office;[37] an act unjustly done by the countenance of an office;[38] an act wrongfully done by an officer under the pretended authority of his office;[39] and is always taken in the worst sense, being grounded upon corruption, of which the office is as a mere shadow or color;[40] under statutes, the phrase is used to define an illegal claim of right or authority to take the security;[41] some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given.[42] (See,

v. Schuyler, 4 N. Y. 173], where it is said: "Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him, whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."

Wisconsin.— Bishop *v.* McGillis, 80 Wis. 575, 579, 50 N. W. 779, 27 Am. St. Rep. 63 [*citing* State *v.* Mann, 21 Wis. 684, 692].

England.— Alcock *v.* Andrews, 2 Esp. 542 note.

35. Bouvier L. Dict. [*quoted* in Wilson *v.* Unselt, 12 Bush (Ky.) 215, 228, dissenting opinion]. See also Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 608, 35 Am. Dec. 582, where it is said: "The words 'color of office' necessarily imply an illegal claim of right or authority to take the security, or to do the act in question, by virtue of his office, which claim is a mere color or pretence on the part of the officer."

36. Burrill L. Dict.

The mere claim to be a public officer is not enough to constitute one an officer *de facto*. There must be some color to the claim of right to the office, or, without such color, a performance of official duties, with the acquiescence of the public, for such a length of time as to raise a presumption of colorable right. Per Sutherland, J., in Wilcox *v.* Smith, 5 Wend. (N. Y.) 231, 233, 21 Am. Dec. 213 [*quoted* in Hamlin *v.* Kassafer, 15 Oreg. 456, 459, 15 Pac. 778, 3 Am. St. Rep. 176]; Hamlin *v.* Kassafer, 15 Oreg. 456, 459, 15 Pac. 778, 3 Am. St. Rep. 176 [*citing* Brown *v.* Lunt, 37 Me. 423, 428; Conover *v.* Devlin, 15 How. Pr. (N. Y.) 470, 477; Burke *v.* Elliott, 26 N. C. 355, 42 Am. Dec. 142; *Ex p.* Strang, 21 Ohio St. 610]. See also State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

It is a technical expression and implies bad faith, corruption, breach of duty. Chamberlain *v.* Beller, 18 N. Y. 115, 117.

37. Tomlin L. Dict. [*quoted* in Richardson *v.* Crandall, 48 N. Y. 348, 361; Winter *v.* Kinney, 1 N. Y. 365, 368; Kelly *v.* McCormick, 2 E. D. Smith (N. Y.) 503, 511; Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 608, 35 Am. Dec. 582].

38. Wharton L. Lex. [*quoted* in Wilson *v.* Unselt, 12 Bush (Ky.) 215, 228, dissenting opinion].

39. Bouvier L. Dict. [*quoted* in Mason *v.* Crabtree, 71 Ala. 479, 481; McElhaney *v.* Gilleland, 30 Ala. 183, 187; Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 503, 20 N. W. 779].

40. Tomlin L. Dict. [*quoted* in Richardson *v.* Crandall, 48 N. Y. 348, 361; Winter *v.* Kinney, 1 N. Y. 365, 368; Kelly *v.* McCormick, 2 E. D. Smith (N. Y.) 503, 511; Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 608, 35 Am. Dec. 582]; Wharton L. Lex. [*quoted* in Wilson *v.* Unselt, 12 Bush (Ky.) 215, 228, dissenting opinion; and *citing* Dive *v.* Maningham, Plowd. 60, 64]. And see Griffiths *v.* Hardenbergh, 41 N. Y. 464, 470; Chamberlain *v.* Beller, 18 N. Y. 115, 117; Decker *v.* Judson, 16 N. Y. 439, 442 [*quoting* Bouvier L. Dict. and *citing* Tomlin L. Dict.].

Against public policy.— No case entitled to weight as authority can be found, which decides that a security taken *colore officii* cannot be condemned unless it was taken with an evil or corrupt intent. The acts of public officers in taking such securities are condemned because they are against the general policy of the law. It matters not that the motives of the officer were good and humane if the acts are of such a character as tend, if countenanced, to oppression or a lax performance of official duty. Richardson *v.* Crandall, 48 N. Y. 348, 362. See also Winter *v.* Kinney, 1 N. Y. 365.

41. Griffiths *v.* Hardenbergh, 41 N. Y. 464, 469 [*citing* Chamberlain *v.* Beller, 18 N. Y. 115; Decker *v.* Judson, 16 N. Y. 439; Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582].

42. U. S. *v.* Humason, 6 Sawy. (U. S.) 199, 26 Fed. Cas. No. 15,421, 8 Am. L. Rec. 466, 12 Chic. Leg. N. 138, 26 Int. Rev. Rec. 12, 9 Reporter 107.

Compared with extortion.— In Dive *v.* Maningham, Plowd. 60, 67 [*cited* in Richardson *v.* Crandall, 48 N. Y. 348, 360; Morton *v.* Campbell, 37 Barb. (N. Y.) 179, 182 (*quoting* Termes de la Ley, p. 156); Webber *v.* Blunt, 19 Wend. (N. Y.) 188, 191, 32 Am. Dec. 445] the action was upon a bond, taken by a sheriff for a previous offense on an execution; and Chief Justice Montague says: "The prisoner not being bailable, the sheriff took the bond unduly, and *colore officii sui*, which is always taken in *malam partem*, and signifies an act badly done under the countenance of an office, and it bears a dissembling visage of duty, and is properly called extortion." See, generally, EXTORTION.

The expression "by color of his office, in any other case or manner than such as are

generally, ARREST; EXTORTION; FALSE IMPRISONMENT; FALSE PERSONATION; OFFICERS; SHERIFFS AND CONSTABLES.)

COLOR OF SUGAR. The hue or degree of lightness which the sugar has attained in the ordinary course of its manufacture, and which indicates the degree of perfection to which the process of clarification has been carried.[43]

COLOR OF TITLE. See ADVERSE POSSESSION.

COLPINDACH. In old Scotch law, a young beast or cow, of the age of one or two years; in later times called a "cowdash."[44]

COLPORTEUR. One who travels for the sale and distribution of religious tracts and books;[45] a hawker and peddler; especially in modern usage, a peddler of religious books;[46] a person employed by a Bible or tract society, or the like, to distribute gratuitously or sell at low rates Bibles and various other religious publications.[47] In England, one who is engaged by a religious society or association to travel about and distribute or sell religious books or tracts of the society, in the latter case at reduced prices.[48] In France, a hawker of books and pamphlets; one who travels for vending small books;[49] a hawker and peddler.[50] (See, generally, HAWKERS AND PEDDLERS.)

COLT. An animal of the horse species, whether male or female, not more than four years old.[51]

COMBARONES. In old English law, fellow-barons; fellow-citizens.[52]

COMBAT. A fight; contest; engagement; battle.[53] (See, generally, AFFRAY; ASSAULT AND BATTERY; BATTEL; DUELING; HOMICIDE; PRIZE FIGHTING.)

COMBINATION. In general, a union of persons or things;[54] a union or association;[55] a union of persons for certain purposes, association, alliance, coalition,

provided by law," limits the penalty of the statute to cases where it is shown, or must be presumed from the circumstances, that the officer designedly departed from the statute. Kelly *v.* McCormick, 28 N. Y. 318, 321.

When applied to the taking by an officer of a written security, "color of office" *ex vi termini*, implies that the security is "unlawful and unauthorized, and that the legal right to take it is a mere color or pretence." Decker *v.* Judson, 16 N. Y. 439, 442 [*citing* Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582].

Where the agreement does not provide for an indemnity to the officer for a breach of duty, and does not necessarily produce an injury to either the plaintiff or the defendant, and is not condemned by either the common or statute law, it cannot be held void as taken *colore officii*. Decker *v.* Judson, 16 N. Y. 439, 442 [*citing* Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582].

43. The term is so used in a statute, relating to the collection of duties on imports of merchandise. U. S. *v.* Cargo of Sugar, 3 Sawy. (U. S.) 46, 54, 25 Fed. Cas. No. 14,722, where it is said in the charge to the jury: "Undoubtedly while the sugar, or while the cane-juice rather, remains in the manufacturer's hands, he may omit to take out the impurities, or may put in impurities if he so desires, for as yet it has not become sugar. The hue of the sugar — that is, the result of his operations will — be determined by the degree to which he has abstracted the impurities or foreign substances from it, or the amount of such foreign substances as he may have introduced into it. But when it has passed out of his hands and gone into the hands of the importer, or the proposed importer, or the merchant, then the hue it has acquired is the 'color' that congress had reference to when it established color as the standard of classification. If, then, by the admixture of some foreign and totally different substance, such as caramel, or, as in this case, charcoal, this color be changed, the color so acquired cannot be considered the color to which congress referred as a standard for assessing the duties."

44. Black L. Dict.

45. Webster Dict. [*quoted* in Fuller's Will, 75 Wis. 431, 436, 44 N. W. 304].

46. Worcester Dict. [*quoted* in Fuller's Will, 75 Wis. 431, 436, 44 N. W. 304].

47. Century Dict. [*quoted* in Fuller's Will, 75 Wis. 431, 436, 44 N. W. 304].

48. Cyclopedic Dict. [*quoted* in Fuller's Will, 75 Wis. 431, 436, 44 N. W. 304].

49. Imperial Dict. [*quoted* in Fuller's Will, 75 Wis. 431, 436, 44 N. W. 304].

50. Cyclopedic Dict. [*quoted* in Fuller's Will, 75 Wis. 431, 436, 44 N. W. 304].

51. Black L. Dict. [*citing* Rex *v.* Beaney, R. & R. 309].

"'Colt' is as well understood as gelding, mare, stud, steer, heifer, cow, or bull." Pullen *v.* State, 11 Tex. App. 89, 91 [*citing* Short *v.* State, 36 Tex. 644; Robertson *v.* State, 1 Tex. App. 311].

52. Black L. Dict.; Burrill L. Dict.

The citizens of the Cinque ports being anciently called "barons"; the term "*combarones*" is used in this sense in a grant of Henry III, to the barons of the port of Fevresham.

53. Century Dict.

54. Burrill L. Dict.

55. Gates *v.* Hooper, 90 Tex. 563, 565, 39 S. W. 1079; Texas, etc., Coal Co. *v.* Lawson,

confederacy;[56] an agreement between two or more persons;[57] a union of men for the purpose of violating the law, a union of different elements;[58] in penal and criminal laws (as in statute providing that one common carrier may not combine with another for any purpose), a coalition, union, mutual agreement, or other blending, for whatever purpose; as, for creating a monopoly.[59] (Combination: Patent For, see PATENTS. Pools, see GAMING. Unlawful, Illegal, or Against Public Policy, see BOYCOTT; CONSPIRACY; CONTRACTS; INJUNCTIONS; LABOR UNIONS; MONOPOLIES.)

COMBINE. To join together; to coalesce; to unite; to be united; to be joined in friendship or design.[60]

COMBUSTIO. In old English law, the punishment of burning, inflicted upon apostates and others.[61]

COMBUSTIO DOMORUM. House-burning; arson.[62]

COMBUSTIO PECUNIÆ. The ancient way of trying mixed or corrupt money, by melting it down upon payments into the exchequer.[63]

COME. To present oneself; to appear in court.[64]

COMEN. Common, the common law.[65]

COMES. As a noun, a follower or attendant; a count or earl.[66] As a verb, used in pleading to indicate the defendant's presence in court.[67] (See COME.)

COMES AND DEFENDS. This phrase, anciently used in the language of pleading, and still surviving in some jurisdictions, occurs at the commencement of a defendant's plea or demurrer; and of its two verbs the former signifies that he appears in court, the latter that he defends the action.[68] (See, generally, PLEADING.)

COME TO. The words in their common acceptation may with perfect propriety be referred to real or personal estate derived through any channel, by the voluntary act of the donor, either by will or other gratuitous benevolence taking immediate effect, or by the operation of law.[69]

COME TO LAND. In old English law, to acquire land; to obtain possession under a title.[70]

COMFIT. A dried sweetmeat; any kind of fruit or root preserved with sugar and dried.[71]

COMFORT. Whatever is necessary to give security from want, and furnish

89 Tex. 394, 401, 32 S. W. 871, 34 S. W. 919.

56. Worcester Dict. [*quoted* in Watson *v.* Harlem, etc., Nav. Co., 52 How. Pr. (N. Y.) 348, 353].

57. *In re* Grice, 79 Fed. 627, 642.

58. Bouvier L. Dict. [*quoted* in Watson *v.* Harlem, etc., Nav. Co., 52 How. Pr. (N. Y.) 348, 353].

Combinations to do unlawful acts are punishable before the unlawful act is executed; this is to prevent the consequences of combinations and conspiracies. Jacob L. Dict. [*quoted* in Watson *v.* Harlem, etc., Nav. Co., 52 How. Pr. (N. Y.) 348, 353].

59. Anderson L. Dict.

60. Worcester Dict. [*quoted* in Watson *v.* Harlem, etc., Nav. Co., 52 How. Pr. (N. Y.) 348, 353].

The term is synonymous with or belonging to the same class as "unite, incorporate, amalgamate, imbody, absorb, reimbody, blend, merge, fuse, melt into one, consolidate, coalesce, centralize, to impregnate, to put together, to lump together." Roget Thesaurus [*quoted* in Watson *v.* Harlem, etc., Nav. Co., 52 How. Pr. (N. Y.) 348, 353].

61. Burrill L. Dict.

62. 4 Bl. Comm. 272.

63. Jacob L. Dict.

64. Black L. Dict.

In modern practice, though such presence may be constructive only, the word is still used to indicate participation in the proceedings. Thus, a pleading may begin, "Now comes the defendant," etc. Black L. Dict. A defendant in pleading is said to "come and defend." Where a party fails to appear, the language of the record is, that he "comes not, but makes default." Burrill L. Dict.

65. Burrill L. Dict.

66. Black L. Dict.

67. Black L. Dict.

68. Burrill L. Dict.

69. Shippen *v.* Izard, 1 Serg. & R. (Pa.) 220, 226.

70. This, together with the still used term "in," appears to be derived from the old practice of giving livery of seisin, in which the feoffee actually went in person to the land, and entered upon it. "If he come to land, . . . by a later title, yet the law will adjudge him in . . . by force of the elder title." Burrill L. Dict.

71. Levy *v.* Robertson, 38 Fed. 714, 715, where it is also said: "A sweetmeat is a

reasonable physical, mental, and spiritual enjoyment;[72] support.[73] The term implies some degree of positive animation of the spirits or some pleasurable sensations derived from hope and agreeable prospects.[74]

COMING TO MARKET. As applied to produce, the term means, on its way to the market place, with intent to be there offered for sale, in market hours.[75]

COMITAS. COMITY, *q. v.*; courtesy; civility.[76]

COMITATU COMMISSO. A writ or commission whereby a sheriff is authorized to take upon him the charge of the county.[77]

COMITATU ET CASTRO COMMISSO. A writ by which the charge of a county, together with the keeping of a castle, is committed to the sheriff.[78]

COMITATUS. A county or shire; the body of a county.[79] (See POSSE COMITATUS.)

COMITY. Reciprocity;[80] courtesy, complaisance, respect, a willingness to grant a privilege, not as a matter of right, but out of deference and good will.[81] (Comity: Between Courts, see ABATEMENT AND REVIVAL; COURTS. Of Nations, see EXTRADITION; INTERNATIONAL LAW. See also CONFLICT OF LAWS.)

COMMA. In punctuation, a point (,) used to indicate the smallest interruptions in continuity of thought or grammatical construction, the marking of which contributes to clearness.[82]

COMMAND. An order, imperative direction, or behest.[83]

COMMANDEMENT. In French law, a writ served by the *huissier* pursuant to a judgment or to an executory notarial deed.[84]

COMMENCE. To cause to begin to be, perform the first act of, enter upon, begin;[85] to originate, to do the first act in anything, to take the first step.[86] (See COMMENCEMENT.)

fruit preserved with sugar, but not necessarily dried. What would be a sweetmeat becomes a comfit if it is not only preserved with sugar, but is also dried."

72. Anderson L. Dict.

73. Webster Dict. [*quoted* in Peckham *v.* Lego, 57 Conn. 553, 556, 19 Atl. 392, 14 Am. St. Rep. 130, 7 L. R. A. 419].

"Comfort and support" as used in a statute may sometimes be considered as synonymous with "maintenance." Eskridge *v.* Ditmars, 51 Ala. 245, 255.

"Comfortable maintenance" is considered in White *v.* White, 16 N. J. L. 202, 213, 31 Am. Dec. 232.

"The words 'to be for her comfort and support,' at most, express the motive and purpose of the gift, but cannot be held to make the gift conditional. They have little, if any, more significance than the words 'to be for her benefit and enjoyment.'" Maynard *v.* Cleaves, 149 Mass. 307, 309, 21 N. E. 376.

74. Webster Dict. [*quoted* in Forman *v.* Whitney, 2 Abb. Dec. (N. Y.) 163, 166, 2 Keyes (N. Y.) 165].

Mental comfort see Forman *v.* Whitney, 2 Abb. Dec. (N. Y.) 163, 166, 2 Keyes (N. Y.) 165.

Physical comfort see Stocker *v.* Foster, 178 Mass. 591, 599, 60 N. E. 407.

75. Botelor *v.* Washington, 2 Cranch C. C. (U. S.) 676, 3 Fed. Cas. No. 1,685.

76. Black L. Dict.

77. Jacob L. Dict.

78. Jacob L. Dict.

79. Black L. Dict.

80. *In re* McCoskey, 1 N. Y. Suppl. 782, 783, 17 N. Y. St. 829, 6 Dem. Surr. (N. Y.) 438.

81. Black L. Dict.

82. Century Dict.

The comma and semicolon are both used for the same purpose, namely, to divide sentences and parts of sentences, the only difference being that the semicolon makes the division a little more pronounced than the comma; but at the last it is the sense of the words, taken together, that dictates where the punctuation marks are to be placed, and what they shall be. Holmes *v.* Phenix Ins. Co., 98 Fed. 240, 242, 39 C. C. A. 45, 47 L. R. A. 308.

83. Black L. Dict.

"The meaning of the word 'command,' as applied to the case of principal and accessary, is where a person having control over another, as a master over his servant, orders a thing to be done." State *v.* Mann, 2 N. C. 4, 7.

Construing a holographic will, it was said in Barney *v.* Hayes, 11 Mont. 571, 576, 29 Pac. 282, 28 Am. St. Rep. 495, "That was his 'will' using that word in its original sense of 'intent,' 'desire' or 'command.'"

84. Its object is to give notice to the debtor that if he does not pay the sum to which he has been condemned by the judgment, or which he engaged to pay by the notarial deed, his property will be seized and sold. Black L. Dict.

85. Century Dict. [*quoted* in State *v.* Hartford F. Ins. Co., 99 Ala. 221, 224, 13 So. 362].

86. Webster Dict. [*quoted* in State *v.* Hartford F. Ins. Co., 99 Ala. 221, 224, 13 So. 362].

COMMENCEMENT. The act or fact of commencing; beginning; rise; origin; first existence; inception.[87] (Commencement: Of Action, see ABATEMENT AND REVIVAL; ACTIONS; LIMITATIONS OF ACTIONS; PROCESS. Of Building, see MECHANICS' LIENS. Of Indictment, see INDICTMENTS AND INFORMATIONS. Of Pleading, see PLEADING. Of Risk, see ACCIDENT INSURANCE; FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE.)

87. Century Dict.

COMMERCE

By John M. Gould*

I. **Definition**, 412

II. **History**, 413

III. **What Constitutes Commerce**, 413

- A. *In General*, 413
- B. *With Foreign Nations*, 415
- C. *Among the Several States*, 415
  - 1. *Definition*, 415
  - 2. *Between Whom*, 415
  - 3. *With the District of Columbia*, 415
  - 4. *Business Involving Commerce*, 415
  - 5. *Sales*, 416
  - 6. *Transportation*, 417
    - a. *In General*, 417
    - b. *Where Both Termini Are in One State*, 417
- D. *With the Indian Tribes*, 418
- E. *Insurance*, 418
- F. *Labor Contracts*, 418

IV. **Power to Regulate Commerce**, 419

- A. *Power of Congress*, 419
  - 1. *In General*, 419
    - a. *Subjects of National Law*, 419
    - b. *Subjects of International Law*, 419
  - 2. *Form of Exercise of Power*, 419
  - 3. *Purpose of Exercise of Power*, 419
  - 4. *Exclusiveness of Power and Effect of Non-Action by Congress*, 420
  - 5. *Effect of Congressional Action on State Law*, 421
  - 6. *Effect of an Interstate Compact*, 421
  - 7. *Delegation of Powers*, 421
- B. *Powers of the States*, 422
  - 1. *Over Interstate Commerce*, 422
  - 2. *Over Internal Commerce*, 422
  - 3. *Discriminations in General*, 423

V. **Protection of Commerce**, 424

- A. *In General*, 424
- B. *Commerce by Water*, 424
- C. *Commerce With the Indian Tribes*, 425
- D. *Removal of Obstructions to Commercial Ways*, 425

VI. **General Law Affecting Commerce**, 426

- A. *Common Law*, 426
- B. *Statutes*, 426
  - 1. *In General*, 426
  - 2. *Affecting Carriers' Liability*, 427
  - 3. *Affecting Commercial Contracts*, 428
  - 4. *Sunday Laws*, 428

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VII. INSTRUMENTS OF COMMERCE, 428
A. *What Are*, 428
B. *Power to Regulate*, 429
VIII. INCORPORATION OF GOODS WITH STATE PROPERTY, 429
A. *Original Packages*, 429
1. *What Is an "Original Package,"* 429
2. *State Power Over*, 429
B. *When Goods Become Incorporated With State Property*, 431
IX. LEGISLATIVE REGULATIONS OF COMMERCE, 432
A. *Subjects of Commerce*, 432
1. *In General*, 432
2. *Unquestioned Subjects of Commerce*, 432
a. *Property*, 432
(I) *Cattle*, 432
(A) *Importation and Transportation*, 432
(B) *Liability of Owners For Disease*, 432
(C) *Slaughtering and Packing*, 432
(D) *Stock-Yards*, 432
(II) *Fish and Game*, 433
(III) *Food*, 434
(A) *In General*, 434
(B) *Oleomargarine*, 434
(IV) *Natural Gas*, 435
(V) *Newspapers*, 435
b. *Persons*, 435
(I) *Immigrants*, 435
(II) *Slaves*, 436
3. *Subjects Injurious to the Public*, 436
a. *In General*, 436
b. *Gambling and Lotteries*, 436
c. *Intoxicating Liquors*, 437
(I) *Federal Authority Over*, 437
(II) *State Power Over*, 437
(A) *In General*, 437
(B) *What Is Within State Power*, 437
(C) *What Is Not Within State Power*, 439
(D) *Discriminations*, 439
(E) *The Wilson Act*, 440
d. *Tobacco*, 441
B. *Methods of Commerce*, 441
1. *Sales by Agents or Peddlers*, 441
a. *State Control Over*, 441
b. *Discriminations*, 443
2. *Brokers and Factors*, 444
3. *Corporations*, 444
a. *Federal Authority Over*, 444
b. *State Authority Over*, 444
(I) *Domestic Corporations*, 444
(II) *Foreign Corporations*, 445
C. *Commerce by Land*, 446
1. *Express Companies — State Power Over*, 446
2. *Railroads*, 446
a. *In General*, 446
(I) *Powers of Congress*, 446
(II) *Powers of the States*, 446
(A) *In General*, 446

(B) *Separate Accommodations For Colored Passengers*, 448
(C) *Powers of a Combination of States*, 449
(D) *Consolidation*, 449
b. *Rates*, 449
3. *Roadway Tolls*, 450
4. *Telegraphs and Telephones*, 450
5. *Warehouses and Grain Elevators*, 452
D. *Commerce by Water*, 453
1. *Navigable Waters*, 453
a. *In General*, 453
b. *Improvements in and Tolls For Use of*, 454
c. *Pollution of*, 455
d. *Bridges*, 455
(I) *In General*, 455
(A) *Powers of Congress*, 455
(B) *Powers of the States*, 456
(II) *Interstate Bridges*, 458
e. *Other Obstructions*, 458
2. *Navigation*, 459
a. *In General*, 459
b. *Pilot Laws*, 459
(I) *Nature of*, 459
(II) *Power to Enact*, 460
(III) *Proper Provisions of*, 461
(IV) *Waters Bounding on Two States*, 461
c. *State Port Regulations*, 462
(I) *In General*, 462
(II) *Fees Must Be Strictly Compensatory*, 463
3. *Ferries*, 463
4. *Preference of Ports*, 464
5. *Rafting*, 465
6. *Vessels and Steamship Companies*, 465
a. *Regulations of in General*, 465
b. *License-Taxes on*, 466
c. *Registration of Vessels*, 466
d. *Maritime Liens*, 467
e. *Steamship Tickets*, 467
E. *Health Laws*, 467
1. *Inspection Laws*, 467
a. *Definition and Scope*, 467
b. *Authority to Enact*, 467
c. *Discriminations*, 468
d. *Fee*, 469
2. *Quarantine Laws*, 469
F. *Trade-Marks*, 470
G. *Commerce With the Indian Tribes*, 470

X. TAXATION OF COMMERCE, 470
A. *In General — Power to Tax*, 470
B. *Taxation of Property the Subject of Commerce*, 471
1. *In General*, 471
a. *Situs in State*, 471
b. *Discriminations*, 472
c. *Within the Indian Reservations*, 472
2. *Duties on Imports and Exports*, 472
a. *Definition and Scope*, 472

b. *Who May Levy*, 472
(I) *National Power*, 472
(II) *State Power*, 473
c. *On What Property*, 473
(I) *Imports*, 473
(II) *Exports*, 473
d. *Form of Duties*, 473
(I) *What Are Imposts on Imports or Exports*, 473
(II) *What Are Not Imposts on Imports or Exports*, 474
(III) *Inspection Fees*, 475
(IV) *Wharfage Fees*, 475
3. *Stamp Duties on Bills of Exchange and Bills of Lading*, 475
4. *Tonnage Tax*, 475
a. *Definition*, 475
b. *Power to Levy*, 476
C. *Taxation of Persons — Passengers*, 476
D. *Taxation of Corporations*, 477
1. *In General*, 477
a. *State Franchise Tax*, 477
(I) *Domestic Corporations*, 477
(II) *Foreign Corporations*, 477
b. *Property Tax*, 478
2. *Bridges and Bridge Companies*, 479
3. *Express Companies*, 479
4. *Ferries*, 479
5. *Insurance Companies*, 480
6. *Pipe Line Companies*, 480
7. *Railroads*, 480
8. *Telegraph and Telephone Companies*, 482
9. *Vessels and Steamship Companies*, 483
E. *Taxation of Business — Occupation Tax — Sales of Goods*, 483
F. *Taxation of Creditor's Interest*, 485
G. *Inheritance Tax*, 485

XI. INTERSTATE COMMERCE COMMISSION, 485
A. *In General*, 485
B. *Authority and Functions*, 486
1. *In General*, 486
2. *Carriers Subject to the Commission*, 487
C. *The Complaint*, 487
1. *Who May Complain*, 487
2. *Proper Contents of Complaint*, 487
D. *The Hearing Before the Commission*, 487
1. *Burden of Proof*, 487
2. *Considerations Proper For the Commission*, 487
3. *Evidence*, 489
4. *Preferences*, 490
E. *Order of the Commission*, 490
F. *Expenses of the Commission*, 490
G. *Enforcement of Interstate Commerce Act*, 490
1. *On Finding by Commission*, 490
a. *Nature of Proceeding*, 490
b. *Jurisdiction of Court*, 490
(I) *In General*, 490
(II) *Law or Equity*, 491
c. *Parties*, 491
d. *Evidence*, 491

(I) *Findings of Commission*, 491
(II) *New Evidence*, 492
e. *Proper Order of the Court*, 492
(I) *In General*, 492
(II) *Injunction*, 492
(III) *In Case of Error by the Commission*, 492
2. *On Original Proceeding Independent of the Commission*, 493
H. *Appeal*, 493

CROSS-REFERENCES

For Matters Relating to:

Agriculture, see AGRICULTURE.
Bridges and Bridge Companies, see BRIDGES.
Brokers, see FACTORS AND BROKERS.
Canals and Canal Companies, see CANALS.
Carriers, see CARRIERS; SHIPPING.
Civil Rights Acts, see CIVIL RIGHTS.
Collision, see COLLISION.
Combinations or Contracts in Restraint of Commerce, see CONSPIRACY; CONTRACTS; MONOPOLIES.
Commercial Ageneies, see MERCANTILE AGENCIES.
Commercial Instruments, see COMMERCIAL PAPER.
Constitutional Law, see CONSTITUTIONAL LAW.
Copyright, see COPYRIGHT.
Customs Duties, see CUSTOMS DUTIES.
Extradition, see EXTRADITION.
Factors, see FACTORS AND BROKERS.
Ferries and Ferry Companies, see FERRIES.
Fish and Game, see FISH AND GAME.
Gas, see GAS.
Hawkers, see HAWKERS AND PEDDLERS.
Health, see HEALTH,
Indians, see INDIANS.
Inspection Laws, see INSPECTION.
Internal Revenue, see INTERNAL REVENUE.
International Law, see INTERNATIONAL LAW.
Jurisdiction of Federal Courts, see ADMIRALTY; COURTS.
Licenses, see LICENSES.
Logs and Logging, see LOGGING.
Manufacturers, see MANUFACTURERS.
Measures, see WEIGHTS AND MEASURES.
Mercantile Agencies, see MERCANTILE AGENCIES.
Mines, see MINES AND MINERALS.
Navigable Waters, see NAVIGABLE WATERS.
Neutrality Laws, see NEUTRALITY LAWS.
Non-Navigable Waters, see WATERS.
Patents, see PATENTS.
Peddlers, see HAWKERS AND PEDDLERS.
Pilots, see PILOTS.
Railroads and Railroad Companies, see RAILROADS.
Salvage, see SALVAGE.
Seamen, see SEAMEN.
Steam, see STEAM.
Taxation, see TAXATION,
Telegraphs and Telegraph Companies, see TELEGRAPHS AND TELEPHONES.
Telephones and Telephone Companies, see TELEGRAPHS AND TELEPHONES.
Towage, see TOWAGE.
Trade-Marks and Trade-Names, see TRADE-MARKS AND TRADE-NAMES.

For Matters Relating to — (*continued*)
Toll-Roads, see TOLL-ROADS.
Warehouses and Warehousemen, see WAREHOUSEMEN.
Weights, see WEIGHTS AND MEASURES.
Wharves, see WHARVES.

I. DEFINITION.

Commerce may be shortly defined as that intercourse and traffic which has to do with the exchange of commodities.[1] "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of one country and the citizens or subjects of other countries, and between the citizens of different states.[2]

1. Abbott L. Dict.; Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict.

In a strict sense commerce is traffic in merchandise. Burrill L. Dict. And *compare* Padelford *v.* Savannah, 14 Ga. 438.

Other definitions are: "An interchange or mutual change of goods, wares, productions or property of any kind, between nations or individuals, either by barter or by purchase and sale; trade; traffic." Webster Dict. [*quoted* in Fuller *v.* Chicago, etc., R. Co., 31 Iowa 187, 207].

"Interchange of goods, merchandise or property of any kind; trade; traffic; used more especially of trade on a large scale, carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as foreign commerce and internal commerce." Century Dict. [*quoted* in State *v.* Indiana, etc., R. Co., 133 Ind. 69, 83, 32 N. E. 817, 18 L. R. A. 502].

"The exchange or buying and selling of commodities; especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic." Webster Dict. [*quoted* in State *v.* Indiana, etc., R. Co., 133 Ind. 69, 83, 32 N. E. 817, 18 L. R. A. 502; McGuire *v.* State, 42 Ohio St. 530, 534].

"The interchange or mutual change of goods, productions, or property of any kind, between nations or individuals." Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 349, 24 Am. Rep. 773.

"Traffic, trade or merchandise in buying and selling of goods." Jacob L. Dict.

2. Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347 [*quoted* in Campbell *v.* Chicago, etc., R. Co., 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443; McNaughton *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367; Preston *v.* Finley, 72 Fed. 850]; Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702. "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation." Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 229, 6 L. ed. 23 [*quoted* in Mitchell *v.* Steelman, 8 Cal. 363, 372; Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 163, 179].

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Per Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 189, 6 L. ed. 23 [*quoted* in Williams *v.* Fears, 110 Ga. 584, 589, 35 S. E. 699, 50 L. R. A. 685; Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 668, 47 N. E. 582; Wilkerson *v.* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572; U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182; U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331]. Commerce includes "trade, traffic, intercourse." Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678 [*quoted* in Williams *v.* Fears, 110 Ga. 584, 589, 35 S. E. 699, 50 L. R. A. 685].

For a fuller treatment of what constitutes commerce see *infra*, III.

Commerce in the civil law see Adams Gloss.

A distinction between trade and commerce is made in People *v.* Fisher, 14 Wend. (N. Y.) 9, 15, 28 Am. Dec. 501 [*quoting* Jacobs L. Dict.], where it is said that "commerce relates to dealings with foreign nations; trade, on the contrary, means mutual traffic among ourselves, or the buying, selling or exchange of articles between members of the same community." And see Hooker *v.* Vandewater, 4 Den. (N. Y.) 349, 353, 47 Am. Dec. 258; Burrill L. Dict.; Rapalje & L. L. Dict.; Wharton L. Dict. *Contra*, Opinion of Daniel, J., in Passenger Cases, 7 How. (U. S.) 283, 501, 12 L. ed. 702. And see U. S. *v.* Patterson, 55 Fed. 605, 639, where it is said: "The court does not feel at all embarrassed by the use of the words 'trade or commerce.' The word 'commerce' is undoubtedly, in its usual sense, a larger word than 'trade,' in its usual sense. Sometimes 'commerce' is used to embrace less than 'trade,' and sometimes 'trade' is used to embrace as much as 'commerce.' They are, in the judgment of the court, in this statute synonymous." But *compare* U. S. *v.* Debs, 64 Fed. 724, 749 (where it is said: "I am unable to regard the word 'commerce,' in this statute, as synonymous

II. HISTORY.

Commerce, encouraged by the ancients and occupying the first place in the polity of the ancient civilization, was ignored by the rude early English common law and disdained by feudalism.[3] But, as England became more civilized, commerce grew in legal importance until, through the decisions of Lord Mansfield toward the close of the eighteenth century, the law merchant became clearly recognized and defined as a part of the common law.[4] Upon the framing of the American constitution the power and manifest future of the new commercial movement caused the insertion in that instrument of a clause intended to unshackle commerce from petty state interference.[5]

III. WHAT CONSTITUTES COMMERCE.

A. In General. Commerce, strictly considered, consists in intercourse and traffic,[6] including in these terms navigation[7] and the transportation and

with 'trade,' as used in the common-law phrase 'restraint of trade.' In its general sense, trade comprehends every species of exchange or dealing, but its chief use is 'to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail,' and so it is used in the phrase mentioned. But 'commerce' is a broader term. It is the word in that clause of the constitution by which power is conferred on congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes'"); *In re* Grand Jury, 62 Fed. 840, 841 [*citing* Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238].

The term "active commerce" is used to designate imports and exports transported in ships of the nation referred to. English L. Dict.

Transportation is the means by which commerce is carried on; without transportation there could be no commerce between nations or among the states. Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773.

3. The condition of early English commerce is described in Pike Hist. Crime, 182, 262, 370.

4. See 39 Dict. Nat. Biography (edited by Sidney Lee) 414.

A description of the English commercial court established in 1895 is contained in 3 Encycl. Eng. L. 119–122.

5. The reasons for giving to congress power over interstate and foreign commerce will be found stated in Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, 508, 510; Welton *v.* Missouri, 91 U. S. 275, 280, 23 L. ed. 347; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 445, 446, 6 L. ed. 678, per Marshall, C. J.; Pomeroy Const. L. § 327; Story Const. §§ 259, 1057 *et seq.*

For a statement of the necessities of a strong, uniform regulation of commerce and an account of the Annapolis commercial convention see 5 Marshall Life of Washington, c. 2, p. 65 *et seq.*

6. State *v.* Foreman, 8 Yerg. (Tenn.) 256; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238. And see Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23 [*quoted* in Western Union Tel. Co. *v.* Atlanta, etc., States Tel. Co., 5 Nev. 102].

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." Field, J., in Mobile County *v.* Kimball, 102 U. S. 691, 702, 26 L. ed. 238. And to the same effect see Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158 [*quoted* in Williams *v.* Fears, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685]; Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800; *In re* Grand Jury, 62 Fed. 840, 841. In the sense used in the constitution it is the transportation and exchange or traffic in articles or commodities between different states, or between the United States and foreign countries or with the Indian tribes. McGuire *v.* State, 42 Ohio St. 530.

Commerce "includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic.—The fact of intercourse and traffic, again, embraces all the means, instruments and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons." McCall *v.* California, 136 U. S. 104, 10 S. Ct. 881, 34 L. ed. 392 [*citing* Pomeroy Const. L. 376]; Sweatt *v.* Boston, etc., R. Co., 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684, 6 Am. L. Rev. 168, 4 Am. L. T. 174, 1 Am. L. T. Bankr. Rep. 273, 5 Nat. Bankr. Reg. 234 [*quoted* in Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582].

7. Kent Comm. 1–21; and the following cases:

transit[8] of property[9] and persons,[10] as well as the purchase, sale,[11] and barter[12] of commodities and agreements therefor.[13] The real distinction between acts and subjects of commerce and those that are not consists in the difference between commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other.[14] The running of an agency for the furtherance of commerce is an operation of commerce.[15] The building of ships[16] or dealing in bills of exchange is not an operation of commerce but the supplying of an instrument of commerce.[17] An agreement to bestow labor upon articles and return them is not a trans-

Alabama.— Pilotage Com'rs *v.* The Cuba, 28 Ala. 185.

Iowa.— Fuller *v.* Chicago, etc., R. Co., 31 Iowa 187.

Maine.— Moor *v.* Veazie, 31 Me. 360, 32 Me. 343, 52 Am. Dec. 655.

New York.— Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 163 [*quoting* Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23]; People *v.* Brooks, 4 Den. (N. Y.) 469 [*quoted* in Parker Mills *v.* Jacot, 8 Bosw. (N. Y.) 161].

United States.— U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182; Passenger Cases, 7 How. (U. S.) 282, 401, 436, 462, 12 L. ed. 702; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 89, 6 L. ed. 23; *In re* Grand Jury, 62 Fed. 840, 841; The Lewellen, 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307; The Wilson *v.* U. S., 1 Brock. (U. S.) 423, 30 Fed. Cas. No. 17,846; King *v.* American Transp. Co., 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787, 1 West. L. Month. 186; The Chusan, 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717. "It [commerce] embraces navigation, and extends to all the instruments used in navigating inland waters and the ocean." Pacific Coast Steam-Ship Co. *v.* Board of R. Com'rs, 9 Sawy. (U. S.) 253, 18 Fed. 10, 11 [*quoted* in Pollock *v.* Cleveland Ship Bldg. Co., 56 Ohio St. 655, 669, 47 N. E. 582]. See 10 Cent. Dig. tit. "Commerce," § 10 *et seq.*; and also Federalist No. 11, to the effect that commerce includes intercourse by means of shipping.

8. See also *infra*, III, C, 6.

9. State *v.* Chicago, etc., R. Co., 40 Minn. 267, 41 N. W. 1047, 12 Am. St. Rep. 730, 3 L. R. A. 238; Chicago, etc., R. Co. *v.* Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710 [*quoted* in Williams *v.* Fears, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685]; *In re* Greene, 52 Fed. 104, 113 (where it was said that commerce "consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities"). And see *In re* Grand Jury, 62 Fed. 840; U. S. *v.* Craig, 28 Fed. 795.

10. People *v.* Raymond, 34 Cal. 492; Ling Sing *v.* Washburn, 20 Cal. 534; North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713; Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702 [*overruling* New York *v.* Miln, 11 Pet. (U. S.) 102, 9 L. ed. 648]. And see *In re* Grand Jury, 62 Fed. 840; and cases cited *supra*, note 9.

Passenger steamers.— The word commerce in the U. S. Const. art. 1, § 8, extends to vessels propelled by steam or fire and exclusively employed in transporting passengers. Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

11. Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238. And see *In re* Grand Jury, 62 Fed. 840; and *infra*, III, C, 5.

The purchase and sale of shares by stock-brokers on the instructions of clients who are not themselves dealers are "commercial matters" within the meaning of the Quebec civil code. Forget *v.* Baxter, [1900] A. C. 467, 69 L. J. P. C. 101, 82 L. T. Rep. N. S. 510.

12. *In re* Nickodemus, 18 Fed. Cas. No. 10,254, 2 Am. L. T. 168, 1 Am. L. T. Bankr. Rep. 140, 2 Chic. Leg. N. 49, 3 Nat. Bankr. Reg. 230, 16 Pittsb. Leg. J. 233. And see, to like effect, *In re* Grand Jury, 62 Fed. 840.

13. Crow *v.* State, 14 Mo. 237, where it is said that commerce in a narrow sense signifies any reciprocal agreement between two persons by which one delivers to the other a thing which the latter accepts and for which he pays a consideration. And see Black L. Dict. to the effect that commerce includes the various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit.

14. White, J., in Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297 [*approved* in Williams *v.* Fears, 179 U. S. 270, 278, 21 S. Ct. 128, 45 L. ed. 186, where the court approves also the following language by White, J., in the same case: "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature"].

15. McCall *v.* California, 136 U. S. 104, 10 S. Ct. 881, 34 L. ed. 392, where a state tax on a railroad agency was held invalid as a regulation of interstate commerce, although the agency did not sell tickets or receive or pay out money, but simply endeavored to procure passengers for its principal which had no lines in the state.

16. Nathan *v.* Louisiana, 8 How. (U. S.) 73, 12 L. ed. 992.

17. Nathan *v.* Louisiana, 8 How. (U. S.) 73, 12 L. ed. 992.

action of commerce, notwithstanding in the course of the proceeding the goods may be transported a considerable distance.[18]

B. With Foreign Nations. A sale of goods by a citizen of a foreign nation to a citizen of the United States, accompanied by a transportation of the goods from one country to the other[19] or the solicitation of such business,[20] is commerce with foreign nations.

C. Among the Several States — 1. Definition. Commerce among the several states may be said to be that commerce which concerns in any direct way more than one state.[21]

2. Between Whom. Commerce among the several states applies to commerce between their citizens rather than to transactions between states in their corporate capacities.[22]

3. With the District of Columbia. Commerce with the District of Columbia is not interstate commerce.[23]

4. Business Involving Commerce. It is not commerce among the states to carry on a business which may involve transactions of[24] or is in aid of interstate commerce.[25] It is not an act of interstate commerce to build and operate a bridge, renting it for the purpose of interstate commerce,[26] or to engage in manufactur-

18. Laundry work is not commerce. Where an agent of a laundry in another state was occupied in collecting and forwarding to his principal soiled linen to be washed and returned, it was held that he was liable to a state occupation tax, as he was not engaged in commerce. Com. *v.* Pearl Laundry Co., 105 Ky. 259, 20 Ky. L. Rep. 1172, 49 S. W. 26; Smith *v.* Jackson, 103 Tenn. 673, 54 S. W. 981, 47 L. R. A. 416.

19. Wagner *v.* Meakin, 92 Fed. 76, 63 U. S. App. 477, 33 C. C. A. 577.

20. Wagner *v.* Meakin, 92 Fed. 76, 63 U. S. App. 477, 33 C. C. A. 577.

"Every species of commercial intercourse between the United States and foreign nations" is included within the term "commerce." Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 189, 6 L. ed. 23 [*quoted* in Williams *v.* Fears, 110 Ga. 584, 589, 35 S. E. 699, 50 L. R. A. 685]. See also *supra*, I, III, A, and cases cited in notes.

21. State *v.* Foreman, 8 Yerg. (Tenn.) 256, 316 (where it is said: "Commerce among the states . . . means commerce which concerns more states than one — not mere internal regulation and traffic"); Hopkins *v.* U. S., 171 U. S. 578, 597, 19 S. Ct. 40, 43 L. ed. 290 (where it is said: "Definitions as to what constitutes interstate commerce are not easily given. . . . It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states"). And see *supra*, III, A, and cases cited in notes.

22. Gibbons *v.* Ogden, 6 Wheat. (U. S.) 448, 5 L. ed. 302. See also dissenting opinion of Miller, J., in Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 S. Ct. 256, 32 L. ed. 637. But see Hicks *v.* Ewhartonah, 21 Ark. 106, 107, where it is said that commerce, when applied to governmental polity, can mean nothing less than commercial intercourse carried on between states or governments. And without a palpable perversion of the term cannot be held applicable to ordinary business transactions occurring between individuals.

23. The District of Columbia is not a state. — Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; Scott *v.* Jones, 5 How. (U. S.) 343, 12 L. ed. 181; New Orleans Corp. *v.* Winter, 1 Wheat. (U. S.) 91, 4 L. ed. 44; Hepburn *v.* Ellzey, 2 Cranch (U. S.) 445, 2 L. ed. 332. See also remarks of Miller, J., in his dissenting opinion in Stoutenburgh *v.* Hennick, 129 U. S. 141, 151, 9 S. Ct. 256, 32 L. ed. 637.

24. Hopkins *v.* U. S., 171 U. S. 578, 19 S. Ct. 40, 43 L. ed. 290 [*reversing* 82 Fed. 529], where it is held that the business of a live-stock commission merchant is not interstate commerce, although the stock may have been shipped from another state or territory, and consigned to him for sale, and may be sold for shipment to another state or foreign country. The circumstance that the state line runs through the stock-yards and that a lot of stock there sold may be at the time partly in each of two states is immaterial. *Compare* McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367, where a consignment of wool to a commission merchant for sale was held a transaction of interstate commerce, the parties to the transaction being resident in different states.

Operating a factory under a contract to market the product on a joint account is not an act of interstate commerce merely because large sales of the product are made in other states. Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838.

25. Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247 [*affirming* 117 N. Y. 1, 22 N. E. 670, 682, 26 N. Y. St. 533, 15 Am. St. Rep. 460, 5 L. R. A. 559]. See also *infra*, IX, C, 5.

26. Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953.

ing, although the state products may become the subjects of interstate or foreign commerce.[27]

5. SALES. A sale, the parties to which are of different states, is a transaction of interstate commerce wherever the contract of sale may be made,[28] when the goods are to be transported from one state to another,[29] whether the sale is made before or after shipment.[30] Negotiation and sale in such cases through selling agents[31] or by agents to buy is also an act of interstate commerce,[32] as is furthermore a contract between citizens of different states to furnish goods and perform labor related thereto,[33] or to manufacture and transport.[34] A sale between citizens of different states is probably not a transaction of interstate commerce unless accompanied by interstate transportation of the goods.[35]

27. Veazie *v.* Moor, 14 How. (U. S.) 568, 574, 14 L. ed. 545, where it is said: "A pretension as far reaching as this, would extend to contracts between citizen and citizens of the same state, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country."

28. It is immaterial where the contract is made. Cook *v.* Rome Brick Co., 98 Ala. 409, 413, 12 So. 918 (where it is said: "The sale of brick in another State to be delivered here, or the filling of an order sent from this State for brick in another State, is an act of interstate commerce"); Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136.

29. *Alabama.*— Culberson *v.* American Trust, etc., Co., 107 Ala. 457, 19 So. 34, sale in Alabama of books situated in Georgia, followed by delivery in Alabama, is a transaction of interstate commerce.

Iowa.— State *v.* Hanaphy, (Iowa 1902) 90 N. W. 601.

Pennsylvania.—Mearsbon *v.* Pottsville Lumber Co., 187 Pa. St. 12, 42 Wkly. Notes Cas. (Pa.) 399, 40 Atl. 1019, 67 Am. St. Rep. 560.

Texas.— Gale Mfg. Co. *v.* Tinkelstein, 22 Tex. Civ. App. 241, 54 S. W. 619 (goods ordered by parties in the state of a foreign corporation situated outside, the merchandise being shipped into the state with a draft attached to the bill of lading); Lewis *v.* W. R. Irby Cigar, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 476; C. B. Cones, etc., Mfg. Co. *v.* Rosenbaum, (Tex. Civ. App. 1898) 45 S. W. 333; H. Zuberbier Co. *v.* Harris, (Tex. Civ. App. 1896) 35 S. W. 403; Lyons-Thomas Hardware Co. *v.* Reading Hardware Co., (Tex. Civ. App. 1893) 21 S. W. 300.

United States.— O'Neil *v.* Vermont, 144 U. S. 323, 12 S. Ct. 693, 36 L. ed. 450 (liquors ordered by persons in Vermont of a New York dealer who expressed them in New York to Vermont C. O. D.); Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137 (especially concurring opinion of Matthews, J.).

See 10 Cent. Dig. tit. "Commerce," § 29.

30. Miller *v.* Goodman, 91 Tex. 41, 40 S. W. 718.

As to a sale made after the goods have been incorporated with state property see *infra*, VIII, B.

31. *Louisiana.*— Pegues *v.* Ray, 50 La. Ann. 574, 23 So. 904.

Tennessee.— State *v.* Scott, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461.

Texas.— Bateman *v.* Western Star Milling Co., 1 Tex. Civ. App. 90, 20 S. W. 931.

Wyoming.— State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, 52 L. R. A. 198.

United States.— Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694, where it is held that the business of selling goods (in Tennessee) which were in Ohio at the time of sale, and were at a future time to be delivered to the purchaser in the state of Tennessee, constituted interstate commerce.

See 10 Cent. Dig. tit. "Commerce," § 29.

Mere negotiation for sale is an act of interstate commerce. *Ex p.* Loeb, 72 Fed. 657.

32. McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367.

33. Milan Milling, etc., Co. *v.* Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135 (contract for furnishing and adjusting machinery in a mill); Davis, etc., Bldg., etc., Co. *v.* Caigle, (Tenn. Ch. 1899) 53 S. W. 240 (where a foreign corporation put in a machinery plant. The opinion does not show whether the interstate transportation of the goods was the determining factor in the decision).

34. Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137, concurring opinion of Matthews, J.

35. Kent, etc., Co. *v.* Tuttle, 20 Mont. 203, 50 Pac. 559, holding that where a foreign corporation suing in a state is met by the defense that it has not complied with state law the corporation must show that the transaction on which suit is brought was an act of interstate commerce, as mere diversity of citizenship of the parties is insufficient for that purpose. *Contra*, Shaw Piano Co. *v.* Ford, (Tex. Civ. App. 1897) 41 S. W. 198, where a foreign corporation sold to a state resident a piano stored in the state. And *compare* U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182, where it was held that a sale of liquor in a state by a citizen of the state to a tribal Indian who was at the time in the state was commerce "with the Indian tribes" and hence within the federal Indian statute. It may be said that this decision is not strictly applicable to interstate commerce, as the citizenship of an Indian is tribal and that of the white man is territorial. See also Maire An-

6. Transportation [36] — a. In General. The transportation of freight and passengers from one state to another or through a state [37] and every link in that transportation,[38] whether or not some of the links are entirely within one state,[39] as the towing and lightering of vessels in and approaching ports,[40] is interstate commerce, as is also the driving of cattle across a state line,[41] the interstate transportation of natural gas in pipes,[42] and the operation of an interstate telegraph system, even by a foreign corporation,[43] but not the moving of instruments of commerce preparatory to engaging in interstate commerce.[44]

b. Where Both Termini Are in One State. A voyage by sea between two points in the same state touching at a port in another state is interstate commerce;[45] but continuous transportation between two points in a state, partly through another state, is internal commerce purely.[46]

cient L. (9th ed.) 103, 106; 1 Polgrave Eng. Con. 62; 2 Thayer Cases Const. L. 1912.

36. See, generally, Carriers; Shipping.

37. *Indiana.*— Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238.

Iowa.— Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773.

Maine.— Bennett *v.* American Express Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33.

New Jersey.— State *v.* Carrigan, 39 N. J. L. 35.

New York.— North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713.

Texas.—Southern Pac. R. Co. *v.* Haas, (Tex. 1891) 17 S. W. 600; American Starch Co. *v.* Bateman, (Tex. Civ. App. 1893) 22 S. W. 771.

United States.— Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; State Freight Tax Cases, 15 Wall. (U. S.) 232, 21 L. ed. 146; Almy *v.* California, 24 How. (U. S.) 169, 16 L. ed. 644; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435; Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; Baird *v.* St. Louis, etc., R. Co., 41 Fed. 592; Mobile, etc., R. Co. *v.* Sessions, 28 Fed. 592; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679; Sweatt *v.* Boston, etc., R. Co., 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,864, 6 Am. L. Rev. 168, 4 Am. L. T. 174, 1 Am. L. T. Bankr. Rep. 273, 5 Nat. Bankr. Reg. 234; Indiana *v.* Pullman Palace-Car Co., 11 Biss. (U. S.) 561, 16 Fed. 193; Kaeiser *v.* Illinois Cent. R. Co., 5 McCrary (U. S.) 496, 18 Fed. 151.

See 10 Cent. Dig. tit. "Commerce," § 26.

Where the terminus is in the state the transportation from and to the state line is nevertheless interstate commerce beyond the power of the state to regulate directly. Fargo *v.* Stevens, 121 U. S. 230, 7 S. Ct. 857, 30 L. ed. 888; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244 [*overruling* in part Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97]; State Freight Tax Cases, 15 Wall. (U. S.) 232, 21 L. ed. 146.

The question was left open in Bondholders *v.* Railroad Com'rs, 3 Fed. Cas. No. 1,625, 1 Month. West. Jur. 188.

38. The Steamer Daniel Ball *v.* U. S., 10 Wall. (U. S.) 557, 19 L. ed. 999.

39. Fargo *v.* Stevens, 121 U. S. 230, 7 S. Ct. 857, 30 L. ed. 888; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; Hall *v.* De Cuir, 95 U. S. 485, 2 L. ed. 547; The Steamer Daniel Ball *v.* U. S., 10 Wall. (U. S.) 557, 19 L. ed. 999; *Ex p.* Koehler, 30 Fed. 867, 869, 25 Fed. 73. *Contra*, Heiserman *v.* Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903; Norfolk, etc., R. Co. *v.* Com., 114 Pa. St. 256, 6 Atl. 45.

40. Harmon *v.* Chicago, 147 U. S. 396, 13 S. Ct. 306, 37 L. ed. 216; Foster *v.* Davenport, 22 How. (U. S.) 244, 16 L. ed. 248.

41. Farris *v.* Henderson, 1 Okla. 384, 33 Pac. 380. And see *infra*, IX, A, 2, a, (I).

42. State *v.* Indiana, etc., Oil, etc., Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579, 120 Ind. 600, 22 N. E. 781. And see *infra*, IX, A, 2, a, (IV).

43. Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877, where the foreign corporation had accepted the conditions of the act of congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for military purposes." And see Western Union Tel. Co. *v.* Atlantic, etc., States Tel. Co., 5 Nev. 102.

44. Norfolk, etc., R. Co. *v.* Com., 93 Va. 749, 24 S. E. 837, 57 Am. St. Rep. 827, 34 L. R. A. 105, where it was held that a train consisting of empty freight-cars being prepared and taken to a point without the state for the purpose of transporting coal within the state from such point is not engaged in interstate commerce.

45. North River Steam Boat Co. *v.* Livingston, Hopk. (N. Y.) 149, where the court says that the intention with which a stop is made at a port out of the state is immaterial, even though that intention be to evade state restrictions.

46. *Iowa.*— Campbell *v.* Chicago, etc., R. Co., 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443.

Missouri.— Seawell *v.* Kansas City, etc., R. Co., 119 Mo. 222, 24 S. W. 1002; Scammon *v.* Kansas City, etc., R. Co., 41 Mo. App. 194.

North Carolina.— State *v.* Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570.

D. With the Indian Tribes.[47] Commerce with the Indian tribes does not include that with small tribes within the limits of a state,[48] but does comprehend a sale within a state between a tribal Indian and a white man, although unaccompanied by interstate transportation of goods.[49]

E. Insurance.[50] The business of insurance is not commerce,[51] and is not interstate commerce, even though the insurer and the insured are of different states,[52] whether in the case of marine,[53] fire,[54] or life insurance;[55] and therefore insurance companies, domestic and foreign, are subject to unlimited state regulation.[56]

F. Labor Contracts. Labor contracts, although involving transportation of the laborers from the state of their residence to that of their work, are not

Virginia.— Western Union Tel. Co. *v.* Reynolds, (Va. 1902) 41 S. E. 856.

United States.— Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 12 S. Ct. 806, 36 L. ed. 672, 145 U. S. 205, 12 S. Ct. 809, 36 L. ed. 676 [*affirming* 129 Pa. St. 308, 18 Atl. 125, 17 Atl. 179].

See 10 Cent. Dig. tit. "Commerce," § 26.

Contra.— Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436; State *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1898) 44 S. W. 542; Galveston, etc., R. Co. *v.* Armstrong, (Tex. Civ. App. 1897) 43 S. W. 614; Kansas City St. R. Co. *v.* Board of R. Com'rs, 106 Fed. 353; Pacific Coast Steam-Ship Co. *v.* Board of R. Com'rs, 9 Sawy. (U. S.) 253, 18 Fed. 10, per Field, J., as to vessels going more than a league from shore.

47. See, generally, INDIANS.

Protection of commerce with the Indian tribes see *infra*, V, C.

48. Caldwell *v.* State, 1 Stew. & P. (Ala.) 327.

49. U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182.

For an explanation of the distinction in this regard from interstate commerce see *supra*, note 35.

50. See, generally, INSURANCE.

51. New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116 [*affirming* 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305, and *quoting* Hooper *v.* California, 155 U. S. 648, 655, 15 S. Ct. 207, 39 L. ed. 297, where it is said: "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" And the court adds, "or against the uncertainty of man's mortality"]; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Russell *v.* Reg., 7 App. Cas. 829, 51 L. J. P. C. 77, 46 L. T. Rep. N. S. 889; Citizens Ins. Co. *v.* Parsons, 7 App. Cas. 96, 51 L. J. P. C. 11, 45 L. T. Rep. N. S. 721 (to the effect that a fire-insurance contract does not relate to trade or commerce).

52. State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116 [*affirming* 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305]; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357, a leading case, where it was said by Field, J.: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire.

These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter. . . . They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered. . . They are, then, local transactions, and are governed by the local law."

53. State *v.* Allgeyer, 48 La. Ann. 104, 18 So. 904; Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297.

54. Philadelphia F. Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

55. New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116; Berry *v.* Mobile L. Ins. Co., 3 Fed. Cas. No. 1,358, 1 Tex. L. J. 157.

56. New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116 [*affirming* 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305].

The state may require a license of foreign insurance companies (Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357), impose a tax as a condition to the establishment of agencies in the state (New York City Fire Dept. *v.* Wright, 3 E. D. Smith (N. Y.) 453; New York City Fire Dept. *v.* Noble, 3 E. D. Smith (N. Y.) 440), or regulate the liability to forfeiture for non-payment of premiums (New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116 [*affirming* 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305]). And see *infra*, IX, B, 3, b, (II); X, D.

transactions of commerce,[57] and neither is the business of hiring laborers to enter into such contracts;[58] but competition with foreign laborers cannot be prevented by a state restriction on immigration.[59]

IV. POWER TO REGULATE COMMERCE.

A. Power of Congress — 1. In General — a. Subjects of National Law. Congress may regulate commerce among the states, with foreign nations, and with the Indian tribes,[60] in whatever form that commerce may be carried on,[61] and in a manner restricted only by the constitution itself,[62] even by prohibiting all such commerce,[63] affecting persons as well as property.[64] The power of congress over commerce may extend to the interior of any state in a proper exercise of the federal authority over interstate and foreign commerce,[65] and is the same over corporations as over individuals.[66]

b. Subjects of International Law. Congress may and should regulate national rights and duties arising from the law of nations connected with foreign commerce.[67]

2. Form of Exercise of Power. A federal statute affecting commerce is invalid unless its operation is expressly limited to commerce among the states, with foreign nations, or with the Indian tribes.[68]

3. Purpose of Exercise of Power. The congressional power over commerce may be used for the promotion of other objects of national concern than commerce.[69]

57. Williams *v.* Fears, 179 U. S. 270, 278, 21 S. Ct. 128, 45 L. ed. 186, where the court follows the distinction laid down in Hooper *v.* California, 155 U. S. 648, 655, 15 S. Ct. 207, 39 L. ed. 297: "Between interstate commerce or an instrumentality thereof on the one side, and the mere incidents which may attend the carrying on of such commerce on the other."

58. A state license-tax on persons inducing laborers to leave the state under contracts of employment is valid. Shepperd *v.* Sumter County, 59 Ga. 535, 27 Am. Rep. 394; Williams *v.* Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. ed. 186. *Contra*, Joseph *v.* Randolph, 71 Ala. 499, 46 Am. Rep. 347.

59. Lin Sing *v.* Washburn, 20 Cal. 534.

As to immigration laws generally see ALIENS, 2 Cyc. 119 *et seq.*

60. U. S. Const. art. 1, § 8, clause 3.

To the effect that congress may not control purely internal commerce within one state see *infra*, IV, B, 2.

61. Reilly *v.* U. S., 106 Fed. 896, 46 C. C. A. 25.

The powers of congress keep pace with invention, as notably in the case of the telegraph. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708. In *In re* Debs, 158 U. S. 564, 591, 15 S. Ct. 900, 39 L. ed. 1092, it is said: "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. . . . Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

The congressional power is not limited by the reasons of the framers, but is complete in itself. Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 20 S. Ct. 96, 44 L. ed. 136 [*modifying* 85 Fed. 271, 54 U. S. App. 723, 29 C. C. A. 141, 46 L. R. A. 122].

62. State *v.* Kennedy, 19 La. Ann. 397.

A law valid as an exercise of the state police power may be enacted by congress as a regulation of commerce. Craig *v.* Kline, 65 Pa. St. 399, 3 Am. Rep. 636.

63. U. S. *v.* The William, 28 Fed. Cas. No. 16,700, 2 Am. L. J. 255. See also Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435.

64. Lin Sing *v.* Washburn, 20 Cal. 534; Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702.

That the status of a person in a state may not be regulated by congress is held in Lemmon *v.* People, 26 Barb. (N. Y.) 270.

65. Guy *v.* Baltimore, 100 U. S. 434, 25 L. ed. 743, 1 Ky. L. Rep. 205; U. S. *v.* Coombs, 12 Pet. (U. S.) 72, 9 L. ed. 1004. And *compare* King *v.* American Transp. Co., 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787, 1 West. L. Month. 186.

66. McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

67. U. S. *v.* Arizona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728, federal statute against the counterfeiting of notes of foreign countries.

68. U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550.

69. U. S. *v.* The William, 28 Fed. Cas. No. 16,700, 2 Am. L. J. 255. See also in general as to the right of congress to use one constitu-

4. Exclusiveness of Power and Effect of Non-Action by Congress. The federal power over commerce is exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation;[70] and where the power is exclusive non-action by congress is an expression of its will

tional power to further another object of power. Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482.

70. Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527; Henderson *v.* Wickham, 92 U. S. 259, 23 L. ed. 543; State Freight Tax Cases, 15 Wall. (U. S.) 232, 21 L. ed. 146; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744, 745; Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; Kaeiser *v.* Illinois Cent. R. Co., 5 McCrary (U. S.) 496, 18 Fed. 151.

The leading case on this proposition is Cooley *v.* Board of Wardens, 12 How. (U. S.) 299, 13 L. ed. 996.

The history of the attitude of the court shows some inconsistency in its views. In 1824 Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23, declared that the power of congress was exclusive, which theory, although somewhat shaken by Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. (U. S.) 245, 7 L. ed. 412, remained the doctrine of the court until 1851, when Curtis, J., pronounced the famous sentence in Cooley *v.* Board of Wardens, 12 How. (U. S.) 299, 319, 13 L. ed. 996: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress." This doctrine, although at times misquoted, still remains the rule of the court, but its application is still unsettled. For twenty years the court was inclined to allow the states large powers, as notably in Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96, where the states were allowed to bridge navigable waters. Hinson *v.* Lott, 8 Wall. (U. S.) 123, 148, 19 L. ed. 387; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164; and Osborne *v.* Mobile, 16 Wall. (U. S.) 479, 21 L. ed. 470, where a state discriminating tax was upheld, although the question of discrimination was not argued, are further illustrations of this tendency. The opposite leaning is noted in 1873, when the court held void a state license-tax on goods of foreign origin (Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347) and the head money provision (Henderson *v.* Wickham, 92 U. S. 259, 23 L. ed. 543). A temporary return to state rights occurs in Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97, where the court upholds a state-fare regulation when one terminus is within the state; but in the next year it held the state could not require separate accommodations for negroes (Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547) and went on in 1885 to quash a state tax on the business of an interstate ferry (Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158). In the two succeeding years the court further cut down state authority by overruling two cases decided in the previous decade. Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244 [*overruling* Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97]; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200 [*overruling* Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164]. In 1887 it was also held that even in the absence of discrimination a state could not levy a tax on drummers engaged in interstate business. Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694. In 1888 in Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 8 S. Ct. 689, 1062, 31 L. ed. 700, the court denied the power of the state to forbid the importation of liquor and went so far in Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128, as to extend this doctrine to a sale of liquor in the original packages. The extremity of this decision provoked congress to set it aside by legislation (see *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572), and for a time the court was more lenient toward the states. In Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613, the state was allowed to tax an interstate carrier proportionately to its business in the state; and in Plumley *v.* Massachusetts, 155 U. S. 461, 15 S. Ct. 154, 39 L. ed. 223, a state oleomargarine statute was upheld, the case being in spirit opposed to Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128. In Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49, concerning oleomargarine, although clearly distinguishable from the Plumley case, the court shows an antistate tendency again.

The power is said to be exclusive in the following cases:

California.— Carson River Lumbering Co. *v.* Patterson, 33 Cal. 334; Mitchell *v.* Steelman, 8 Cal. 363; People *v.* Downer, 7 Cal. 169.

Iowa.— Gatton *v.* Chicago, etc., R. Co., 95 Iowa 112, 63 N. W. 589, 29 L. R. A. 556.

Kansas.— Hardy *v.* Atchison, etc., R. Co., 32 Kan. 698, 5 Pac. 6.

Minnesota.— Foster *v.* Blue Earth County, 7 Minn. 140.

United States.— Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; The Chusan, 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717.

Contra, see People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

See 10 Cent. Dig. tit. "Commerce," § 5.

that the subject shall remain free from legislative interference and is prohibited by state action;[71] but non-action by congress is not equivalent to a declaration that the subject shall be untrammeled by regulation, where the subject is of a local nature.[72] The inference prohibiting state action drawn from non-action by congress is said to be stronger in the case of foreign than interstate commerce,[73] and in the case of commerce by water than commerce by land.[74]

5. Effect of Congressional Action on State Law. A regulation of commerce by congress is of paramount authority, superseding state law,[75] under whatever authority the state may have acted.[76] Valid state statutes are merely suspended from operation by the enactment of a superseding federal statute and revive on the repeal of such statute.[77]

6. Effect of an Interstate Compact. The powers of congress over commerce can be in no way affected by an agreement between two states.[78]

7. Delegation of Powers. Congress may not delegate to a state its powers of regulation,[79] but it may constitutionally provide at what point in their transporta-

71. Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765 [*affirming* 58 Nebr. 192, 78 N. W. 519]; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. ed. 785; Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691; Brown *v.* Huston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347; State Freight Tax Cases, 15 Wall. (U. S.) 232, 21 L. ed. 146; Passenger Cases, 7 How. (U. S.) 283, 462, 12 L. ed. 702, per Grier, J.; Gibbons *v.* Ogden, 9 Wheat (U. S.) 1, 222, 6 L. ed. 23, per Johnson, J. *Compare* Lemmon *v.* People, 20 N. Y. 562, 611, where in the stress of the anti-slavery feeling it was held that the fact that congress had not regulated the interstate transshipment of slaves "partly on land and partly on water" allowed state action.

72. See *infra*, IV, B; and Western Union Tel. Co. *v.* James, 162 U. S. 650, 16 S. Ct. 934, 40 L. ed. 1105; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 S. Ct. 1087, 38 L. ed. 962; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 193, 4 L. ed. 529; Silliman *v.* Hudson River Bridge Co., 4 Blatchf. (U. S.) 395, 22 Fed. Cas. No. 12,852.

73. Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 8 S. Ct. 689, 1062, 31 L. ed. 700.

74. Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 22 L. ed. 678, where the following language is used by Bradley, J.: "The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. . . . But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair and management, to state regulation and control," etc.

75. Lin Sing *v.* Washburn, 20 Cal. 534; Palmer *v.* Cuyahoga County, 3 McLean (U. S.) 226, 18 Fed. Cas. No. 10,688; Charge to Grand Jury, 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256.

Where the federal statute expressly provides that the state power of regulation is not superseded by it, the state's authority remains unimpaired. Pervear *v.* Massachusetts, 5 Wall. (U. S.) 475, 18 L. ed. 608. *Compare* Crossman *v.* Lurman, 57 N. Y. App. Div. 393, 68 N. Y. Suppl. 311, where it is held that congress, by the act of 1890 (26 U. S. Stat. at L. p. 414, c. 839) prohibiting the adulteration of food products, did not supersede or render inoperative N. Y. Laws (1893), c. 661, § 41, prohibiting the sale of a food product colored or powdered, since the state law is not a regulation of commerce but an exercise of the police power.

76. Sinnot *v.* Davenport, 22 How. (U. S.) 227, 16 L. ed. 243, where it was said, per Nelson, J., that a federal statute would override a state statute "without regard to the source of power whence the State Legislature derived its enactment" [*cited* with approval in Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. ed. 878]. *Compare* Com. *v.* Crane, 158 Mass. 218, 33 N. E. 388, holding that the act of congress of Aug. 2, 1886, in which is incorporated section 3243 of the Revised Statutes, providing for licensing by the internal revenue department the sale of oleomargarine, does not render the prohibition or regulation of such traffic by a state unconstitutional.

77. Henderson *v.* Spofford, 59 N. Y. 131 [*affirming* 3 Daly (N. Y.) 361, 10 Abb. Pr. N. S. (N. Y.) 140]. See also for a like result in an analogous situation, where the effect of a repeal of a national bankrupt act upon state insolvent laws is discussed, BANKRUPTCY; INSOLVENCY.

78. South Carolina *v.* Georgia, 93 U. S. 4, 23 L. ed. 782; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435.

79. *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572 [*reversing* 43 Fed. 556, 10 L. R. A. 444]; *In re* Van Vliet, 43 Fed. 761, 10 L. R. A. 451.

tion subjects of interstate commerce shall become subject to state law and to state regulation.[80]

B. Powers of the States — 1. Over Interstate Commerce. The states may not directly regulate interstate or foreign commerce,[81] except in matters unaffected by congressional action and of a local nature, not requiring uniform treatment,[82] as in the exercise of the state police power where the safety, health, or convenience of their citizens is affected,[83] or in matters incidentally affecting commerce,[84] as a charge for a local facility furnished,[85] although the article regulated may enjoy a federal patent.[86]

2. Over Internal Commerce. The states have exclusive control over internal commerce within their boundaries.[87]

80. *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572 [*reversing* 43 Fed. 556, 10 L. R. A. 444]; *In re* Van Vliet, 43 Fed. 761, 10 L. R. A. 451; *In re* Spickler, 43 Fed. 653, 10 L. R. A. 446. And *compare* State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.

81. Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702. And see Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 22 S. Ct. 277, 46 L. ed. 416.

The rule of the court is well stated as follows: "The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all." Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 209, 14 S. Ct. 1087, 38 L. ed. 962.

82. *California.*— State *v.* The Constitution, 42 Cal. 578, 10 Am. Rep. 303.

Kentucky.— Newport *v.* Taylor, 16 B. Mon. (Ky.) 699.

Louisiana.— New Orleans *v.* The Martha J. Ward, 14 La. Ann. 289.

Pennsylvania.— Craig *v.* Kline, 65 Pa. St. 399, 3 Am. Rep. 636.

South Carolina. — State *v.* Pinckney, 10 Rich. (S. C.) 474.

United States. — Cardwell *v.* American River Bridge Co., 113 U. S. 205, 5 S. Ct. 423, 28 L. ed. 959; Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654; Cooley *v.* Board of Wardens, 12 How. (U. S.) 299, 13 L. ed. 996; Rhea *v.* Newport, etc., R. Co., 50 Fed. 16; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679.

See 10 Cent. Dig. tit. "Commerce," § 7 *et seq.*

83. Norfolk, etc., R. Co. *v.* Com., 93 Va. 749, 24 S. E. 837, 57 Am. St. Rep. 827, 34 L. R. A. 105; Austin *v.* Tennessee, 179 U. S. 343, 349, 21 S. Ct. 132, 45 L. ed. 224, where it is said: "We have had repeated occasion to hold, where state legislation has been attacked as violative . . . of the power of Congress over interstate commerce, . . . that, if the action of the state legislature were as a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce." And see State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.

For striking examples of the use of the state police power over interstate commerce see *infra*, IX, C, 2.

The suppression of vagrants by a statute requiring payment of a license-tax by a person residing on a boat, although it applies to the Ohio and Mississippi, is not an interference with interstate commerce. Robertson *v.* Com., 101 Ky. 285, 19 Ky. L. Rep. 442, 40 S. W. 920.

When the state police power conflicts with the powers of congress the federal authority is supreme. Lin Sing *v.* Washburn, 20 Cal. 534. See also *supra*, IV, A, 4.

84. Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 493, 7 S. Ct. 592, 30 L. ed. 694. And see *infra*, IX.

85. Hopkins *v.* U. S., 171 U. S. 578, 597, 19 S. Ct. 40, 43 L. ed. 290, where it is said: "But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce." The court holds that the business of live-stock commission merchants is of this latter nature. See also *infra*, IX.

86. An article patented by the United States may be regulated in sale and use by a state. Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565; Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115, illuminating oil alleged to be dangerous.

87. *Indiana.* — Brechbill *v.* Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695; Sears *v.* Warren County, 36 Ind. 267, 10 Am. Rep. 62.

Louisiana.— New Orleans *v.* The Martha J. Ward, 14 La. Ann. 289.

New Jersey.— State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780.

New York.— Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492; People *v.* Huntington, 4 N. Y. Leg. Obs. 187.

South Carolina. — State *v.* Pinckney, 10 Rich. (S. C.) 474.

United States.— Sinnot *v.* Davenport, 22 How. (U. S.) 227, 16 L. ed. 243; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23 [*reversing* 17 Johns. (N. Y.) 488]; King *v.*

3. Discriminations in General.[88] The federal constitution forbids the several states to discriminate in any way against the persons or property of other states,[89] or against the use of products of other states,[90] even after they have become incorporated with the mass of property of the state,[91] or against their sale within the state, either by requiring a license for their sale on more onerous terms and requirements than are imposed on domestic products[92] or in other ways,[93] or

American Transp. Co., 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787, 1 West. L. Month. 186; Halderman *v.* Beckwith, 4 McLean (U. S.) 286, 11 Fed. Cas. No. 5,907; U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867, 10 Law Rep. 127; The Bright Star, 1 Woolw. (U. S.) 266, 4 Fed. Cas. No. 1,880, 1 Am. L. T. Rep. (U. S. Cts.) 107, 8 Int. Rev. Rec. 130; U. S. *v.* The James Morrison, Newb. Adm. 241, 26 Fed. Cas. No. 15,465, 4 N. Y. Leg. Obs. 333, 6 Pa. L. J. 132.

See 10 Cent. Dig. tit. "Commerce," § 7.

The Creek Council Act incorporating and granting an exclusive franchise to a company to operate a telephone system in the Creek nation is not repugnant to the interstate commerce clause of the constitution (U. S. Const. art. 1, § 8), in so far as it grants to the company the exclusive franchise to conduct its business locally within such nation. Muskogee Nat. Tel. Co. *v.* Hall, (Indian Terr. 1901) 64 S. W. 600.

88. For a fuller treatment of this topic see *infra*, IX.

89. The theory of the court as to discriminations is not always clear from the decisions. Where the discrimination acts upon persons of other states it may be bad under the privileges and immunities clause of the constitution (U. S. Const. art. 4, § 2, clause 1) or as a denial of "the equal protection of the laws" guaranteed by the fourteenth amendment. But where, as in Osborne *v.* Mobile, 16 Wall. (U. S.) 479, 21 L. ed. 470, the discrimination is on a business and not on a person, it may conceivably be held bad on the theory expressed in Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744, 745, that the United States is one nation and not to be divided by state regulations. See Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449, where it is said in relation to a discriminating license-tax on peddlers: Inasmuch as the "constitution also provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," it follows that the defendant might lawfully sell or expose to sale any goods which the permanent residents of the state might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents. The theory is well stated as follows: "It must be regarded as settled that no State can consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory." Guy *v.* Baltimore, 100 U. S. 434, 439, 25 L. ed. 743, 1 Ky. L. Rep. 205.

90. Examples of invalid regulations.— The state may not prohibit the use on municipal works of stone prepared outside the state (People *v.* Coler, 166 N. Y. 144, 59 N. E. 776 [*affirming* 56 N. Y. App. Div. 459, 68 N. Y. Suppl. 767]) or require distinctive markings on convict-made goods from another state (People *v.* Hawkins, 157 N. Y. 1, 51 N. E. 257, 68 Am. St. Rep. 736, 42 L. R. A. 490 [*affirming* 20 N. Y. App. Div. 494, 47 N. Y. Suppl. 56 (*affirming* 85 Hun (N. Y.) 43, 32 N. Y. Suppl. 524, 65 N. Y. St. 679, which *affirms* 10 Misc. (N. Y.) 65, 31 N. Y. Suppl. 115, 63 N. Y. St. 399)]).

91. Welton *v.* Missouri, 91 U. S. 275, 281, 282, 23 L. ed. 347, where it is said that the power of congress protects merchandise, "even after it has entered the State, from any burdens imposed by reason of its foreign origin." *Contra*, Davis *v.* Dashiel, 61 N. C. 114, sustaining a discrimination in taxation on the ground that the goods were incorporated in the mass of property in the state. And see *infra*, VIII.

92. The state may not require a license merely of non-residents offering to sell within the state the products of other states (Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449 [*reversing* 31 Md. 279, 1 Am. Rep. 50]), or of any person selling within the state merchandise from outside the state (*Ex p.* Thomas, 71 Cal. 204, 12 Pac. 53; Ames *v.* People, 25 Colo. 508, 55 Pac. 725; State *v.* North, 27 Mo. 464; Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565 [*reversing* 33 Gratt. (Va.) 898]; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347, where a license-tax was imposed on peddlers and peddlers were defined as persons going from place to place selling goods not the product of the state. *Contra*, Beall *v.* State, 4 Blackf. (Ind.) 107; Higgins *v.* Rinker, 47 Tex. 381, 393, as to intoxicating liquors), or impose a license-tax and other restrictions on persons selling meat not of their own raising while imposing no such burdens on persons selling their own meat (Georgia Packing Co. *v.* Macon, 60 Fed. 774, 22 L. R. A. 775).

A license for the sale of convict goods made out of the state is an invalid requirement. Arnold *v.* Yanders, 56 Ohio St. 417, 47 N. E. 50, 60 Am. St. Rep. 753; State *v.* Yanders, 5 Ohio S. & C. Pl. Dec. 575, 7 Ohio N. P. 659; Matter of Yanders, 2 Ohio S. & C. Pl. Dec. 126, 1 Ohio N. P. 190.

93. An affidavit as to the place of growth of nursery stock grown outside the state and

against persons.[94] It is not a discrimination to require government work to be done in the state,[95] to pass general regulations respecting sales,[96] to lay a general tax on certain articles which are not manufactured in the state,[97] or to pass particular laws concerning all persons engaged in certain kinds of business.[98]

V. PROTECTION OF COMMERCE.

A. In General. Congress has plenary authority to protect interstate and foreign commerce.[99] It may enact statutes punishing combinations against restraint of commerce among the states[1] or may punish the counterfeiting of foreign bank-notes.[2] So it is not in contravention of federal jurisdiction for a state to punish crimes and enforce contracts made in the course of interstate and foreign commerce.[3]

B. Commerce by Water. Congress may punish offenses against commerce by water by defining and punishing either piracies and felonies,[4] or offenses of lower grade committed on the high seas,[5] as by punishing theft from stranded vessels[6] or by making it a crime to board an incoming vessel without permission.[7] Under the same power congress may provide for the arrest and detention of seamen deserting in breach of their contract of services,[8] and a state may, in the absence of congressional action, punish those who aid seamen to desert.[9]

a bond to the purchaser may not be required to be filed with the secretary of state. *In re* Schechter, 63 Fed. 695.

Wharfage fees.— Guy *v.* Baltimore, 100 U. S. 434, 25 L. ed. 743, 1 Ky. L. Rep. 205. A wharfage fee imposed by a city only upon vessels transporting the products of other states is invalid. See *infra*, X, B, 2, d. (IV).

94. Fecheimer *v.* Louisville, 84 Ky. 306, 8 Ky. L. Rep. 310, 2 S. W. 65 (where a higher tax was imposed on the business of merchants of other states); Albertson *v.* Wallace, 81 N. C. 479, 486 (a discrimination between wholesale dealers doing business in the state and there residing and non-residents is invalid); Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449 [*reversing* 31 Md. 279, 1 Am. Rep. 50].

95. Tribune Printing, etc., Co. *v.* Barnes, 7 N. D. 591, 75 N. W. 904.

96. **"Bankrupt sales"** may be regulated by a requirement that the facts shall be stated under oath to a state officer and a deposit made. *Ex p.* Mosler, 8 Ohio Cir. Ct. 324.

97. Singer Mfg. Co. *v.* Wright, 33 Fed. 121, where a tax on sewing-machine companies "selling or dealing in sewing-machines, by itself or its agents, in this state" was held to be valid, although there are in fact no sewing machines manufactured in the state.

98. It is no discrimination to lay a tax on all corporations, foreign and domestic, except manufacturing or mining corporations wholly engaged in carrying on manufactures or mining ores within the state, as the exemption includes foreign as well as domestic corporations (New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323) or to require a license-tax of all persons selling cigarettes in the state whether or not they are there manufactured (*In re* May, 82 Fed. 422).

99. Charge to Grand Jury, 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256.

1. U. S. *v.* Elliott, 64 Fed. 27; U. S. *v.* Alger, 62 Fed. 824.

2. U. S. *v.* Arjona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728, even though the counterfeiting is of private and not government paper. The court proceeds on the theory that international protection against counterfeit money was a matter of international law or the comity of nations which falls, without express provision in the constitution, within the power of congress, and the court assimilates the case of private negotiable paper within this principle, on account of the demands of modern commercial custom. The court quotes *inter alia*, Vattel L. Nat. (ed. of 1876), bk. 1, c. 10, pp. 46, 47.

3. Caldwell *v.* State, 1 Stew. & P. (Ala.) 327.

4. U. S. Const. art. 1, § 8, clause 10.

5. The Ulysses, Brunn. Col. Cas. (U. S.) 529, 24 Fed. Cas. No. 14,330, 5 Law Rep. 241 (holding that the power to punish minor offenses may be sustained under the commerce clause of the constitution); Charge to Grand Jury, 2 Sprague (U. S.) 285, 30 Fed. Cas. No. 18,277.

6. U. S. *v.* Coombs, 12 Pet. (U. S.) 72, 9 L. ed. 1004.

7. U. S. *v.* Anderson, 10 Blatchf. (U. S.) 226, 24 Fed. Cas. No. 14,447.

8. *Ex p.* Pool, 2 Va. Cas. 276. *Compare* Matter of Francis de Flanchet, 2 Hawaii 112, where a deserting seaman was arrested in Hawaii under the provisions of the tenth article of the United States treaty with the kingdom of Hawaii.

A **second arrest** for the same act of desertion is unjustifiable. Matter of Kauffman, 2 Hawaii 313.

Evidence of a custom binding seamen to remain with their ships eight days after the end of a cruise must be clearly proved. Matter of Evans, 2 Hawaii 311.

9. Handel *v.* Chaplin, 111 Ga. 800, 36 S. E. 979, 51 L. R. A. 720; *Ex p.* Young, 36 Oreg. 247, 59 Pac. 707, 78 Am. St. Rep. 772, 48 L. R. A. 153.

C. Commerce With the Indian Tribes.[10] Congress may, as a protection to commerce with the Indian tribes, define and punish crimes committed by white men on Indians and by Indians on white men even within state limits.[11]

D. Removal of Obstructions to Commercial Ways. The national government may remove all obstructions to the highways of interstate or foreign commerce[12] on artificial as well as natural highways,[13] either by force operating through the executive,[14] even although the obstruction is also a crime,[15] or by the equity powers of the federal courts,[16] if the obstruction cannot be as well removed by legal process,[17] on the initiative of an individual irreparably damaged[18] or at the petition of the government, although the government has no pecuniary interest,[19] notwithstanding a concurrent remedy exists by the use of physical force,[20] and even although the acts enjoined involve the commission of a crime.[21]

10. What constitutes commerce with the Indian tribes see *supra*, III, D.

11. U. S. *v.* Martin, 8 Sawy. (U. S.) 473, 14 Fed. 817.

12. A summary of the views of the court is contained in *In re* Debs, 158 U. S. 564, 599, 15 S. Ct. 900, 39 L. ed. 1092, where it is said by Brewer, J.: "Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail."

13. *In re* Debs, 158 U. S. 564, 589, 15 S. Ct. 900, 39 L. ed. 1092, where this language is found: "It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to water-ways — the natural highways of the country — and not over artificial highways such as railroads . . . but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce."

14. *In re* Debs, 158 U. S. 564, 582, 15 S. Ct. 900, 39 L. ed. 1092.

15. *In re* Debs, 158 U. S. 564, 581, 15 S. Ct. 900, 39 L. ed. 1092, where it is said: "If all the inhabitants of a state, or even a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. . . . The whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state. But there is no such impotency in the national government. . . . If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

16. *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; Atty.-Gen. *v.* Forbes, 2 Myl. & C. 123, 133, 14 Eng. Ch. 123 (where it is said: "The court of exchequer, as well as this court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information to prevent nuisances to public harbors and public roads"); Atty.-Gen. *v.* Terry, L. R. 9 Ch. 423, 30 L. T. Rep. N. S. 215, 22 Wkly. Rep. 395 (an injunction against extending a wharf into the navigable portion of a stream).

17. Rowe *v.* The Granite Bridge Corp., 21 Pick. (Mass.) 344; Atty.-Gen. *v.* Brown, 24 N. J. Eq. 89, 91 *semble; In re* Debs, 158 U. S. 564, 592, 15 S. Ct. 900, 39 L. ed. 1092, where it was said: "And because the remedy by indictment [for a public nuisance] is so efficacious, courts of equity entertain jurisdiction in such cases with great reluctance, . . . and they will only do so where there appears to be a necessity for their interference."

18. U. S. *v.* Railroad Bridge Co., 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114, 3 Liv. L. Mag. 568 [*quoting* Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249].

19. *In re* Debs, 158 U. S. 564, 586, 15 S. Ct. 900, 39 L. ed. 1092, where it is said: "While it is not the province of the government to interfere in the mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

20. Stamford *v.* Stamford Horse R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

21. *In re* Debs, 158 U. S. 564, 593, 15 S. Ct. 900, 39 L. ed. 1092, where it is said: "It is objected that it is outside the jurisdiction of a court of equity to enjoin the commission of crimes. . . . There must be some interfer-

VI. General Law Affecting Commerce.

A. Common Law. There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states,[22] but interstate commercial transactions are subject to this common law and not merely to federal statute.[23] This common law may be enforced by state courts only, unless a question under it comes before the United States courts as a matter of state law.[24]

B. Statutes[25] — **1. In General.** The states may apply general state law to persons engaged in interstate commerce,[26] unless the law is a denial of a right arising from interstate commerce.[27] The service of legal process on one engaged in interstate commerce[28] or a state statute regulating the disinterment of dead bodies[29] is not an unlawful obstruction of interstate commerce. A state may prohibit limitations by contract on the right to sue as to contracts made in the state.[30]

ences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law." See also Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 126, 4 So. 106, 5 Am. St. Rep. 342; Cranford *v.* Tyrrell, 128 N. Y. 341, 28 N. E. 514, 40 N. Y. St. 414 (injunction against a house of ill fame).

22. Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765 [*affirming* 58 Nebr. 192, 78 N. W. 519]; Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Sheldon *v.* Wabash R. Co., 105 Fed. 785. And see, generally, Common Law.

23. Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 102, 21 S. Ct. 561, 45 L. ed. 765 (where it is said: "We are clearly of opinion that . . . the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment." In this case a common carrier was sued for discriminating rates, the suit not being founded on any statute and the transaction being one of interstate commerce, and the suit to recover the excess rates was sustained); Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 275, 12 S. Ct. 844, 36 L. ed. 699 (where it is said by Brown, J.: "Prior to the enactment of . . . the Interstate Commerce Act railway traffic in this country was regulated by the principles of the common law applicable to common carriers"); Kentucky Bank *v.* Adams Express Co., 93 U. S. 174, 177, 23 L. ed. 872; Murray *v.* Chicago, etc., R. Co., 62 Fed. 24.

24. Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8, 8 S. Ct. 811, 31 L. ed. 629, where it is said: "There is no common law of the United States which prohibits obstructions and nuisances in navigable rivers. . . . There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. . . . The failure of state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence."

25. **Power to regulate commerce** see *supra*, IV.

Statutory regulations of commerce see *infra*, VIII.

26. **Illustrations.**— The state may subject vessels to liens, for debts contracted in equipping and fitting them for service (The Del Norte, 90 Fed. 506), may impose on mortgagees a penalty for failure to record a satisfaction of the mortgage, even when this penalty applies to non-resident mortgagees (George F. Dittman Boot, etc., Co. *v.* Mixon, 120 Ala. 206, 24 So. 847), or may permit the garnishment of an interstate carrier (Landa *v.* Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459).

27. The right to sue on an interstate contract cannot be denied for failure to pay a state franchise tax. Woessner *v.* Cottam, 19 Tex. Civ. App. 611, 47 S. W. 678.

28. Holyoke, etc., Ice Co. *v.* Ambden, 55 Fed. 593, 21 L. R. A. 319, holding that a service of a summons from a Massachusetts court on a citizen of Vermont who is at the time of service traveling through Massachusetts in order to attend court in Connecticut as a witness for and at the request of a citizen of Massachusetts is not invalid as an unlawful interference with interstate commerce.

29. *In re* Wong Yung Quy, 6 Sawy. (U. S.) 442, 2 Fed. 624, statute requiring a permit costing ten dollars for the disinterment of a dead body.

30. Western Union Tel. Co. *v.* Mellon, 100 Tenn. 429, 45 S. W. 443; Armstrong *v.* Galveston, etc., R. Co., 92 Tex. 117, 46 S. W. 33 [*reversing* (Tex. Civ. App. 1897) 43 S. W. 614] upholding Tex. Rev. Stat. (1895), arts. 3378, 3379, which declare void any stipulation in a carrier's contract limiting below two years the time within which suit may be brought or requiring notice of claim within less than ninety days of the accident. See

2. Affecting Carriers' Liability. Congress may enact statutes regulating the liability of common carriers engaged in interstate or foreign commerce,[31] and the states may also pass such laws either providing a remedy to the representatives of a deceased person for death by wrongful act either on land[32] or water if in the state,[33] or limiting the right of the carrier to contract to exempt itself from its common-law liability either wholly or in part,[34] even as to liability for the negligence of a connecting carrier.[35] A state may not prohibit a carrier from limiting its liability to its own lines[36] nor make a carrier receiving goods outside the state liable for the negligence of any connecting carrier[37] but it may impose liability

also the following cases upholding the same legislation: Galveston, etc., R. Co. *v.* Herring, (Tex. Civ. App. 1896) 36 S. W. 129; Reeves *v.* Texas, etc., R. Co., 11 Tex. Civ. App. 514, 32 S. W. 920; Armstrong *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1895) 29 S. W. 1117; Galveston, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1895) 29 S. W. 428; Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 151. *Contra*, Western Union Tel. Co. *v.* Burgess, (Tex. Civ. App. 1897) 43 S. W. 1033, as to messages sent from another state.

31. Sherlock *v.* Alling, 93 U. S. 99, 104, 23 L. ed. 319.

Inland navigation but not internal commerce may be covered by limited liability legislation (The Katie, 40 Fed. 480, 7 L. R. A. 55), while if inland navigation is expressly excepted from the operation of the federal statute it is clearly valid (Lord *v.* Goodall, etc., Steamship Co., 102 U. S. 541, 26 L. ed. 224).

32. Sherlock *v.* Alling, 93 U. S. 99, 103, 23 L. ed. 819, where it is said: "General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce."

33. Sherlock *v.* Alling, 93 U. S. 99, 103, 23 L. ed. 819 (where it is said: "It [the statute] only declares a general principle respecting the liability of all persons within the jurisdiction of the State, for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water"); American Steamboat Co. *v.* Chace, 16 Wall. (U. S.) 522, 21 L. ed. 369; U. S. *v.* Bevans, 3 Wheat. (U. S.) 337, 4 L. ed. 404.

The pilot laws do not affect the liability of the owners of the vessels for damage done by the negligence of the pilots, as the regulations requiring pilots to be taken do not change the relationship of master and servant. Sherlock *v.* Alling, 93 U. S. 99, 106, 108, 23 L. ed. 819.

34. *Indiana.*— Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238, holding valid a statute prohibiting the issue of tickets limiting liability.

Iowa.— Hart *v.* Chicago, etc., R. Co., 69 Iowa 485, 29 N. W. 597.

Kentucky.— Ohio, etc., R. Co. *v.* Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685.

Texas.— Pittman *v.* Pacific Express Co., 24 Tex. Civ. App. 595, 59 S. W. 949.

United States.— Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 134, 18 S. Ct. 289, 42 L. ed. 688 [*affirming* 95 Iowa 260, 63 N. W. 692, 58 Am. St. Rep. 430, 28 L. R. A. 718], upholding Iowa Code (1873), § 1308, which provided: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier . . . which would exist had no contract . . . been made or entered into." The court says at page 137: "It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. . . . A carrier . . . although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. . . . The statute now in question . . . is in no just sense a regulation of commerce." And see New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627, in which it was held that an agreement with a carrier involving total exemption from responsibility for loss was void as against public policy.

See 10 Cent. Dig. tit. "Commerce," §§ 26, 77 *et seq.*

The statute governing the carriage is that of the state where the contract was made and the transportation begins. Brockway *v.* American Express Co., 168 Mass. 257, 47 N. E. 87, 171 Mass. 158, 50 N. E. 626; Pittman *v.* Pacific Express Co., 24 Tex. Civ. App. 595, 59 S. W. 949; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 18 S. Ct. 289, 42 L. ed. 688; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. ed. 325.

35. McCann *v.* Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110.

36. Richmond, etc., R. Co. *v.* R. A. Patterson Tobacco Co., 169 U. S. 311, 313, 18 S. Ct. 335, 42 L. ed. 759 [*affirming* 92 Va. 670, 24 S. E. 261, 41 L. R. A. 511], where the proposition in the text was agreed to by both parties.

37. McCann *v.* Eddy, (Mo. 1894) 27 S. W. 541, holding that Mo. Rev. Stat. (1889), § 944, is void in so far as it attempted to operate outside the state.

for fire on railroads[38] or steamers,[39] or regulate the form of a contract limiting liability.[40]

3. AFFECTING COMMERCIAL CONTRACTS.[41] Congress[42] and the states may regulate contracts affecting interstate commerce,[43] the obligations of which are not impaired by mere commercial regulations.[44]

4. SUNDAY LAWS.[45] The usual state Sunday laws are inapplicable to those engaged in interstate commerce,[46] but the state may regulate acts of interstate commerce on Sunday.[47]

VII. INSTRUMENTS OF COMMERCE.

A. What Are.[48] Warehouses and elevators are instruments of commerce,[49] but dredges, although employed to aid navigation, are not instruments of interstate and foreign commerce.[50] Barrels, boxes, bottles, and other commercial cases are not the subjects of commercial regulation more than other property.[51]

38. Smith *v.* Boston, etc., R. Co., 63 N. H. 25; McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440.

39. Burrows *v.* Delta Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468, upholding Mich. Pub. Acts (1881), No. 183, requiring steamers using wood for fuel to be provided with spark-arresters, and making the vessel's owner liable for loss by fire occasioned by neglect to comply with the act.

40. Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 19 S. Ct. 755, 43 L. ed. 1093; Richmond, etc., R. Co. *v.* R. A. Patterson Tobacco Co., 169 U. S. 311, 314, 18 S. Ct. 335, 42 L. ed. 759 [*affirming* 92 Va. 670, 24 S. E. 261, 41 L. R. A. 511], where the court points out "the distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form." In this case the state statute provided that a common carrier accepting goods for transportation to a point beyond its own terminus assumes an obligation for their safe carriage to that point unless otherwise provided by a written contract, and this was held to establish merely a rule of evidence.

41. **Contracts of insurance** see *supra*, III, E. **Labor contracts** see *supra*, III, F.

42. Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, 234, 20 S. Ct. 96, 44 L. ed. 136 [*modifying* 85 Fed. 271, 54 U. S. App. 723, 29 C. C. A. 141, 46 L. R. A. 122], where the court says: "We conclude that the plain language of the grant to Congress of power to regulate commerce among the several states includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power." And see U. S. *v.* Joint Traffic Assoc., 171 U. S. 505, 19 S. Ct. 25, 43 L. ed. 259 [*reversing* 76 Fed. 895].

43. **Statutes prohibiting railroad consolidation** may be passed by a state. Von Steuben *v.* New Jersey Cent. R. Co., 4 Pa. Dist. 153; Gulf, etc., R. Co. *v.* State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 17 Ky. L. Rep. 427, 31 S. W. 476].

For regulation of contracts in restraint of trade see, generally, MONOPOLIES.

The rules of a live-stock exchange relating to the conduct of the business of buying or selling for others are not agreements affecting interstate commerce, within the meaning of the antitrust law. Hopkins *v.* U. S., 171 U. S. 578, 19 S. Ct. 40, 43 L. ed. 290 [*reversing* 82 Fed. 529].

44. Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70, holding that a contract to engage in interstate commerce is subject to the power of congress to regulate that commerce.

45. See, generally, SUNDAY.

46. Dinsmore *v.* New York Bd. of Police, 12 Abb. N. Cas. (N. Y.) 436; Adams Express Co. *v.* Board of Police, 65 How. Pr. (N. Y.) 72; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. (U. S.) 209, 16 L. ed. 433 [*affirming* 19 Fed. Cas. No. 11,085, 5 Am. L. Reg. 280].

47. See *infra*, IX, C, 2, a, (II), (A).

The delivery by express companies of nonperishable articles on Sunday may be prohibited. Dinsmore *v.* New York Bd. of Police, 12 Abb. N. Cas. (N. Y.) 436; Adams Express Co. *v.* Board of Police, 65 How. Pr. (N. Y.) 72.

48. **Bills of exchange and bills of lading** as instruments of commerce see *infra*, X, B, 3.

49. Munn *v.* Illinois, 94 U. S. 113, 134, 24 L. ed. 77, where the court says: "They [the warehouses and grain elevators] are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so."

50. McRae *v.* Bowers Dredging Co., 90 Fed. 360.

51. Nathan *v.* Louisiana, 8 How. (U. S.) 73, 12 L. ed. 992 [*cited* with approval in U. S. *v.* Steffens, 100 U. S. 82, 95, 25 L. ed. 550].

A bridge company is not a common carrier of property although it receives tolls.[52]

B. Power to Regulate. The power to regulate commerce embraces all the instruments by which such commerce may be conducted.[53]

VIII. INCORPORATION OF GOODS WITH STATE PROPERTY.

A. Original Packages — 1. WHAT IS AN "ORIGINAL PACKAGE." The phrase "original package" denotes the identical package delivered by the consignor to the carrier at the point of shipment, in the identical condition in which it then was.[54]

2. STATE POWER OVER. The states without congressional aid may not impede the importation and sale by the importer in the original package of goods the lawful subjects of commerce brought in from a foreign country[55] or another

52. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 617, 2 L. R. A. 289.

53. Welton *v.* Missouri, 91 U. S. 275, 280, 23 L. ed. 347 (per Field, J., who said: "The power to regulate it [commerce] embraces all the instruments by which such commerce may be conducted"); Hopkins *v.* U. S., 171 U. S. 578, 597, 19 S. Ct. 40, 43 L. ed. 290. And see *supra*, I; III, A.

54. McGregor *v.* Cone, 104 Iowa 465, 73 N. W. 1041, 65 Am. St. Rep. 522, 39 L. R. A. 484; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678.

Where bottles are packed in boxes for importation, the boxes and not the bottles are the original packages.

Alabama.— Harrison *v.* State, 91 Ala. 62, 10 So. 30.

Missouri.— State *v.* Parsons, 124 Mo. 436, 27 S. W. 1102, 46 Am. St. Rep. 457.

Nebraska.— Haley *v.* State, 42 Nebr. 556, 60 N. W. 962, 47 Am. St. Rep. 718.

South Dakota.— State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

United States.— Guckenheimer *v.* Sellers, 81 Fed. 997.

Contra.— State *v.* Miller, 86 Iowa 638, 53 N. W. 330; Hopkins *v.* Lewis, 84 Iowa 690, 51 N. W. 255, 15 L. R. A. 397; State *v.* Coonan, 82 Iowa 400, 48 N. W. 921.

See 10 Cent. Dig. tit. "Commerce," §§ 31, 94.

And this is true even though the bottles are separately wrapped in paper marked "original package" (Keith *v.* State, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430) or packed in an open box (Keith *v.* State, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432) furnished by the carrier and marked "to be returned" (*In re* Harmon, 43 Fed. 372). But the bottles are the original packages where the carrier, without the knowledge of the consignor, places them in boxes for shipment. Tinker *v.* State, 96 Ala. 115, 11 So. 383.

Car-loads of flour sacks are not the original packages but the sacks are such. Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425.

Cigarette boxes.— Boxes containing each ten cigarettes, separately shipped, are original packages (Iowa *v.* McGregor, 76 Fed. 956), and where cigarettes are shipped in small boxes bearing internal revenue stamps there also the boxes are original packages (*In re* May, 82 Fed. 422); but if shipped in larger packages with other like boxes the larger packages and not the small boxes constitute the original package (McGregor *v.* Cone, 104 Iowa 465, 73 N. W. 1041, 65 Am. St. Rep. 522, 39 L. R. A. 484), even where the small boxes are placed by the carrier loosely in an open basket furnished by the carrier, in which the boxes are carried and from which they are emptied into the receptacle of the consignee (Austin *v.* Tennessee, 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224 [*affirming* 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478]).

Sale of liquor conditional on testing and acceptance by the consignee is not a sale in the original packages, as they must be opened before the sale is consummated. Wasserboehr *v.* Boulier, 84 Me. 165, 24 Atl. 808, 30 Am. St. Rep. 344.

Sale of two pounds from a ten-pound box of oleomargarine is not a sale in the original package. Com. *v.* Paul, 148 Pa. St. 559, 24 Atl. 78.

Sale of packages where two or three dozen pieces of dry-goods are placed in a package and the packages are imported packed in larger boxes is not a sale in the original package. May *v.* New Orleans, 178 U. S. 496, 20 S. Ct. 976, 44 L. ed. 1165 [*affirming* 51 La. Ann. 1064, 25 So. 959].

Pleading.— In an action to recover a penalty for an alleged illegal sale of oleomargarine a statement that the package sold was "made, stamped, and branded" by a foreign manufacturer is not a sufficient assertion that it was an original package. Com. *v.* Schollenberger, 156 Pa. St. 201, 27 Atl. 30, 36 Am. St. Rep. 32, 22 L. R. A. 155.

55. *In re* Doane, 197 Ill. 376, 64 N. E. 377 (holding imported goods in the original packages on which the United States duties have been paid to be exempt from state taxation); State *v.* Shapleigh, 27 Mo. 344; State *v.* Pinckney, 10 Rich. (S. C.) 474 (state taxation of original packages).

Intoxicating liquors.— State *v.* Intoxicating Liquors, 82 Me. 558, 19 Atl. 913; Yearteau *v.* Bacon, 65 Vt. 516, 27 Atl. 198; Jones *v.* Hard, 32 Vt. 481; Brown *v.* Maryland, 12

state,[56] unless the goods are shipped in packages not ordinarily used by importers for the mere purpose of evading state law.[57] The importer has a right unimpeded

Wheat. (U. S.) 419, 6 L. ed. 678; Schandler Bottling Co. *v.* Welch, 42 Fed. 561; Tuchman *v.* Welch, 42 Fed. 548; *In re* Beine, 42 Fed. 545; U. S. *v.* Fiscus, 42 Fed. 395.

A state tax on auction sales is invalid when applied to goods sold by the auctioneer for the importer in the original packages. Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. ed. 1015.

A state tax on imported goods in the hands of the importer in the original packages is unconstitutional. Low *v.* Austin, 13 Wall. (U. S.) 29, 20 L. ed. 517.

56. Intoxicating liquors.— *Iowa.*— State *v.* Corrick, 82 Iowa 451, 48 N. W. 808; State *v.* Pfleajor, 81 Iowa 759, 46 N. W. 1063. *Contra*, State *v.* Bowman, 78 Iowa 519, 43 N. W. 302; Leisy *v.* Hardin, 78 Iowa 286, 43 N. W. 188; Grousendorf *v.* Howat, 77 Iowa 187, 41 N. W. 573; Collins *v.* Hills, 77 Iowa 181, 41 N. W. 571, 3 L. R. A. 110.

Kansas.— State *v.* Winters, 44 Kan. 723, 25 Pac. 235, 10 L. R. A. 616. *Contra*, State *v.* Fulker, 43 Kan. 237, 22 Pac. 1020, 7 L. R. A. 183.

Maine.— State *v.* Intoxicating Liquors, 83 Me. 158, 21 Atl. 840; State *v.* Robinson, 49 Me. 285.

Maryland.— Bode *v.* State, 7 Gill (Md.) 326, construing a state prohibition statute inapplicable to an importer selling in the original package.

Massachusetts.— Bradford *v.* Stevens, 10 Gray (Mass.) 379.

Rhode Island.— State *v.* Amery, 12 R. I. 64.

United States.— Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128. *Contra*, License Cases, 5 How. (U. S.) 504, 12 L. ed. 256 [*overruled* by Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128, the effect of which decision was then in turn nullified by the Wilson Bill (26 U. S. Stat. at L. p. 313, c. 728; U. S. Comp. Stat. (1901), p. 3177)].

See 10 Cent. Dig. tit. "Commerce," § 94.

Sales to minors and drunkards in the original packages may be regulated by the state. Com. *v.* Silverman, 138 Pa. St. 642, 21 Atl. 13.

Oleomargarine.— McAllister *v.* State, 94 Md. 290, 50 Atl. 1046; Waterbury *v.* Egan, 3 Misc. (N. Y.) 355, 23 N. Y. Suppl. 115, 52 N. Y. St. 421; Com. *v.* Paul, 9 Pa. Co. Ct. 196; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49; *In re* Scheitlin, 99 Fed. 272; *In re* Brundage, 96 Fed. 963; *In re* Worthen, 58 Fed. 467; *In re* McAllister, 51 Fed. 282; Minnesota *v.* Gooch, 44 Fed. 276, 10 L. R. A. 830. See also *infra*, IX, A, 2, a, (III), (B).

Other articles.— *In re* Wilson, 10 N. M. 32, 60 Pac. 73, 48 L. R. A. 417; State *v.* Goetze, 43 W. Va. 495, 27 S. E. 225, 64 Am. St. Rep. 871 (cigarettes); *In re* Minor, 69 Fed. 233 (cigarettes); Spellman *v.* New Orleans, 45 Fed. 3, holding a city ordinance to be invalid which prohibited the sale of perishable freight at railroad stations where the merchandise affected largely comes from other states and where the purpose of the statute is to favor resident dealers.

The changing attitude of the supreme court on the original package doctrine may be traced in the line of leading cases as follows: In Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678, a state license-tax on sales by importers was held to be invalid as a duty on imports, as the privilege of sale in the original package was essential to the right of import. In License Cases, 5 How. (U. S.) 504, 12 L. ed. 256, the court refused to apply this doctrine to interstate commerce, holding that the states may prohibit or regulate by license the sale of an article from outside the state in the original package. In Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257, the court again refuses to apply the doctrine of Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678, to interstate commerce, although the cases are not necessarily inconsistent, as in the earlier case congress had acted on the matter in dispute while in Brown *v.* Houston congress had in no way acted. The doctrine of the Houston case is that when goods come to rest in the state they are immediately incorporated in state property and subject to state law, although still in the original package in the hands of him who conveyed them from another state. Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128, is a reversion to the tendency of Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678, for it holds that all persons have a right to transport goods from one state to another and sell them in the latter state, without hindrance from any state law. The court expressly dissents from the License Cases. The case of Emert *v.* Missouri, 156 U. S. 296, 15 S. Ct. 367, 39 L. ed. 430, apparently made an exception to this doctrine in declaring that the states could regulate itinerant peddlers and others taking goods round with them for sale in the original packages and even though such peddlers were the importers or their agents.

57. *Arkansas.*— Smith *v.* State, 54 Ark. 248, 15 S. W. 882.

Nebraska.— Haley *v.* State, 42 Nebr. 556, 60 N. W. 962, 47 Am. St. Rep. 718.

Pennsylvania.— Com. *v.* Paul, 170 Pa. St. 284, 37 Wkly. Notes Cas. (Pa.) 137, 33 Atl. 82, 50 Am. St. Rep. 776, 30 L. R. A. 396; Com. *v.* Bishman, 138 Pa. St. 639, 21 Atl. 12; Com. *v.* Zelt, 138 Pa. St. 615, 27 Wkly. Notes Cas. (Pa.) 131, 21 Atl. 7, 11 L. R. A. 602, pint bottles of intoxicating liquors.

South Dakota.— State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

United States.— Austin *v.* Tennessee, 179 U. S. 343, 359, 21 S. Ct. 132, 45 L. ed. 224, where it is held that cigarette packages three inches long are not original packages, the court saying: "The real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which

by state interference to sell such article in the original package in person or through an agent,[58] unless he is keeping it with intent to sell illegally[59] or in a manner to defraud the consumer.[60] The only exception to this rule is the case of the itinerant peddler, whose sales even of goods brought into the state in the original package are subject to state control within the exercise of the state police power for the public safety.[61] The importer also has a right to store goods in original packages within the state for the purpose of sale in such packages.[62] A mortgagee foreclosing is not the importer of the original package entitled to sell it in the state.[63] A state may not regulate the labeling of original packages brought in from outside the state[64] but it may, however, interfere with the sale, even in the original package, of articles which are not legitimate articles of commerce,[65] but has no more control over packages suitable for retail trade than over packages intended for dealers.[66]

B. When Goods Become Incorporated With State Property. Merchandise becomes incorporated with state property and so subject to state law and state regulation only on a breaking of the original package[67] or mingling with the mass of property of the state,[68] as by sale[69] or by exposure for sale[70] at retail by

bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country."

See 10 Cent. Dig. tit. "Commerce," §§ 31, 94.

58. Carstairs *v.* O'Donnell, 154 Mass. 357, 28 N. E. 271; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49. See also *infra*, IX, B, 1.

59. State *v.* Blackwell, 65 Me. 556.

60. Com. *v.* Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; Plumley *v.* Massachusetts, 155 U. S. 461, 15 S. Ct. 154, 39 L. ed. 223.

61. State *v.* Wheelock, 95 Iowa 577, 64 N. W. 620, 58 Am. St. Rep. 442, 30 L. R. A. 429; Com. *v.* Newhall, 164 Mass. 338, 41 N. E. 647 [*distinguishing* Brennan *v.* Titusville, 153 U. S. 289, 14 S. Ct. 829, 38 L. ed. 719, and upholding Mass. Stat. (1890), c. 448, placing a license-tax on itinerant vendors as being an exercise of the state police power to prevent frauds]; Com. *v.* Ober, 12 Cush. (Mass.) 493; Saulsbury *v.* State, (Tex. Crim. 1901) 63 S. W. 568; Emert *v.* Missouri, 156 U. S. 296, 15 S. Ct. 367, 39 L. ed. 430; Howe Mach. Co. *v.* Gage, 100 U. S. 676, 25 L. ed. 754.

62. Siegfried *v.* Raymond, 190 Ill. 424, 60 N. E. 868; Moore *v.* Bahr, 82 Fed. 19.

63. King *v.* McEvoy, 4 Allen (Mass.) 110.

64. *In re* Ware, 53 Fed. 783; *In re* Sanders, 52 Fed. 802, 18 L. R. A. 549.

65. Blaufield *v.* State, 103 Tenn. 593, 53 S. W. 1090. But see Sawrie *v.* Tennessee, 82 Fed. 615, holding that cigarettes are legitimate objects of commerce. And see *infra*, IX, A, 3, d.

66. Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49.

67. A breaking of the original package renders goods subject to state law.

Arkansas.— Smith *v.* State, 54 Ark. 248, 15 S. W. 882.

Delaware.— State *v.* Allmond, 2 Houst. (Del.) 612.

Maine.— State *v.* Montgomery, 92 Me. 433, 43 Atl. 13.

New York.— People *v.* Wilmerding, 62 Hun (N. Y.) 391, 17 N. Y. Suppl. 102, 42 N. Y. St. 139.

Tennessee.— Croy *v.* Obion County, 104 Tenn. 525, 58 S. W. 235, 78 Am. St. Rep. 931, 51 L. R. A. 254; Kimmell *v.* State, 104 Tenn. 184, 56 S. W. 854.

See 10 Cent. Dig. tit. "Commerce," §§ 31, 94.

Drawing the bungs of liquor barrels for the purpose merely of testing is not a breaking of the original package. Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219.

Removing the lid of an original package of oleomargarine so that a prospective buyer may examine its contents was held not a breaking of the original package in *In re* McAllister, 51 Fed. 282.

68. People *v.* Huntington, 4 N. Y. Leg. Obs. 187; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347.

69. Mobile *v.* Waring, 41 Ala. 139, where goods purchased from an importer after they have been brought within the jurisdiction of the United States but before they have been delivered at the port of entry and before duties have been paid on them, and which are transported by the purchaser to the port to which they were consigned, are subject to state taxation.

70. McGregor *v.* Cone, 104 Iowa 465, 73 N. W. 1041, 65 Am. St. Rep. 522, 39 L. R. A. 484; *In re* May, 82 Fed. 422.

Goods exposed for sale in the small packages in which they were packed by the importer, when such packages were transported into the state in larger boxes, crates, or bales, are subject to state taxation, as the larger boxes and not the small packages are the

peddlers.[71] Goods imported but not delivered to the importer are solely within federal power.[72]

IX. LEGISLATIVE REGULATIONS OF COMMERCE.

A. Subjects of Commerce — 1. In General. The determination of legitimate subjects of commerce depends largely on custom.[73]

2. Unquestioned Subjects of Commerce — a. Property — (I) *Cattle*[74] — (A) *Importation and Transportation.* The federal government[75] or the states may regulate the methods of interstate transportation of cattle in the interest of humanity and of safety to the consumers,[76] but the states may not prohibit or impede interstate traffic in such cattle[77] except for protection against disease.[78]

(B) *Liability of Owners For Disease.*[79] The states may also regulate the liability of cattle-owners for the spread of disease.[80]

(C) *Slaughtering and Packing.* Slaughtering and packing cattle for interstate and foreign markets is not a branch of interstate commerce.[81]

(D) *Stock-Yards.* The business of operating stock-yards and there buying and selling as commission merchant stock from outside the state is not a part of interstate commerce.[82]

original packages. May *v.* New Orleans, 178 U. S. 496, 20 S. Ct. 976, 44 L. ed. 1165 [*affirming* 51 La. Ann. 1064, 25 So. 959].

71. *In re* Wilson, 19 D. C. 341, 12 L. R. A. 624; Davis *v.* Dashiel, 61 N. C. 114; Wynne *v.* Wright, 18 N. C. 19; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

72. Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683.

73. Austin *v.* Tennessee, 179 U. S. 343, 345, 21 S. Ct. 132, 45 L. ed. 224, where it is said: "Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the states."

74. See also, generally, Animals; Carriers.

75. U. S. Rev. Stat. (1878), §§ 4386, 4388; U. S. Comp. Stat. (1901), § 4386 *et seq.*, concerns the unloading of live stock *en route* for feeding, watering, or resting. And see Cotting *v.* Kansas City Stock-Yards Co., 82 Fed. 839.

76. See Animals; Carriers; and *infra*, IX, C, 2.

77. A prohibition of the importation of "Texas, Mexican, or Indian cattle" into the state during certain times of the year is an invalid exercise of the state police power, as it directly interferes with interstate commerce. Chicago, etc., R. Co. *v.* Erickson, 91 Ill. 613, 33 Am. Rep. 70; Salzenstein *v.* Mavis, 91 Ill. 391; Urton *v.* Sherlock, 75 Mo. 247; Gilmore *v.* Hannibal, etc., R. Co., 67 Mo. 323; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527 [*overruling* Yeazel *v.* Alexander, 58 Ill. 254]. *Contra*, Chicago, etc., R. Co. *v.* Gasaway, 71 Ill. 570; Stevens *v.* Brown, 58 Ill. 289; Brown *v.* Hannibal, etc., R. Co., 62 Mo. 490; Kenney *v.* Hannibal, etc., R. Co., 62 Mo. 476; Mercer *v.* Kansas City, etc., R. Co., 60 Mo. 397; Diamond *v.* Kansas City, etc., R. Co., 60 Mo. 393; Husen *v.* Hannibal, etc., R. Co., 60 Mo. 226; Wilson *v.* Kansas City, etc., R. Co., 60 Mo. 184. And a prohibition on the transportation through the state of certain kinds of cattle infected with Texas fever is invalid as a practical prohibition on interstate traffic in those kinds of cattle, as all of them, although healthy, contain fever microbes. Selvege *v.* St. Louis, etc., Co., 135 Mo. 163, 36 S. W. 652; Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638, 27 S. W. 479.

78. See Animals, 2 Cyc. 332 *et seq.*

A prohibition on the introduction into the state at certain seasons of cattle capable of imparting a certain fever and making the fact that the cattle came from a certain district *prima facie* evidence of such capability is a valid state regulation (Rouse *v.* Yonard, 1 Kan. App. 270, 41 Pac. 426; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. ed. 878); as is also a statute prohibiting the importation into a state of cattle affected with certain diseases (Missouri Pac. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951). See also *infra*, IX, E.

79. As to diseased animals generally see Animals, 2 Cyc. 332 *et seq.*

80. Liability for damages caused by allowing certain kinds of cattle to run at large and so spreading disease may be imposed by the state. Kimmish *v.* Ball, 129 U. S. 217, 9 S. Ct. 277, 32 L. ed. 695. *Contra*, Jarvis *v.* Riggin, 94 Ill. 164.

A rule of evidence.— A statute providing that the fact that cattle came from certain sections is *prima facie* evidence of the liability of the owner for the spread of disease is a valid rule of evidence and not a regulation of interstate commerce. Grimes *v.* Eddy, 126 Mo. 168, 27 S. W. 479, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. ed. 878.

81. U. S. *v.* Boyer, 85 Fed. 425.

82. Hopkins *v.* U. S., 171 U. S. 578, 19 S. Ct. 40, 43 L. ed. 290 [*reversing* 82 Fed. 529]. And see Cotting *v.* Kansas City Stock-

(II) *Fish and Game.*[83] Fishing is not commerce,[84] and its regulation is exclusively within state control.[85] A state may furthermore prohibit the citizens of other states from fishing within its limits, as navigable waters, their beds and contents, are state property.[86] So the states may in any way regulate the capture of wild animals.[87] The states may also regulate or prohibit the exportation to points outside the state of fish and game caught within state limits,[88] and to prevent the evasion of the state fish and game laws may restrict or prohibit the free importation and sale of fish and game from outside the state and may make it a crime to have in possession such fish or game.[89]

Yards Co., 82 Fed. 839. In these cases it was further held that the fact that the border line between two states ran through the stockyards did not render the business interstate commerce.

83. See, generally, Fish and Game.

84. McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248.

85. *Maine.*— Fuller *v.* Spear, 14 Me. 417.

Massachusetts.— Dunham *v.* Lamphere, 3 Gray (Mass.) 268, regulating the time and manner of taking fish.

New Hampshire.— State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199.

New Jersey.— Johnson *v.* Loper, 46 N. J. L. 321, state statute requiring a license from all boats engaged in planting or taking oysters is constitutional.

Pennsylvania.— Com. *v.* Bender, 7 Pa. Co. Ct. 620.

Virginia.— Morgan *v.* Com., 98 Va. 812, 35 S. E. 448, license-tax on state residents for the privilege of fishing in state waters.

United States.— Manchester *v.* Massachusetts, 139 U. S. 240, 11 S. Ct. 559, 35 L. ed. 159 [*affirming* 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236]. And see *In re* Deininger, 108 Fed. 623.

See 10 Cent. Dig. tit. "Commerce," § 101.

A state tax on those engaged in the business of packing oysters is valid, although applied to those packing oysters caught in and shipped from another state. Applegarth *v.* State, 89 Md. 140, 42 Atl. 941.

86. State *v.* Harrub, 95 Ala. 176, 10 So. 752, 36 Am. St. Rep. 195, 15 L. R. A. 761; Dunham *v.* Lamphere, 3 Gray (Mass.) 268 *semble*; State *v.* Medbury, 3 R. I. 138; McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248 [*affirming* 27 Gratt. (Va.) 985]; Smith *v.* Maryland, 18 How. (U. S.) 71, 15 L. ed. 269; Dize *v.* Lloyd, 36 Fed. 651 (Md. Laws (1886), c. 296, providing that the possession of oyster-dredging instruments on a boat is *prima facie* evidence of intent to dredge is not unconstitutional, as a regulation of interstate commerce or an interference with navigation); Corfield *v.* Coryell, 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230.

Penalty for having in possession fish.— A state law making it an offense to have in possession trout for sale is a valid police regulation, although applied to trout imported from another state. *In re* Deininger, 108 Fed. 623.

87. Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793, where is found a historical discussion of the subject of game laws and holding valid a state statute which, *inter alia*, prohibited the killing of certain game at any time for the purpose of exporting the same beyond state limits. See also, generally, Fish and Game.

88. State *v.* Harrub, 95 Ala. 176, 10 So. 752, 36 Am. St. Rep. 195, 15 L. R. A. 761 (where, under the Alabama statute of February, 1891, providing that a person taking oysters should have only such title in them as the legislature allowed, they being state property, it was held that the state could restrict this state property to use only by citizens of the state); Organ *v.* State, 56 Ark. 267, 19 S. W. 840; State *v.* Northern Pac. Express Co., 58 Minn. 403, 59 N. W. 1100; State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098; Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793 (where it appears from the opinion of White, J., that this state power may be rested either on the fact that the ownership of *feræ naturæ* is common and public and not private, or on "the duty of the state to preserve for its people a valuable food supply"); U. S. *v.* Smith, 115 Fed. 423.

Contra.— See Territory *v.* Nelson, 2 Ida. 638, 23 Pac. 116; Territory *v.* Evans, 2 Ida. 634, 23 Pac. 115, 7 L. R. A. 288 (Ida. Rev. Stat. § 7193, prohibiting the exportation of fish from the state, is invalid as an interference with the interstate sale of merchandise); State *v.* Saunders, 19 Kan. 127, 27 Am. Rep. 98 (where it is said that a prohibition on the exportation of prairie chickens is void).

Game lawfully captured and delivered to an interstate carrier for interstate transportation is an article of interstate commerce, and not subject to the state police power. Bennett *v.* American Express Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33.

89. *California.*— *Ex p.* Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129, holding valid a state statute against the sale or offering for sale of meat although legally killed in another state.

Illinois.— Magner *v.* People, 97 Ill. 320.

Maryland.— Stevens *v.* State, 89 Md. 669, 43 Atl. 929.

Michigan.— People *v.* O'Neil, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696.

Missouri.— State *v.* Judy, 7 Mo. App. 524; State *v.* Randolph, 1 Mo. App. 15.

See 10 Cent. Dig. tit. "Commerce," § 102.

Contra.— See People *v.* Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 34, 79 Am. St. Rep.

(III) *Food*[90]—(A) *In General.* The states may control the sale of food products in the interest of the public health,[91] convenience, or pecuniary interest.[92]

(B) *Oleomargarine.*[93] Oleomargarine is a legitimate article of commerce,[94] interstate trade in which may be in no way impeded by the states,[95] as, it seems, by requiring a foreign substance to be added to it;[96] but the states may use the police power to prevent its interstate sale in a shape calculated to deceive parties as to its true character,[97] or they may in any way regulate or even prohibit its

622, 52 L. R. A. 803 [*affirming* 30 Misc. (N. Y.) 130, 62 N. Y. Suppl. 543, holding that the statute of 1892 making it a misdemeanor to catch, kill, or have in one's possession certain kinds of fish at certain times of the year, is void so far as it affects the importation and sale of fish from a foreign country on which a customs duty has been paid]; *In re* Davenport, 102 Fed. 540.

90. See also, generally, Food.

91. The states may prohibit the sale of perishable food at certain points in the city where sales in the original package are not affected (State *v.* Davidson, 50 La. Ann. 1297, 24 So. 324, 69 Am. St. Rep. 478), or the sale of food colored or powdered deceitfully, although congress had prohibited the adulteration of food (Crossman *v.* Lurman, 171 N. Y. 329, 63 N. E. 1097 [*affirming* 57 N. Y. App. Div. 393, 68 N. Y. Suppl. 311]), but may not prohibit the sale of farm products in a city without a license, excepting from the prohibition of retail sales from vehicles, sales by state residents owning land in the city, etc., where these exceptions showed that the act was not for the purpose of protecting the public health (Buffalo *v.* Reavey, 37 N. Y. App. Div. 228, 55 N. Y. Suppl. 792).

92. Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441, where it was held that the state might regulate the weight and price of bread.

93. See also, generally, Food.

94. Schollenberger *v.* Pennsylvania, 171 U. S. 1, 15, 18 S. Ct. 757, 43 L. ed. 49, where the court says: "We have no difficulty in holding that oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients, and effect upon the health are and have been for many years as well known as almost any article of food in daily use. . . . If properly and honestly manufactured it is conceded to be a healthful and nutritious article of food." The court also finds that oleomargarine has been recognized by the act of congress of Aug. 2, 1886, c. 840, 24 U. S. Stat. at L. p. 209, defining butter and oleomargarine and taxing oleomargarine as a recognized proper subject of commerce. "Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the states and with foreign nations."

95. A prohibition on the importation and sale of oleomargarine is void, when made either directly (Fox *v.* State, 89 Md. 381, 43 Atl. 775, 73 Am. St. Rep. 193), or under the guise of an act to prevent the adulteration of butter and cheese (*Ex p.* Scott, 66 Fed. 45), or to prevent the manufacture of any oleaginous substance designed to take the place of butter and cheese (Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49).

Susceptibility to adulteration is no ground for the exclusion of oleomargarine from a state. Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49.

A statute forbidding the sale of oleomargarine was held not to apply to a sale in the original package. Com. *v.* Paul, 10 Pa. Co. Ct. 332. See also *supra*, VIII.

96. Requirement of coloring invalid.— In Collins *v.* New Hampshire, 171 U. S. 30, 33, 18 S. Ct. 768, 43 L. ed. 60, it appeared that the state statute required oleomargarine to be colored pink, on which the court uses the following pertinent language: "Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. . . . If enforced the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. . If this provision for coloring the article were a legal condition, . . . the legislative fancy or taste would be boundless. It might equally as well provide that it should be colored blue or red or black [or be mixed with something to give it an offensive odor]. . . . The statute in its necessary effect is prohibitory, and therefore . . . it is invalid." *Compare* Armour Packing Co. *v.* Snyder, 84 Fed. 136, where Minn. Laws (1891), c. 11, requiring the coloring of oleomargarine pink was upheld on the ground that it applied only to articles when sold or exposed for sale within the state and therefore did not interfere with congressional power over interstate commerce.

97. *Maine.*— State *v.* Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395.

Missouri.— State *v.* Addington, 77 Mo. 110.

New Jersey.— Waterbury *v.* Newton, 50 N. J. L. 534, 14 Atl. 604.

Pennsylvania.— Com. *v.* Vandyke, 13 Pa. Super. Ct. 484, 9 Pa. Dist. 41, upholding the Pennsylvania statute of May 5, 1899, drawn in view of Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49, and prohibiting the sale of imitations of butter. And to the same effect construing the same statute see Com. *v.* McCann, 14 Pa. Super. Ct. 221.

United States.— Plumley *v.* Massachusetts, 155 U. S. 461, 15 S. Ct. 154, 39 L. ed. 223

manufacture or sale when such manufacture or sale is not an act of interstate commerce.[98]

(iv) *Natural Gas.*[99] Natural gas is an article of commerce with the free interstate transportation of which the states may not interfere, although they may regulate it in the exercise of the state police power.[1]

(v) *Newspapers.*[2] Newspapers are legitimate subjects of commerce.[3]

b. Persons — (i) *Immigrants.* Congress has full and paramount power over immigration,[4] and the states may not in any way restrict it,[5] but until congress

[*affirming* 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839]. The statute upheld here prohibited the sale of any article in imitation of butter, and expressly refrained from interfering with the sale of any substance "free from coloration or ingredient that 'causes it to look like butter.'"

See 10 Cent. Dig. tit. "Commerce," § 93.

98. Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253; Armour Packing Co. *v.* Snyder, 84 Fed. 136; *In re* Brosnahan, 4 McCrary (U. S.) 1, 18 Fed. 62.

The commerce clause of the federal constitution is not violated by the provisions of the statutes of Ohio relating to the manufacture and sale of oleomargarine within the state by a corporation created by its laws. State *v.* Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181 [*affirmed* in 183 U. S. 238, 22 S. Ct. 120, 46 L. ed. 171].

99. See, generally, GAS.

For analogous powers of the state over other natural products see *supra*, IX, A, 2, a, (II); and, generally, FISH AND GAME.

1. An absolute prohibition on the exportation of natural gas from the state is void as a direct interference with interstate commerce. Manufacturers' Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 545, 58 N. E. 706; Avery *v.* Indiana, etc., Oil, etc., Co., 120 Ind. 600, 22 N. E. 781; State *v.* Indiana, etc., Oil, etc., Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579. See also Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505, where it was said that the Indiana statue of 1889, which grants to domestic companies organized for mining natural gas and furnishing the same to patrons within the state the right to condemn land for piping, does not prohibit the piping of gas out of the state, and is therefore not void as an interference with interstate commerce.

But a prohibition on transportation through pipes under artificial pressure or at a greater pressure than three hundred pounds per square inch, imposed for safety, is a valid state regulation, although its effect may be incidentally to prevent the transportation of gas beyond state borders. Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 [*distinguishing* Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128; State *v.* Indiana, etc., Oil, etc., Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579], holding valid the Indiana statute of 1891. *Contra*, Benedict *v.* Columbus Constr. Co., 49 N. J. Eq. 23, 23 Atl. 485, holding invalid the Indiana statute of 1891.

2. See, generally, NEWSPAPERS.

3. Preston *v.* Finley, 72 Fed. 850.

4. See, generally, ALIENS, 2 Cyc. 119; and *supra*, III, F.

That a nation may restrict immigration see Matter of Tatsu, 10 Hawaii 701; Fong Kee *v.* Wilson, 8 Hawaii 513; Chong Chum *v.* Kohala Sugar Co., 8 Hawaii 425; Matter of Ah Hin, 7 Hawaii 454 (*construing* Hawaiian statute of Dec. 20, 1887, requiring permits of Chinese immigrants); Rex *v.* Leong Tiam, 7 Hawaii 338; and ALIENS, VI, B [2 Cyc. 119].

That a nation may require a property qualification of immigrants see *In re* Michimoshu, 11 Hawaii 797.

5. The state may not require the masters and owners of vessels to give bond for the protection of the state against the support of criminal, infirm, or indigent passengers. Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. ed. 550; *In re* Ah Fong, 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102, 3 Am. L. Rec. 403, 13 Am. L. Reg. N. S. 761, 9 Am. L. Rev. 359, 1 Centr. L. J. 516, 7 Chic. Leg. N. 17, 20 Int. Rev. Rec. 112. The addition to such a provision of a clause allowing the master to pay one dollar and fifty cents for each passenger instead of giving bond does not validate it, as this burdensome bond provision with its alternative really amounts to a tax on the passenger to be paid over by the captain because he carries him as a passenger. Henderson *v.* Wickham, 92 U. S. 259, 23 L. ed. 543.

Chinese exclusion.— Cal. Stat. (1891), p. 185, intended to exclude the Chinese from California and prescribing the terms on which they may remain or travel in the state, is void as an interference with foreign commerce. *Ex p.* Lippman, (Cal. 1894) 35 Pac. 557; *Ex p.* Ah Cue, 101 Cal. 197, 35 Pac. 556. And see Lin Sing *v.* Washburn, 20 Cal. 534. See also, generally, ALIENS, 2 Cyc. 124.

Head money tax invalid.— A state tax to be paid by the ship-owner for every passenger landed in the state is invalid. Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702. See also, generally, BOUNTIES, 5 Cyc. 992.

Negro exclusion.— La. Acts (1842), No. 123, prohibiting the entrance of free negroes into the state and providing that any such negro coming in on a vessel shall be imprisoned until the vessel is ready for sea and then be sent off on her, when the master of the vessel shall pay all costs and expenses, was held to be void, as an interference with commerce. The William Jarvis, 1 Sprague (U. S.) 485, 29 Fed. Cas. No. 17,697; The Cynosure, 1 Sprague (U. S.) 88, 6 Fed. Cas. No. 3,529, 7 Law Rep. 226.

has acted the states may, in the exercise of their police power, pass such laws affecting immigration as the public health and safety may demand.[6]

(II) *SLAVES.* Before the passage of the thirteenth amendment to the federal constitution congress could prohibit the foreign slave trade,[7] and the states could also regulate commerce in slaves.[8]

3. SUBJECTS INJURIOUS TO THE PUBLIC — a. In General. Congress may control interstate traffic in articles affecting the public welfare[9] and the states may control the internal sale of such commodities,[10] although patented by the United States.[11]

b. Gambling and Lotteries.[12] Congress may prohibit interstate trade in gambling or lottery tickets,[13] and a state may prohibit chartered lotteries in its midst,[14] even though the persons engaged in the sale of tickets hold federal

Port physician's fee invalid.— The Pennsylvania statute of March 25, 1850, providing for a physician's examination of the baggage of the passengers and crew of all vessels coming from a foreign port, for which a fee of fifty cents is collected, is an invalid interference with commerce. American Steamship Co. *v.* Board of Health, 26 Int. Rev. Rec. 69.

Removal of paupers.— The state may not require common carriers bringing non-residents into it to remove them if they become indigent within a year. Bangor *v.* Smith, 83 Me. 422, 22 Atl. 379, 13 L. R. A. 686.

6. Board of Health *v.* Loyd, 1 Phila. (Pa.) 20, 7 Leg. Int. (Pa.) 7; Minneapolis, etc., R. Co. *v.* Milner, 57 Fed. 276, holding that the detention and disinfection of immigrants to prevent the spread of disease is within the power of the state. And see *supra*, IV, A, 4; and *infra*, IX, E, 2.

Exclusion of infected immigrants by a state, under the direction of the state board of health, is valid. Compagnie Francaise de Navigation à Vapeur *v.* State Bd. of Health, 51 La. Ann. 645, 25 So. 591, 72 Am. St. Rep. 458, 56 L. R. A. 795.

Exclusion of paupers valid.— The state may, as a police measure, probably exclude from its borders paupers or those likely to be paupers. Passenger Cases, 7 How. (U. S.) 283, 410, 12 L. ed. 702; Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 625, 10 L. ed. 1060. See also Henderson *v.* Wickham, 92 U. S. 259, 23 L. ed. 543, where the court expressly abstains from deciding the question, but remarks that the whole subject lends itself better to uniform treatment.

Passenger report requirement valid.— The state may require the masters or owners of all vessels bringing passengers from any place outside the state to make a full written report to state authorities concerning all passengers. Immigration Com'rs *v.* Brandt, 26 La. Ann. 29; New York *v.* Miln, 11 Pet. (U. S.) 102, 9 L. ed. 648 [*affirming* 2 Paine (U. S.) 429, 17 Fed. Cas. No. 9,618].

7. Charge to Grand Jury, 30 Fed. Cas. No. 18,269*a*, 3 Phila. (Pa.) 527; U. S. *v.* Gould, 25 Fed. Cas. No. 15,239, 8 Am. L. Reg. 525.

8. Com. *v.* Griffin, 3 B. Mon. (Ky.) 208 (to the effect that the right of property and commerce in slaves is not subject to the ordinary rules which distinguish other property and is the subject of internal regulation by the states, over which congress has no control); Lemmon *v.* People, 20 N. Y. 562 (holding that the transshipment of slaves partly by land and partly by water was a subject on which the states could act as congress had not acted).

A state prohibition on the carrying away of slaves out of the state in boats was upheld in Church *v.* Chambers, 3 Dana (Ky.) 274.

Negroes mingled with the mass of the population of a state are beyond federal control. U. S. *v.* Gould, 25 Fed. Cas. No. 15,239, 8 Am. L. Reg. 525. And see *supra*, VIII.

Importation of slaves could be legally prohibited by statute. Cotton *v.* Brien, 6 Rob. (La.) 115; Brien *v.* Williamson, 7 How. (Miss.) 14; Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800 *semble*.

9. U. S. *v.* Popper, 98 Fed. 423, article preventing conception.

10. Dabbs *v.* State, 39 Ark. 353, 43 Am. Rep. 275, prohibition of sale of all except the "navy pistol" is valid.

11. **The state may regulate,** in the exercise of the police power, the sale of patented articles, as illuminating oil (Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115), gunpowder (*dictum* in Webber *v.* Virginia, 103 U. S. 344, 347, 26 L. ed. 565 [*reversing* 33 Gratt. (Va.) 898]), or poison (*dictum* in Webber *v.* Virginia, 103 U. S. 344, 347, 26 L. ed. 565 [*reversing* 33 Gratt. (Va.) 898]).

12. See, generally, GAMING; LOTTERIES.

13. Reilley *v.* U. S., 106 Fed. 896, 46 C. C. A. 25.

14. Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079, where it is said: "They [lotteries] are not, in the legal acceptation of the term, *mala in se*, but as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. . . . Anyone, therefore, who accepts a lottery charter, does so with the implied understanding that the People, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, and this whether it be paid for or not."

That lotteries were formerly favored see 2 Quincy Hist. Harv. Coll. 162, 273, 292; 2 Thayer Const. L. 1773 note.

licenses.[15] It may also prohibit business within its borders carried on in furtherance of gambling outside the state [16] or in a foreign country.[17]

c. Intoxicating Liquors [18] — (I) *Federal Authority Over.* Intoxicating liquor is a legitimate article of commerce,[19] interstate or foreign commerce in which may be regulated by congress; and congress may also delegate to the states authority to act upon it at a certain stage in its interstate transit.[20]

(II) *State Power Over* — (A) *In General.* The states may interfere with traffic in liquors only when they have reached their destination in the sense of interstate transportation, or when they are otherwise incorporated in the general mass of property in the state.[21]

(B) *What Is Within State Power.* The states may, in the exercise of their police power, in any way regulate the sale within the state of intoxicating liquors,

15. License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497, where a federal license on persons engaged in the sale of lottery tickets was held a tax and not an authority to sell.

16. Pools on horse-races.— The selling of pools in the state on horse-races to take place outside the state (State *v.* Stripling, 113 Ala. 120, 21 So. 409, 36 L. R. A. 81; Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822) or the business of sending money out of the state, there to bet on horse-races, may be prohibited by the states (State *v.* Harbourne, 70 Conn. 484, 40 Atl. 179, 66 Am. St. Rep. 126, 40 L. R. A. 607).

17. Ballock *v.* State, 73 Md. 1, 20 Atl. 184, 8 L. R. A. 671, 25 Am. St. Rep. 559, where a state prohibition on the sale of an Austrian government bond was upheld on the ground that the bond provided for a chance to win a premium in a lottery.

18. See, generally, Intoxicating Liquors.

19. State *v.* O'Donnell, 41 S. C. 553, 19 S. E. 748 [But see State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345]; McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410; License Cases, 5 How. (U. S.) 504, 12 L. ed. 256; *Ex p.* Loeb, 72 Fed. 657.

20. 26 U. S. Stat. at L. p. 313, c. 728; U. S. Comp. Stat. (1901), p. 3177. This statute is known as the Wilson Act.

For interpretation of this act see *infra*, note 21.

21. The original package doctrine was carried in Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128, so far as to hold that an importer had a right to sell in the state, in the original package, intoxicating liquors imported from outside the state. This decision was abrogated by the Wilson Bill of 1890 (26 U. S. Stat. at L. p. 313, c. 728; U. S. Comp. Stat. (1901), p. 3177), which left the matter of sale in the state to state control. This latter result had been reached before the passage of the Wilson Act in State *v.* Zimmerman, 78 Iowa 614, 43 N. W. 458, although sales in the original packages by agents of the importers were held beyond state control in *In re* Beine, 42 Fed. 545.

The Wilson Act of 1890 (26 U. S. Stat. at L. p. 313, c. 728; U. S. Comp. Stat. (1901), p. 3177) provides that all intoxicating liquors transported into any state, or remaining there for use, consumption, sale, or storage, shall, on arrival in such state, be "subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers." It has been held that the liquor had not "arrived" in the state, where it was seized in the state while being conveyed by the purchaser to his home from a point outside the state, where he had brought it for his personal use (State *v.* Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567); where it was in a railroad car standing at a siding and was still in transit (State *v.* Intoxicating Liquors, 94 Me. 335, 47 Atl. 531); or at any time before the arrival of the goods at their destination and their delivery to the consignee (Rhodes *v.* Iowa, 170 U. S. 412, 18 S. Ct. 664, 42 L. ed. 1088 [*reversing* 90 Iowa 496, 58 N. W. 887, 24 L. R. A. 245]; Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 474, 42 L. ed. 1100 [*affirming* in part 80 Fed. 786]).

The liquor had "arrived" when shipped by a concern outside the state to its agent in the state who had made a sale of it to a resident. Stevens *v.* Ohio, 93 Fed. 793.

The statute does not give the state power to prohibit the importation of liquor by any but state officials (Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632 [*affirming* 76 Fed. 559]) or to prohibit the importation of liquors into a port with no attempt to unload them (*Ex p.* Jervey, 66 Fed. 957).

When state power attaches.— The state has no power over liquors while in the possession of the importer for his personal use, but when he gives his importation to another then it is no longer an article of interstate commerce (Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632 [*affirming* 76 Fed. 559]), and liquors imported become subject to state supervision when offered for sale (Fuqua *v.* Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241); but not merely when the bungs of barrels are drawn for the sole purpose of testing the liquor (Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219).

The constitutionality of the Wilson Act was upheld in *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572 [*reversing* 43 Fed. 556, 10 L. R. A. 444]; *In re* Van Vliet, 43 Fed. 761, 10 L. R. A. 451.

either by prohibiting the sale entirely;[22] by prohibiting the keeping of liquor for the purpose of sale within[23] or outside the state;[24] by prohibiting its sale within certain parts of the state;[25] by forbidding sales to unfit persons, such as drunkards or minors;[26] by restricting the sale to persons licensed therefor,[27] to state

22. *Connecticut.*— State *v.* Wheeler, 25 Conn. 290; State *v.* Brennan's Liquors, 25 Conn. 278; State *v.* Cunningham, 25 Conn. 195.

Delaware.— State *v.* Allmond, 2 Houst. (Del.) 612.

Iowa.— State *v.* Creeden, 78 Iowa 556, 43 N. W. 673, 7 L. R. A. 295; Connolly *v.* Scarr, 72 Iowa 223, 33 N. W. 641.

Massachusetts.— Com. *v.* Clapp, 5 Gray (Mass.) 97.

New York.— People *v.* Quant, 12 How. Pr. (N. Y.) 83, 2 Park. Crim. (N. Y.) 410; People *v.* Huntington, 4 N. Y. Leg. Obs. 187.

South Carolina.— Charleston *v.* Ahrens, 4 Strobh. (S. C.) 241.

United States.— Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205; Foster *v.* Kansas, 112 U. S. 201, 5 S. Ct. 897, 28 L. ed. 629; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; License Cases, 5 How. (U. S.) 504, 12 L. ed. 256; Kansas *v.* Bradley, 26 Fed. 289.

See 10 Cent. Dig. tit. "Commerce," § 92.

Valid features of prohibition laws.— The law may prohibit the manufacture of liquors even for exportation out of the state (Tredway *v.* Riley, 32 Nebr. 495, 49 N. W. 268, 29 Am. St. Rep. 447; Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346 [*affirming* 72 Iowa 348, 34 N. W. 1]), the sale of imported liquor by any other person than the importer (Wynhamer *v.* People, 20 Barb. (N. Y.) 567), merely the sale of liquor to be drunk on the premises (People *v.* Huntington, 4 N. Y. Leg. Obs. 187), may confine such manufacture and sale to liquors for medicinal, culinary, or sacramental purposes (Kidd *v.* Pearson, 128 U. S. 1, 4 S. Ct. 6, 32 L. ed. 346 [*affirming* 72 Iowa 348, 34 N. W. 1]), may prohibit the manufacture of liquors in the state for the maker's own use (Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205), or may authorize such manufacture and use although prohibiting sales (Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100).

Sales in the original packages of liquors imported into the state need not be expressly exempted from the operation of a state prohibition law; the law will still be held constitutional as to purely interstate sales. Dorman *v.* State, 34 Ala. 216; Com. *v.* Gay, 153 Mass. 211, 26 N. E. 571, 852; Com. *v.* Gagne, 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 442; Com. *v.* Clapp, 5 Gray (Mass.) 97.

Prior to the fourteenth amendment to the United States constitution the ordinary state prohibition laws raised no federal question, but if a case should be presented where the law prevented the use of property in the hands of a citizen before the enactment of the law, a grave question would arise whether or not this were a deprivation of property within the fourteenth amendment. Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929.

The theory of the prohibition laws is well stated in Mugler *v.* Kansas, 123 U. S. 623, 662, 8 S. Ct. 273, 31 L. ed. 205, as follows: "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks. . . . If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors . . . to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."

23. State *v.* Wheeler, 25 Conn. 290; State *v.* Brennan's Liquors, 25 Conn. 278; State *v.* Cunningham, 25 Conn. 195.

24. State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767.

25. Dorman *v.* State, 34 Ala. 216 (a statute incorporating a university and forbidding the sale of liquors within five miles of it is constitutional); State *v.* Stevens, 8 Ohio S. & C. Pl. Dec. 6, 5 Ohio N. P. 354 (local option statute); Weil *v.* Calhoun, 25 Fed. 865 (local option statute).

26. A sale to a drunkard or minor, even though in the course of interstate commerce, may be prohibited by the states. Com. *v.* Zelt, 138 Pa. St. 615, 27 Wkly. Notes Cas. (Pa.) 131, 21 Atl. 7, 11 L. R. A. 602 [*distinguishing* Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128].

27. *Alabama.*— Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68.

Georgia.— Fincannon *v.* State, 93 Ga. 418, 21 S. E. 53.

New Hampshire.— State *v.* Moore, 14 N. H. 451; Pierce *v.* State, 13 N. H. 536.

New York.— Smith *v.* People, 1 Park. Crim. (N. Y.) 583.

United States.— License Cases, 5 How. (U. S.) 504, 12 L. ed. 256. *Contra, In re* Lebolt, 77 Fed. 587, holding that as intoxicating liquors have been decided to be proper subjects of commerce a city license law is not a police regulation but passed for revenue only and therefore invalid.

See 10 Cent. Dig. tit. "Commerce," § 105.

Valid provisions of license laws.— The license law may apply to sales in small quantities merely (Com. *v.* Kimball, 24 Pick. (Mass.) 359, 35 Am. Dec. 326; Ingersoll *v.* Skinner, 1 Den. (N. Y.) 540; State *v.* Peckham, 3 R. I. 289; License Cases, 5 How. (U. S.) 504, 12 L. ed. 256), to sales for medicinal purposes only (Kohn *v.* Melcher, 29 Fed. 433), or to manufacturers retailing liquor within the state (Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226); but not to the sale in an-

officials,[28] or to sales in a certain manner;[29] by prohibiting the soliciting or taking of orders in the state for the interstate sale of liquors to unlicensed dealers in the state;[30] by providing for the confiscation of liquors kept for unlawful sale;[31] or by denying relief in the courts to parties making such sale.[32]

(c) *What Is Not Within State Power.* The states may not in any way burden interstate traffic in intoxicating liquors, either by prohibiting the importation of liquors into the state;[33] by requiring a certificate that liquor imported into the state is consigned to a licensed dealer[34] and is chemically pure;[35] by restricting to state officials the importation of liquors;[36] by requiring the unloading of liquors at certain points only;[37] by restricting the transportation of liquors at night;[38] by prohibiting the importation of liquors into the state with intent to sell them illegally;[39] by forbidding, under penalty, any person to solicit or take orders in the state for liquor to be delivered in another state with reason to believe that the liquor is intended to be there illegally sold;[40] by prohibiting or restricting in any way delivery to the consignee;[41] or probably by regulating the sale on vehicles of commerce in transit through the state.[42]

(d) *Discriminations.* Such state regulations, although in other respects

other state of liquors delivered to the purchaser in the state (State *v.* Stilsing, 52 N. J. L. 517, 20 Atl. 65); or the granting of the license may be made dependent on the approval of adjacent property-owners (*Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747; McGinnis *v.* Medway, 176 Mass. 67, 57 N. E. 210 *semble*, construing Mass. Rev. Laws, c. 100, § 15).

28. Deal *v.* Singletary, 105 Ga. 466, 30 S. E. 765; Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345 [*overruling* McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410]; Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100, holding that the South Carolina dispensary law is not invalid in its provisions restricting sales within the state to state officials, since it does not in any way affect the importation of liquor into the state in the original package for the personal use of the importer.

29. A prohibition on the sale of liquor at wholesale "in connection with drugs" is valid, although applied to an exporter. Jacobs Pharmacy Co. *v.* Atlanta, 89 Fed. 244.

30. Westheimer *v.* Weisman, 8 Kan. App. 75, 54 Pac. 332 [*citing* Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. ed. 878], where the court proceeded on the theory that the purpose of the statute was to restrict the sale of liquors in the state and it was therefore valid, although it might incidentally affect interstate commerce.

31. State *v.* Intoxicating Liquors, 58 Vt. 594, 4 Atl. 229; State *v.* Intoxicating Liquors, 58 Vt. 140, 2 Atl. 586.

Search warrants.— A search warrant to discover liquor illegally held was legally issued, so that replevin brought by the owner of the liquor seized was improper, although the liquors were in the original package and not liable to seizure. Lemp *v.* Fullerton, 83 Iowa 192, 48 N. W. 1034, 13 L. R. A. 408.

32. Knowlton *v.* Dougherty, 87 Me. 518, 33 Atl. 18, 47 Am. St. Rep. 349; Meservey *v.* Gray, 55 Me. 540, holding that a statute is constitutional which prohibits recovery in the state courts for liquors lawfully sold out of the state to a vendee who intended to sell illegally in the state, although the vendor was ignorant of such intention.

33. Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632.

34. Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 8 S. Ct. 689, 1062, 31 L. ed. 700.

35. State *v.* McGee, 55 S. C. 247, 33 S. E. 353, 74 Am. St. Rep. 741; Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100; Donald *v.* Scott, 74 Fed. 859.

36. Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632.

37. *In re* Langford, 57 Fed. 570, holding invalid the provision of the South Carolina dispensary act requiring the unloading of liquors at a place only where there is a dispensary.

38. Jervey *v.* The Carolina, 66 Fed. 1013, holding void a state prohibition on the transportation of liquors at night except on regular passenger or freight steamers and railroad cars. *Contra*, State *v.* Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567.

39. State *v.* Intoxicating Liquors, 94 Me. 335, 47 Atl. 531.

40. Corbin *v.* McConnell, (N. H. 1902) 52 Atl. 447 (holding that the Wilson Act did not empower the states to act extraterritorially); Durkee *v.* Moses, 67 N. H. 115, 23 Atl. 793 [*overruling* Jones *v.* Surprise, 64 N. H. 243, 9 Atl. 384; Dunbar *v.* Locke, 62 N. H. 442]. *Contra*, Lang *v.* Lynch, 38 Fed. 489, 4 L. R. A. 831 [*distinguishing* Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 8 S. Ct. 689, 1062, 31 L. ed. 700].

41. State *v.* Stilsing, 52 N. J. L. 517, 20 Atl. 65 [*following* Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 8 S. Ct. 689, 1062, 31 L. ed. 700].

42. A steamboat in transit through the state cannot be forced by state law to pay a license-tax for selling liquor on board. State *v.* Frappart, 31 La. Ann. 340.

within the scope of the police power, will be invalid if they discriminate in any way between the property or citizens of the state and of those outside the state.[43]

(E) *The Wilson Act.*[44] Congress has provided that all intoxicating liquors transported into any state or remaining there for sale shall upon arrival be subject to the police laws of the state. This statute gives the states authority to prohibit the sale of intoxicating liquors in the original package[45] in the exercise of the police power only,[46] and applied to liquors imported into the state before its passage.[47] It was held that this federal statute made operative unconstitutional state statutes previously enacted,[48] but did not allow the states to forbid the importation of liquors in the original package,[49] and did not permit of discrimination against liquors imported from outside the state.[50] The state law can become operative only when the liquors have reached their destination in the state.[51]

43. Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100, and cases cited *infra*, this note.

Examples of discriminating provisions.— It is an invalid discrimination to prohibit sales of liquor excepting that produced within the state (McCreary *v.* State, 73 Ala. 480; Powell *v.* State, 69 Ala. 10; State *v.* Deschamp, 53 Ark. 490, 14 S. W. 653; McGuire *v.* State, 42 Ohio St. 530. See also *Ex p.* Kinnehrew, 35 Fed. 52, holding that a statute exempting domestic wines from a prohibition was valid, as it must be construed as exempting all wines); although a state may authorize the personal use of liquors made by a resident for that purpose, while the use of other liquors is restricted (Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100). It is also unconstitutional as discriminating to force a manufacturer outside the state to pay a license-fee for a warehouse, while exempting manufacturers within the state from such fee (Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258), to prohibit the having in possession of liquors purchased outside the state while permitting the possession of liquor purchased at a state dispensary (State *v.* Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567), to exempt from state law sales of intoxicating liquors made by the manufacturer at the factory (Reymann Brewing Co. *v.* Brister, 179 U. S. 445, 21 S. Ct. 201, 45 L. ed. 269 [*affirming* 92 Fed. 28], holding this not to be a discrimination against a corporation having a factory in another state, as the exemption applies to all factories in the state whether or not owned by state residents), or to prohibit citizens from importing liquors from other states while permitting such importation by state officials (Donald *v.* Scott, 67 Fed. 854); but the mere restriction to state officials of the importation of liquor for sale is not discriminating, as any citizen may import for himself (Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100). See also Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68 (where it was held that a provision that no liquor shall be sold in counties where dispensaries are located, excepting sales to dispensaries or authorized dealers, was valid. The court holds that the section does not discriminate against sales by persons residing outside the dispensary district, as it applies solely to sales effected in the district and has no relation to interstate commerce); Davis *v.* Dashiel, 61 N. C. 114 (where a difference in taxation was upheld between liquors purchased from non-residents and those purchased from the maker in the state, on the ground that the distinction might be made after the goods were incorporated in the mass of property in the state.

44. 26 U. S. Stat. at L. p. 313, c. 728; U. S. Comp. Stat. (1901), p. 3177. And see, generally, INTOXICATING LIQUORS.

45. 26 U. S. Stat. at L. p. 313, c. 728; U. S. Comp. Stat. (1901), p. 3177. And see Stevens *v.* State, 61 Ohio St. 597, 56 N. E. 478; Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100; Moore *v.* Bahr, 82 Fed. 19; Cantini *v.* Tillman, 54 Fed. 969.

46. Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100; Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258.

A license-tax was held to be invalid as not being in the exercise of the police power in Pabst Brewing Co. *v.* Terre Haute, 98 Fed. 330. But a contrary result was reached as to a license-fee in Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857.

47. Tinker *v.* State, 90 Ala. 638, 8 So. 814, holding that on the passage of the Wilson Bill imported liquors in the state became subject immediately to the provisions of existing state law.

48. State *v.* Fraser, 1 N. D. 425, 48 N. W. 343; *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572 [*reversing* 43 Fed. 556, 10 L. R. A. 444]; *In re* Spickler, 43 Fed. 653, 10 L. R. A. 446.

49. Jervey *v.* The Carolina, 66 Fed. 1013; *Ex p.* Jervey, 66 Fed. 957; *Ex. p.* Edgerton, 59 Fed. 115.

50. Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258.

51. State *v.* Intoxicating Liquors, 94 Me. 335, 47 Atl. 531 (liquors in transit are not subject to state law); Bailey Liquor Co. *v.* Austin, 82 Fed. 785 (liquor offered for sale in the original packages is subject to state regulations). *Contra*, State *v.* Rhodes, 90 Iowa 496, 58 N. W. 887, 24 L. R. A. 245, holding that the Wilson Act makes state laws

d. Tobacco. Tobacco is a legitimate article of commerce,[52] but its sale in the states may be limited in the proper exercise of the police power only where interstate commerce in tobacco in the original package is unaffected.[53]

B. Methods of Commerce — 1. Sales by Agents or Peddlers[54] — a. State Control Over. The states may control sales by peddlers who buy goods to sell on their own account or who as agents, even for non-residents, sell goods which are in fact within the state at the time of sale,[55] but sales, or the soliciting of sales

operative when the liquor crosses the state border.

52. McGregor *v.* Cone, 104 Iowa 465, 73 N. W. 1041, 65 Am. St. Rep. 522, 39 L. R. A. 484; Austin *v.* Tennessee, 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224 [*affirming* 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478]. *Contra*, Blaufield *v.* State, 103 Tenn. 593, 53 S. W. 1090, cigarettes.

53. McGregor *v.* Cone, 104 Iowa 465, 73 N. W. 1041, 65 Am. St. Rep. 522, 39 L. R. A. 484 (concerning cigarettes); Austin *v.* Tennessee, 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224 [*affirming* 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478, relating to cigarettes, and holding, however, that certain so-called original packages were not such]; Sawrie *v.* Tennessee, 82 Fed. 615.

54. See, generally, Hawkers and Peddlers. Taxation of sales of goods see *infra*, X, E.

55. A license or occupation tax may be imposed on peddlers.

District of Columbia.— *In re* Wilson, 19 D. C. 341, 12 L. R. A. 624, defining "peddler" as a person who sells sample wares from house to house and delivers them at the time of sale.

Florida.— Hall *v.* State, 39 Fla. 637, 23 So. 119.

Georgia.— Chrystal *v.* Macon, 108 Ga. 27, 33 S. E. 810; Duncan *v.* State, 105 Ga. 457, 30 S. E. 755; L. B. Price Co. *v.* Atlanta, 105 Ga. 358, 31 S. E. 619.

Illinois.— Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522, license-tax on itinerant merchants held good as not discriminating against goods manufactured out of the state and not applying to sales in the original package.

Indiana.— South Bend *v.* Martin, 142 Ind. 31, 41 N. E. 315; Sears *v.* Warren County, 36 Ind. 267, 10 Am. Rep. 62.

Kentucky.— Rash *v.* Farley, 91 Ky. 344, 12 Ky. L. Rep. 913, 15 S. W. 862, 34 Am. St. Rep. 233.

Louisiana.— Cole *v.* Randolph, 31 La. Ann. 535; The Stella Block *v.* Richland Parish, 26 La. Ann. 642.

Massachusetts.— Com. *v.* Ober, 12 Cush. (Mass.) 493, describing a peddler as an itinerant merchant with no fixed place of business.

Missouri.— State *v.* Snoddy, 128 Mo. 523, 31 S. W. 36; State *v.* Smithson, 106 Mo. 149, 17 S. W. 221.

Nevada.— *Ex p.* Robinson, 12 Nev. 263, 28 Am. Rep. 794.

North Carolina.— State *v.* Caldwell, 127 N. C. 521, 37 S. E. 138; Wrought Iron Range Co. *v.* Carver, 118 N. C. 328, 24 S. E. 352; State *v.* Wessell, 109 N. C. 735, 14 S. E. 391; Wynne *v.* Wright, 18 N. C. 19; Cowles *v.* Brittain, 9 N. C. 204.

Pennsylvania.— Com. *v.* Dunham, 191 Pa. St. 73, 44 Wkly. Notes Cas. (Pa.) 101, 43 Atl. 84; Com. *v.* Harmel, 166 Pa. St. 89, 36 Wkly. Notes Cas. (Pa.) 1, 30 Atl. 1036, 27 L. R. A. 388; Com. *v.* Gardner, 133 Pa. St. 284, 25 Wkly. Notes Cas. (Pa.) 462, 19 Atl. 550, 19 Am. St. Rep. 645, 7 L. R. A. 666; New Castle *v.* Cutler, 15 Pa. Super. Ct. 612; Com. *v.* Walker, 3 Pa. Dist. 534, 14 Pa. Co. Ct. 586.

Tennessee.— Howe Mach. Co. *v.* Cage, 9 Baxt. (Tenn.) 518 [*affirmed* in 100 U. S. 676, 25 L. ed. 754].

Texas.— *In re* Butin, 28 Tex. App. 304, 13 S. W. 10. And see Saulsbury *v.* State, (Tex. Crim. 1901) 63 S. W. 568.

West Virginia.— State *v.* Richards, 32 W. Va. 348, 9 S. E. 245, 3 L. R. A. 705.

United States.— Emert *v.* Missouri, 156 U. S. 296, 15 S. Ct. 367, 39 L. ed. 430 [*affirming* 103 Mo. 241, 15 S. W. 81, 23 Am. St. Rep. 874, 11 L. R. A. 219]; Howe Mach. Co. *v.* Gage, 100 U. S. 676, 25 L. ed. 754; Hynes *v.* Briggs, 41 Fed. 468. *Contra*, *In re* Spain, 47 Fed. 208, 14 L. R. A. 97, holding that a license-tax on peddlers is invalid as applied to residents of other states [*citing* Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694] and holding that the fact that the goods were in the state at the time of sale did not distinguish the case from the Robbins case.

See 10 Cent. Dig. tit. "Commerce," § 107.

The theory of the court appears in the course of a unanimous opinion in Emert *v.* Missouri, 156 U. S. 296, 15 S. Ct. 367, 39 L. ed. 430 [*affirming* 103 Mo. 241, 15 S. W. 81, 23 Am. St. Rep. 874, 11 L. R. A. 219], upholding a state occupation tax, where it is said: "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place. . . . There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. . . . The only business or commerce in which he was engaged was internal and domestic; and, . . the only goods in which he was dealing had become part of the mass of property within the state."

Where part of the transaction is purely an act of interstate commerce still the state power over the separable internal portion of the matter is unaffected. So where customers order portraits of agents in the state to be made outside the state and have the privilege of buying in addition a frame which is in the state, the agent selling such frame may be convicted for neglect to procure a state license

by peddlers, commercial travelers, or other agents for non-residents of goods in fact outside the state at the time of sale, are acts of interstate commerce and beyond state influence.[56]

for the sale of the frame (Chrystal *v.* Macon, 108 Ga. 27, 33 S. E. 810), but not for the mere delivery of the portrait (Laurens *v.* Elmore, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249; State *v.* Coop, 52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501).

Goods stored in state by non-resident.— Where a corporation sends goods in large quantities to a central storehouse in another state, where its agents carry the goods about the country in small quantities selling and delivering them to customers, these agents are not engaged in interstate commerce. American Harrow Co. *v.* Shaffer, 68 Fed. 750. *Contra, In re* Tyerman, 48 Fed. 167; *In re* Nichols, 48 Fed. 164.

Goods consigned to agent.— An agent in the state received orders for goods, which he transmitted to his principals in another state. They forwarded the goods consigned to the firm in one car, some of the packages being marked with the purchasers' names, and the court held that the goods were so incorporated with the property of the state of the purchaser that the agent's acts in selling to the purchaser were not connected with interstate commerce. Hence a state license-tax on the agent was held valid. New Castle *v.* Cutler, 15 Pa. Super. Ct. 612. To the same effect see Racine Iron Co. *v.* McCommons, 111 Ga. 536, 36 S. E. 866, 51 L. R. A. 134. *Contra*, Huntington *v.* Mahan, 142 Ind. 695, 42 N. E. 463, 51 Am. St. Rep. 200.

An agent sharing in the profits and fulfilling contracts often from goods in his possession, although he received his goods from a concern out of the state which paid him a salary, is not engaged in interstate business, but is either an independent dealer or a resident partner. Camp *v.* State, (Tex. Crim. 1901) 61 S. W. 401.

A peddler on whom a license may be imposed may be one who receives a salary (*In re* Wilson, 19 D. C. 341, 12 L. R. A. 624), and may be a publishing house shipping books from without the state to its agents within who deliver them to buyers previously obtained by other employees (Collier *v.* Burgin, 130 N. C. 632, 41 S. E. 874).

A state license-tax on an itinerant who puts up lightning rods is valid. State *v.* Gorham, 115 N. C. 721, 20 S. E. 179, 44 Am. St. Rep. 494, 25 L. R. A. 810.

Incorporation in state property was held to have taken place where goods were sold by the manufacturer, a non-resident, to a resident wholesale dealer and then repurchased from him by the manufacturer and sent directly to an agent of the manufacturer who opened the original packages and peddled the contents, the sale to the wholesale dealer being an advertising scheme. *In re* Wilson, 19 D. C. 341, 12 L. R. A. 624. See also *supra*, VIII.

56. A state license or occupation tax on such agents is invalid.— *Alabama.*— *Ex p.* Murray, 93 Ala. 78, 9 So. 868; State *v.* Agee, 83 Ala. 110, 3 So. 856.

District of Columbia.— *Re* Hennick, 5 Mackey (D. C.) 489.

Georgia.—Wrought Iron Range Co. *v.* Johnson, 84 Ga. 754, 11 S. E. 233, 8 L. R. A. 273.

Illinois.— Bloomington *v.* Bourland, 137 Ill. 534, 27 N. E. 692, 31 Am. St. Rep. 382.

Indiana.—Martin *v.* Rosedale, 130 Ind. 109, 29 N. E. 410; McLaughlin *v.* South Bend, 126 Ind. 471, 26 N. E. 185, 10 L. R. A. 357.

Kansas.— Ft. Scott *v.* Pelton, 39 Kan. 764, 18 Pac. 954.

Louisiana.— McClellan *v.* Pettigrew, 44 La. Ann. 356, 10 So. 853; Simmons Hardware Co. *v.* McGuire, 39 La. Ann. 848, 2 So. 592.

Massachusetts.—Carstairs *v.* O'Donnell, 154 Mass. 357, 28 N. E. 271, intoxicating liquors.

Michigan.— People *v.* Bunker, 128 Mich. 160, 87 N. W. 90.

Mississippi.— Overton *v.* Vicksburg, 70 Miss. 558, 13 So. 226; Richardson *v.* State, (Miss. 1892) 11 So. 934.

Nevada.— *Ex p.* Rosenblatt, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901 [*overruling Ex p.* Robinson, 12 Nev. 263, 28 Am. Rep. 794].

North Carolina.—State *v.* Bracco, 103 N. C. 349, 9 S. E. 404.

North Dakota.— State *v.* O'Connor, 5 N. D. 629, 67 N. W. 824.

Ohio.— Haldy *v.* Tomoor-Haldy Co., 4 Ohio S. & C. Pl. Dec. 118, 3 Ohio N. P. 43.

Oklahoma.— Baxter *v.* Thomas, 4 Okla. 605, 46 Pac. 479.

South Carolina.— Laurens *v.* Elmore, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249 [*following* State *v.* Coop, 52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501].

South Dakota.— State *v.* Rankin, 11 S. D. 144, 76 N. W. 299.

Tennessee.— State *v.* Scott, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461; Hurford *v.* State, 91 Tenn. 669, 20 S. W. 201.

Texas.— Kirkpatrick *v.* State, (Tex. Crim. 1901), 60 S. W. 762; Turner *v.* State, 41 Tex. Crim. 545, 55 S. W. 834; Talbutt *v.* State, 39 Tex. Crim. 64, 44 S. W. 1091, 73 Am. St. Rep. 903; *Ex p.* Holman, 36 Tex. Crim. 255, 36 S. W. 441.

Virginia.—Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967, 81 Am. St. Rep. 705, 47 L. R. A. 583.

West Virginia.— State *v.* Lichtenstein, 44 W. Va. 99, 28 S. E. 753.

Wyoming.— State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, 52 L. R. A. 198.

United States.—Brennan *v.* Titusville, 153 U. S. 289, 14 S. Ct. 829, 38 L. ed. 719 [*reversing* 143 Pa. St. 642, 22 Atl. 893, 24 Am. St. Rep. 580, 14 L. R. A. 100]; Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 S. Ct. 256, 32 L. ed. 637 (applying to the District of Columbia); Asher *v.* Texas, 128 U. S. 129, 9 S. Ct. 1, 32 L. ed. 368 [*reversing* 23 Tex. App.

b. Discriminations. Any state legislation concerning sales by agents is invalid which in any way discriminates between the citizens[57] or the products[58] of the several states or foreign countries.

662, 5 S. W. 91, 59 Am. Rep. 783]; Leloup *v.* Mobile, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694 [*reversing* 13 Lea (Tenn.) 303]; *In re* Bergen, 115 Fed. 339 (holding that the Wilson Act was not intended to give the states authority over those soliciting under the circumstances set forth in the text); *Ex p.* Green, 114 Fed. 959; *In re* Tinsman, 95 Fed. 648; *Ex p.* Loeb, 72 Fed. 657; *Ex p.* Hough, 69 Fed. 330; *In re* Mitchell, 62 Fed. 576; Louisiana *v.* Lagarde, 60 Fed. 186; *In re* Tyerman, 48 Fed. 167; *In re* Nichols, 48 Fed. 164; *In re* Houston, 47 Fed. 539, 14 L. R. A. 719; *In re* White, 43 Fed. 913, 11 L. R. A. 284; *In re* Kimmel, 41 Fed. 775; *Ex p.* Stockton, 33 Fed. 95. *Contra, Ex p.* Hanson, 28 Fed. 127; *In re* Rudolph, 6 Sawy. (U. S.) 295, 2 Fed. 65, where a license requirement of every traveling merchant was held constitutional on the ground that there was no discrimination shown.

Facts showing interstate sale.— Importation of goods from outside the state as ordered by purchasers is an act of interstate commerce, although the goods shipped are placed for a time in the hands of a bailee (French *v.* State, (Tex. Crim. 1900) 58 S. W. 1015, 52 L. R. A. 160), and although goods as ordered by customers are shipped to a general agent in the state who repacks them and sends them to the subordinate agents who deliver them to purchasers (Huntington *v.* Mahan, 142 Ind. 695, 42 N. E. 463, 51 Am. St. Rep. 200); and where it is an agent's custom to merely receive orders for goods, the fact that in one instance he did sell directly to a customer one of his samples will not make him a peddler subject to state law (*In re* Houston, 47 Fed. 539, 14 L. R. A. 719).

The inclusion in the sale of property in the state, the purchase of which is optional with the purchaser, does not render the transaction amenable to the state license-tax as regards the sale of the property outside the state. Laurens *v.* Elmore, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249; State *v.* Coop, 52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501.

The theory of the court is well laid down in the leading case of Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694, as follows: "In numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application. . . . The mere calling the business of a drummer a privilege cannot make it so. . . . Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce. . . . The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce."

A prohibition on foreign corporations preventing them from doing business in the state will be construed not to include drummers taking orders for goods to be sent into the state by such corporations. Havens, etc., Co. *v.* Diamond, 93 Ill. App. 557.

57. *Ex p.* Thornton, 4 Hughes (U. S.) 220, 12 Fed. 538.

Instances of discrimination.— A state may not require a license-fee to be paid only by non-resident peddlers and traveling merchants (Sears *v.* Warren County, 36 Ind. 267, 10 Am. Rep. 62; Radebaugh *v.* Plain City, 11 Ohio Dec. (Reprint) 613, 28 Cinc. L. Bul. 107; Van Buren *v.* Downing, 41 Wis. 122 [*following* Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347, and *overruling* Morrill *v.* State, 38 Wis. 428, 20 Am. Rep. 12]. *Contra,* Mork *v.* Com., 6 Bush (Ky.) 397; Com. *v.* Smith, 6 Bush (Ky.) 303; Speer *v.* Com., 23 Gratt. (Va.) 935, 14 Am. Rep. 164, where a tax on those who sell by sample is imposed, excepting resident merchants, and it is held that "resident" applies to place of business and so is not a violation of the privileges and immunities clause) or by non-residents not having a regular place of business in the state (Buffalo *v.* Reavey, 37 N. Y. App. Div. 228, 55 N. Y. Suppl. 792). Neither may it deny to non-residents, while granting to residents, a peddler's license (Ward *v.* State, 9 Am. L. Reg. N. S. (Md.) 424; *Ex p.* Bliss, 63 N. H. 135; Sayre *v.* Phillips, 148 Pa. St. 482, 24 Atl. 76, 33 Am. St. Rep. 842, 16 L. R. A. 49, a practical prohibition by a high license-fee), require non-residents to pay more for such license than residents (Rothermel *v.* Zeigler, 7 Pa. Co. Ct. 505), prohibit salesmen for non-residents, excepting those who sell exclusively to regular merchants of the state, from doing business in the state (State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, 52 L. R. A. 198; Clements *v.* Casper, 4 Wyo. 494, 35 Pac. 472), or except from payment of the license-fee resident manufacturers who have paid their taxes (Com. *v.* Myer, 92 Va. 809, 23 S. E. 915, 31 L. R. A. 379), or persons who have paid an annual state tax on the goods sold (State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, 52 L. R. A. 198); and a city may not except peddlers resident in the county (Marshalltown *v.* Blum, 58 Iowa 184, 12 N. W. 266, 43 Am. Rep. 116).

It is not a discrimination to allow a rebate from the drummers' license-tax to merchants paying a purchase-tax on their state business, as no discrimination is made between residents of the state and non-residents. State *v.* Long, 95 N. C. 582, 59 Am. Rep. 263.

Statute construed valid if possible.—An apparently discriminating statute will be construed valid if possible. Rash *v.* Holloway, 6 Ky. L. Rep. 349.

58. State *v.* McGinnis, 37 Ark. 362; *In re* Watson, 15 Fed. 511.

2. BROKERS AND FACTORS.[59] The brokerage business is probably an enterprise exclusively of the state of the broker, and therefore a state may probably control factors and brokers and their business even when negotiating transactions between residents of different states.[60]

3. CORPORATIONS — a. Federal Authority Over. Congress may in any way control corporations in their interstate business, but may not interfere with their business within the borders of one state.[61]

b. State Authority Over — (1) *DOMESTIC CORPORATIONS.* A state may in any way control or even extinguish a corporation incorporated by it, even though such corporation is engaged in interstate commerce.[62] A state may make corporations liable for taxes on bonds issued,[63] and may discriminate between her own domestic corporations and those of other states in regard to doing business within the state.[64]

Examples of discrimination.— A state may not require a peddler's license to sell goods manufactured outside the state while requiring no license for domestic products.

Alabama.— Vines *v.* State, 67 Ala. 73 [*overruling* Seymour *v.* State, 51 Ala. 52].

Dakota.— Rodgers *v.* McCoy, 6 Dak. 238, 44 N. W. 990.

Maine.— State *v.* Furbush, 72 Me. 493.

Missouri.— State *v.* Browning, 62 Mo. 591.

Vermont.— State *v.* Pratt, 59 Vt. 590, 9 Atl. 556.

Virginia.— *Ex p.* Rollins, 80 Va. 314, as to book printing.

United States.—Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565 (excepting from license requirement "resident manufacturers or their agents, selling articles manufactured in this State"); Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347. *Contra,* Ward *v.* State, 9 Am. L. Reg. (N. S.) 424.

See 10 Cent. Dig. tit. "Commerce," § 108.

So a state may not demand a license from peddlers unless the goods are manufactured in a certain county (Marshalltown *v.* Blum, 58 Iowa 184, 12 N. W. 266, 43 Am. Rep. 116) or impose a license-tax exempting persons soliciting orders for the manufacture of goods manufactured outside the state (Port Clinton *v.* Shafer, 5 Pa. Dist. 583) on the ground that this is a discrimination against goods which are not manufactured.

59. See, generally, FACTORS AND BROKERS.

60. Hopkins *v.* U. S., 171 U. S. 578, 19 S. Ct. 40, 43 L. ed. 290 [*reversing* order in 82 Fed. 529, and holding that a live-stock commission merchant who negotiates transactions of interstate commerce for others is not engaged in interstate commerce]; Ficklen *v.* Shelby County Taxing Dist., 145 U. S. 1, 12 S. Ct. 810, 36 L. ed. 601.

A state license-tax on brokers and factors is valid although they negotiate interstate sales. Walton *v.* Augusta, 104 Ga. 757, 30 S. E. 964; State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L. R. A. 442; Stockard *v.* Morgan, 105 Tenn. 412, 58 S. W. 1061; Nathan *v.* Louisiana, 8 How. (U. S.) 73, 12 L. ed. 992 [*affirming* 12 Rob. (La.) 332]. *Contra,* assimilating brokers to other agents for sale see Stratford *v.* Montgomery, 110 Ala. 619, 20 So. 127; People *v.* Moring, 3 Abb. Dec. (N. Y.) 539, 3 Keyes (N. Y.) 374, 4 Transcr. App. (N. Y.) 522; Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967, 81 Am. St. Rep. 705, 47 L. R. A. 583; *In re* Rozelle, 57 Fed. 155.

N. C. Laws 1901, c. 9, § 84, imposing a tax of twenty-five dollars on every person engaged in procuring laborers to accept employment in another state, does not violate the constitution of the United States, or interfere with interstate commerce. State *v.* Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758. And see *supra,* III, F.

61. See *supra,* III; IV; VI; and, generally, CORPORATIONS.

Taxation of corporations see *infra,* X, D.

The acquisition of property in the state by a state corporation may not be controlled by congress. *In re* Greene, 52 Fed. 104.

62. Lumberville Delaware Bridge Co. *v.* State Bd. of Assessors, 55 N. J. L. 529, 26 Atl. 711, 25 L. R. A. 134.

Charter provisions regulating corporations. — The acceptance of a charter making certain provisions for taxation is a contract freely entered into and so cannot be unconstitutional (Pennsylvania R. Co. *v.* Com., 3 Grant (Pa.) 128); and so a charter provision for the payment of a periodic bonus for a right of way is valid for the same reason (Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 22 L. ed. 678). However, a charter provision that in the transportation of freight a corporation shall be subject to the laws applicable to common carriers does not render the corporation, when engaged in interstate commerce, subject to state control. Houston Direct Nav. Co. *v.* Insurance Co. of North America, 89 Tex. 1, 32 S. W. 889, 59 Am. St. Rep. 17, 30 L. R. A. 713 [*reversing* (Tex. Civ. App. 1895) 31 S. W. 560].

63. Com. *v.* Delaware, etc., Canal Co., 150 Pa. St. 245, 24 Atl. 599, 1 L. R. A. 232; Com. *v.* New York, etc., R. Co., 150 Pa. St. 234, 24 Atl. 609, holding that the Pennsylvania act of June 30, 1885, requiring officers of foreign or domestic corporations to deduct a state tax in paying interest on bonds owned by residents of the state, is constitutional even as to corporations engaged in interstate business.

64. Ducat *v.* Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

(11) *Foreign Corporations.* The states may in any way control the intrastate, but not the interstate, business of a foreign corporation, even though it be a federal corporation,[65] either by entirely prohibiting it from doing state business,[66] by requiring a permit for such business,[67] for which a license-fee may be charged,[68] by requiring the filing with state officials of papers giving information as to the company,[69] or by requiring it to have a known place of business and an authorized agent in the state;[70] but the states may in no way abridge the right of any foreign corporation to perform within the state acts of interstate commerce.[71]

65. Western Union Tel. Co. *v.* Mississippi R. Commission, 74 Miss. 80, 21 So. 15.

66. Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238; Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141 (holding that a state may expressly exclude a foreign corporation or impose proper restrictions upon it as a condition of doing business in the state); Com. *v.* Standard Oil Co., 101 Pa. St. 119; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650.

67. Goodrel *v.* Kreichbaum, 70 Iowa 362, 30 N. W. 872; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650.

Inapplicable to interstate commerce.— A statutory requirement of such permit is held inapplicable to interstate transactions. Lewis *v.* W. R. Irby Cigar, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 476; C. B. Cones, etc., Mfg. Co. *v.* Rosenbaum, (Tex. Civ. App. 1898) 45 S. W. 333; Shaw Piano Co. *v.* Ford, (Tex. Civ. App. 1897) 41 S. W. 198.

68. People *v.* Thurber, 13 Ill. 554; Lumberville Delaware Bridge Co. *v.* State Bd. of Assessors, 55 N. J. L. 529, 26 Atl. 711, 25 L. R. A. 134; Norfolk, etc., R. Co. *v.* Com., 114 Pa. St. 256, 6 Atl. 45; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239.

Discriminations.— This license-fee may be omitted as to certain classes of corporations. State *v.* Under-Ground Cable Co., (N. J. 1889) 18 Atl. 581.

69. **Valid as to state business.**— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369; Associated Press *v.* Com., 22 Ky. L. Rep. 1229, 60 S. W. 295, 523, 867 (valid as applied to a press-despatch company); State *v.* Morgan, 2 S. D. 32, 48 N. W. 314; Western Paper Bag Co. *v.* Johnson, (Tex. Civ. App. 1896) 38 S. W. 364; Reed *v.* Walker, 2 Tex. Civ. App. 92, 21 S. W. 687 [*distinguishing* Bateman *v.* Western Star Milling Co., 1 Tex. Civ. App. 90, 20 S. W. 931].

Invalid as to interstate commerce.— *Arkansas.*— Gunn *v.* White Sewing-Mach. Co., 57 Ark. 24, 20 S. W. 591, 38 Am. St. Rep. 223, 18 L. R. A. 206 [*construing* statute that all contracts of the corporation were void unless the papers were filed].

Colorado.—Kindel *v.* Beck, etc., Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311 (where a certificate was required before suit brought for sale of goods); Fairbanks *v.* Macleod, 8 Colo. App. 190, 45 Pac. 282.

Montana.— McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367.

New York.— Murphy Varnish Co. *v.* Connell, 10 Misc. (N. Y.) 553, 32 N. Y. Suppl. 492, 65 N. Y. St. 817.

Tennessee.— Milan Milling, etc., Co. *v.* Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; Davis, etc., Bldg., etc., Co. *v.* Caigle, (Tenn. Ch. 1899) 53 S. W. 240.

Texas.— Miller *v.* Goodman, 91 Tex. 41, 40 S. W. 718; Gale Mfg. Co. *v.* Finkelstein, 22 Tex. Civ. App. 241, 54 S. W. 619; Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425; American Starch Co. *v.* Bateman, (Tex. Civ. App. 1893) 22 S. W. 771; Lyons-Thomas Hardware Co. *v.* Reading Hardware Co., (Tex. Civ. App. 1893) 21 S. W. 300; Bateman *v.* Western Star Milling Co., 1 Tex. Civ. App. 90, 20 S. W. 931.

United States.— Wagner *v.* Meakin, 92 Fed. 76, 63 U. S. App. 477, 33 C. C. A. 577.

See 10 Cent. Dig. tit. "Commerce," § 100.

There is no presumption that sales of goods within the state are transactions of interstate commerce so as to render inapplicable to a foreign corporation state requirements laid down as a condition precedent to the right to do business. Kent, etc., Co. *v.* Tuttle, 20 Mont. 203, 50 Pac. 559.

Fees for filing of papers incident to the merging of corporatic are valid, as they are conditions imposed on a grant of privileges and not a tax on interstate commerce. Ashley *v.* Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. ed. 773 [*affirming* 49 Ohio St. 504, 31 N. E. 721]. So of ordinary corporation papers filed. Chicago, etc., R. Co. *v.* State, 153 Ind. 134, 51 N. E. 924.

70. Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136; American Union Tel. Co. *v.* Western Union Telegraph Co., 67 Ala. 26, 42 Am. Rep. 90; McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367; New Orleans, etc., Packet Co. *v.* James, 32 Fed. 21.

Requiring residence.— A state statute requiring a foreign railroad corporation to become a resident corporation, as a condition of its right to continue to operate that part of its road within the state, is not an interference with interstate commerce, within the inhibition of the federal constitution on that subject. Com. *v.* Mobile, etc., R. Co., 23 Ky. L. Rep. 784, 64 S. W. 451, 54 L. R. A. 916.

71. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708.

The sale and transshipment into the state by a foreign corporation of goods produced outside may not be impeded by the states.

Alabama.— Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141.

The power of the state over foreign corporations not engaged in interstate commerce is as great as that over domestic corporations.[72]

C. Commerce by Land — 1. Express Companies — State Power Over. The interstate business of an express company may not be obstructed by a state,[73] which may not require of an express company engaged in part in interstate commerce a license-fee[74] or the filing of a statement of assets showing a certain capital,[75] but as to its local business such company must comply with state law.[76]

2. Railroads — a. In General — (I) *Powers of Congress.* Congress may authorize the construction of railroads engaged in interstate or foreign commerce[77] or may control their operation.[78]

(II) *Powers of the States* — **(A)** *In General.* In the absence of federal action the states may pass regulations aimed at the safety or convenience of their citizens, even though such laws may incidentally materially affect interstate commerce.[79] Thus the states may lawfully act on both state and interstate commerce

Michigan.— Coit *v.* Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819.

New York.— Hargraves Mills *v.* Harden, 25 Misc. (N. Y.) 665, 56 N. Y. Suppl. 937.

Ohio.— Haldy *v.* Tomoor-Haldy Co., 1 Ohio S. & C. Pl. Dec. 118, 3 Ohio N. P. 43, holding that a state requirement that no foreign corporation shall do business in the state until it files certain papers, and that until that time the state courts are closed to it, is void when applied to interstate transactions.

Texas.—Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714.

United States.— Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137; Aultman *v.* Holder, 68 Fed. 467; Williams *v.* Hintermeister, 26 Fed. 889; Indiana *v.* Pullman Palace-Car Co., 11 Biss. (U. S.) 561, 16 Fed. 193.

See 10 Cent. Dig. tit. "Commerce," §§ 113, 126.

License-taxes.— "It is well settled by numerous decisions of this court that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits." Per Lamar, J., in Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 118, 10 S. Ct. 958, 34 L. ed. 394.

A franchise tax, levied not as a condition precedent to the right of the corporation to perform interstate business, but imposed as other taxes are laid, is valid. Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 15 S. Ct. 268, 39 L. ed. 311.

72. New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 401, 20 S. Ct. 962, 44 L. ed. 116 [*affirming* 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305]; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552.

73. Dinsmore *v.* New York Bd. of Police, 12 Abb. N. Cas. (N. Y.) 436 (holding the New York Sunday laws void as to through traffic but valid as to merchandise from or to New York on the ground that this business is internal); Adams Express Co. *v.* Board of Police, 65 How. Pr. (N. Y.) 72.

Taxation of express companies see *infra*, X, D, 3.

74. Crutcher *v.* Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. ed. 649 [*reversing* 89 Ky. 6, 11 Ky. L. Rep. 212, 12 S. W. 141]; Osborne *v.* Mobile, 16 Wall. (U. S.) 479, 21 L. ed. 470 [*reversing* 44 Ala. 493]; Webster *v.* Bell, 68 Fed. 183, 15 C. C. A. 360; U. S. Express Co. *v.* Allen, 39 Fed. 712; Wells *v.* Northern Pac. R. Co., 10 Sawy. (U. S.) 441, 23 Fed. 469. *Contra*, Southern Express Co. *v.* Mobile, 49 Ala. 404; Woodward *v.* Com., 9 Ky. L. Rep. 670, 7 S. W. 613; Memphis, etc., R. Co. *v.* Nolan, 14 Fed. 532, 4 Ky. L. Rep. 840, 27 Alb. L. J. 217, on the ground that the privilege tax there imposed was levied with no intention to obstruct or prohibit interstate commerce.

A license-tax for transporting packages between points within the state, the amount of such tax being regulated by the length of the company's lines, is held void as in effect a tax on interstate business. U. S. Express Co. *v.* Allen, 39 Fed. 712. But see *infra*, X, D, 7.

75. Crutcher *v.* Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. ed. 649 [*reversing* 89 Ky. 6, 11 Ky. L. Rep. 212, 12 S. W. 141].

76. Wells *v.* Northern Pac. R. Co., 10 Sawy. (U. S.) 441, 23 Fed. 469.

77. California *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150.

Taxation of railroads see *infra*, X, D, 7.

78. See *infra*, XI.

Transportation of animals.— U. S. Rev. Stat. (1878), §§ 4386, 4390, prohibiting the confining of live stock *en route* for more than twenty-eight hours without unloading for rest and feed, is constitutional. U. S. *v.* Boston, etc., R. Co., 15 Fed. 209; U. S. *v.* East Tennessee, etc., R. Co., 13 Fed. 642.

79. Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. ed. 99; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97; Gulf, etc., R. Co. *v.* Miami Steamship Co., 86 Fed. 407, 52 U. S. App. 732, 30 C. C. A. 142. And see *supra*, IV, A, 4.

The question of federal action is a grave one. It has been held that congress, through the interstate commerce commission, took exclusive charge of the regulation of interstate commerce, thus in effect prohibiting the states

by regulating the sale of railroad tickets,[80] when such regulation does not operate so as to affect or to impair the use of the tickets[81] or the rate of fare

from imposing additional regulations. Missouri, etc., R. Co. *v.* Fookes, (Tex. Civ. App. 1897) 40 S. W. 858.

Instances of valid state regulations.— In the exercise of the state police power the states may pass laws requiring the quick shipment of freight (Bagg *v.* Wilmington, etc., R. Co., 109 N. C. 279, 14 S. E. 79, 26 Am. St. Rep. 566, 14 L. R. A. 596 [*distinguishing* McGwigan *v.* Wilmington, etc., R. Co., 95 N. C. 428, 59 Am. Rep. 247] where a statute prohibiting the detention of freight more than five days after delivery for shipment was upheld as an aid and not an obstruction of interstate commerce), prohibiting stoves in trains (New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. ed. 853), requiring guards and guard-posts on bridges and trestles and their approaches (New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. ed. 853), requiring the lighting of the road by electricity within village limits (St. Bernard *v.* Cleveland, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 371), posting notices as to whether trains are on time (State *v.* Pennsylvania Co., 133 Ind. 700, 32 N. E. 822; State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502), requiring the drawing of cars of other companies for a reasonable compensation, at reasonable times (Rae *v.* Grand Trunk R. Co., 14 Fed. 401), providing for the recording of railroad leases (Com. *v.* Chesapeake, etc., R. Co., 101 Ky. 159, 19 Ky. L. Rep. 329, 40 S. W. 250), or requiring free carrying of the shipper (Atchison, etc., R. Co. *v.* Campbell, 8 Kan. App. 661, 56 Pac. 509, holding that the states may require railroads to carry the shipper of a car-load of goods to and from the point designated in the bill of lading where they do not attempt to fix the shipping rates per car).

Place of transfer.— A state requirement (Iowa Code, §§ 1310–1316) that companies connecting with a certain railway company shall transfer freight and passengers at a certain place is invalid as to interstate commerce, as in conflict with acts of congress of July 1, 1862, and June 15, 1866. Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773.

Joint use of tracks required.— Iowa *v.* Chicago, etc., R. Co., 33 Fed. 391, where the defendant had been given permission to lay its tracks in city streets on condition that they would be open for the use of all, it seems that the state might fix the rates on these tracks and force the defendant to allow other railroads to use them. This seems to represent the tendency of the opinion, and therefore the federal court found that no federal question was with certainty involved and declined to take jurisdiction of the case.

Transportation of animals.— A state prohibition against overloading cars in transporting animals is valid as to interstate commerce. Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80; Gulf, etc., R. Co. *v.* Gray, (Tex. Civ. App. 1894) 24 S. W. 837. And so as to feeding and watering stock *en route*. Gulf, etc., R. Co. *v.* Gray, (Tex. Civ. App. 1894) 24 S. W. 837. But a state requirement of double-deck cars in the transportation of sheep is invalid as to interstate shipments, being connected with the freight rate rather than with the health of the animals. Stanley *v.* Wabash, etc., R. Co., 100 Mo. 435, 13 S. W. 709, 8 L. R. A. 549.

80. Scalping.— The states may, for the protection of the public against fraud, prohibit any person except the agent of the railroad, duly authorized with a certificate of authority or otherwise, from selling railroad tickets, even for interstate passages.

Illinois.— Burdick *v.* People, 149 Ill. 600, 36 N. E. 948, 41 Am. St. Rep. 329, 24 L. R. A. 152, 149 Ill. 611, 36 N. E. 952.

Indiana.— Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238.

Minnesota.—State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498 *semble*.

Pennsylvania.— Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472; Com. *v.* Wilson, 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484.

Texas.—Jannin *v.* State, (Tex. Crim. 1899) 51 S. W. 1126.

Contra, People *v.* Warden City Prison, 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. Rep. 113, 43 L. R. A. 264 [*reversing* 26 N. Y. App. Div. 228, 50 N. Y. Suppl. 56]. In the opinion of the superior court in Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472, this case is explained and distinguished from the other cases cited *supra*, this note, on the ground that the New York statute allowed an agent of one company to buy and sell tickets of other railroads.

See 10 Cent. Dig. tit. "Commerce," § 78.

An injunction against scalping will be granted, in the absence of a prohibitory statute, as to non-transferable tickets, where the defendants are engaged in the business of selling such tickets to travelers who then falsely represent themselves to the railroad officials as the original purchasers. Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65.

The hours for opening a ticket office may be regulated by the states. Hall *v.* South Carolina R. Co., 25 S. C. 564.

On the subject of tickets see also *infra*, IX, D, 6, e.

81. The redemption of unused tickets may be required by a state only when such tickets are for transportation between points within the state. Missouri, etc., R. Co. *v.* Fookes, (Tex. Civ. App. 1897) 40 S. W. 858. *Contra,* State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498 *semble*.

Stop-over.— A statute allowing stop-overs on railroad tickets, and making tickets binding on the company six years from date, is valid as to tickets between points within the state, but invalid as to tickets for passages to or from another state or a foreign country.

charged;[82] or the states may control the speed of trains,[83] the stops of trains, unless interfering materially with interstate commerce,[84] the running of trains on Sunday,[85] the licensing of engineers,[86] or track connections and terminal facilities,[87] or may limit the hours of labor of railroad employees.[88]

(B) *Separate Accommodations For Colored Passengers.* The states may order the providing of separate although equal accommodations for white and colored passengers traveling within the limits of a single state but not for interstate passengers.[89]

Lafarier *v.* Grand Trunk R. Co., 84 Me. 286, 24 Atl. 848, 17 L. R. A. 111.

82. A statute requiring the issue of mileage books at certain specified rates will be construed to apply only to a passage within the state, for it would be void if applied to interstate commerce. Smith *v.* Lake Shore, etc., R. Co., 114 Mich. 460, 72 N. W. 328; Beardsley *v.* New York, etc., R. Co., 15 N. Y. App. Div. 251, 44 N. Y. Suppl. 175; Dillon *v.* Erie R. Co., 19 Misc. (N. Y.) 116, 43 N. Y. Suppl. 320. See also *infra*, IX, C, 2, b.

Ground for refusal to sell a mileage book. —A railroad cannot refuse to sell a mileage book as required by statute, on the ground that the purchaser intends to tender its coupons in exchange for a ticket to a point without the state. Dillon *v.* Erie R. Co., 19 Misc. (N. Y.) 116, 43 N. Y. Suppl. 320.

83. Clark *v.* Boston, etc., R. Co., 64 N. H. 323, 10 Atl. 676; Erb *v.* Morasch, 177 U. S. 584, 20 S. Ct. 819, 44 L. ed. 897 [*affirming* 60 Kan. 251, 56 Pac. 133].

84. Davidson *v.* State, 4 Tex. App. 545, 30 Am. Rep. 166 (state statute is valid which requires every passenger train to stop five minutes at each way station); Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 20 S. Ct. 722, 44 L. ed. 868 [*reversing* 175 Ill. 359, 51 N. E. 842, and going a little farther than the Illinois Central railroad case, *infra*, in that here a state requirement that trains should all stop at county-seats in their path was held invalid. The court expressly denies the overruling of any other case, but decides the question on the fact that the requirement is a serious impediment to fast through trains and is also injuring this company in its competition with other railroads. It appears also that county-seats are amply provided for]; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 19 S. Ct. 465, 43 L. ed. 702 [*affirming* 8 Ohio Cir. Ct. 220, holding that Ohio Rev. Stat. (1890), § 3320, requiring the stopping daily of three passenger trains running each way at places of over three thousand inhabitants is valid and not inconsistent with U. S. Rev. Stat. (1878), § 5258, authorizing railroads to carry all passengers, troops, government supplies, mails, freight, and property from one state to another]; Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 16 S. Ct. 1096, 41 L. ed. 107 [*reversing* 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119, and *overruling* Chicago, etc., R. Co. *v.* People, 105 Ill. 657. In the last case a state statute requiring all passenger trains to stop at county-seats was held to be invalid at least in so far as it requires a fast mail train to run three miles out of its course and back again, in view also of the fact that the company furnishes other ample railroad facilities for the county-seats].

Trains running wholly within the state may be required to stop at all county-seats directly in their course. Gladson *v.* Minnesota, 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064 [*affirming* 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502].

85. State *v.* Southern R. Co., 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689; Norfolk, etc., R. Co. *v.* Com., 93 Va. 749, 24 S. E. 837, 57 Am. St. Rep. 827, 34 L. R. A. 105 [*overruling* 88 Va. 95, 13 S. E. 340, 29 Am. St. Rep. 705, 13 L. R. A. 107]; State *v.* Baltimore, etc., R. Co., 24 W. Va. 783, 49 Am. Rep. 290; Hennington *v.* Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. ed. 166 [*affirming* 90 Ga. 396, 17 S. E. 1009], holding that a state prohibition against the running of trains on Sunday is valid, although it prevents interstate freight trains from passing across the state on Sunday.

86. Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 9 S. Ct. 28, 33 L. ed. 352 (the Alabama statute of June 1, 1887, requiring railroad employees to be examined by a state medical board to determine whether they are color-blind is valid even as to men working on interstate trains); Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508.

87. The state may require the building of track connections at the intersection of railroads engaged in interstate commerce. Wisconsin, etc., R. Co. *v.* Jacobsen, 179 U. S. 287, 21 S. Ct. 115, 45 L. ed. 194 [*affirming* 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389].

The state may require a terminal company to admit an interstate railroad to its facilities and may fix a proper rate for the use of such facilities. State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225. *Contra*, Fielder *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 362, holding that a state may not regulate rates for terminal facilities.

88. Stone *v.* Tanners' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 29 L. ed. 636.

89. Ohio Valley R. Co. *v.* Sander, 104 Ky. 431, 20 Ky. L. Rep. 913, 47 S. W. 344, 882, 48 S. W. 145; Chesapeake, etc., R. Co. *v.* Com., 21 Ky. L. Rep. 228, 51 S. W. 160; State *v.* Hicks, 44 La. Ann. 770, 11 So. 74; Carrey *v.* Spencer, 36 N. Y. Suppl. 886, 72 N. Y. St. 108 (construing as invalid Tenn. Laws (1891), c. 52, so far as it requires separate accommodations for white and colored interstate passengers); Plessy *v.* Ferguson, 163 U. S. 537,

(c) *Powers of a Combination of States.* A group of states through which an interstate railroad is to pass may, by combining, construct such railroad.[90]

(d) *Consolidation.* The state may prohibit the consolidation of a railroad with a competing line.[91]

b. Rates. Congress may regulate transportation charges only on interstate traffic,[92] while the states may regulate such charges as to commerce entirely within their borders,[93] but may not directly dictate the rates on any part of an interstate carriage of goods or passengers,[94] not even by prohibiting discrimina-

16 S. Ct. 1138, 41 L. ed. 256; Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 L. ed. 784 [*affirming* 66 Miss. 662, 6 So. 203, 14 Am. St. Rep. 599, 5 L. R. A. 132, and holding the Mississippi act of March 2, 1888, to be valid, for its requirement of separate accommodations for white and colored passengers does not apply to interstate commerce. The court expressly distinguishes Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547, on the ground that in that case the state statute held invalid applied to interstate carriers]; Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547 (holding as invalid a state statute regulating steamer accommodations as applied to interstate steamers); Anderson *v.* Louisville, etc., R. Co., 62 Fed. 46 (holding that the Kentucky act of May 24, 1892, is invalid as requiring separate accommodations for white and colored passengers, whether or not their journey is entirely within the state). *Contra,* Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432, holding that the states may require, both for intra and interstate travel, separate accommodations for the white and colored races.

The state may not abrogate all common-law remedies for the exclusion of a passenger from railroad cars engaged in interstate commerce. Brown *v.* Memphis, etc., R. Co., 5 Fed. 499.

90. Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

Effect of interstate compact see IV, A, 6.

91. Von Steuben *v.* New Jersey Cent. R. Co., 4 Pa. Dist. 153; Gulf, etc., R. Co. *v.* State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 L. ed. 849 [*affirming* 97 Ky. 675, 17 Ky. L. Rep. 427, 31 S. W. 476].

92. See *infra,* XI.

93. Osborn *v.* Wabash R. Co., (Mich. 1900) 82 N. W. 526 (Mich. Laws (1891), p. 103, is valid as it regulates only rates to be charged on commerce within the state); Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94 (holding that fares on a railroad located entirely within the limits of one state might be regulated by the state although part of its business was interstate commerce. As applied to internal commerce entirely within a state the case is still law, but as to interstate commerce it must be considered as superseded by Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244).

A state railroad commission may be properly established, with power to regulate traffic, fix charges, and prevent discriminations as to commerce carried on entirely within the state, where they are prohibited from affecting charges on interstate transportation (Stone *v.* New Orleans, etc., R. Co., 116 U. S. 352, 6 S. Ct. 349, 29 L. ed. 651; Stone *v.* Illinois Cent. R. Co., 116 U. S. 347, 6 S. Ct. 348, 388, 1191, 29 L. ed. 650; Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. ed. 636); and it will be presumed that such commission will only attempt to govern commerce entirely within the state, wherefore statutes creating such commissions in general terms will be held constitutional (Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436); and interstate railroads, in so far as their lines are located in the state and their business confined to state traffic, are subject to the control of such commissions (State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225).

94. *Iowa.*— State *v.* Chicago, etc., R. Co., 70 Iowa 162, 30 N. W. 398; Carton *v.* Illinois Cent. R. Co., 59 Iowa 148, 13 N. W. 67, 44 Am. Rep. 672.

Kansas.— Hardy *v.* Atchison, etc., R. Co., 32 Kan. 698, 5 Pac. 6.

Massachusetts.—Com. *v.* Housatonic R. Co., 143 Mass. 264, 9 N. E. 547.

Minnesota.— State *v.* Chicago, etc., R. Co., 40 Minn. 267, 41 N. W. 1047, 12 Am. St. Rep. 730, 3 L. R. A. 238.

Missouri.— Stanley *v.* Wabash, etc., R. Co., 100 Mo. 435, 13 S. W. 709, 8 L. R. A. 549.

North Carolina.— McGwigan *v.* Wilmington, etc., R. Co., 95 N. C. 428, 59 Am. Rep. 247.

South Carolina.— Hall *v.* South Carolina R. Co., 25 S. C. 564; Railroad Com'rs *v.* Railroad Co., 22 S. C. 220.

United States.— Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244 [*overruling* in part Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97]; Kansas City St. R. Co. *v.* Board of R. Com'rs, 106 Fed. 353 (regulating rates between two points in a state where route partly through another state); Sheldon *v.* Wabash R. Co., 105 Fed. 785; Illinois Cent. R. Co. *v.* Stone, 20 Fed. 468; Farmers' L. & T. Co. *v.* Stone, 20 Fed. 270; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679; Kaeiser *v.* Illinois Cent. R. Co., 5 McCrary (U. S.) 496, 18 Fed. 151.

See 10 Cent. Dig. tit. "Commerce," § 82; and *compare* Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 22 S. Ct. 95, 46 L. ed. 298 [*affirming* 106 Ky. 633, 21 Ky. L. Rep.

tion,[95] nor by permitting discriminations.[96] But the states may, in the exercise of their police power, unless prevented by federal statute, make proper regulations concerning rates charged on interstate traffic, when such regulations do not directly fix the amount of such rates.[97]

3. Roadway Tolls. A state may levy, even on those engaged in interstate commerce, a toll for the use of an improved roadway.[98]

4. Telegraphs and Telephones.[99] The telegraph and the telephone are instruments of commerce, and therefore congress may control the business of sending telegraphic and telephonic messages from state to state, or to and from a foreign

232, 51 S. W. 164, 1012], where it is said in effect that any interference with interstate commerce by the enforcement of state laws prohibiting a greater charge for shorter than for longer hauls is too remote and indirect to be regarded as an unconstitutional interference with interstate commerce.

The control of rates for the part of an interstate journey within the state only is beyond the power of the states. Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244, where it is said, by Miller, J.: "But when . . . each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, . . . of a general and national character, . . . we think is clear." And see Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679.

State switching regulations legal.— It has been held that the price charged for switching cars used in interstate traffic may be regulated by a state board as a merely local act like trucking, although "switching" is an act of interstate commerce. Chicago, etc., R. Co. *v.* Becker, 32 Fed. 849. And see Iowa *v.* Chicago, etc., R. Co., 33 Fed. 391.

Terminal facilities' charges.— The state may also require a terminal company to charge just and reasonable rates for terminal facilities. State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

Construction of statutes.— State statutes regulating rates will be construed if possible not to apply to interstate commerce. Gulf, etc., R. Co. *v.* Miami Steamship Co., 86 Fed. 407, 52 U. S. App. 732, 30 C. C. A. 142.

95. McGwigan *v.* Wilmington, etc., R. Co., 95 N. C. 428, 59 Am. Rep. 247; Wigton *v.* Pennsylvania R. Co., 8 Pa. Co. Ct. 191; Southern Pac. R. Co. *v.* Haas, (Tex. 1891) 17 S. W. 600; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244 [*overruling* 105 Ill. 236, 104 Ill. 476]; Iron Mountain R. Co. *v.* Memphis, 96 Fed. 113, 37 C. C. A. 410; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679. *Contra*, Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338; Providence Coal Co. *v.* Providence, etc., R. Co., 15 R. I. 303, 4 Atl. 394; Denver, etc., R. Co. *v.* Atchison, etc., R. Co., 15 Fed. 650. And see Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 22 S. Ct. 277, 46 L. ed. 416.

Recovery of overcharges.— The state cannot authorize a recovery for overcharges of freight in an interstate shipment, being an unjust discrimination. Gatton *v.* Chicago, etc., R. Co., 95 Iowa 112, 63 N. W. 589, 29 L. R. A. 556.

96. State *v.* Omaha, etc., R., etc., Co., 113 Iowa 30, 84 N. W. 983, 86 Am. St. Rep. 357, 52 L. R. A. 315, where a city ordinance was considered to be invalid which permits a street railroad company to make a discrimination in fare against residents of another state.

97. **Fixing and posting rates and a penalty for overcharging** is within the power of the state. Chicago, etc., R. Co. *v.* Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710 [*affirming* 31 Iowa 187].

Changing rate after freight tendered.— The states may prohibit railroads from charging more than was their rate when the freight was tendered to them. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

Prohibiting higher rate than in bill of lading.— Little Rock, etc., R. Co. *v.* Hanniford, 49 Ark. 291, 5 S. W. 294; Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 16 Am. St. Rep. 926, 7 L. R. A. 478; Ft. Worth, etc., R. Co. *v.* Lillard, (Tex. App. 1890) 16 S. W. 654; St. Louis, etc., R. Co. *v.* Carden, (Tex. Civ. App. 1896) 34 S. W. 145; Gulf, etc., R. Co. *v.* McCown, (Tex. Civ. App. 1894) 25 S. W. 435; Gulf, etc., R. Co. *v.* Nelson, 4 Tex. Civ. App. 345, 23 S. W. 732.

Conflict with interstate commerce act.— Thus Texas legislation was held invalid on the ground that it was inconsistent with the federal interstate commerce act which required railways to charge and collect the rates contained in the tariff schedules fixed by the interstate commerce commission. Houston, etc., R. Co. *v.* Peters, 15 Tex. Civ. App. 515, 40 S. W. 429; St. Louis, etc., R. Co. *v.* Carden, (Tex. Civ. App. 1896) 34 S. W. 145; Gulf, etc., R. Co. *v.* Hefley, 158 U. S. 98, 15 S. Ct. 802, 39 L. ed. 910.

98. Bogart *v.* State, 10 Ohio Dec. (Reprint) 365, 20 Cinc. L. Bul. 458, sustaining a license-tax on owners of vehicles using the streets of a city, the fees being placed to the credit of the municipal street-repairing department, even in the case of a non-resident using the streets purely in the pursuit of interstate commerce. *Compare* also *infra*, IX, D, 1, b.

99. See also *infra*, X, D, 8; and, generally, Telegraphs and Telephones.

country.[1] Although the states may regulate that part of this business which is entirely within the state, they may not in any way obstruct or directly affect the conduct of the interstate telegraph or telephone business either directly[2] or by a license-tax,[3] unless such license-tax is confined to intra-state business[4] or is compensatory in nature, as on each pole erected,[5] although the state may aid its proper conduct, as by the imposing of penalties for negligence in its perform-

1. Reed *v.* Western Union Tel. Co., 56 Mo. App. 168; Western Union Tel. Co. *v.* Atlantic, etc., States Tel. Co., 5 Nev. 102; Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 3 Va. Supreme Ct. 39, 37 S. E. 789, 86 Am. St. Rep. 877 (where a foreign telegraph company is engaged in the transmission of messages from state to state, and has accepted the provisions of the acts of congress governing telegraph companies, it is a corporation engaged in interstate commerce); Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 464, 26 L. ed. 1067 (where Waite, C. J., says: "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself"); Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 9, 24 L. ed. 708 (where it is said: "The electric telegraph works an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. . . . Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress"); St. Louis *v.* Western Union Tel. Co., 39 Fed. 59.

2. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (a state statute requiring a telephone company to supply all applicants, without discrimination, and charge no more than a certain rate for telephone rent, is valid as it applies only to service within the state); Butner *v.* Western Union Tel. Co., 2 Okla. 234, 37 Pac. 1087 (a territorial statute regulating the order of transmission of telegraph messages is valid as confined to messages within the state); Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187 (a state statute is invalid as to messages sent out of the state, which prescribes the order in which telegrams shall be sent and that they shall be delivered by messenger where the addressees live within one mile of the station).

Rates.— The state may regulate telegraph rates between points in the state, although the connecting line passes out of the state, it all being owned by one corporation (Leavell *v.* Western Union Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; State *v.* Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570); and it has also been held that a telegraph company may be amenable to common-law principles relative to discrimination in rates of public service corporations, even as to its interstate business, in the absence of federal action (Western Union Tel. Co. *v.* Call Pub. Co., 58 Nebr. 192, 78 N. W. 519).

An exclusive state privilege is inoperative to shut out a telegraph company availing itself of a federal law enacting that any telegraph company may construct and operate lines of telegraph along any of the military post roads of the United States. American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708 [*affirming* 2 Woods (U. S.) 643, 19 Fed. Cas. No. 10,960]. See, however, American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90, where it was held that a state requirement is valid which demands of foreign corporations a known place of business and authorized agent within the state, even as applied to a telegraph corporation which had accepted the provisions of the federal statute granting a license to such companies on post and military roads.

3. Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 3 Va. Supreme Ct. 39, 37 S. E. 789, 86 Am. St. Rep. 877 (where the tax was held bad, although it was recited to be in lieu of a property *ad valorem* tax); Leloup *v.* Mobile, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311 [*reversing* 76 Ala. 401, where the company had accepted the provisions of the act of congress of July 24, 1866]; St. Louis *v.* Western Union Tel. Co., 39 Fed. 59 [*reversed* on another ground in 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380].

4. Western Union Tel. Co. *v.* Fremont, 43 Nebr. 499, 61 N. W. 724, 26 L. R. A. 706 [*affirming* 39 Nebr. 692, 58 N. W. 415, 26 L. R. A. 698]; Postal Tel. Cable Co. *v.* Charlestown, 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871 [*affirming* 56 Fed. 419]. And see Moore *v.* Eufaula, 97 Ala. 670, 11 So. 921, where a city ordinance imposing a license-tax on companies engaged in business within the state was upheld on the ground that it could be enforced without interfering with interstate commerce.

5. Philadelphia *v.* Postal Tel. Cable Co., 67 Hun (N. Y.) 21, 21 N. Y. Suppl. 556, 50 N. Y. St. 301; New Hope *v.* Western Union Tel. Co., 16 Pa. Super. Ct. 306; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380 [*reversing* 39 Fed. 59], where it was said that an ordinance compelling a telegraph company to pay five dollars per annum for every pole within the city "for the privilege of using the streets, alleys, and public places" was not properly a license-tax but rental.

ance,[6] or they may incidentally affect it by the use of the police power, in the absence of congressional action, controlling the placing of wires,[7] poles,[8] the hours of business,[9] or public facilities.[10]

5. WAREHOUSES AND GRAIN ELEVATORS.[11] The states may regulate the business of conducting warehouses and grain elevators even though they are used as instruments of interstate commerce, either by dictating their charges within reasonable limits[12] or by requiring a license for engaging in the business,[13] although such provisions apply only to certain classes of elevators,[14] and although the business was established and the structures completed before the regulations were passed[15] and the goods affected are to be shipped out of the state[16] or are in the course of transshipment through the state,[17] unless the state regulation is discriminating in nature.[18]

6. **A state penalty for negligence** in transmitting even an interstate message is valid as to acts of negligence occurring within the state.

Georgia.— Western Union Tel. Co. *v.* Lark, 95 Ga. 806, 23 S. E. 118; Western Union Tel. Co. *v.* Howell, 95 Ga. 194, 22 S. E. 286, 51 Am. St. Rep. 68, 30 L. R. A. 158; Western Union Tel. Co. *v.* James, 90 Ga. 254, 16 S. E. 83.

Indiana.— Western Union Tel. Co. *v.* Ferris, 103 Ind. 91, 2 N. E. 240; Western Union Tel. Co. *v.* Meredith, 95 Ind. 93; Western Union Tel. Co. *v.* Pendleton, 95 Ind. 12, 48 Am. Rep. 692.

Missouri.— Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883.

Tennessee.— Western Union Tel. Co. *v.* Mellon, 100 Tenn. 429, 45 S. W. 443, holding the statute valid as having no extraterritorial effect.

Virginia.— Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828; Western Union Tel. Co. *v.* Bright, 90 Va. 778, 20 S. E. 146; Western Union Tel. Co. *v.* Tyler, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910.

United States.— Western Union Tel. Co. *v.* James, 162 U. S. 650, 662, 16 S. Ct. 934, 40 L. ed. 1105, holding valid a state statute requiring telegraph companies to transmit and deliver despatches with impartiality and speed, the court saying: "There are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the state over the subject."

See 10 Cent. Dig. tit. "Commerce," § 87.

7. **Wires may be put underground** by state action in cities. Western Union Tel. Co. *v.* New York City, 38 Fed. 552, 3 L. R. A. 449.

8. **Poles may be moved** by the states in the interest of safety and convenience. Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

9. **Keeping office open.**— In Western Union Tel. Co. *v.* Mississippi R. Commission, 74 Miss. 80, 21 So. 15, the telegraph company was held liable to the penalty provided by statute for violation of the rules of the state railroad commission in not keeping open a station in the town of X as ordered by the commission. The plea that the company was acting purely under federal legislation and not by virtue of any state grant or privilege was adjudged insufficient.

10. Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883.

11. See, generally, WAREHOUSEMEN.

12. Brass *v.* North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757 [*affirming* 2 N. D. 482, 52 N. W. 408]; Munn *v.* Illinois, 94 U. S. 113, 135, 24 L. ed. 77 (where the court speaking of grain elevators, says: "Their regulation is a thing of domestic concern and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce"); Allnutt *v.* Inglis, 12 East 527, 540 (where the right of a warehouseman to make arbitrary charges was denied, Lord Ellenborough saying: "It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose").

13. W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 467, 470, 21 S. Ct. 423, 45 L. ed. 618 [*affirming* 77 Minn. 223, 79 N. W. 962, although the grain stored is to be shipped out of the state].

14. W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. ed. 618, where the statute in question applied solely to elevators on lines of railroad.

15. Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.

16. W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. ed. 618 [*affirming* 77 Minn. 223, 79 N. W. 962].

17. Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247 [*affirming* 117 N. Y. 1, 22 N. E. 670, 682, 26 N. Y. St. 533, 15 Am. St. Rep. 460, 5 L. R. A. 559].

18. Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258, subjecting liquor-dealers to a license-tax in each place where they operate warehouses except where the dealers are also manufacturers within the state.

D. Commerce by Water — 1. Navigable Waters — a. In General. Congress may legislate concerning waters of the United States navigable in fact and accessible from a state other than the one in which they lie, when such legislation in any way affects their navigability or use as instruments of commerce,[19] and the federal courts have jurisdiction in admiralty and maritime causes arising upon the high seas or upon navigable waters within the limits of a state, and accessible from other states.[20] A state may legislate in reference to the commercial use of a river entirely within its limits, unless congress has acted inconsistently with such state legislation.[21] Navigable waters and their beds are state property, subject only to congressional control for the purpose of regulating commerce and navigation.[22]

19. The City of Salem, 13 Sawy. (U. S.) 607, 37 Fed. 846; Hatch *v.* Wallamet Iron Bridge Co., 7 Sawy. (U. S.) 127, 6 Fed. 326.

Power of congress.— Congress may prohibit the states from modifying the channel of any navigable stream without the consent of federal officials (Chicago *v.* Law, 144 Ill. 569, 33 N. E. 855, sustaining the congressional act of Sept. 19, 1890), or may act by inserting provisions as to waters into acts admitting states to the Union, and such provision is binding on the state (Woodruff *v.* North Bloomfield Gravel-Min. Co., 9 Sawy. (U. S.) 441, 18 Fed. 753, holding binding the provision in the California admission statute that "all navigable rivers . . . shall be common highways and forever free"). Congress may, without compensation, erect in aid of commerce structures on submerged land even in shallow water near the shore so as to interfere with the owner's access to deep water. Scranton *v.* Wheeler, 57 Fed. 803, 16 U. S. App. 152, 6 C. C. A. 585. Congress must, however, pay for a state franchise to improve a waterway and collect tolls, on condemning such franchise by an exercise of the power to regulate commerce. Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463 [*distinguishing* Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 26 L. ed. 1143]. To the same effect see Luxton *v.* North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129; Stockton *v.* Baltimore, etc., R. Co., 32 Fed. 9; Decker *v.* Baltimore, etc., R. Co., 30 Fed. 723.

The ordinance of the Confederate congress of July 13, 1787, respecting the Northwest Territory was at first thought to be binding upon congress as a promise of the federal power to the people of that territory (Hutchinson *v.* Thompson, 9 Ohio 52), but it is now well settled that the ordinance is of no effect except as adopted by later acts of congress, and the conditions of admission of this territory to the federal domain placed it on an equal footing with all other territory (Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149).

A statement that navigable waters shall be forever free refers to political and not to physical obstructions. Cardwell *v.* American River Bridge Co., 113 U. S. 205, 5 S. Ct. 423, 28 L. ed. 959. *Contra,* Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435.

20. *Ex p.* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058; U. S. Const. art. 3, § 2; U. S. Rev. Stat. (1878), § 563. And see, generally, Admiralty.

Powers distinct.— The federal powers over navigable waters arising from the commerce clause and from admiralty jurisdiction are distinct and unconnected. The Steamboat Belfast *v.* Boon, 7 Wall. (U. S.) 624, 19 L. ed. 266; Commercial Transp. Co. *v.* Fitzhugh, 1 Black (U. S.) 574, 17 L. ed. 107.

The regulation of the admiralty jurisdiction of the district courts of the United States over certain cases upon the lakes is not a regulation of commerce. Fretz *v.* Bull, 12 How. (U. S.) 466, 13 L. ed. 1068; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058.

21. *California.*— People *v.* Potrero, etc., R. Co., 67 Cal. 166, 7 Pac. 445.

Illinois.— Chicago *v.* McGinn, 51 Ill. 266, 2 Am. Rep. 295.

Indiana.— Depew *v.* Trustees Wabash, etc., Canal, 5 Ind. 8.

New York.—Cisco *v.* Roberts, 36 N. Y. 292, 1 Transcr. App. (N. Y.) 297, 33 How. Pr. (N. Y.) 424 [*affirming* 6 Bosw. (N. Y.) 494].

Pennsylvania.— Craig *v.* Kline, 65 Pa. St. 399, 3 Am. Rep. 636, 2 Leg. Gaz. (Pa.) 81, navigable streams are subject to the state police power, unless congressional statutes conflict with its exercise.

United States.— Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149 [*affirming* 53 Mich. 593, 19 N. W. 199]; Heerman *v.* Beef Slough Mfg., etc., Co., 1 Fed. 145; U. S. *v.* Beef Slough Mfg., etc., Co., 8 Biss. (U. S.) 421, 24 Fed. Cas. No. 14,559.

See 10 Cent. Dig. tit. "Commerce," § 12.

The ordinance of 1787 does not prevent the states from action concerning rivers within their own limits, when no discrimination is made against the citizens of other states. Hutchinson *v.* Thompson, 9 Ohio 52.

The state may declare a stream a public highway and repeal or modify such act. Atkinson *v.* Philadelphia, etc., R. Co., 2 Fed. Cas. No. 615, 14 Haz. Reg. (Pa.) 10.

Power of a state to divert an interstate river see 8 Harv. L. Rev. 138.

22. Rumsey *v.* New York, etc., R. Co., 63 Hun (N. Y.) 200, 17 N. Y. Suppl. 672, 45 N. Y. St. 33; McCready *v.* Com., 27 Gratt.

b. Improvements in and Tolls For Use of. Congress may make improvements in all waterways which are or may be the means of interstate or foreign commerce or commerce with the Indian tribes, when the purpose of such improvements is to benefit such commerce,[23] paying compensation for vested existing rights taken.[24] The states may also improve all waterways within their own limits when their acts do not conflict with any federal statute, even though such waters are public navigable waters of the United States,[25] and may provide

(Va.) 985 [*affirmed* in 94 U. S. 391, 24 L. ed. 248]; Richardson *v.* U. S., 100 Fed. 714; Griffing *v.* Gibb, McAll. (U. S.) 212, 11 Fed. Cas. No. 5,819 [*reversed* in 2 Black (U. S.) 519, 17 L. ed. 353].

The states may grant away the salt-water flats within their limits, subject always to the federal right to control them for the purpose of aiding navigation. Galveston *v.* Menard, 23 Tex. 349. It has been held that the state holds land under tide-waters in trust for the public and may grant them away only for public purposes, the advancement of commerce being one of such public purposes. Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400, 63 N. Y. St. 642. *Compare* King *v.* Oahu R., etc., Co., 11 Hawaii 717, where it is held that the Hawaiian national government holds title to all lands under navigable waters in trust for the people.

23. U. S. Const. art. 1, § 8, clause 3. The word "commerce" as used in the constitution is held to include navigation for commercial purposes as well as actual traffic (Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23), and the usual exercise of this power is in the form of the "River and Harbor Bill" passed at almost every session of congress.

Where the improvement is an obstruction. — South Carolina *v.* Georgia, 93 U. S. 4, 23 L. ed. 782 (where the state of South Carolina attempted to enjoin the continuance of the work of improving the navigation of the Savannah river by obstructing its northern channel, thus deepening the southern; and it was held that the mere fact that in the particular spot where it stands the improvement may obstruct the flow of the stream does not make it any the less a proper exercise of the congressional power to regulate commerce); U. S. *v.* Duluth, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,001, 10 Am. L. Reg. N. S. 449 (where United States government was attempting to improve a channel by narrowing it to increase the current and thus wash it out, and it was held that the city should be enjoined from cutting a canal which would tend to lessen this current).

An act authorizing the construction of an apron of planked timber over the crest of the falls of St. Anthony, in the Mississippi river, under the direction of the secretary of war, to protect the rock and prevent the washing away of the underlying soft sandstone is within the constitutional jurisdiction of congress as being necessary to preserve the river for the passage of logs, its chief use at that point; and an injunction will therefore issue prohibiting log-owners from allowing logs to pass over the apron to its injury, not using the government sluiceway. U. S. *v.* Mississippi, etc., Boom Co., 1 McCrary (U. S.) 601, 3 Fed. 548.

24. Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463 [*distinguishing* Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 26 L. ed. 1143], payment for waterway improvements effected under a state franchise.

25. *Connecticut.*— Kellogg *v.* Union Co., 12 Conn. 7.

Florida.— Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42, holding constitutional the Florida statute of June 11, 1891, providing for the improvement of a navigable river.

Maine.— Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655 [*affirmed* in 14 How. (U. S.) 568, 14 L. ed. 545], where the state granted the exclusive right of navigation to A in return for the improvement by A of a portion of a river entirely within the state and separated from the sea by a fall and four dams. The act was held to be constitutional, on the ground that the river was entirely within the borders of a state.

Michigan.— Manistee River Imp. Co. *v.* Sands, 53 Mich. 593, 19 N. W. 199 [*affirmed* in 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149].

Mississippi.— Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 64 Am. Dec. 126 [*affirmed* in 20 How. (U. S.) 84, 15 L. ed. 816].

New York.— Morgan *v.* King, 18 Barb. (N. Y.) 277.

Wisconsin.— Wisconsin River Imp. Co. *v.* Manson, 43 Wis. 255, 28 Am. Rep. 542.

United States.— Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149 [*affirming* 53 Mich. 593, 19 N. W. 199]; Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487 [*affirming* 11 Biss. (U. S.) 550, 15 Fed. 292]; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238 (where it was said that congressional inaction was a virtual declaration that the states might control waters within their borders); Veazie *v.* Moor, 14 How. (U. S.) 568, 14 L. ed. 545 [*affirming* 32 Me. 343, 52 Am. Dec. 655].

See 10 Cent. Dig. tit. "Commerce," § 16.

Changing the channels of rivers.— This improvement by a state may take the form of changing the channels of navigable rivers within the state. Withers *v.* Buckley, 20 How. (U. S.) 84, 15 L. ed. 816 [*affirming* 29 Miss. 21, 64 Am. Dec. 126]. In Withers *v.* Buckley, 20 How. (U. S.) 84, 15 L. ed. 816, Daniel, J., uses language which supports the proposition that congress has no power to impair the right of a state to make improve-

for the payment of such improvement where the waters affected are entirely within the borders of a state, either by a toll on users of the waters,[26] although a federal port of delivery exists on them,[27] or by granting exclusive privileges to those who effected the improvement.[28] A toll levied for the use of such improved streams is not a tonnage duty.[29]

c. Pollution of. The national government[30] or the states[31] may regulate deposits made in navigable waters.

d. Bridges — (I) *In General* — (A) *Powers of Congress.* Congress may, for the purpose of furthering interstate or foreign commerce, authorize or con-

ments on the rivers and water-courses situated within such state. This case is no longer law on this point. See also Huse *v.* Glover, 119 U. S. 543, 548, 7 S. Ct. 313, 30 L. ed. 487 [*affirming* 11 Biss. (U. S.) 550, 15 Fed. 292].

A state franchise to improve waterways is a vested right for which due compensation must be paid on condemnation by the federal authorities. Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463 [*distinguishing* Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 26 L. ed. 1143].

26. *Connecticut.*— Thames Bank *v.* Lovell, 18 Conn. 500, 46 Am. Dec. 332; Kellogg *v.* Union Co., 12 Conn. 7.

Kentucky.— Sinking Fund Com'rs *v.* Green, etc., Nav. Co., 79 Ky. 73.

Michigan.— In Michigan the state constitution expressly prohibits state participation in any internal improvement. Ryerson *v.* Utley, 16 Mich. 269.

Texas.— Morris *v.* State, 62 Tex. 728, as to a state ship canal.

Wisconsin.— Wisconsin River Imp. Co. *v.* Manson, 43 Wis. 255, 28 Am. Rep. 542.

United States.— Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149 [*affirming* 53 Mich. 593, 19 N. W. 199]; Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487 [*affirming* 11 Biss. (U. S.) 550, 15 Fed. 292], where a bill in equity was filed to prevent the exaction of tolls for the use of locks on the Illinois river, which had been improved by the state. The plaintiffs were engaged in interstate commerce. The tolls were held constitutional, the court saying: "The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream." It was held also that the provision in the northwest ordinance of 1787 prohibiting tolls did not apply to streams artificially improved. It was further said that the fact that the surplus tolls beyond the necessary expenditure in running the locks were deposited in the state treasury did not render the toll a tax, as it was impossible to adjust the tolls exactly to expenditures, and this was a proper way to deal with the surplus till it should be needed.

See 10 Cent. Dig. tit. "Commerce," § 16.

Leasing to toll company.— The state may lease improved waterways to a navigation company, giving it the right to collect tolls thereon in return for the care of the improvements by the company. McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447.

The toll must be bona fide; and so the exaction of a license-fee on tugboats by the city of Chicago cannot be justified on the ground that the city had from time to time expended money in deepening the Chicago river for navigation purposes, when the ordinance does not profess to require the license-fee on any such ground, and no suggestion is made that any special benefit has arisen, or can arise, to such tugs, by such deepening of the river. Harmon *v.* Chicago, 147 U. S. 396, 13 S. Ct. 306, 37 L. ed. 216 [*reversing* 140 Ill. 374, 29 N. E. 732]. And see *supra*, IX, C, 3.

27. Thames Bank *v.* Lovell, 18 Conn. 500, 46 Am. Dec. 332.

28. Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472 (where it is held that when a state legislature has given to a navigation company authority to collect tolls on a navigable river when the assent of congress is obtained, and congress subsequently assents, acts afterward passed by the legislature, reviving the corporation or amending its charter, need not be assented to by congress, if no extension of the right to take tolls grows out of the revival or amendment); Veazie *v.* Moor, 14 How. (U. S.) 568, 14 L. ed. 545 [*affirming* 32 Me. 343, 52 Am. Dec. 655]. *Contra*, Sinking Fund Com'rs *v.* Green, etc., Nav. Co., 79 Ky. 73.

29. Thames Bank *v.* Lovell, 18 Conn. 500, 46 Am. Dec. 332; McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447; Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487 [*affirming* 11 Biss. (U. S.) 550, 15 Fed. 292].

30. 25 U. S. Stat. at L. p. 209, c. 496, prohibiting the dumping of refuse in New York harbor. This statute was incidentally considered in Ausbro *v.* U. S., 159 U. S. 695, 16 S. Ct. 187, 40 L. ed. 310; The Bayonne, 159 U. S. 687, 16 S. Ct. 185, 40 L. ed. 305.

54 Geo. III, c. 159, § 11, prohibits the casting of refuse on a shore whence it may reach a navigable stream or the sea, whether or not it has a tendency to injure navigation. United Alkali Co. *v.* Simpson, [1894] 2 Q. B. 116, 58 J. P. 607, 63 L. J. M. C. 141, 71 L. T. Rep. N. S. 258, 10 Reports 235, 42 Wkly. Rep. 509.

31. New York *v.* Furgueson, 23 Hun (N. Y.) 594, where N. Y. Laws (1875), c. 604, prohibiting, except under certain restrictions, the deposit of offal or dead animals in certain rivers and bays, was held to be constitutional, as it is a police regulation rather than a regulation of commerce.

struct a bridge at any place, even though it may obstruct a navigable stream,[32] and it may do this either in the name of the United States[33] or in that of a corporation,[34] without the consent of the state in which the bridge is to be placed.[35] Congress may also legalize an existing bridge,[36] regulate its use,[37] or condemn it as a nuisance.[38]

(B) *Powers of the States.* A state may build bridges within its borders which may obstruct public navigable channels having their terminus within its borders, except where congressional action is directly inconsistent with such work,[39] and

32. People *v.* Kelly, 76 N. Y. 475 (holding that congress could authorize the Brooklyn bridge); Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 26 L. ed. 1143; South Carolina *v.* Georgia, 93 U. S. 4, 23 L. ed. 782; Dubuque, etc., R. Co. *v.* Richmond, 19 Wall. (U. S.) 584, 22 L. ed. 173; Gray *v.* Chicago, etc., R. Co., 10 Wall. (U. S.) 454, 19 L. ed. 969 [*affirming* 1 Woolw. (U. S.) 150, 5 Fed. Cas. No. 2,900, 7 Am. L. Reg. N. S. 149]; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91, 9 L. ed. 1012; Stockton *v.* Baltimore, etc., R. Co., 32 Fed. 9; Miller *v.* New York, 13 Blatchf. (U. S.) 469, 17 Fed. Cas. No. 9,585.

33. People *v.* Kelly, 76 N. Y. 475; Luxton *v.* North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808; Miller *v.* New York City, 18 Blatchf. (U. S.) 212, 10 Fed. 513.

Delegation of authority.— Power may be conferred upon an official as the secretary of war to protect improvements or approve or reject the plans of bridges and other obstructions upon public navigable waters. Park Com'rs *v.* Detroit, 80 Mich. 663, 45 N. W. 508; Egan *v.* Hart, 165 U. S. 188, 17 S. Ct. 300, 41 L. ed. 680; Miller *v.* New York City, 109 U. S. 385, 3 S. Ct. 228, 27 L. ed. 971; U. S. *v.* Moline, 82 Fed. 592; U. S. *v.* Ormsbee, 74 Fed. 207; U. S. *v.* Rider, 50 Fed. 406; U. S. *v.* Keokuk, etc., Bridge Co., 45 Fed. 178; U. S. *v.* Breen, 40 Fed. 402; U. S. *v.* Pittsburgh, etc., R. Co., 26 Fed. 113.

34. Winifrede Coal Co. *v.* Central R., etc., Co., 11 Ohio Dec. (Reprint) 35, 24 Cinc. L. Bul. 173; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129; Decker *v.* Baltimore, etc., R. Co., 30 Fed. 723. In these cases congressional grants to private corporations of authority to construct bridges were upheld.

35. Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 37 Fed. 129; Stockton *v.* Baltimore, etc., R. Co., 32 Fed. 9 (where the New Jersey act of April 6, 1886, prohibiting the erection of bridges over tide-water is held unconstitutional so far as it affects a company possessing a United States license. This license is a grant of the mere use of the soil on which the bridge is built, and therefore a state cession of the soil is unnecessary to the exercise of the privilege); Decker *v.* Baltimore, etc., R. Co., 30 Fed. 723.

36. Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Gray *v.* Chicago, etc., R. Co., 10 Wall. (U. S.) 454, 19 L. ed. 969. In Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435, it was held that congress had power to legalize a structure which the supreme court of the United States had already directed to be abated as a nuisance. The reasoning of the court was that the bridge was a nuisance for want of congressional authorization, and when that was granted it ceased to be a nuisance.

37. Dubuque, etc., R. Co. *v.* Richmond, 19 Wall. (U. S.) 584, 22 L. ed. 173, holding valid acts of congress authorizing railroads to use interstate bridges, and making certain bridges over the Mississippi river free for trains on payment of a reasonable compensation.

International bridge toll.— Congress may prescribe the toll to be charged on a bridge built by a corporation incorporated by Canada and New York, over public navigable waters of the United States. Canada Southern R. Co. *v.* International Bridge Co., 8 Fed. 190.

Taxation of bridges and bridge companies see *infra*, X, D, 2.

38. Compensation.— Congress may not declare a lawful existing bridge built under state authority to be a nuisance without compensation. Dover *v.* Portsmouth Bridge, 17 N. H. 200.

39. *Maine.*— State *v.* Leighton, 83 Me. 419, 22 Atl. 380; State *v.* Freeport, 43 Me. 198; Rogers *v.* Kennebec, etc., R. Co., 35 Me. 319.

Maryland.—Baltimore *v.* Stoll, 52 Md. 435; Talbot County *v.* Queen Anne's County, 50 Md. 245.

Massachusetts.— Com. *v.* Proprietors New Bedford Bridge, 2 Gray (Mass.) 339; Com. *v.* Breed, 4 Pick. (Mass.) 460.

New Hampshire.— Dover *v.* Portsmouth Bridge, 17 N. H. 200; Proprietors Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

Ohio.— Muskingum County *v.* Board of Public Works, 39 Ohio St. 628.

Pennsylvania.— Flanagan *v.* Philadelphia, 42 Pa. St. 219.

United States.—Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629 [*reversing* 9 Sawy. (U. S.) 643, 19 Fed. 347]; Cardwell *v.* American River Bridge Co., 113 U. S. 205, 5 S. Ct. 423, 28 L. ed. 959; Miller *v.* New York City, 109 U. S. 385, 3 S. Ct. 228, 27 L. ed. 971 (the Brooklyn Bridge); Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678, 2 S. Ct. 185, 27 L. ed. 442; Wisconsin *v.* Duluth, 96 U. S. 379, 24 L. ed. 668; Pound *v.* Turck, 95 U. S. 459, 24 L. ed. 525; Gilman *v.* Philadelphia, 3

may also regulate the use of such bridges.[40] A state probably may not, without concurrent favorable action by congress, authorize the obstruction of an interstate waterway whose terminus is not within its own borders,[41] but concurrent

Wall. (U. S.) 713, 18 L. ed. 96; Oregon City Transp. Co. *v.* Columbia St. Bridge Co., 53 Fed. 549; Rhea *v.* Newport News, etc., R. Co., 50 Fed. 16; Stockton *v.* Baltimore, etc., R. Co., 32 Fed. 9; Hatch *v.* Wallamet Iron Bridge Co., 7 Sawy. (U. S.) 127, 6 Fed. 326; U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867, 10 Law Rep. 127; Pennsylvania R. Co. *v.* New York, etc., R. Co., 19 Fed. Cas. No. 10,953, 18 Int. Rev. Rec. 142; Milnor *v.* New Jersey R. Co., 17 Fed. Cas. No. 9,620, 3 Wall. (U. S.) 782, 16 L. ed. 799, 6 Am. L. Reg. 6.

See 10 Cent. Dig. tit. "Commerce," § 15.

The following early cases contra must be considered as overruled: People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249; Silliman *v.* Hudson River Bridge Co., 4 Blatchf. (U. S.) 74, 22 Fed. Cas. No. 12,851. The supreme court has repeatedly maintained that the Wheeling Bridge case was not overruled by Gilman *v.* Philadelphia. See Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96. See also the opinion of Grier, J., in Milnor *v.* New Jersey R. Co., 17 Fed. Cas. No. 9,620, 3 Wall. (U. S.) 782, 16 L. ed. 799, 6 Am. L. Reg. 6; and that of Bradley, J., in Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629 [*reversing* 9 Sawy. (U. S.) 643, 19 Fed. 347]. It is commonly supposed, however, that the Wheeling Bridge case is no longer law for the most part, and the change of view of the court is often attributed to the growing importance of railroads. Pomeroy Const. L. §§ 371, 372.

The leading case on the proposition in the text is Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96. In Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629 [*reversing* 9 Sawy. (U. S.) 643, 19 Fed. 347], Bradley, J., speaks as follows: "There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offences against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offences against United States laws which do not exist; and none such exist except what are to be found on the statute book."

Port of entry.— The fact that congress has made of a port a port of entry does not prevent the state from building a bridge obstructing the approach to it. Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629 [*reversing* 9 Sawy. (U. S.) 643, 19 Fed. 347]; Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96; Milnor *v.* New Jersey R. Co., 17 Fed. Cas. No. 9,620, 3 Wall. (U. S.) 782, 16 L. ed. 799, 6 Am. L. Reg. 6. *Contra,* Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249.

Coasting license.— There is a passage in Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96, to the effect that a federal coasting license gives authority to use any navigable waters, but the result of the case is authority for the proposition that a coasting license is not that "direct statute of the United States" which alone can prevent the states from building bridges.

The provision in the act admitting California "that all the navigable waters within the said State shall be common highways and forever free" is not that direct act of congress which alone may bar a state from the erection of bridges obstructing navigable waters. Cardwell *v.* American River Bridge Co., 113 U. S. 205, 5 S. Ct. 423, 28 L. ed. 959.

A similar provision of the Oregon admission act received a like construction in Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629 [*reversing* 9 Sawy. (U. S.) 643, 19 Fed. 347].

Similar language in the famous northwest ordinance of 1787 was held to be adopted by congress and to prevent state action obstructing interstate channels in two earlier Indiana cases, viz., Neaderhouser *v.* State, 28 Ind. 257; Depew *v.* Trustees Wabash, etc., Canal, 5 Ind. 8.

40. Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678, 2 S. Ct. 185, 27 L. ed. 442 [*affirming* 12 Fed. 777]. In this case the validity was affirmed of a city ordinance regulating the opening and closing of bridges over rivers within the limits of Chicago, so as to permit the alternate passage of vessels and teams and persons, and also providing for the closing of the bridges altogether against vessels during certain hours of the morning and evening.

41. The statement in the text is, to be sure, opposed to the language of Gilman *v.* Philadelphia and other cases in that line (see *supra,* note 39), but under these exact facts the state's power to act alone has never been upheld, and in Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249, it was denied. Probably this phase of the Wheeling Bridge case is still law as it has never been overruled, either directly or *sub silentio.* It is also significant that the practice is well settled of obtaining federal assent to the erection of such bridges. See cases cited *supra,* note 36. See also the following language directed against legislative obstruction of interstate commerce: "The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern." Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547.

favorable action by congress and the states interested will legalize the obstruction of any navigable waters.[42]

(II) *Interstate Bridges.* The states may also by joint action bridge navigable waters forming the boundary line between two states,[43] but may not levy tolls for the use of such bridges.[44]

e. Other Obstructions. Any obstruction to navigation may be controlled by the federal government,[45] even though it was authorized by a state,[46] or in the absence of federal action the states may act in the exercise of their police power, without compensation to those whose mere right to navigate is abridged,[47] and may thus obstruct even vessels holding a federal coasting license.[48] The

42. Miller *v.* New York City, 109 U. S. 385, 3 S. Ct. 228, 27 L. ed. 971 [*affirming* 13 Blatchf. (U. S.) 469, 17 Fed. Cas. No. 9,585].

43. Dover *v.* Portsmouth Bridge, 17 N. H. 200; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 S. Ct. 1087, 38 L. ed. 962; New Orleans, etc., R. Co. *v.* Mississippi, 112 U. S. 12, 5 S. Ct. 19, 28 L. ed. 619, where it was held that two states may, under certain circumstances, require a railroad company to build an interstate bridge in a certain manner.

Each state may tax that portion of an interstate bridge within its own borders, even though it is of course an instrument of interstate commerce. Pittsburgh, etc., R. Co. *v.* Board of Public Works, 172 U. S. 32, 19 S. Ct. 90, 43 L. ed. 354. See also Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029.

44. Covington, etc., El. R., etc., Co. *v.* Kentucky, 154 U. S. 224, 14 S. Ct. 1094, 38 L. ed. 970 [*overruling* 15 Ky. L. Rep. 740, 22 S. W. 851]; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 S. Ct. 1087, 38 L. ed. 962 [*overruling* 14 Ky. L. Rep. 836, 21 S. W. 1042]. In these cases a regulation of toll by one state alone on an interstate bridge was held invalid, partly on the ground that the two states connected by the bridge should act together, if at all, and partly on the broad ground that a regulation of fare is indistinguishable from a tax on interstate commerce which is beyond the power of the states.

45. Depew *v.* Trustees Wabash, etc., Canal, 5 Ind. 8; Works *v.* Junction R. Co., 5 McLean (U. S.) 425, 30 Fed. Cas. No. 18,046, 10 West. L. J. 370; Woodruff *v.* North Bloomfield Gravel Min. Co., 9 Sawy. (U. S.) 441, 18 Fed. 753, 8 Sawy. (U. S.) 628, 16 Fed. 25. In this latter case it was held that congressional power to obstruct navigable waters is limited to the purposes of regulating commerce and establishing post roads. It may be said that this view is opposed to the doctrine laid down in Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482, that one power of congress may be exercised with the ulterior aim of controlling the subject of another power.

46. U. S. *v.* Moline, 82 Fed. 592.

47. *Connecticut.*— Groton *v.* Hurlburt, 22 Conn. 178.

Delaware.— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

Indiana.— Depew *v.* Trustees Wabash, etc., Canal, 5 Ind. 8.

New York.— Morgan *v.* King, 18 Barb. (N. Y.) 277.

United States.— Pound *v.* Turck, 95 U. S. 459, 24 L. ed. 525 (holding good the session laws of Wisconsin for 1857, c. 235, which authorized the damming of a small but navigable river connected with the Mississippi. Under these facts the plaintiff, whose raft was injured by the dam, was held not entitled to recover against the owners of the dam. The stream in question was wholly within the state of Wisconsin, although emptying into the Mississippi); Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. (U. S.) 245, 7 L. ed. 412 (to the effect that a state might properly dam a small navigable creek. It is usually thought that this case stands merely on its own facts and was never intended to embrace the obstruction by a state of a great harbor. See opinion of Clifford, J., in Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96; Pomeroy Const. L. § 346); Heerman *v.* Beef Slough Mfg., etc., Co., 1 Fed. 145 (obstruction for the purpose of facilitating the floatage of logs held legal); Atkinson *v.* Philadelphia, etc., R. Co., 2 Fed. Cas. No. 615, 14 Haz. Reg. (Pa.) 10 (where an injunction against a bridge was refused at the suit of owners of vessels, when it appeared that the only inconvenience occasioned was the striking of the masts). *Contra*, Texas, etc., R. Co. *v.* New Orleans, 40 Fed. 111. In this case the city of New Orleans was held incompetent to authorize the driving of piles beyond its own harbor line, as this would be an obstruction of the Mississippi river.

See 10 Cent. Dig. tit. "Commerce," § 10 *et seq.*

Temporary obstructions.— A state may authorize reasonable obstructions to navigation for the purpose of repairing railroad bridges spanning rivers (Green, etc., Nav. Co. *v.* Chesapeake, etc., R. Co., 88 Ky. 1, 10 Ky. L. Rep. 625, 10 S. W. 6 2 L. R. A. 540), or may authorize the use of a coffer-dam in the building of a tunnel under a river, although the dam obstructs the river (Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336).

The Canadian provinces may not obstruct tidal navigable rivers in a manner to impede navigation. Queddy River Driving Boom Co. *v.* Davidson, 10 Can. Supreme Ct. 222.

48. Hatch *v.* Wallamet Iron Bridge Co., 7 Sawy. (U. S.) 127, 6 Fed. 326.

states may in no way interfere with federal operations in improving navigable rivers.[49]

2. Navigation — a. In General. Congress may make regulations concerning navigation on public navigable waters[50] and the states may also pass such regulations when they do not conflict with any act of congress,[51] but the state probably may not interfere with navigation over a marine league from shore.[52]

b. Pilot Laws[53]**— (i)** *Nature of.* A proper pilot law of the kind usually

49. U. S. *v.* Mississippi, etc., Boom Co., 1 McCrary (U. S.) 601, 3 Fed. 548, 27 Fed. Cas. No. 16,206; U. S. *v.* Duluth, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,001, 10 Am. L. Rep. N. S. 449.

The courts will not interfere where it does not appear that the acts complained of will really interfere with federal projects. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; State *v.* Leighton, 83 Me. 419, 22 Atl. 380; U. S. *v.* Beef Slough Mfg., etc., Co., 8 Biss. (U. S.) 421, 24 Fed. Cas. No. 14,559; Rhea *v.* Newport News, etc., R. Co., 50 Fed. 16.

50. The Steamer Daniel Ball *v.* U. S., 10 Wall. (U. S.) 557, 19 L. ed. 999 [*overruling* Brown Adm. 193, 6 Fed. Cas. No. 3,564]. The doctrine of this leading case seems to be that any vessel, which is in the habit ever of carrying goods or passengers coming from or destined to points outside the state, although it never itself leaves state waters, is subject to federal regulation and control by federal legislation.

Vessels engaged exclusively in domestic commerce.— It seems not yet to be settled whether vessels engaged in purely internal commerce are subject to congressional navigation regulations, although the better view might seem to be, for reasons of convenience and safety, that such regulations cover such vessels. To that effect see U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331; Silliman *v.* Hudson River Bridge Co., 4 Blatchf. (U. S.) 74, 22 Fed. Cas. No. 12,851. *Contra*, see Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655 (holding inoperative a federal coasting license applied to a vessel plying on waters from which it could not reach another state or a foreign country); Houston, etc., Nav. Co. *v.* Dwyer, 29 Tex. 376; The Gretna Green, 20 Fed. 901; The Bright Star, 1 Woodw. (U. S.) 266, 4 Fed. Cas. No. 1,880, 1 Am. L. T. Rep. (U. S. Cts.) 107, 8 Int. Rev. Rec. 130.

Vessels on the high seas.— While navigating the high seas between ports in the same state, both the vessel and the business in which she is engaged are subject to the regulating power of congress, as on the ocean only the national character of the vessel is recognized. Lord *v.* Goodall, etc., Steamship Co., 102 U. S. 541, 26 L. ed. 224.

What are waters of the United States.— Since the case of The Steamer Daniel Ball *v.* U. S., 10 Wall. (U. S.) 557, 19 L. ed. 999, navigation on practically all navigable waters may be said to be under federal control, as it would be hard to find a vessel which did not at some time take goods or passengers which come within the definition of interstate commerce. The following streams, *inter alia*, have been held to be navigable waters of the United States: The American river in California. Cardwell *v.* American River Bridge Co., 113 U. S. 205, 5 S. Ct. 423, 28 L. ed. 959. The Savannah river. Lawton *v.* Comer, 40 Fed. 480, 7 L. R. A. 55. The Wallamet river in Oregon. Wallamet Iron Bridge Co. *v.* Hatch, 9 Sawy. (U. S.) 643, 19 Fed. 347. The following has been held not subject to the congressional regulating power. Raccoon creek in Parke county, Indiana. Depew *v.* Trustees Wabash, etc., Canal, 5 Ind. 8.

51. Lights.— It has been held that a state may lawfully prescribe the number of lights to be carried within its limits on vessels engaged in interstate commerce, although congress has passed a regulation on that point. Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492.

Speed.—A state may regulate the speed of boats on navigable rivers. People *v.* Roe, 1 Hill (N. Y.) 470; People *v.* Jenkins, 1 Hill (N. Y.) 469.

Exclusive right to navigate.—A state may not grant to any one an exclusive right to navigate in a certain way (as with steamboats) navigable waters so as to exclude vessels having a United States coasting license and engaged in interstate commerce. North River Steam Boat Co. *v.* Livingston, 3 Cow. (N. Y.) 713, 3 Wheel. Crim. (N. Y.) 483 [*affirming* Hopk. (N. Y.) 149]; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23 [*reversing* 17 Johns. (N. Y.) 488, 4 Johns. Ch. (N. Y.) 150]. *Contra*, Livingston *v.* Van Ingen, 9 Johns. (N. Y.) 507; North River Steam Boat Co. *v.* Hoffman, 5 Johns. Ch. (N. Y.) 300. However, a state may grant an exclusive right of navigation over an improved or artificial waterway entirely within its borders. Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655 [*affirmed* in 14 How. (U. S.) 568, 14 L. ed. 545]. See also *supra*, IX, D, 1, b.

Rules as to passing.— Halderman *v.* Beckwith, 4 McLean (U. S.) 286, 11 Fed. Cas. No. 5,907, construing the Louisiana act of March 6, 1834, which provided for the manner in which steamboats shall pass each other, as void as to vessels engaged in interstate commerce.

A local custom of navigation, forming a part of the common law of a state, is on the same footing as a state statute respecting navigation. Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492.

52. Pacific Coast Steamship Co. *v.* Board of R. Com'rs, 9 Sawy. (U. S.) 253, 18 Fed. 10. But see *infra*, IX, D, 2, b.

53. The term "pilot" includes two classes of persons, those whose sole duty it is to

imposed is a regulation of commerce[54] local in its nature,[55] and is not an impost or duty,[56] a tonnage tax,[57] or a revenue law,[58] and does not constitute a preference of one port over another within the meaning of the constitution.[59]

(11) *Power to Enact.* A pilot law being a regulation of commerce may be enacted by congress[60] and may take the form of an adoption of existing state law.[61] The states may enact such reasonable pilot laws as do not conflict with any act of, or regulation by, congress,[62] even to controlling vessels on the high

guide vessels into or out of ports, and those intrusted with the navigation of vessels on the high seas. Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; Abbott Shipp. 195; Bouvier L. Dict. And see, generally, Pilots.

54. Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 316, 13 L. ed. 996. In this case the court says, by Curtis, J.: "We are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution." This conclusion is reached on the ground that the pilot is the temporary master of the vessel and regulations of commerce may properly include the persons who conduct it as well as the instruments used in its advancement. See also Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

55. Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 314, 13 L. ed. 996.

56. Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 314, 13 L. ed. 996. In this case Curtis, J., observes that the mere name is not decisive and a so-called pilot regulation might be so excessive as to constitute a tonnage duty or an impost on imports or exports.

57. Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996.

58. Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996. In this case the court holds at page 313 that the fact that the half-pilotage penalty was directed to be given to trustees for charitable uses among the pilots does not render the Pennsylvania pilot law a revenue law.

59. Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 315, 13 L. ed. 996, where Curtis, J., remarks that a pilot law is and has always been regarded as an objection to a port rather than a preference.

60. There have been but three important national statutes concerning pilotage. The statute of Aug. 7, 1789 (1 U. S. Stat. at L. p. 54), adopting existing state laws; the statute of March 2, 1837 (5 U. S. Stat. at L. p. 153), regulating pilots in waters bordering on two or more states; and the statute of Aug. 30, 1852 (10 U. S. Stat. at L. p. 61), which was held in Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805, not to apply to port pilots.

The proposition in the text has never been questioned since Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23, decided that commerce included navigation within the meaning of the constitution and since Curtis, J., in Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996, decided that a pilot law was a regulation of commerce.

61. Wilson *v.* McNamee, 102 U. S. 572, 26 L. ed. 234; Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; 1 U. S. Stat. at L. p. 54.

62. *Georgia.*— Dale *v.* Daniels, 72 Ga. 207; Thompson *v.* Spraigue, 69 Ga. 409, 47 Am. Rep. 760; Low *v.* Pilotage Com'rs, R. M. Charlt. (Ga.) 302.

Indiana.— Barnaby *v.* State, 21 Ind. 450.

New York.— Cisco *v.* Roberts, 36 N. Y. 292, 1 Transcr. App. (N. Y.) 297, 33 How. Pr. (N. Y.) 424; People *v.* Sperry, 50 Barb. (N. Y.) 170; Stilwell *v.* Raynor, 1 Daly (N. Y.) 47.

South Carolina.— State *v.* Penny, 19 S. C. 218.

United States.— Wilson *v.* McNamee, 102 U. S. 572, 26 L. ed. 234; *Ex p.* McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624; Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996.

See 10 Cent. Dig. tit. "Commerce," § 74.

The proposition in the text was first authoritatively decided in the case of Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996, and is now considered so well settled that in the case of Wilson *v.* McNamee, 102 U. S. 572, 26 L. ed. 234, the supreme court refused to consider the question.

The theory of the court is well stated in Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 320, 13 L. ed. 996, by Curtis, J., as follows: "The nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. . . . It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots." The court also bases its reasoning in part on the statute of 1789 (1 U. S. Stat. at L. p. 54) which it construes as a contemporaneous legislative declaration that the subject of pilotage is local and not national and to be regulated by the states. To the same effect see The Panama, 1 Deady (U. S.) 27, 18 Fed. Cas. No. 10,702, 1 Oreg. 418. These cases are

seas,[63] and do not discriminate against other states;[64] but it has been held that they may discriminate against vessels engaged in foreign commerce.[65]

(III) *Proper Provisions of.* Pilot laws may properly include a provision for remuneration to the pilot whose proffered services are refused[66] and a penalty on those who attempt to navigate vessels without the aid of pilots.[67] They may also apply only to certain specified kinds of vessels.[68]

(IV) *Waters Bounding on Two States.* Where waters are bounded by two or more states, all such states may license and regulate pilots on the waters, but no state may in any way interfere with the pilots licensed by any other.[69]

at variance with the opinion of Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 208, 6 L. ed. 23, where he expressly denied that the enactment of the statute of 1789 tended against the theory that congress alone could legislate as to commerce, saying, in effect, that the very enactment of such a law indicates an opinion that it was necessary.

63. Wilson *v.* McNamee, 102 U. S. 572, 26 L. ed. 234, where the opinion proceeds on two grounds: First, that the vessel in that case was an American ship and therefore carried the local sovereignty with her; and second, that the state laws are impliedly adopted by congress. On this point the court say: "The long continued silence of Congress, with its plenary power, in the presence of such legislation by the States concerned, is itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect." See *contra*, Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

64. Chapman *v.* Miller, 2 Speers (S. C.) 769; Spraigue *v.* Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. ed. 115; Freeman *v.* The Undaunted, 13 Sawy. (U. S.) 616, 37 Fed. 662; The Alameda, 12 Sawy. (U. S.) 429, 31 Fed. 366. In Spraigue *v.* Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. ed. 115, the court held invalid section 1512 of the code of Georgia which provided that all vessels except those between the ports of Georgia and South Carolina or Florida should pay full pilotage fees on refusal to accept a pilot. This section was held to conflict with U. S. Rev. Stat. (1878), § 4237, which expressly forbids discrimination between states.

65. Collins *v.* Pilots Relief Soc., 73 Pa. St. 194, imposing full pilotage on vessels in foreign commerce and half pilotage on coasting vessels is here held constitutional.

66. Harrison *v.* Green, 18 Cal. 94 (holding that the California pilot statute of 1856, § 23, relating to half pilotage is not a toll within the California Const. art. 6, § 4); Dale *v.* Daniels, 72 Ga. 207 (construing Ga. Code, §§ 1512, 1517, which provide that the first licensed pilot who offers his services to a vessel is entitled to full pilotage fee, even though the vessel uses no pilot. These provisions are held constitutional); Thompson *v.* Spraigue, 69 Ga. 409, 47 Am. Rep. 760; Com. *v.* Ricketson, 5 Metc. (Mass.) 412 (where it is held that the mere hailing of a vessel by a pilot is a sufficient offer of services); *Ex p.* McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624; Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 456, 17 L. ed. 805 (where the following language is used: "The object of the regulations . . . was to create a body of hardy and skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property. . . . This object would he in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or if the exertions of a pilot to reach the vessel in order to tender his services were without any remuneration"); Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 312, 13 L. ed. 996 (where Curtis, J., observes, after remarking that these provisions are customary in all pilot laws: "They rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places. . . . There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage service one of those cases"); The Alameda, 12 Sawy. (U. S.) 429, 31 Fed. 366.

67. Avery *v.* Steamship Cyphrenes, 3 Hawaii 650 (compulsory pilot law); Com. *v.* Ricketson, 5 Metc. (Mass.) 412 (construing Mass. Rev. Stat. c. 32, § 24); People v. Sperry, 50 Barb. (N. Y.) 170 (construing N. Y. Stat. (1865), c. 115, § 3); Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805.

68. In the leading case of Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996, it was held that the fact that vessels engaged in the Pennsylvania coal trade were exempted from certain provisions of the Pennsylvania statute did not bastardize the act, as pilot laws should properly be made applicable only to those vessels likely to need a pilot.

69. Congress attempted to guard against a conflict of state laws by 5 U. S. Stat. at L. p. 153, which provided, "that it shall . . . be lawful for the master . . . of any vessel coming into or going out of any port situate upon waters, which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters."

The proposition in the text is further supported by The Wm. Law, 14 Fed. 792; The

c. State Port Regulations — (1) *In General.* Where congress has not acted on the subject the states may pass the usual harbor regulations, either prescribing the rates of wharfage on wharves owned by the state or by the municipality[70] or by private parties,[71] or prescribing a penalty for landing at a place other than a government wharf,[72] regulating the positions in which vessels may rest in a harbor,[73] what lights they shall show while in a harbor,[74] or performing, through local port authorities, other usual police duties in harbors and levying a toll for services rendered.[75] The states may also act in determining the proper wharf

Clymene, 9 Fed. 164. And see Flanigan *v.* Washington Ins. Co., 7 Pa. St. 306. In The Clymene, 9 Fed. 164, a Delaware pilot sued under a Delaware statute for pilot fees, the defendant being a vessel bound for Philadelphia which had refused plaintiff's offer on Delaware bay. It was held that the plaintiff should recover, as any licensed pilot of any of the states bordering on the bay had a right to act. The fact that the vessel was bound for Philadelphia was considered immaterial, as all navigable waters, even within the territorial limits of a state, are public waters of the nation as to which the states have no authority except by grace of the federal government. It was also held incidentally that the provisions of the Delaware statute of April 5, 1881, requiring any pilot on Delaware bay to obtain a Delaware license were void.

70. *California.*— People *v.* Roberts, 92 Cal. 659, 28 Pac. 689.

Louisiana.— Sweeney *v.* Otis, 37 La. Ann. 520; First Municipality *v.* Pease, 2 La. Ann. 538; Worsley *v.* New Orleans Second Municipality, 9 Rob. (La.) 324, 41 Am. Dec. 333.

Mississippi.— O'Conley *v.* Natchez, 1 Sm. & M. (Miss.) 31, 40 Am. Dec. 87.

Texas.— Sterrett *v.* Houston, 14 Tex. 153.

United States.— Ouachita, etc., Packet Co. *v.* Aiken, 121 U. S. 444, 7 S. Ct. 907, 30 L. ed. 976; Parkersburg, etc., Transp. Co. *v.* Parkersburg, 107 U. S. 691, 2 S. Ct. 732, 27 L. ed. 584; Cincinnati, etc., Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Northwestern Union Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. ed. 688 [*affirming* 4 Dill. (U. S.) 10, 18 Fed. Cas. No. 10,345, 15 Alb. L. J. 107, 4 Centr. L. J. 58, 23 Int. Rev. Rec. 33]; Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. ed. 377.

See 10 Cent. Dig. tit. "Commerce," § 75.

Exorbitant rates.— The fact that a city charges exorbitant rates proportioned to the tonnage of vessels, for the use of municipal wharves, will not render the rates void as being a tonnage tax necessarily. Parkersburg, etc., Transp. Co. *v.* Parkersburg, 107 U. S. 691, 2 S. Ct. 732, 27 L. ed. 584.

Wharfage charges on packages.—A wharfage charge by a municipality on all packages landed in or shipped from it was held not to be invalid as a regulation of interstate commerce in Worsley *v.* New Orleans Second Municipality, 9 Rob. (La.) 324, 41 Am. Dec. 333.

71. Benedict *v.* Vanderbilt, 1 Rob. (N. Y.) 194, 25 How. Pr. (N. Y.) 209; Cannon *v.* New Orleans, 20 Wall. (U. S.) 577, 582, 22 L. ed. 417 *semble* (where Miller, J., speaking of compensation for the use of private wharves, says: "And it may be safely admitted also that it is within the power of the State to regulate this compensation, so as to prevent extortion"); Breck *v.* The John M. Welch, 9 Ben. (U. S.) 507, 13 Fed. Cas. No. 7,359, 24 Int. Rev. Rec. 207 [*reversed* in 2 Fed. 364]; The Ann Ryan, 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428; Bolt *v.* Stennett, 8 T. R. 606, 608, 5 Rev. Rep. 486 [*quoting* Lord Hale, who in his treatise *De Portibus Maris*, c. 6 (1 Hargrave Law Tracts 77) said: "A man for his own private advantage may in a port or town, set up a wharf or crane and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods . . . because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, . . . in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c. neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's licence or charter. For now the wharf and crane are affected with a public interest, and they cease to be *juris privati* only.'

72. Cincinnati, etc., Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. ed. 1169. The basis of this decision seems to be that a city may designate the proper landing places and prohibit the use of others.

73. Tinken *v.* Stillwagon, 1 N. Y. City Ct. 390; The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106; Green *v.* The Helen, 5 Hughes (U. S.) 116, 1 Fed. 916; King *v.* American Transp. Co., 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787, 1 West. L. Month. 186.

74. The Brig Jas. Gray *v.* The Ship John Fraser, 21 How. (U. S.) 184, 16 L. ed. 106.

75. Harbor Master *v.* Southerland, 47 Ala. 511 (sustaining the Alabama statute and Mobile ordinance of 1870, relating to port wardens' fees, on the ground that such fees were to be paid only for services which were necessary and offered to be rendered); State *v.* Charleston, 4 Rich. (S. C.) 286 (to the effect that a fee for assigning a vessel its place at a wharf is not a duty on tonnage); Benedict *v.* Vanderbilt, 1 Rob. (N. Y.) 194, 25 How. Pr. (N. Y.) 209 (holding valid the New York act of 1850, which provided for the appointment of harbor masters and defined their duties).

The port officers may be protected by a

lines[76] or examining vessels and determining their seaworthiness,[77] provided such regulations do not discriminate against vessels of other states,[78] although discrimination may be made against certain kinds or classes of vessels.[79]

(II) *Fees Must Be Strictly Compensatory.* A state harbor fee is unconstitutional if levied indiscriminately on every vessel coming within a port, regardless of services rendered, as it is then a tonnage duty[80] and also an impost on commerce.[81]

3. **Ferries.**[82] Congress may regulate ferries engaged in interstate or foreign

prohibition against the assumption of their duties or title by others. Curtin *v.* People, 26 Hun (N. Y.) 564 (N. Y. Laws (1881), c. 87); New York *v.* Cartwright, 4 Sandf. (N. Y.) 236. *Compare* Queen's Hospital *v.* Castle, 9 Hawaii 576, port charge of one dollar per person on passengers for the benefit of the Queen's hospital.

76. Savannah *v.* State, 4 Ga. 26; Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 163; Texas, etc., R. Co. *v.* New Orleans, 40 Fed. 111.

77. New York *v.* Cartwright, 4 Sandf. (N. Y.) 236. In this case the New York statute of March 29, 1844, prohibiting any person from exercising any of the functions of the port warden, one of which was the examination of vessels, was held not to mean that private parties could not make an additional examination.

78. Guy *v.* Baltimore, 100 U. S. 434, 443, 25 L. ed. 743 [*reversing* 1 Ky. L. Rep. 205], where wharfage fees were imposed by the city on vessels transporting goods "other than the production of this state," and the court said: "Such exactions, in the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States and quasi-public corporations transporting the products of the country cannot be permitted, by discriminations of that character, to impede commercial intercourse and traffic among the several States and with foreign nations." And see Wharf Case, 3 Bland (Md.) 361.

79. The John M. Welch, 9 Ben. (U. S.) 507, 13 Fed. Cas. No. 7,359, 24 Int. Rev. Rec. 207 [*reversed* in 2 Fed. 364].

80. *District of Columbia.*— Washington *v.* Barnes, 6 D. C. 230.

Louisiana.— New Orleans *v.* Prats, 10 Rob. (La.) 459 *semble*.

Missouri.— St. Louis *v.* Consolidated Coal Co., 158 Mo. 342, 59 S. W. 103, 81 Am. St. Rep. 310, 51 L. R. A. 850, where the fee exacted was not as compensation for the use of the city's wharf, but for the privilege of towing craft within the harbor.

New Jersey.— Hackley *v.* Geraghty, 34 N. J. L. 332.

New York.— Cole *v.* Johnson, 10 Daly (N. Y.) 258.

South Carolina.— Board of Harbor Com'rs *v.* Pashley, 19 S. C. 315; Alexander *v.* Wilmington, etc., R. Co., 3 Strobh. (S. C.) 594.

United States.—Northwestern Union Packet Co. *v.* St. Louis, 100 U. S. 423, 25 L. ed. 688 [*affirming* 4 Dill. (U. S.) 10, 18 Fed. Cas. No. 10,345, 15 Alb. L. J. 107, 4 Centr. L. J. 58, 23 Int. Rev. Rec. 33]; Inman Steamship Co. *v.* Tinker, 94 U. S. 238, 24 L. ed. 118; Cannon *v.* New Orleans, 20 Wall. (U. S.) 577, 22 L. ed. 417 [*reversing* 27 La. Ann. 16]; Southern Steamship Co. *v.* Port Wardens, 6 Wall. (U. S.) 31, 18 L. ed. 749 (holding unconstitutional the Louisiana act of March 15, 1855, and in effect *overruling* Port Wardens *v.* Ship Charles Morgan, 14 La. Ann. 595; The Martha J. Ward, 14 La. Ann. 289).

See 10 Cent. Dig. tit. "Commerce," § 75.

When not a tonnage tax.—An ordinary wharfage charge, although computed in proportion to the tonnage of vessels, is not a tonnage tax. Sweeney *v.* Otis, 37 La. Ann. 520; Benedict *v.* Vanderbilt, 1 Rob. (N. Y.) 194, 25 How. Pr. (N. Y.) 209; Vicksburg *v.* Tobin, 100 U. S. 430, 25 L. ed. 690; Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. ed. 377; The Ann Ryan, 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428.

81. Webb *v.* Dunn, 18 Fla. 721; Hackley *v.* Geraghty, 34 N. J. L. 332; Southern Steamship Co. *v.* Port Wardens, 6 Wall. (U. S.) 31, 18 L. ed. 749.

When not an impost.— A usual wharfage charge is not an impost within the meaning of the constitution. Benedict *v.* Vanderbilt, 1 Rob. (N. Y.) 194, 25 How. Pr. (N. Y.) 209.

82. A ferry is a franchise in the nature of a property right and is connected with the landing place rather than with the water.

Iowa.— Phillips *v.* Bloomington, 1 Greene (Iowa) 498.

Kentucky.— Newport *v.* Taylor, 16 B. Mon. (Ky.) 699; New-Port *v.* Taylor, 6 J. J. Marsh. (Ky.) 134.

New Jersey.— Hudson County *v.* State, 24 N. J. L. 718.

New York.— People *v.* Babcock, 11 Wend. (N. Y.) 586, 590. In this case a state license for a ferry across Niagara river was upheld, the court saying: "The privilege of the license may not be as valuable to the grantee by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place."

Tennessee.— Memphis *v.* Overton, 3 Yerg. (Tenn.) 387.

United States.— Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191; Fanning *v.* Gregoire, 16 How. (U. S.) 524, 14 L. ed. 1043 *semble*; Mills *v.* St. Clair County, 8 How. (U. S.) 569, 12 L. ed. 1201; Bowman *v.* Wathen, 2 McLean (U. S.) 376, 3 Fed. Cas. No. 1,740.

commerce,[83] while the state may establish and regulate all ferries within its borders,[84] and may even regulate ferries engaged in interstate[85] or international commerce.[86]

4. Preference of Ports. The provision in the United States constitution[87] that "no preference shall be given, by any regulation of commerce . . . to the ports of one State over those of another" is a prohibition on the federal government and not on the states,[88] and is directed against direct commercial discrimination rather than against indirect preferences resulting from the legitimate use of other powers of congress over commerce.[89] Furthermore the

England.— "A ferry is in respect of the landing place and not of the water. The water may be to one, and the ferry to another." 13 Viner Abr. 208 (A).

See 10 Cent. Dig. tit. "Commerce," §§ 20, 76, 119; and, generally, Ferries.

Taxation of ferries see *infra*, X, D, 4.

83. The Steamer Daniel Ball *v.* U. S., 10 Wall. (U. S.) 557, 19 L. ed. 999. The acts of congress of 1793, 1838, or 1852, requiring vessels to procure federal licenses, do not relate to ferry-boats, over which congress has never assumed to act. U. S. *v.* The William Pope, Newb. Adm. 256, 28 Fed. Cas. No. 16,703. See also Newport *v.* Taylor, 16 B. Mon. (Ky.) 699.

Intra-state ferry.— It has been held that congress cannot license a ferry-boat employed altogether within the limits of the state. North River Steam Boat Co. *v.* Livingston, 3 Cow. (N. Y.) 713, 3 Wheel. Crim. (N. Y.) 483; U. S. *v.* Morrison, Newb. Adm. 241, 26 Fed. Cas. No. 15,465, 4 N. Y. Leg. Obs. 333, 6 Pa. L. J. 132. *Contra*, U. S. *v.* Jackson, 26 Fed. Cas. No. 15,458, 4 N. Y. Leg. Obs. 450.

84. King *v.* American Transp. Co., 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787, 1 West. L. Month. 186.

A state license-tax may be imposed on ferries engaged in interstate commerce (Chilvers *v.* People, 11 Mich. 43) and is not a tonnage tax (Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419); but such license-tax may not be imposed where the only property of a foreign ferry corporation is its landing place and facilities (St. Clair County *v.* Interstate Car Transfer Co., 109 Fed. 741).

Ferry not in conflict with "free navigation."—A state regulation of ferries is not in conflict with a treaty of the United States or an act of congress providing for the free navigation of the waters on which such ferries are operated. Mills *v.* St. Clair County, 7 Ill. 197; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191; Fanning *v.* Gregoire, 16 How. (U. S.) 524, 14 L. ed. 1043.

Ferries obstructing navigation.—The states cannot grant ferry rights which will be a serious obstruction to navigation. Mississippi River Co. *v.* Lonergan, 91 Ill. 508; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191.

85. *Illinois.*— Mississippi River Bridge Co. *v.* Lonergan, 91 Ill. 508.

Kentucky.— Newport *v.* Taylor, 16 B. Mon. (Ky.) 699.

Mississippi.— Marshall *v.* Grimes, 41 Miss. 27 (Stat. Nov. 29, 1865).

Missouri.— Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809, 108 Mo. 550, 17 S. W. 884.

New Jersey.— Hudson County *v.* State, 24 N. J. L. 718; State *v.* Hudson County, 23 N. J. L. 206.

United States.— Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191.

See 10 Cent. Dig. tit. "Commerce," § 76.

Ferry rates may be regulated by the states, although they may affect interstate commerce, provided such state regulations do not directly conflict with congressional legislation. U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867, 10 Law Rep. 127.

One state alone may grant a ferry franchise across a stream which is an interstate boundary, which franchise will be effective as to the waters and landing place in that state, the concurrent action of the two states being unnecessary. Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191.

86. Chilvers *v.* People, 11 Mich. 43 (where it was held that a ferry-boat operating between the United States and Canada may be required to obtain a state license, although it already was possessed of a federal license to engage in interstate and foreign commerce); People *v.* Babcock, 11 Wend. (N. Y.) 586 (where a license under the laws of New York for a ferry across the Niagara river was upheld).

87. U. S. Const. art. 1, § 9, clause 6.

88. The reasoning of the court is that this provision is inserted in section 9, which contains the limitations on the power of congress while section 10 limits the powers of the states. Morgan's Louisiana, etc., R., etc., Co. *v.* Louisiana Bd. of Health, 118 U. S. 455, 467, 6 S. Ct. 1114, 30 L. ed. 237. To the same effect see Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447; Munn *v.* Illinois, 94 U. S. 113, 135, 24 L. ed. 77. *Contra*, Williams *v.* The Lizzie Henderson, 29 Fed. Cas. No. 17,726*a*.

89. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 433, 15 L. ed. 435, where the court holds, *inter alia*, that the erection of the Wheeling bridge, although it incidentally benefits Wheeling and injures Pittsburg, is not such a preference as the constitution prohibits. The court says: "The history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of our state over those of another. . . . It may, certainly, also embrace any other description of

provision is confined to a preference of the ports of one state over those of another state.[90]

5. Rafting.[91] The states may, under the police power, pass such reasonable regulations as to the floatage of logs as do not conflict with some lawful exercise of federal authority,[92] but may not impose a toll on logs floating in the state destined for or coming from points outside the state.[93]

6. Vessels and Steamship Companies — a. Regulations of in General.[94] Congress may pass ordinary regulations concerning vessels engaged in interstate or foreign commerce,[95] and the states may also, within the limits of their police

legislation looking to a direct privilege or preference of the ports of any particular state over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its power." To the same general effect that the word "preference" applies, not to the port itself physically but to the business in it, see Williams *v.* The Lizzie Henderson, 29 Fed. Cas. No. 17,726*a*.

Improvement of waterways.— It is not a preference that the federal government, for the purpose of improving navigation in a river, closes one channel flowing by one port and improves another outlet in a port of another state. South Carolina *v.* Georgia, 93 U. S. 4, 23 L. ed. 782.

Pilotage.— The imposition of a pilotage toll is a detriment possibly to a port, but is certainly not a preference. Cooley *v.* Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996. But see Williams *v.* The Lizzie Henderson, 29 Fed. Cas. No. 17,726*a*, where the Florida act of March 7, 1879, exempting vessels owned in the state from pilotage fees was held void as a preference. The decision might well be attacked on the ground that a state act cannot be a "preference." See *supra*, note 88. A similar state pilotage provision was held to be discriminating and so in conflict with U. S. Rev. Stat. § 4235, in Spraigue *v.* Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. ed. 115 [*reversing* 69 Ga. 409, 47 Am. Rep. 760].

Quarantine laws.—A state quarantine law is not a preference, as the prohibition against preference does not apply to the states. Morgan's Louisiana, etc., R., etc., Co. *v.* Louisiana Bd. of Health, 118 U. S. 455, 467, 6 S. Ct. 1114, 30 L. ed. 237.

Maritime lien.— For the same reason a maritime lien imposed by state law in certain cases is not a preference. Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447.

90. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435, 439, where, after commenting on the fact that congress creates preferences among individual ports by making ports of entry of some and omitting others, the court says: "The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states."

91. See, generally, Logging.

92. The following regulations have been upheld: Md. Code, art. 34, allowing the owner of the shore of Chesapeake bay where logs are washed to retain them until payment of twenty-five cents by the log-owner, and providing for the sale of such logs after advertising. Henry *v.* Roberts, 50 Fed. 902. Minn. Rev. Stat. c. 32, tit. 3, clause 25, providing for the scaling of all logs run through Lake St. Croix. Hospes *v.* O'Brien, 24 Fed. 145.

Binding into rafts.— In the following cases provisions that logs should not be floated singly but should be bound into rafts were sustained: Harrigan *v.* Connecticut River Lumber Co., 129 Mass. 580, 37 Am. Rep. 387 (construing Mass. Gen. Stat. c. 78, clause 15; in this case the logs came from another state and were merely passing through Massachusetts on their way to a third state); Scott *v.* Wilson, 3 N. H. 321 (sustaining the New Hampshire statute of June 10, 1808, to the effect that all logs found floating singly or lodged on the shores of the Connecticut river should be forfeited to the finder); Craig *v.* Kline, 65 Pa. St. 399, 3 Am. Rep. 636, 2 Leg. Gaz. (Pa.) 81.

The state may incorporate corporations for rafting logs and regulating their floatage. Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266. In this case the question whether the corporation had a lien on the logs for services performed without request or contract on the part of the log-owners was not passed upon.

Lien for surveying.— In Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 L. ed. 400, it was held that a lien given by state statute on logs cut in another state for surveying and scaling them by the surveyor-general while in a log-boom does not constitute a burden on interstate commerce, but is a lawful charge imposed by the state for furnishing additional facilities for navigation of a waterway.

Obstruction of stream.— The state may authorize the obstruction of a navigable stream for the purpose of facilitating the floatage of logs. Heerman *v.* Beef Slough Mfg., etc., Co., 1 Fed. 145.

93. Carson River Lumbering Co. *v.* Patterson, 33 Cal. 334.

94. See also in this connection *supra*, IX, C, 2, a.

95. Shaw *v.* McCandless, 36 Miss. 296 (regulating the sale of vessels); Bradley *v.* Northern Transp. Co., 15 Ohio St. 553 (regulating burden of proof in personal injury cases);

power, control any vessels coming within their jurisdiction.[96] It has been said that the power of the states is less over vessels than over the vehicles of transportation by land.[97]

b. License-Taxes on. The states may not impose license-taxes on vessels engaged in interstate commerce holding a federal coasting license.[98]

c. Registration of Vessels. Congress may provide for the enrolment of all vessels engaged in interstate or foreign commerce,[99] and when congress has acted the states may not regulate the subject further.[1]

The Lewellen, 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307 (requiring the posting of laws relating to the carriage of passengers); U. S. *v.* The James Morrison, Newb. Adm. 241, 26 Fed. Cas. No. 15,465, 4 N. Y. Leg. Obs. 333, 6 Pa. L. J. 132 (holding valid the act of July 7, 1838, providing for the safety of passengers on steam-vessels).

Coasting license.— The federal coasting license act was passed under the grant of authority to regulate commerce. North River Steam Boat Co. *v.* Livingston, 3 Cow. (N. Y.) 713, 3 Wheel. Crim. (N. Y.) 483; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

Vessels used only within one state.— Congress may not pass regulations affecting vessels used purely in commerce within a state. The Thomas Swan, 6 Ben. (U. S.) 42, 23 Fed. Cas. No. 13,931 (holding that a steamer employed in transporting passengers from one point to another within a state is not subject to the penalty of the United States statute of Aug. 30, 1852 (10 U. S. Stat. at L. p. 61), for failure to carry life-preservers and have her boilers inspected); The City of Salem, 13 Sawy. (U. S.) 607, 37 Fed. 846 (where it is held that a United States statute regulating the number of passengers which a steamboat might carry is applicable to boats engaged in carrying passengers on a navigable water of the United States between ports of the same state only). *Contra*, U. S. *v.* Jackson, 26 Fed. Cas. No. 15,458, 4 N. Y. Leg. Obs. 450, federal regulations concerning the building and equipment of vessels in the United States, whether or not engaged in foreign or interstate commerce, are valid.

Exclusion of foreign ships.— Congress may restrict the use of foreign vessels engaged in the foreign trade with the United States, or may entirely exclude them from that trade. Aguirre *v.* Maxwell, 3 Blatchf. (U. S.) 140, 1 Fed. Cas. No. 101.

96. Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698 (Chicago smoke ordinance); Board of Canal, etc., Com'rs *v.* Willamette Transp., etc., Co., 6 Oreg. 219 (requiring vessels using canals to furnish statements of their freight and passengers); Baker *v.* Wise, 16 Gratt. (Va.) 139 (construing the Virginia statute of March 17, 1856, authorizing the searching of vessels about to leave port).

Forfeiture.—A state statute is not invalid as a regulation of commerce simply because it inflicts the penalty of forfeiture on vessels engaged in interstate commerce for violation of state law. Smith *v.* Maryland, 18 How. (U. S.) 71, 15 L. ed. 269.

Exhibition on vessel.—A city tax imposed on an exhibition given on board a vessel engaged in interstate commerce is a valid police regulation. Board of Selectmen *v.* Spalding, 8 La. Ann. 87.

A prohibition against loading and unloading of foreign ships by their own crews, imposed by state statute, is void as a direct interference with foreign commerce. Cuban Steamship Co. *v.* Fitzpatrick, 66 Fed. 63.

97. Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 470, 22 L. ed. 678, where it is said: "Maritime transportation requires no artificial roadway. . . . No franchise is needed. . . . So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." See also *supra*, IX, D, 2, a.

98. Frere *v.* Von Schoeler, 47 La. Ann. 324, 16 So. 808, 27 L. R. A. 414 (license-tax on towboats); Lightburne *v.* Shelby County Taxing Dist., 4 Lea (Tenn.) 219; Harmon *v.* Chicago, 147 U. S. 396, 13 S. Ct. 306, 37 L. ed. 216 [*reversing* 140 Ill. 374, 29 N. E. 732, 26 N. E. 697 (*affirming* 37 Ill. App. 496), license-tax on steam-tugs]; Moran *v.* New Orleans, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653; *Ex p.* Insley, 33 Fed. 680 (state license for oyster fishermen); Booth *v.* Lloyd, 33 Fed. 593. *Contra*, New Orleans *v.* Eclipse Tow Boat Co., 33 La. Ann. 647, 39 Am. Rep. 279, holding that a license-tax on the owners of towboats having a federal coasting license and running on the Mississippi river is valid, as it is not a regulation of commerce but a taxation of property.

99. *Alabama.*— Foster *v.* Chamberlain, 41 Ala. 158.

California.— Mitchell *v.* Steelman, 8 Cal. 363, holding that the act of congress of July 29, 1850, as to recording mortgages and transfers of vessels, is valid and controls the statute of frauds.

Maine.— Wood *v.* Stockwell, 55 Me. 76.

Mississippi.— Shaw *v.* McCandless, 36 Miss. 296.

United States.— White's Bank *v.* The Schooner Robert Emmett, 7 Wall. (U. S.) 646, 19 L. ed. 211 [*reversing* 37 How. Pr. (N. Y.) 168].

Compare Spencer *v.* McStocker, 12 Hawaii 66; Spencer *v.* McStocker, 11 Hawaii 581, where the registration of vessels was compelled by the Hawaiian government.

And see 10 Cent. Dig. tit. "Commerce," § 73.

1. Foster *v.* Davenport, 22 How. (U. S.) 244, 16 L. ed. 248; Sinnot *v.* Davenport, 22

d. Maritime Liens.[2] The states may subject vessels engaged in interstate or foreign commerce to liens.[3]

e. Steamship Tickets. The states may regulate the sale of tickets of steamship companies engaged in interstate commerce either by prohibiting the issuing of tickets limiting liability,[4] by making it unlawful to sell without a certificate of authority,[5] by confining the sale of tickets to authorized agents,[6] or by requiring the purchase of unused tickets.[7]

E. Health Laws — 1. Inspection Laws — a. Definition and Scope. An inspection law is a provision for the official inspection of personal property[8] and applies to articles imported as well as to those produced within the state.[9]

b. Authority to Enact. The United States may pass inspection laws[10] and the states, in the absence of congressional action, may also make the usual and proper regulations for official inspection and certification of the quality and quantity of articles exported from and imported into a state,[11] covering the usual

How. (U. S.) 227, 16 L. ed. 243, holding void the Alabama statute of Feb. 15, 1854, which required the owners of steamers using the state internal waters to file with state officers a statement as to the ownership of the vessel, and thus conflicted with the United States enrolment and license act of 1793. This latter case in effect *overruled* The Cuba, 28 Ala. 185, which upheld this same Alabama statute. It has been suggested that Sinnot *v.* Davenport might have been decided the other way if the state statute had not included a heavy penalty for leaving port without complying with its provisions.

Personal property recording act not applicable to vessels.— The Florida statute of Nov. 25, 1828, requiring all mortgages on personal property to be recorded does not apply to vessels. Cunningham *v.* Tucker, 14 Fla. 251.

Where congress has not acted.— For an analogous case where, after careful consideration, a state statute requiring the registration of patents was upheld in the absence of congressional action, although it affected instrumentalities and articles of interstate commerce see Brechbill *v.* Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695.

2. See, generally, Maritime Liens.

3. Hursey *v.* Hassam, 45 Miss. 133; Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447.

Lien an aid to commerce.—A local statute subjecting vessels to liens for debts contracted in equipping and fitting them for service is held not to be an amendment of the general maritime law, and to be valid as in aid of commerce by enabling vessels to obtain credit or necessaries when away from their home port. The Robert Dollar, 115 Fed. 218; The Del Norte, 90 Fed. 506. *Compare* Matter of Brigantine Nicolaus, 4 Hawaii 354, where it is said that the general maritime law gives a lien to ship-repairers and those providing necessities for vessels.

4. Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238.

5. State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.

6. Burdick *v.* People, 149 Ill. 600, 36 N. E. 948, 41 Am. St. Rep. 329, 24 L. R. A. 152, 149 Ill. 611, 36 N. E. 952; People *v.* Warden City Prison, 26 N. Y. App. Div. 228, 50 N. Y. Suppl. 56; Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472.

7. State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.

8. New York *v.* Compagnie Générale Transatlantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. ed. 383.

A statute prohibiting the importation of liquors without regard for purity is not an inspection law merely because it provides for the examination by a state chemist of all liquors sold in the state. Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632.

The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be for domestic use. Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23, said: "The object of such [inspection] laws is to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers." And see Foster *v.* New Orleans, 94 U. S. 246, 24 L. ed. 122 [*reversing* 26 La. Ann. 105].

9. Green *v.* Savannah, R. M. Charlt. (Ga.) 368; Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 362, 43 L. ed. 191; Neilson *v.* Garza, 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

10. Buttfield *v.* Bidwell, 96 Fed. 328, 37 C. C. A. 506, a provision that the secretary of the treasury shall fix the minimum standard of tea to be imported is here construed.

11. Gaines *v.* Coates, 51 Miss. 335; Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191.

A prohibition on the importation of all intoxicating liquors into the state for the use of the importer is not an inspection law merely because it provides for the examination by a state chemist of all liquors sold in the state. Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632.

Surveying cargoes not inspection.— The Louisiana statute of March 6, 1869, confiding the duty of surveying cargoes exclusively to state officials is an unconstitutional interference with commerce, as it is not an inspection law, not being for the protection of con-

articles[12] and containing the proper provisions for enforcement,[13] but may not usually affect articles of commerce *in transitu*.[14]

c. Discriminations. A state inspection law may not discriminate between the products of different states[15] even indirectly.[15]

sumers, but simply to give state officials a monopoly of the business of furnishing this information to the owners. Foster *v.* New Orleans, 94 U. S. 246, 24 L. ed. 122 [*reversing* 26 La. Ann. 105].

The fact that one port only is made subject to an inspection law does not render it invalid. Glover *v.* Board of Flour Inspectors, 48 Fed. 348.

The testing of intoxicating liquors shipped into a state for the personal use of the consignee may not be required by a state. Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100.

12. Proper subjects of inspection.— The states may require the inspection of boilers on vessels (Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. Ann. 85, holding, however, that the Louisiana statute of March 6, 1834, was superseded by the United States statute of July 7, 1838), fertilizers (Vanmeter *v.* Spurrier, 94 Ky. 22, 14 Ky. L. Rep. 684, 21 S. W. 337; State *v.* Caraleigh Phosphate, etc., Works, 119 N. C. 120, 25 S. E. 795; Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191 [*affirming* 52 Fed. 690]), hay (Board of Hay Inspectors *v.* Pleasants, 23 La. Ann. 349; New York *v.* Nichols, 4 Hill (N. Y.) 209), intoxicating liquors (State *v.* Bixman, 162 Mo. 1, 62 S. W. 828), tobacco exported (Turner *v.* Maryland, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370 [*affirming* 55 Md. 240]), or wine (Addison *v.* Saulnier, 19 Cal. 82); or may require the measurement of coal sold within its borders (State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465, 6 So. 220; Charleston *v.* Rogers, 2 McCord (S. C.) 495, 13 Am. Dec. 751; Pittsburgh, etc., Coal Co. *v.* Louisiana, 156 U. S. 590, 15 S. Ct. 459, 39 L. ed. 544, valid although applied to coal imported from outside the state).

Samples may be required to be furnished to the inspection officer. Vanmeter *v.* Spurrier, 94 Ky. 22, 14 Ky. L. Rep. 684, 21 S. W. 337.

The size of articles may be regulated by an inspection law. Turner *v.* Maryland, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370.

13. Bringing the article to the officer is just as lawful a requirement as that the officer should go to the article for inspection. Turner *v.* Maryland, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370.

The removal or destruction of unsound articles is a proper part of an inspection law, and is an exercise of the power to inspect. Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; Neilson *v.* Garza, 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091, per Bradley, J.

A penalty for violation of an inspection law by the sale of **uninspected articles** is a proper part of an inspection law. State *v.* Fosdick, 21 La. Ann. 256. The mere fact that no penalty for violation is provided for does not render an inspection law invalid. Glover *v.* Board of Flour Inspectors, 48 Fed. 348.

14. Georgetown *v.* Davidson, 6 D. C. 278, holding that the ordinance of the city of Georgetown of July 24, 1852, concerning the inspection of flour is valid, as it does not apply to flour *in transitu* through the city.

Cattle.— Farris *v.* Henderson, 1 Okla. 384, 33 Pac. 380, holding that the Oklahoma statute requiring the inspection of all stock driven into a certain county is invalid in view of the fact that that county is used largely by cattle men in driving cattle from one state to another across Oklahoma. This driving of cattle was held to be interstate commerce and the statute in question an unwarranted interference with it.

15. State *v.* Duckworth, (Ida. 1897) 51 Pac. 456, 39 L. R. A. 365 (holding that Ida. Laws (1897), p. 115, §§ 4, 6, is void as a discrimination, as it provides that even sound sheep brought in from outside the state shall be clipped once by the state inspector, while no such requirement is made as to sheep within the state); Voight *v.* Wright, 141 U. S. 62, 11 S. Ct. 855, 35 L. ed. 638 (holding that it is unconstitutional to require the inspection of flour brought into a state at a charge of two cents per barrel while the inspection of flour produced in the state is merely permitted).

A provision that lime imported from a certain state only shall be in casks of prescribed kind is void as a discrimination. Higgins *v.* Three Hundred Casks of Lime, 130 Mass. 1.

It is not a discrimination for a state to require that all tobacco grown in the state for export shall be inspected unless marked with the seller's name, while tobacco produced and sold within the state need not be inspected as to size. Turner *v.* Maryland, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370.

16. Indirect discrimination.—An inspection law is invalid as a discrimination under the "privileges and immunities" clause of the constitution, if its evident purpose or effect is to favor one state at the expense of another, even though it is not in terms discriminating. So a statute directing all meat sold in the state to be inspected in the state before slaughter is void as excluding the importation into the state of dressed meat. Schmidt *v.* People, 18 Colo. 78, 31 Pac. 498; State *v.* Klein, 126 Ind. 68, 25 N. E. 873; Minnesota *v.* Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 [*affirming* 39 Fed. 641]; *Ex p.* Kieffer, 40 Fed. 399; Harvey *v.* Huffman, 39 Fed. 646; *In re* Christian, 39 Fed. 636; Swift *v.* Sutphin, 39 Fed. 630. A provision that all meats slaughtered one hundred miles from the place of sale are to be inspected at a charge of one cent a pound is

d. Fee. A fee for inspection, when compensatory in nature, is a valid provision of such state law,[17] although it be an impost on imports or exports,[18] and it is probably for congress and not for the courts to decide whether or not such fee is so excessive that it should be reduced.[19]

2. Quarantine Laws. Congress may enact the usual quarantine laws,[20] and when it has not done so, the states, in the exercise of their police powers, may also pass such laws in the usual forms.[21] This includes quarantine laws concerning cattle[22] and such laws with respect to localities afflicted with disease.[23] A state quarantine fee, compensatory in nature, is valid.[24]

void as an unreasonable charge amounting to a prohibitory tax. Brimmer *v.* Rebman, 138 U. S. 78, 11 S. Ct. 213, 35 L. ed. 862 [*affirming* 41 Fed. 867].

17. *California.*— Addison *v.* Saunier, 19 Cal. 82.

Kentucky.— Vanmeter *v.* Spurrier, 94 Ky. 22, 14 Ky. L. Rep. 684, 21 S. W. 337, holding the fee proper as being only what was necessary in furtherance of the object of protecting buyers against fraud.

Louisiana.— State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465, 6 So. 220.

Maryland.— Turner *v.* State, 55 Md. 240, the charge of outage for inspecting tobacco is valid.

North Carolina.— State *v.* Caraleigh Phosphate, etc., Works, 119 N. C. 120, 25 S. E. 795.

South Carolina.— Charleston *v.* Rogers, 2 McCord (S. C.) 495, 13 Am. Dec. 751.

United States.— Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191 [*affirming* 52 Fed. 690]; Neilson *v.* Garza, 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

See 10 Cent. Dig. tit. "Commerce," § 63.

Application of the tax.— The fact that some of the revenue derived from inspection fees has been applied to other purposes than inspection does not of itself render the fee invalid as a tax on interstate commerce. Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191 [*affirming* 52 Fed. 690].

An excessive fee is invalid but an inspection tax of twenty-five cents per ton on fertilizers, although somewhat in excess of the actual cost of inspection, is not in itself so large as to show a purpose to tax commerce under this guise. Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191 [*affirming* 52 Fed. 690]. *Contra,* State *v.* Bixman, 162 Mo. 1, 62 S. W. 828, where it was held that a fee largely in excess of the cost of inspection of intoxicating liquors was valid in view of the act of congress of Aug. 8, 1890, declaring that all intoxicating liquors on arrival in a state are subject to its police powers. This was upheld as a restriction on the sale and use of liquors which the state could have entirely prohibited.

18. U. S. Const. art. 1, § 10, clause 2. And see *infra,* X, B, 2.

19. State *v.* Bixman, 162 Mo. 1, 62 S. W. 828; Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191 [*affirming* 52 Fed. 690]; Neilson *v.* Garza, 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

Contra where fee onerous and discriminating. Brimmer *v.* Rebman, 138 U. S. 78, 11 S. Ct. 213, 35 L. ed. 862 [*affirming* 41 Fed. 867].

20. Morgan's Louisiana, etc., R., etc., Co. *v.* Louisiana State Bd. of Health, 118 U. S. 455, 6 S. Ct. 1114, 30 L. ed. 237.

21. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113 (authorizing the disinfection of vessels in the discretion of the board of health); St. Louis *v.* McCoy, 18 Mo. 238 (requiring boats coming up the Mississippi river from below Memphis to stop in quarantine in St. Louis from two to twenty days); St. Louis *v.* Boffinger, 19 Mo. 13; Board of Health *v.* Loyd, 1 Phila. (Pa.) 20, 7 Leg. Int. (Pa.) 7 (concerning emigrants); Morgan's Louisiana, etc., R., etc., Co. *v.* Louisiana State Bd. of Health, 118 U. S. 455, 6 S. Ct. 1114, 30 L. ed. 237; King *v.* American Transp. Co., 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787, 1 West. L. Month. 186.

22. **Cattle quarantine.**— A state may prohibit the introduction within its limits of animals from districts in which infectious animal diseases prevail. Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 21 S. Ct. 603, 45 L. ed. 847 [*affirming* 20 Tex. Civ. App. 451, 49 S. W. 627]; Rasmussen *v.* Idaho, 181 U. S. 198, 21 S. Ct. 594, 45 L. ed. 820 [*affirming* (Ida. 1900) 59 Pac. 933, 52 L. R. A. 78]; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. ed. 878, holding that a state statute, prohibiting, under penalty, persons driving into the state cattle capable of imparting disease, and making the fact that they came from a certain district *prima facie* evidence of such ability to transmit infection, and granting a civil remedy for damages for such infection, is valid and not in conflict with the congressional regulations as to the transportation of cattle. The court proceeds on the theory that the congressional statute was not intended to affect civil liability, but only to prevent the actual spread of disease.

23. Compagnie Francaise, etc. *v.* Louisiana State Bd. of Health, 186 U. S. 380, 22 S. Ct. 811, 46 L. ed. 1209 [*affirming* 51 La. Ann. 645, 25 So. 591, 72 Am. St. Rep. 458, 56 L. R. A. 795], upholding a state statute excluding healthy persons from a locality infected with a contagious disease.

24. Morgan's Louisiana, etc., R., etc., Co. *v.* State Bd. of Health, 36 La. Ann. 666

F. Free Trade-Marks.[25] Congress may not regulate trade-marks used in commerce generally, without restricting such regulation to interstate and foreign commerce and commerce with the Indian tribes, as by requiring the registration of trade-marks,[26] which cannot be justified on the ground that trade-marks are inventions or discoveries in the arts and sciences or are writings of authors.[27] The question whether the registration of trade-marks used only in interstate or foreign commerce may be required by congress has never been decided.[28]

G. Commerce With the Indian Tribes. Congress may regulate commerce with the Indian tribes,[29] even though they reside within the limits of a single state,[30] as by regulating sales of goods to Indians.[31] The states may not control intercourse with the Indian tribes,[32] but where a tribe ceases to exercise its tribal governmental functions the state may terminate its existence.[33]

X. TAXATION[34] OF COMMERCE.[35]

A. In General — Power to Tax. The federal government may tax only commerce among the states, with foreign nations, and with the Indian tribes; while a state may tax only commerce entirely within its borders,[36] or property

[*affirmed* in 118 U. S. 455, 6 S. Ct. 1114, 30 L. ed. 237].

25. See, generally, TRADE-MARKS AND TRADE-NAMES.

26. U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550.

Diversity of citizenship will enable courts of equity to take cognizance of trade-mark cases under the earlier invalid statutes. U. S. *v.* Seymour, 153 U. S. 353, 14 S. Ct. 871, 38 L. ed. 742; Prince's Metallic Paint Co. *v.* Prince Mfg. Co., 53 Fed. 493; Battle *v.* Finlay, 50 Fed. 106.

The statute of March 3, 1881, is recognized as valid as applied to interstate or foreign commerce in Luyties *v.* Hollendeer, 30 Fed. 632; Luyties *v.* Hollender, 21 Fed. 281; Pratt Mfg. Co. *v.* Astral Refining Co., 27 Fed. 492; Glen Cove Mfg. Co. *v.* Ludeling, 23 Blatchf. (U. S.) 46, 22 Fed. 823.

27. U. S. Const. art. 1, § 8, clause 8. In U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550, it is said: "The trade-mark may be, and, generally is, the adoption of something already in existence as the distinctive symbol of the party using it. . . . But in neither case does it depend upon novelty, upon invention, upon discovery, or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation."

28. U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550, where the question is expressly left open.

29. U. S. Const. art. 1, § 8, clause 3. See, generally, INDIANS; and *supra*, III, D; V, C.

Alaska is an Indian country in the legal sense that congress is there the sole law-making power and may forbid the manufacture or sale of intoxicating liquors. U. S. *v.* Nelson, 29 Fed. 202.

The power to regulate Indian contracts was denied to congress in Hicks *v.* Ewhartonah, 21 Ark. 106.

The punishment of crime among Indians cannot be sustained under the commerce clause. U. S. *v.* Bailey, 1 McLean (U. S.) 234, 24 Fed. Cas. No. 14,495.

30. Veazie *v.* Moor, 14 How. (U. S.) 568, 14 L. ed. 545.

31. **Sales of liquor** to an Indian under charge of an Indian agent, although made outside of the reservation and within the limits of a state, may be regulated by congress under the commerce clause. U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182.

32. Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483, holding invalid the Georgia act of Dec. 22, 1890, to prevent the exercise of assumed and arbitrary power by persons under pretext of authority from the Cherokee Indians, and providing for the imprisonment of persons residing among them without authority from the state governor.

State jurisdiction over the Indian nation was sustained in Caldwell *v.* State, 1 Stew. & P. (Ala.) 327; State *v.* Foreman, 8 Yerg. (Tenn.) 256.

33. *In re* Narragansett Indians, 20 R. I. 715, 40 Atl. 347.

34. See, generally, TAXATION.

35. **For license-taxes** see, generally, *supra*, IX; and especially *supra*, IX, B, 1.

36. **State taxation of interstate commerce.** — "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce." Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694.

Nature of taxing power of states. — "The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government." Nathan *v.* Louisiana, 8 How. (U. S.) 73, 12 L. ed. 992. See also McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579, where the following general principle is laid down: "Taxation is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sov-

having a *situs* in the state and used in internal or interstate or foreign commerce, unless such property is taxed merely because it is used in such commerce.[37] Direct taxes levied by the federal government on commerce or its instruments must be apportioned among the several states according to population.[38] The states may in no way directly tax commerce itself, even though the same tax is levied on internal commerce.[39]

B. Taxation of Property the Subject of Commerce — 1. In General — a. Situs in State. A state may lawfully tax property produced within its borders,[40] or imported from outside the state and incorporated in state property by reaching its destination, for the purpose of use or sale in the state.[41] A state may also tax property temporarily within it for the purpose of the expenditure of work and labor upon it,[42] but may not tax goods, the subjects of interstate or foreign commerce, which are in the process of transportation through the state,[43] although the merchandise may be temporarily at rest within the state.[44] A state may tax goods, although intended for export, before they commence their final movement for transportation from the state of their origin to that of their des-

ereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation."

37. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158, where the following language is used: "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with and an obstruction of the power of Congress in the regulation of such commerce."

38. U. S. Const. art. 1, § 2, clause 3. And see, generally, TAXATION.

39. Fargo *v.* Michigan, 121 U. S. 230, 7 S. Ct. 857, 30 L. ed. 888; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146; Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744.

40. See, generally, TAXATION.

41. *In re* Wilson, 19 D. C. 341, 12 L. R. A. 624; Pittsburgh, etc., Coal Co. *v.* Bates, 156 U. S. 577, 15 S. Ct. 415, 39 L. ed. 538 [*affirming* 40 La. Ann. 226, 3 So. 642, 8 Am. St. Rep. 519]; Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257 [*affirming* 33 La. Ann. 843, 39 Am. Rep. 284].

As to when property becomes incorporated with the mass of property in the state see *supra*, VIII.

42. Standard Oil Co. *v.* Combs, 96 Ind. 179, 181, 49 Am. Rep. 156 (holding that stoves purchased by a non-resident, remaining in the state only for the application of a finishing process, are subject to state taxation, the court saying: "Property within the State for the purpose of undergoing any part of the process of manufacture is here for more than a temporary purpose connected with its transportation. The *situs* of the property does not depend upon the extent of the work that is to be done upon it, for, if it is here to be put through any of the stages in the process of manufacture, it is here for a purpose which legitimately subjects it to taxation"); Rieman *v.* Shepard, 27 Ind. 288; Powell *v.* Madison, 21 Ind. 335.

Cattle grazing in a state, although in transit on foot through the state, are subject to taxation under a law taxing live stock brought into the state for the purpose of grazing. Kelley *v.* Rhoads, 9 Wyo. 352, 63 Pac. 935, 87 Am. St. Rep. 959.

43. Standard Oil Co. *v.* Bachelor, 89 Ind. 1; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146 [*reversing* 62 Pa. St. 286, 1 Am. Rep. 399]. *Compare* Kelley *v.* Rhoads, 9 Wyo. 352, 63 Pac. 935, 87 Am. St. Rep. 959, where cattle in transit through a state on foot, grazing as they went, were held subject to a state cattle-grazing statute. And see *contra*, State *v.* Delaware, etc., R. Co., 30 N. J. L. 473; Pennsylvania R. Co. *v.* Com., 3 Grant (Pa.) 128.

Capital invested in products on shipboard for exportation to foreign countries or in transit from one state to another; — *quære* whether it may be taxed. People *v.* New York, 104 U. S. 466, 26 L. ed. 632.

44. Deposit on a dock for transshipment does not give rise to a *situs* within the state for the purposes of taxation. State *v.* Carrigan, 39 N. J. L. 35.

Logs cut out of the state and floated through the state to the sea, but which lie over in the state during one season on account of low water, are not subject to taxation by the state in which they thus lie over. Coe *v.* Errol, 62 N. H. 303 [*affirmed* in 116 U. S. 517 *dictum*, 6 S. Ct. 475, 29 L. ed. 715].

Delay for separation and assortment merely in the course of interstate transportation does not render the goods liable to state taxation. State *v.* Engle, 34 N. J. L. 425.

tination,[45] and this final movement is not begun when goods are brought from points within the state and collected in a central storage depot in the state preparatory to final shipment.[46]

b. Discriminations. A state may not in any way discriminate in its taxation against the products and manufactures of other states or foreign countries;[47] but there is no discrimination where the same tax is laid on such goods as is laid on state products or manufactures.[48]

c. Within the Indian Reservations.[49] The state may not levy taxes on property within the Indian reservations.[50]

2. Duties on Imports and Exports — a. Definition and Scope. The phrase "imports or exports" refers only to imports from and exports to a foreign country,[51] and does not apply to passengers.[52]

b. Who May Levy — (i) *National Power.* Congress may impose any duty

45. Myers *v.* Baltimore County, 83 Md. 385, 35 Atl. 144, 55 Am. St. Rep. 349, 34 L. R. A. 309; Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715 [*affirming* 62 N. H. 303]. *Contra,* Ogilvie *v.* Crawford County, 2 McCrary (U. S.) 148, 7 Fed. 745, holding that goods ready and intended for immediate shipment, when actually shipped in a reasonable time, are beyond the reach of state taxation.

Coal mined in the state awaiting shipment to parties outside the state who have purchased it is not subject to state taxation. State *v.* Carrigan, 39 N. J. L. 35.

46. Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715 [*affirming* 62 N. H. 303].

The theory of the court is well stated by Bradley, J., in Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715, as follows: "There must be a point of time when they [the goods] cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or a station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun till they are committed to the common carrier for transportation out of the State to the State of their destination or have started on their ultimate passage to that State."

47. Powell *v.* State, 69 Ala. 10; Vines *v.* State, 67 Ala. 73; Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691. *Compare* Huddleston *v.* Hagerty, 1 Ohio S. & C. Pl. Dec. 331, 2 Ohio N. P. 291, where it was held that the taxation of personal property consigned from a place without the state for sale within the state but not requiring a consignee to list property consigned for sale from any place within the state is not a discrimination between the home and foreign product. And see *contra,* People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

48. *Ex p.* Hanson, 28 Fed. 127; *Ex p.* Thornton, 4 Hughes (U. S.) 220, 12 Fed. 538, tax on sample agents.

49. See, generally, Indians; and *supra,* III, D; V, C; IX, G.

50. Foster *v.* Blue Earth County, 7 Minn. 140, holding such tax inconsistent with the power of congress over the Indian tribes.

51. *Alabama.*— Hinson *v.* Lott, 40 Ala. 123 [*affirmed* in 8 Wall. (U. S.) 148, 19 L. ed. 387].

Louisiana.— State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465, 6 So. 220. *Contra,* State *v.* Kennedy, 19 La. Ann. 397.

Missouri.— State *v.* Bixman, 162 Mo. 1, 62 S. W. 828, inspection fee on articles from another state.

Nevada.— *Ex p.* Martin, 7 Nev. 140, 8 Am. Rep. 707, as to "exports."

North Carolina.— State *v.* Norris, 78 N. C. 443.

South Carolina.— State *v.* Pinckney, 10 Rich. (S. C.) 474 (as to "imports"); State *v.* Charleston, 10 Rich. (S. C.) 491 (as to slaves imported from another state).

United States.— Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257; Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382; Preston *v.* Finley, 72 Fed. 850; *Ex p.* Brown, 48 Fed. 435. And see *contra,* Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 449, 6 L. ed. 678, where it was said by Marshall, C. J., in the course of the discussion of the constitutional phrase, "duties on imports": "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state."

See 10 Cent. Dig. tit. "Commerce," § 61; and, generally, Customs Duties.

Viewed from standpoint of the taxing power the word "exports" refers only to goods exported from the jurisdiction of the taxing power. State *v.* Charleston, 10 Rich. (S. C.) 491.

52. New York *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. ed. 383 [*affirming* 20 Blatchf. (U. S.) 296, 10 Fed. 357]; Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744, where it was held that passengers going out of the state were not exports. See also Smith *v.* Turner, 7

on imports from a foreign country[53] but has no power to impose a duty on exports from a state.[54]

(II) *State Power.* No state may lay a duty on imports or exports without the consent of congress[55] except for the purpose of executing her inspection laws.[56]

c. On What Property — (I) *Imports.* Imports consist of subjects of commerce imported into a state before their incorporation with state property.[57]

(II) *Exports.* The word "exports" includes property sold to exporters awaiting shipment,[58] but not property purchased by dealers for the purpose of exportation.[59] A state tax on foreign bills of lading is invalid as a tax on exports,[60] but a state tax on foreign bills of exchange is not.[61]

d. Form of Duties — (I) *What Are Imposts on Imports or Exports.* A tax on sales of goods is a duty on imports or exports when applied to foreign but not to merely interstate commerce.[62] A state prohibition on the sale of liquors

How. (U. S.) 283, 12 L. ed. 702, where the question whether a head money tax on immigrants was a duty on imports was discussed but not decided.

53. See, generally, Customs Duties.

54. "No tax or duty shall be laid on articles exported from any State." U. S. Const. art. 1, § 9, clause 5.

55. **State tax on exports to another state** invalid as a regulation of commerce (Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691. See also *dictum* in Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715); and hence a tax on all coal mined in the state and transported to any point in the state or outside (State *v.* Cumberland, etc., R. Co., 40 Md. 22 [*citing* Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146]), or on unsmelted ore exported from the state (Jackson Min. Co. *v.* Auditor-Gen., 32 Mich. 488) is void as an interference with interstate commerce.

56. No state shall, without the consent of congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. U. S. Const. art. 1, § 10, clause 2.

As to inspection fee see *infra*, X, B, 2, d, (III).

Valid till congress acts.— It has been held that a state may tax imports for any purpose in the absence of congressional control. Padelford *v.* Savannah, 14 Ga. 438.

Admission of states to the Union.— See Cocke *v.* Calkin, 1 Tex. 542, on the question when Texas became a part of the United States and therefore ceased to have the right to levy import duties.

57. **As to when merchandise imported becomes incorporated with state property** so that its taxation is not invalid as a duty on imports see May *v.* New Orleans, 178 U. S. 496, 20 S. Ct. 976, 44 L. ed. 1165; and, generally, *supra*, VIII.

As to what are imports see, generally, Customs Duties.

Goods in original packages.— Goods imported from a foreign country are not subject to taxation in the state while they remain in the hands of the importer in original packages. State *v.* Davis, (N. J. 1901) 50 Atl. 586. And to the same effect see Pitkin's Appeal, 193 Ill. 268, 61 N. E. 1048.

58. Clarke *v.* Clarke, 3 Woods (U. S.) 408, 5 Fed. Cas. No. 2,846. See also Customs Duties.

59. Myers *v.* Baltimore County, 83 Md. 385, 35 Atl. 144, 55 Am. St. Rep. 349, 34 L. R. A. 309.

60. Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 648, 45 L. ed. 862; Almy *v.* California, 24 How. (U. S.) 169, 16 L. ed. 644, where the court, in an opinion based upon the authority of Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678, speaks as follows: "A tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it." This case was overruled in so far as it held that the terms "imports" and "exports" might apply to interstate commerce, by Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382, but on the question cited in the text it is still law, and was sustained by Woodruff *v.* Parham. See opinion of White, J., in Dooley *v.* U. S., 183 U. S. 151, 160, 22 S. Ct. 62, 46 L. ed. 128; Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 648, 45 L. ed. 862.

61. *Ex p.* Martin, 7 Nev. 140, 8 Am. Rep. 707; Williams *v.* Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. ed. 186; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Nathan *v.* Louisiana, 8 How. (U. S.) 73, 81, 12 L. ed. 992, where it is said: "A bill of exchange is neither an export nor an import. . . . The individual who uses his money and credit in buying and selling bills of exchange . . . may be taxed by a state. . . . He is not engaged in commerce, but in supplying an instrument of commerce."

62. Dooley *v.* U. S., 183 U. S. 151, 161, 22 S. Ct. 62, 46 L. ed. 128, per White, J.; Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 648, 45 L. ed. 862; Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257; Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382. *Contra*, Almy *v.* California, 24 How. (U. S.) 169, 16 L. ed. 644.

Sales of foreign goods may not be taxed by the states while the merchandise is in the

may be a duty on imports and hence invalid within the "imports" clause of the constitution.[63]

(II) *What Are Not Imposts on Imports or Exports.* A tax on imports or exports is not created by a license-tax on a business,[64] on traveling merchants or peddlers,[65] or on other merchants doing business in the state;[66] by a tax on money invested in the business of buying imports;[67] by a corporate franchise tax, although the corporation is engaged in the importing business;[68] by a tax on the gross receipts of interstate business;[69] by a capitation tax on passengers leaving a state;[70] or by an inheritance tax levied on all foreign heirs or legatees.[71] An ordinary personal property tax is not a tax on exports, although the property taxed is invested in the business of exporting and in property in the process of

original packages. State *v.* Shapleigh, 27 Mo. 344; People *v.* Moring, 47 Barb. (N. Y.) 642; Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. ed. 1015, where it is held that a statute which requires an auctioneer to collect and pay into the state treasury a tax on his sales is invalid when applied to imported goods in the original packages, sold by him for the importer.

Sales of domestic goods may be taxed by the states without infringing on the "imports or exports" clause. Cumming *v.* Savannah, R. M. Charlt. (Ga.) 26; Harrison *v.* Vicksburg, 3 Sm. & M. (Miss.) 581, 41 Am. Dec. 633 (city tax on sales of goods imported from another state); State *v.* Pinckney, 10 Rich. (S. C.) 474.

Those buying cargoes "to arrive" are not importers. Waring *v.* Mobile, 8 Wall. (U. S.) 110, 19 L. ed. 342, where it was held that goods bought of the shipper but not to be at the risk of the purchaser until delivered could be properly taxed by the state, although still in the original packages.

63. See, generally, Intoxicating Liquors; and *supra*, VIII. See also Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128 [*overruling* the reasoning of Peirce *v.* New Hampshire, 5 How. (U. S.) 554, 12 L. ed. 279, in which latter case it was said that a state prohibition law was not an impost on imports]. And *compare* People *v.* Huntington, 4 N. Y. Leg. Obs. 187, where it was held that a prohibition against the sale of liquor to be drunk on the premises was not a tax on imports.

64. Osborne *v.* Mobile, 44 Ala. 493 [*affirmed* in 16 Wall. (U. S.) 479, 21 L. ed. 470, without there commenting on the question whether or not the tax in question, a license-tax on an express company, was a duty on imports or exports]; People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581; Jenkins *v.* Ervin, 8 Heisk. (Tenn.) 456; Higgins *v.* Rinker, 47 Tex. 381. *Compare* American Fertilizing Co. *v.* North Carolina Bd. of Agriculture, 43 Fed. 609, 11 L. R. A. 179, where a license-tax on the privilege of sale of fertilizers was held the same as a tax on the fertilizers themselves [*citing* as authority for this point Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678], but as they were imported from another state the court decided the case on the point that the tax was an unconstitutional interference with interstate commerce.

65. Sears *v.* Warren County, 36 Ind. 267, 10 Am. Rep. 62 (license-fee on non-resident traveling merchants vending foreign merchandise); Wynne *v.* Wight, 18 N. C. 19; Cowles *v.* Brittain, 9 N. C. 204; *In re* Rudolph, 6 Sawy. (U. S.) 295, 2 Fed. 65. See also *supra*, VII; IX, B, 1.

66. People *v.* Walling, 53 Mich. 264, 18 N. W. 807 (license-tax on non-residents selling liquors in the state; the case was reversed in 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691, but on the ground that the tax was void as a discrimination); *Ex p.* Robinson, 12 Nev. 263, 28 Am. Rep. 794; Paguet *v.* Wade, 4 Ohio 107; State *v.* Harrington, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100.

67. Padelford *v.* Savannah, 14 Ga. 438; People *v.* Barker, 21 N. Y. App. Div. 480, 48 N. Y. Suppl. 641, where the N. Y. Laws (1892), c. 202, § 1, prohibited a deduction in any taxation assessment for any debt "incurred in the purchase of non-taxable property," and it was held that a refusal to make a deduction for money borrowed to buy imports was not an impost on imports, as the prohibition covered all non-taxable property, whence it could not be claimed that the statute was directed expressly at imports.

68. People *v.* Roberts, 158 N. Y. 168, 52 N. E. 1104 [*reversing* 29 N. Y. App. Div. 585, 51 N. Y. Suppl. 487]; People *v.* Roberts, 158 N. Y. 162, 52 N. E. 1102.

69. Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164 [*reversing* 62 Pa. St. 286, 1 Am. Rep. 399, and *citing* Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382]. That such a tax may be void as an interference with commerce see, however, Philadelphia, etc., Mail Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200 [*overruling* Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164].

70. Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744.

71. Magee *v.* Grima, 8 How. (U. S.) 490, 12 L. ed. 1168 [*affirming* 12 Rob. (La.) 584], where it is said by Taney, C. J.: "The law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted

exportation;[72] and neither is a United States stamp act, aimed at the prevention of fraud.[73]

(III) *Inspection Fees.* Duties on imports or exports may be levied by the states to the extent of proper fees for inspection of articles of commerce.[74] It has been said that if a law is in reality an inspection law it is valid although its fee is excessive, until congress supersedes it.[75]

(IV) *Wharfage Fees.* Reasonable wharfage fees compensatory in nature are not void as duties on imports or exports.[76]

3. Stamp Duties on Bills of Exchange and Bills of Lading. Neither congress[77] nor a state may levy a stamp tax on foreign bills of lading.[78] And a state may not lay such duties on bills of lading connected with interstate commerce,[79] but may so tax bills of exchange used in foreign or interstate commerce.[80]

4. Tonnage Tax — a. Definition. A tonnage tax is a tax levied on a vessel as an instrument of commerce and not according to its value as property,[81] and it

by last will and testament, or by inheritance. . . . Every state or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee."

72. People *v.* New York, 10 Hun (N. Y.) 255.

73. The stamp duty required on tobacco exported by the acts of congress of 1868 and of 1872 was a means simply of identifying tobacco intended for exportation and was merely compensatory in nature and valid. Burwell *v.* Burgess, 32 Gratt. (Va.) 472; Turpin *v.* Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. ed. 988; Pace *v.* Burgess, 92 U. S. 372, 23 L. ed. 657.

74. U. S. Const. art. 1, § 10, clause 2; Turner *v.* State, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370, where an inspection law is held valid which provides for exemption from its provisions of tobacco packed where grown. And see *supra*, IX, D, 2, c, (II); IX, E, 1, d.

75. Bradley, J., in Neilson *v.* Garza, 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091 (where it is said: "It seems to me that congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until congress shall see fit to alter it." The above language was considered a possible view in Turner *v.* Maryland, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370, and cited with approval in State *v.* Bixman, 162 Mo. 1, 62 S. W. 828); Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191. See also Padelford *v.* Savannah, 14 Ga. 438.

76. Wharfage fees proportioned to the tonnage of the vessel are not imposts on imports or exports, where they are in their nature and intent merely local port charges. Benedict *v.* Vanderbilt, 1 Rob. (N. Y.) 194. See also *supra*, IX, D, 2, b; *infra*, X, B, 3.

77. Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 648, 45 L. ed. 862. See *supra*, X, B, 2.

78. See *supra*, X, B, 2.

79. People *v.* Raymond, 34 Cal. 492; Garrison *v.* Tillinghast, 18 Cal. 404.

80. *Ex p.* Martin, 7 Nev. 140, 8 Am. Rep. 707.

81. Sheffield *v.* Parsons, 3 Stew. & P. (Ala.) 302 (holding a port duty a tonnage tax); Johnson *v.* Drummond, 20 Gratt. (Va.) 419 (holding invalid a tax upon vessels carrying oysters of a certain amount per ton of the capacity of the vessel); Inman Steamship Co. *v.* Tinker, 94 U. S. 238, 24 L. ed. 118 (where the court speaks of a tonnage tax as follows: "The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself"); Cannon *v.* New Orleans, 20 Wall. (U. S.) 577, 22 L. ed. 417; Cox *v.* Lott, 12 Wall. (U. S.) 204, 20 L. ed. 370 (where it is said: "Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any duty of tonnage"); The North Cape, 6 Biss. (U. S.) 505, 18 Fed. Cas. No. 10,316, 8 Chic. Leg. N. 121.

Wharfage fees.— A wharfage fee for services rendered is not a tonnage tax (Cincinnati, etc., Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Broeck *v.* The John M. Welch, 18 Blatchf. (U. S.) 54, 2 Fed. 364), although it is exorbitant in amount (Parkersburg, etc., Transp. Co. *v.* Parkersburg, 107 U. S. 691, 2 S. Ct. 732, 27 L. ed. 584), and is computed in proportion to the tonnage of vessels (Sweeney *v.* Otis, 37 La. Ann. 520; Cincinnati, etc., Packet Co. *v.* Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Wicksburg *v.* Tobin, 100 U. S. 430, 25 L. ed. 690; Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. ed. 377; The Ann Ryan, 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428). But a wharfage fee imposed irrespective of services rendered on all vessels coming within a border is a tonnage tax. Cannon *v.* New Orleans, 20 Wall. (U. S.) 577, 22 L. ed. 417. See also *supra*, IX, D, 2, c.

Quarantine charges.— Quarantine charges

may be in the form of a tax proportioned to tonnage or cubical capacity, or simply on each vessel as a unit.

b. Power to Levy.[82] The United States may levy a tonnage tax,[83] but the states may not levy such tax without the consent of congress for any purpose[84] on vessels engaged in interstate or foreign commerce,[85] or on vessels exclusively engaged in trade between places in the same state.[86]

C. Taxation of Persons — Passengers. The federal government may impose a tax on immigrant passengers from foreign countries.[87] The states may

levied as compensation for services rendered are not a tax on tonnage, although the fee is fixed by the character and size of the vessel. Morgan's Louisiana, etc., R., etc., Co. *v.* Louisiana State Bd. of Health, 118 U. S. 455, 6 S. Ct. 1114, 30 L. ed. 237 [*affirming* 36 La. Ann. 666].

Tax on vessels as property valid.— In the following cases the tax levied being based on valuation and on the vessels as property was held not to be a tonnage tax: Lott *v.* Cox, 43 Ala. 697 (a tax on steamboats assessed and collected in the same way as other taxes and by the same officers); Lott *v.* Mobile Trade Co., 43 Ala. 578; Gunther *v.* Baltimore, 55 Md. 457 (a tax on the interests of a citizen in registered vessels engaged in foreign commerce); Perry *v.* Torrence, 8 Ohio 521, 32 Am. Dec. 725 (steamboats included in taxable property); Wheeling, etc., Transp. Co. *v.* Wheeling, 9 W. Va. 170, 27 Am. Rep. 552 (an annual tax on steamboats as personal property in the city); The North Cape, 6 Biss. (U. S.) 505, 18 Fed. Cas. No. 10,316, 8 Chic. Leg. N. 121 (the assessment of a vessel owned in a city for a city tax is not a tonnage tax).

Lighters.— A tax on all vessels plying in the navigable waters of the state at a certain rate per ton is a tonnage duty even when applied to vessels licensed in the coasting trade or engaged in the lighterage business within state waters. Lott *v.* Morgan, 41 Ala. 246, construing the provisions of Alabama act of Feb. 22, 1866.

A license-tax imposed on boats entitled to engage in oyster planting in certain tidal waters within the state, according to the tonnage measurement of the boats, does not violate U. S. Const. art. 1, § 10, declaring that no state shall, without the consent of congress, levy any duty of tonnage; the tax being imposed on the business of oyster planting, and not on the ship as an instrument of commerce. State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780.

A license-tax on the owners of tugboats running on the Mississippi between New Orleans and the Gulf of Mexico is not a duty on tonnage. New Orleans *v.* Eclipse Tow-Boat, 33 La. Ann. 647, 39 Am. Rep. 279.

82. As to tonnage duty see *supra*, IX, D, 2, c.

As to tonnage tax see also *supra*, IX, D, 1, b.

83. Cox *v.* Lott, 12 Wall. (U. S.) 204, 20 L. ed. 370; Aguirre *v.* Maxwell, 3 Blatchf. (U. S.) 140, 1 Fed. Cas. No. 101, holding that the act of June 30, 1834 (4 U. S. Stat. at L. p. 741), levying a tonnage duty on Spanish vessels, is not unconstitutional as being a duty on exports.

84. No state shall, without the consent of congress, lay any duty of tonnage. U. S. Const. art. 1, § 10, clause 3.

Not for revenue.— Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 203, 6 L. ed. 23, says: "It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may also be imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the states from exercising this power."

Not for quarantine charges.— The states may not levy such tax to pay the expenses of quarantine regulations. Peete *v.* Morgan, 19 Wall. (U. S.) 581, 22 L. ed. 201.

85. Geraghty *v.* McMhicker, 37 N. J. L. 530; Geraghty *v.* Hackley, 36 N. J. L. 459; Peete *v.* Morgan, 19 Wall. (U. S.) 581, 22 L. ed. 201, state tonnage tax on vessels owned in foreign ports and entering the ports of Texas.

86. Lott *v.* Morgan, 41 Ala. 246 (where the vessels taxed were owned by citizens of the state and were exclusively engaged in commerce within the state); Cox *v.* Lott, 12 Wall. (U. S.) 204, 20 L. ed. 370.

87. Edge *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798 [*affirming* 21 Blatchf. (U. S.) 460, 18 Fed. 135].

22 U. S. Stat. at L. p. 214, § 1 et seq.; U. S. Comp. Stat. (1901), p. 1288, provided for a duty of fifty cents for each and every passenger not a citizen of the United States coming by water to the United States from a foreign port. These taxes were to form an immigrant fund to be used for the protection and care of needy immigrants. The statute also provided for the return to their native land of convicts. In Edye *v.* Robertson, 112 U. S. 580, 595, 5 S. Ct. 247, 28 L. ed. 798 [*affirming* 21 Blatchf. (U. S.) 460, 18 Fed. 135, and *citing* Taylor *v.* Morton, 2 Curt. (U. S.) 454, 23 Fed. Cas. No. 13,799; *In re* Ah Lung, 9 Sawy. (U. S.) 306, 18 Fed. 28], the court, in upholding the statute, says: "But the true answer to all these objections is, that the power exercised in this instance is not the taxing power. The burden imposed on the ship-owner by this statute is the mere incident of the regulation of commerce, of that branch of foreign commerce which is involved in immigration." The court also holds that the statute is not invalid as being opposed to treaties, as all treaties are made subject to acts of congress.

not lay taxes on passengers in the act of interstate or foreign transportation, either by taxing immigrants from foreign countries,[88] even under the guise of an inspection law,[89] or taxing persons passing into or out of or through a state.[90]

D. Taxation of Corporations — 1. In General — a. State Franchise Tax — (I) *Domestic Corporations.* A state may levy a franchise tax on corporations chartered by it,[91] although they may be engaged in interstate commerce,[92] in the form of a tax on gross receipts,[93] unless such tax is of such a nature that it is really a tax on interstate business.[94]

(II) *Foreign Corporations.* A state may levy a tax on foreign corporations for the privilege of doing business within the state[95] based on the total amount

88. Lin Sing *v.* Washburn, 20 Cal. 534; Mitchell *v.* Steelman, 8 Cal. 363; People *v.* Downer, 7 Cal. 169; Smith *v.* Turner, 7 How. (U. S.) 283, 12 L. ed. 702. *Contra*, State *v.* Fullerton, 7 Rob. (La.) 210; People *v.* Brooks, 4 Den. (N. Y.) 469, holding taxes for the members of the crews of incoming vessels valid, but for passengers invalid.

89. People *v.* Edye, 11 Daly (N. Y.) 132; New York *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. ed. 383 [*affirming* 20 Blatchf. (U. S.) 236, 10 Fed. 357]; People *v.* Pacific Mail Steamship Co., 8 Sawy. (U. S.) 640, 16 Fed. 344, where a tax of seventy cents was imposed on each passenger inspected to see if he is afflicted with leprosy.

As to inspection laws and their validity see *supra*, IX, E, 1.

90. Clarke *v.* Philadelphia, etc., R. Co., 4 Houst. (Del.) 158; Erie R. Co. *v.* State, 31 N. J. L. 531, 86 Am. Dec. 226; Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744 [*reversing* 1 Nev. 294].

The leading case of Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744, contains the following language: "But we do not concede that the question before us is to be determined by the two clauses of the Constitution which we have been examining [the commerce clause and that relating to duties on imports or exports]. The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. . . . The government also has its offices of secondary importance in all other parts of the country. . . . In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established. . . . But if the government has these rights on her own account, the citizen also has correlative rights. . . . He has a right to free access to its sea-ports, . . . and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it."

Receipts for transportation between points in the same state, although the route crosses another state, are subject to state taxation, such transportation not being interstate commerce. Com. *v.* Lehigh Valley R. Co., (Pa. 1888) 17 Atl. 179.

A percentage tax on passenger receipts is a tax on the company and not a capitation tax on passengers. State *v.* Baltimore, etc., R. Co., 34 Md. 344.

A state passenger tax contravened the Cumberland road federal legislation and was therefore void. Neil *v.* Ohio, 3 How. (U. S.) 720, 11 L. ed. 800 [*reversing* 7 Ohio 132, 28 Am. Dec. 623].

91. See, generally, Corporations; Taxation. And see *supra*, IX, B. 3.

92. Honduras Commercial Co. *v.* State Bd. of Assessors, 54 N. J. L. 278, 23 Atl. 668; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888, where Field, J., says: "The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, . . . when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress."

93. People *v.* Campbell, 74 Hun (N. Y.) 210, 26 N. Y. Suppl. 832, 56 N. Y. St. 358; Pullman's Palace-Car Co. *v.* Com., 107 Pa. St. 148.

A tax on gross receipts is a franchise tax, when applied to foreign building and loan associations (Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 17 Ky. L. Rep. 887, 32 S. W. 952, 56 Am. St. Rep. 367, 31 L. R. A. 41), or to railroad companies (Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164). But see Philadelphia, etc., Mail Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200; Fargo *v.* Michigan, 121 U. S. 230, 7 S. Ct. 857, 30 L. ed. 888, to the effect that such tax on the franchise or business is beyond state power.

94. Fargo *v.* Michigan, 121 U. S. 230, 244, 7 S. Ct. 857, 30 L. ed. 888 [*citing* Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. ed. 1015], where Miller, J., said: "Nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

95. Com. *v.* Milton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522 (privilege tax on foreign

of their capital stock,[96] or on the amount of capital stock employed within the state,[97] and even upon strictly private corporations engaged in part in interstate commerce,[98] but not on public service corporations engaged in interstate commerce.[99] There is a possible distinction between a franchise tax, the payment of which is a condition precedent to the right to do interstate business, and a franchise tax levied in the usual way. The former may be held void and the latter valid.[1] The protection of the federal constitution may be invoked only by corporations actually engaged in interstate commerce and not merely by those having power to engage in it.[2]

b. Property Tax. The states may constitutionally tax as property the property of a foreign corporation within the state, although such corporation may be engaged in interstate or foreign commerce,[3] but may not include in their

but not on domestic corporations); Moline Plow Co. *v.* Wilkinson, 105 Mich. 57, 62 N. W. 1119; New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323; Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

An annual license-fee, excepting from its provisions manufacturing or mining companies doing business in the state, was upheld in State *v.* Under Ground Cable Co., (N. J. 1889) 18 Atl. 581.

96. Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164.

97. New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323 [*affirming* 167 N. Y. 617, 60 N. E. 1117 (*affirming* 36 N. Y. App. Div. 597, 55 N. Y. Suppl. 950)]. And see People *v.* Wemple, 131 N. Y. 64, 29 N. E. 1002, 43 N. Y. St. 963, 27 Am. St. Rep. 542 [*affirming* 61 Hun (N. Y.) 83, 15 N. Y. Suppl. 446, 39 N. Y. St. 738]; People *v.* Wemple, 117 N. Y. 136, 22 N. E. 1046, 27 N. Y. St. 341, 6 L. R. A. 303 [*affirming* 52 Hun (N. Y.) 434, 5 N. Y. Suppl. 581, 24 N. Y. St. 668], upholding N. Y. Laws (1880), c. 542, § 3, imposing a tax on foreign corporations doing business within the state computed on the amount of capital used by the corporation in the state.

98. New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323 [*affirming* 167 N. Y. 617, 60 N. E. 1117 (*affirming* 36 N. Y. App. Div. 597, 55 N. Y. Suppl. 950)]. *Contra*, Woessner *v.* Cottam, 19 Tex. Civ. App. 611, 47 S. W. 678.

If engaged wholly in interstate commerce such corporation would probably still be thus taxable, within the language of the court in New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323, where the distinction between public service and private corporations is laid down. But the question was expressly left open in People *v.* Roberts, 167 N. Y. 617, 60 N. E. 1117.

Distinction between quasi-public and private corporations.— Although the court has been very strict in prohibiting the taxation by the states of the business of interstate commerce, when conducted by public service corporations, such taxation has been allowed on the interstate business of strictly private corporations. New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323 [*affirming* 167 N. Y. 617, 60 N. E. 1117 (*affirming* 36 N. Y. App. Div. 597, 55 N. Y. Suppl. 950)]. In this case a state statute was upheld which laid a tax on the franchise or business " of a foreign corporation engaged in interstate commerce in New York, selling on its own account its goods manufactured in another state, which statute provided that " the amount of its capital used within the state " should be the basis of the tax. In the course of the opinion the court says: " This is a tax on the business of a corporation . . . being laid as a tax upon the franchise of doing business as a corporation." After commenting on the decisions concerning the taxation of the business of interstate carriers the court proceeds: " The cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business." And see Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164.

99. Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 3 Va. Supreme Ct. 39, 37 S. E. 789, 86 Am. St. Rep. 877; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394, a tax on the privilege of keeping an office in the state by a corporation engaged in interstate commerce is a tax on commerce among the states. But see Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 22 L. ed. 678, where a state tax on gross receipts was held to be good.

1. Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 15 S. Ct. 268, 360, 39 L. ed. 311. *Compare* Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 163, 35 L. ed. 994 (where a franchise tax measured by the length of line in the state was held to be good); Crutcher *v.* Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. ed. 649 (where a license-tax on express companies imposed as a prerequisite to the right to do business was held to be invalid).

2. Honduras Commercial Co. *v.* State Bd. of Assessors, 54 N. J. L. 278, 23 Atl. 668.

3. Indianapolis, etc., R. Co. *v.* Backus, 133 Ind. 609, 33 N. E. 443 [*affirmed* in 154 U. S. 438, 14 S. Ct. 1114, 38 L. ed. 1040]; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33

assessment for the purposes of taxation federal franchises owned by a foreign corporation.[4]

2. Bridges[5] and Bridge Companies. The states may tax bridges and bridge companies having property within their limits, although used exclusively for interstate commerce,[6] and although the bridges have been declared federal post roads.[7] The states may also tax directly the business of a bridge company which merely rents its property for purposes of interstate commerce.[8]

3. Express Companies.[9] The states may tax the intra-state business of express companies,[10] but a state may not tax the interstate express business, either by a levy on the gross receipts of an express company from its interstate business,[11] or by a tax worded to cover companies doing interstate business only;[12] but may tax the property of an express company engaged in interstate business, and may fix the value of such property, either by reference to the whole capital[13] or the gross earnings[14] of the company, or by taxing its intangible property in proportion to mileage in the state compared with total mileage.[15]

4. Ferries.[16] The states may impose a license-tax on interstate ferries,[17] and

N. E. 421, 18 L. R. A. 729 [*affirmed* in 154 U. S. 439, 14 S. Ct. 1122, 38 L. ed. 1041].

Theory of the court.—"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution." Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683.

4. California *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150.

5. See, generally, Bridges, 5 Cyc. 1049 *et seq.* And see *supra*, IX, D, 1, d.

6. Henderson Bridge Co. *v.* Com., 99 Ky. 623, 17 Ky. L. Rep. 389, 31 S. W. 486, 29 L. R. A. 73; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679, 12 S. Ct. 114, 35 L. ed. 900.

7. Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953, where a proportional state tax on the property within the state of a bridge company was upheld. See also Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871.

8. Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 20 S. Ct. 205, 44 L. ed. 299 [*affirming* 176 Ill. 267, 52 N. E. 117], a tax on the capital stock.

A state franchise tax is good on a bridge company which rents its property for purposes of interstate commerce, as the bridge company is not engaged in interstate commerce. The fact that the tax in question had an influence in raising bridge tolls was held to be "too remote and incidental to make it a tax on the business transacted." Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 154, 17 S. Ct. 532, 41 L. ed. 953 [*citing* New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 15 S. Ct. 896, 39 L. ed. 1043].

9. See *supra*, IX, C, 1.

10. Osborne *v.* Florida, 164 U. S. 650, 17 S. Ct. 214, 41 L. ed. 586 [*affirming* 33 Fla. 162, 14 So. 588, 39 Am. St. Rep. 99, 25 L. R. A. 120, upholding a state license-tax in effect on express companies doing local business and not on those doing interstate business only]; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. ed. 1035 [*affirming* 44 Fed. 310].

A tax on express companies doing business in the state is void as to interstate transportation but valid as to state business, and the levy of the tax on a company engaged in both kinds of business will be enjoined until a separation between the two kinds can be made. U. S. Express Co. *v.* Hemmingway, 39 Fed. 60.

11. Walcott *v.* People, 17 Mich. 68; American Union Express Co. *v.* St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; Southern Express Co. *v.* Hood, 15 Rich. (S. C.) 66, 94 Am. Dec. 141; Indiana *v.* American Express Co., 7 Biss. (U. S.) 227, 13 Fed. Cas. No. 7,021.

12. Length of line.—A statute is void charging a license-tax of five hundred dollars for express companies operating a line less than one hundred miles and one thousand dollars for companies of a greater mileage. Com. *v.* Smith, 92 Ky. 38, 13 Ky. L. Rep. 362, 17 S. W. 187, 36 Am. St. Rep. 578.

13. Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683.

14. State *v.* State Bd. of Assessment, etc., 3 S. D. 338, 53 N. W. 192.

15. Weir *v.* Norman, 166 U. S. 171, 17 S. Ct. 527, 41 L. ed. 960.

16. See *supra*, IX, D, 3; and, generally, Ferries.

17. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419 [*affirming* 102 Ill. 560], where a license-tax was imposed on each boat of a ferry company located within state limits.

The Canadian provinces may tax ferries. Longueuil Nav. Co. *v.* Montreal, 15 Can. Supreme Ct. 566.

may probably tax their franchise,[18] but may not tax the capital stock of interstate ferry companies.[19]

5. INSURANCE COMPANIES. As insurance is not commerce any taxation of insurance companies will not be held invalid on the ground that it is an unconstitutional regulation of commerce.[20]

6. PIPE LINE COMPANIES. It has been held that a state may tax foreign pipe line companies engaged in interstate transportation.[21]

7. RAILROADS.[22] The general principle underlying the railroad tax decisions is that the states may tax property used by railroads in interstate or foreign commerce but may not tax the act of interstate or foreign commerce itself.[23] State statutes have accordingly been upheld, as property taxes, which laid taxes on railroad companies in general,[24] even at a different rate from individuals,[25] or in the form of a bonus in return for privileges granted,[26] or which laid taxes on their capital stock,[27] on their rolling-stock, although used in interstate commerce,[28] on

18. Louisville, etc., Ferry Co. *v.* Com., 22 Ky. L. Rep. 446, 57 S. W. 624.

19. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158, where a state laid taxes based on the appraised value of the capital stock, none of the property of the company being owned in the state where it had only a leasehold interest. The tax under these circumstances was held bad as a tax on interstate commerce itself rather than on property.

20. People *v.* National F. Ins. Co., 27 Hun (N. Y.) 188. See also *supra*, III, E.

A tax on premiums received by insurance companies from within or without the state is not a regulation of interstate commerce, although it is a tax on all the business of the companies. Insurance Co. of North America *v.* Com., 87 Pa. St. 173, 30 Am. Rep. 352.

21. Tide Water Pipe Co. *v.* State Bd. of Assessors, 57 N. J. L. 516, 31 Atl. 220, 27 L. R. A. 684.

22. See *supra*, IX, C, 2; and, generally, RAILROADS.

23. Theory of the courts.—"It has been again and again said by this court that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce." Brewer, J., in Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 14 S. Ct. 1122, 38 L. ed. 1041 [*affirming* 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729]; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146.

A tax on the business of a railroad company engaged in interstate commerce only is invalid. People *v.* Wemple, 138 N. Y. 1, 33 N. E. 720, 51 N. Y. St. 702, 19 L. R. A. 694 [*affirming* 65 Hun (N. Y.) 252, 20 N. Y. Suppl. 287, 47 N. Y. St. 695, 29 Abb. N. Cas. (N. Y.) 85].

Taxation of cab service.—A railroad company, engaged in interstate commerce, which maintains a cab service at a ferry station in a city for the conveyance of passengers between the station and any part of the city, is subject to taxation on such business, it not being interstate commerce, nor necessarily connected therewith. People *v.* Knight, 67 N. Y. App. Div. 398, 73 N. Y. Suppl. 790 [order *affirmed* in 171 N. Y. 354, 64 N. E. 152].

Taxation of sleeping cars.—Miss. Code (1892), § 3387, authorizing a privilege tax on each sleeping car of one hundred dollars, and, in addition, a tax of twenty-five cents a mile for each mile of railroad over which it runs, affects only the business done in the state, and is not unconstitutional as an interference with interstate commerce. Pullman Co. *v.* Adams, 78 Miss. 814, 30 So. 757, 84 Am. St. Rep. 647.

24. Alabama Great Southern R. Co. *v.* Bessemer, 113 Ala. 668, 21 So. 64 (upholding a city license-tax on a railroad company for the privilege of doing business in the state and for carrying passengers and freight from the city to other points in the state); Anniston *v.* Southern R. Co., 112 Ala. 557, 20 So. 915; Piedmont R. Co. *v.* Reidsville, 101 N. C. 404, 8 S. E. 124, 2 L. R. A. 284; Atty.-Gen. *v.* Western Union Tel. Co., 33 Fed. 129.

A valuation of the property of a railroad company based on mileage within the state is permissible. Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 14 S. Ct. 1122, 38 L. ed. 1041 [*affirming* 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729]; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888 [*affirming* 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645, 5 Am. L. Rev. 370, 3 Am. L. T. Rep. (U. S. Cts.) 193, 2 Leg. Gaz. (Pa.) 385, 7 Phila. (Pa.) 555, 27 Leg. Int. (Pa.) 396].

25. Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663.

26. Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 22 L. ed. 678, a condition in a charter for a bonus to be paid in return for the right of way.

27. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158.

A tax on the stock proportioned to the length of line of the road in the state is held valid in State *v.* New York, etc., R. Co., 60 Conn. 326, 22 Atl. 765.

28. Denver, etc., R. Co. *v.* Church, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252; Pullman Southern Car Co. *v.* Gaines, 3 Tenn. Ch. 587 (privilege tax); Reinhart *v.* McDonald, 76

the net earnings proportioned to the length of line of the road in the state,[29] or on tolls paid for the lease of a railroad, although the lessee company is engaged in interstate commerce;[30] but it is beyond state power as a burden on commerce itself to levy a tax on the gross receipts of railroads earned in interstate commerce,[31] except where the circumstances show that the tax is a privilege

Fed. 403. *Contra*, Bain *v.* Richmond, etc., R. Co., 105 N. C. 363, 11 S. E. 311, 18 Am. St. Rep. 912, 8 L. R. A. 299; Leloup *v.* Mobile, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. ed. 785; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276 (quashing a state privilege tax on sleeping cars used in interstate transportation); Minot *v.* Philadelphia, etc., Co., 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645, 5 Am. L. Rev. 370, 3 Am. L. T. Rep. (U. S. Cts.) 193, 2 Leg. Gaz. (Pa.) 385, 7 Phila. (Pa.) 555, 27 Leg. Int. (Pa.) 396 [*affirmed* in 18 Wall. (U. S.) 206, 21 L. ed. 888, without adverting to this point].

How determined.—A tax on railroad rolling-stock may be determined by levying on that part of the value of the capital stock proportioned to the mileage covered by the rolling-stock within the state compared to the total mileage of the company's rolling-stock (Pullman's Palace-Car Co. *v.* Hayward, 141 U. S. 36, 11 S. Ct. 883, 35 L. ed. 621 [*affirming* 107 Pa. St. 156]; Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613. *Contra*, on the ground that such rolling-stock is only transitorily within the state and has no *situs* there, see Central R. Co. *v.* State Bd. of Assessors, 49 N. J. L. 1, 7 Atl. 306; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276); or may be levied on the value of the average number of cars employed within the state (Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149, 20 S. Ct. 631, 44 L. ed. 708 [*affirming* 18 Utah 378, 55 Pac. 639, 48 L. R. A. 790]; American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70, 19 S. Ct. 599, 43 L. ed. 899 [*affirming* 24 Colo. 291, 51 Pac. 421, 65 Am. St. Rep. 223, 56 L. R. A. 89]), or by taking that part of the value of the entire road which is measured by the proportion of the particular part in that state to that of the whole road (State *v.* Severance, 55 Mo. 378; Franklin County *v.* Nashville, etc., R. Co., 12 Lea (Tenn.) 521; Indianapolis, etc., R. Co. *v.* Backus, 154 U. S. 438, 14 S. Ct. 1114, 38 L. ed. 1040 [*affirming* 133 Ind. 609, 33 N. E. 443]; Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 14 S. Ct. 1114, 38 L. ed. 1031 [*affirming* 133 Ind. 625, 33 N. E. 432]; Columbus Southern R. Co. *v.* Wright, 151 U. S. 470, 14 S. Ct. 396, 38 L. ed. 238; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663).

The situs of the rolling-stock in the state for the purpose of taxation is a delicate question, which was the ground of holding the tax invalid, especially as the car-owners were non-residents, in Bain *v.* Richmond, etc., R. Co., 105 N. C. 363, 11 S. E. 311, 18 Am. St. Rep. 912, 8 L. R. A. 299; Pickard *v.* Pullman Southern Car Co., 117 U. S. 31, 6 S. Ct. 635, 29 L. ed. 785. The question is thus treated by Gray, J., in Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613, where the car-owner was a non-resident: "If they [the cars] had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. . . . This was a just and equitable mode of assessment." In Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 8 S. Ct. 1037, 32 L. ed. 94, in speaking of a tax on rolling-stock it was said: "It is quite true, as the *situs* of the . . . Railroad Company is in . . . Maryland, that also, upon general principles, it is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner, by the law of the place where it is found." And see Fargo *v.* Michigan, 121 U. S. 230, 7 S. Ct. 857, 30 L. ed. 888.

For distinction between ships and rolling-stock of railroads see *infra*, X, D, 9.

29. Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888. *Contra*, Northern Pac. R. Co. *v.* Raymond, 5 Dak. 356, 40 N. W. 538, 1 L. R. A. 732.

30. New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 15 S. Ct. 896, 39 L. ed. 1043 [*affirming* 145 Pa. St. 38, 22 Atl. 212], holding that the state may tax the tolls paid by the lessee for the use of that part of the road within the state, where part of the road is outside the state.

31. State *v.* Woodruff, etc., Co., 114 Ind. 155, 15 N. E. 814; Delaware, etc., Canal Co. *v.* Com., (Pa. 1888) 17 Atl. 175, 1 L. R. A. 232; Philadelphia, etc., Mail Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200; Fargo *v.* Michigan, 121 U. S. 230, 240, 7 S. Ct. 857, 30 L. ed. 888; Southern R. Co. *v.* Asheville, 69 Fed. 359; Indiana *v.* Pullman Palace Car Co., 11 Biss. (U. S.) 561, 16 Fed. 193. *Contra*, Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 22 L. ed. 678 [*affirming* 34 Md. 344, where a statute was upheld giving to a foreign corporation a right of way in the state and providing that the company should make a semi-annual payment of a percentage of its gross receipts]; Reading R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164.

Operation of road within the state.—A tax on the gross earnings "arising from the operation of such railroad as shall be situated within this territory" refers only to the re-

tax,[32] or on the number of passengers,[33] or the weight of merchandise carried by interstate railroads,[34] or on a railroad agent soliciting business,[35] even where the railroad does not operate in the state.[36] A state may impose a privilege tax on an interstate railroad for the privilege of transportation between points in the state.[37]

8. TELEGRAPH AND TELEPHONE COMPANIES.[38] A state may tax the property of a telegraph company within its borders, although the company is engaged in interstate or foreign commerce,[39] provided such tax does not really amount to a privilege tax.[40] And while a state may not impose a privilege tax upon a telegraph company engaged in interstate or foreign commerce it may probably impose a pole and wire tax for its reasonable expense in inspection and regulation;[41] and may also levy a tax on messages sent between points within the state,[42] but not on messages sent across state border lines, or to or from, foreign countries.[43] So a state tax on the receipts of telegraph companies is good only as to receipts from

ceipts from business within the state and is therefore valid. Northern Pac. R. Co. *v.* Tressler, 2 N. D. 397, 51 N. W. 787; Northern Pac. R. Co. *v.* Brewer, 2 N. D. 396, 51 N. W. 787; Northern Pac. R. Co. *v.* Strong, 2 N. D. 395, 51 N. W. 787; Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 395, 51 N. W. 386, 786.

A gross receipts tax proportionate to the mileage of trains run within the state is unconstitutional. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.

A review of the authorities holding that Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164, is still law on the basis of Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 163, 35 L. ed. 994, will be found in Cumberland, etc., R. Co. *v.* State, 92 Md. 668, 48 Atl. 503, 52 L. R. A. 764.

32. Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 163, 35 L. ed. 994, upholding the Maine act of 1881, requiring every corporation operating a railroad in the state, to pay "an annual excise tax for the privilege of exercising its franchises," the amount of the tax being determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the year preceding the levy of the tax.

33. Clarke *v.* Philadelphia, etc., R. Co., 4 Houst. (Del.) 158, a state tax on carriers of ten cents for each passenger carried.

34. Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146.

35. Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394 [*reversing* 114 Pa. St. 256, 6 Atl. 45].

36. McCall *v.* California, 136 U. S. 104, 10 S. Ct. 881, 34 L. ed. 392, holding that the state's inability to tax interstate commerce extends to all such commerce whether or not it actually passes through state territory.

37. Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Lightburne *v.* Shelby County Taxing Dist., 4 Lea (Tenn.) 219. *Contra*, San Bernardino *v.* Southern Pac. Co., 107 Cal. 524, 40 Pac. 796, 29 L. R. A. 327, to the effect that a city situated on a branch line of a foreign railway corporation engaged in interstate commerce could not impose a privilege tax for engaging in business within city limits.

38. See *supra*, IX, C, 4; and, generally, TELEGRAPHS AND TELEPHONES.

39. People *v.* Tierney, 57 Hun (N. Y.) 357, 10 N. Y. Suppl. 940, 32 N. Y. St. 605; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 16 S. Ct. 1054, 41 L. ed. 49; Sanford *v.* Poe, 69 Fed. 546, 37 U. S. App. 378, 16 C. C. A. 305 [*affirming* Western Union Tel. Co. *v.* Poe, 64 Fed. 9].

A tax on wires of a telegraph company is valid (Philadelphia *v.* American Union Tel. Co., 167 Pa. St. 406, 31 Atl. 628), especially where it is a state privilege tax of a certain rate for wires operated within the state, in place of all other state taxes and amounting to less than the *ad valorem* tax and practically amounts to a tax on property (Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 15 S. Ct. 268, 360, 39 L. ed. 311 [*affirming* 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476].

Property used in interstate commerce valued as a unit profit-producing plant and estimated in view of the value of the capital stock may be taxed by a state. Sanford *v.* Poe, 69 Fed. 546, 37 U. S. App. 378, 16 C. C. A. 305 [*affirming* Western Union Tel. Co. *v.* Poe, 64 Fed. 9].

40. **Arbitrary tax on line invalid.**—A tax of one dollar per mile for the line of poles and first wire, and fifty cents for each additional wire, is invalid as an arbitrary sum and not a sum levied on the value of the property. Com. *v.* Smith, 92 Ky. 38, 13 Ky. L. Rep. 362, 17 S. W. 187, 36 Am. St. Rep. 578. So a tax of five dollars per year on every telegraph pole used in a city cannot be upheld under the city's power "to regulate" telegraph companies, where the city's power of taxation of them has been taken away. St. Louis *v.* Western Union Tel. Co., 39 Fed. 59.

41. Taylor *v.* Postal Tel. Cable Co., 202 Pa. St. 583, 52 Atl. 128; North Braddock *v.* Central Dist., etc., Tel. Co., 11 Pa. Super. Ct. 24; Philadelphia *v.* Western Union Tel. Co., 82 Fed. 797.

42. Western Union Tel. Co. *v.* Seay, 132 U. S. 472, 10 S. Ct. 161, 33 L. ed. 409.

43. Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067.

An injunction for refusal to pay taxes on interstate telephone messages will not lie against a telephone company. Matter of

intra-state messages.[44] The state may also levy a tax on such proportion of the capital stock of a telegraph company [45] or its property as the length of its line in the state bears to the whole length of its line.[46]

9. Vessels and Steamship Companies.[47] A state may not tax vessels as instruments of commerce,[48] or when temporarily within state limits.[49] Nor may a state tax foreign-owned ships engaged in interstate or international commerce even for the purpose of meeting quarantine charges;[50] but it may levy a tax on the interest of residents in vessels valued as personal property,[51] although they hold federal coasting licenses [52] and are engaged in interstate or foreign commerce.[53] A state may not impose a tax on the gross receipts of a steamship company engaged in interstate or foreign commerce,[54] but may levy a tax on a steamship company incorporated in the state and engaged in foreign commerce.[55]

E. Taxation of Business — Occupation Tax — Sales of Goods.[56] A state may tax any business carried on entirely within its borders, although such tax may incidentally affect interstate commerce,[57] either by levying a tax on the sale

Pennsylvania Tel. Co., 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462.

44. Western Union Tel. Co. *v.* Seay, 132 U. S. 472, 10 S. Ct. 161, 33 L. ed. 409 [*reversing* 80 Ala. 273, 60 Am. Rep. 99]; Western Union Tel. Co. *v.* Pennsylvania, 128 U. S. 39, 9 S. Ct. 6, 32 L. ed. 345. *Contra*, to the effect that a state tax on gross receipts is good even as to interstate messages see Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; Western Union Tel. Co. *v.* Com., 110 Pa. St. 405, 20 Atl. 720; Western Union Tel. Co. *v.* Richmond, 26 Gratt. (Va.) 1.

Tax valid in part.—A single tax on the receipts of a telegraph company is "invalid only in proportion and to the extent that said receipts were derived from interstate commerce" (Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229), and where the record discloses the amounts assessed separately on intra and interstate messages respectively, only taxes assessed on messages within the state may be recovered (Western Union Tel. Co. *v.* Pennsylvania, 128 U. S. 39, 9 S. Ct. 6, 32 L. ed. 345).

45. Atty.-Gen. *v.* Western Union Tel. Co., 141 U. S. 40, 11 S. Ct. 889, 35 L. ed. 628; Atty.-Gen. *v.* Western Union Tel. Co., 33 Fed. 129, holding valid Mass. Pub. Stat. c. 13, § 40, providing a franchise tax estimated at the value of the total shares of stock, proportioned to the length of line in the state.

46. Western Union Tel. Co. *v.* Taggart, 141 Ind. 281, 40 N. E. 1051.

47. See *supra*, IX, D, 6; and, generally, Shipping.

48. Wheeling, etc., Transp. Co. *v.* Wheeling, 99 U. S. 273, 23 L. ed. 412.

For tonnage tax see *supra*, X, B, 4.

49. A state may not tax a vessel temporarily within its borders for the purpose of discharging and receiving passengers and freight (Hays *v.* Pacific Mail Steamship Co., 17 How. (U. S.) 596, 15 L. ed. 254), or which merely makes a port in the state one of its regular stopping-places in the course of interstate trips, its owner being a non-resident (Morgan *v.* Parham, 16 Wall. (U. S.) 471, 21 L. ed. 303).

50. Peete *v.* Morgan, 19 Wall. (U. S.) 581, 22 L. ed. 201.

51. Battle *v.* Mobile, 9 Ala. 234, 44 Am. Dec. 438; Howell *v.* State, 3 Gill (Md.) 14; Wheeling, etc., Transp. Co. *v.* Wheeling, 99 U. S. 273, 25 L. ed. 412 [*affirming* 9 W. Va. 170, 27 Am. Rep. 552].

52. Battle *v.* Mobile, 9 Ala. 234, 44 Am. Dec. 438; Wheeling, etc., Transp. Co. *v.* Wheeling, 99 U. S. 273, 25 L. ed. 412.

53. Gunther *v.* Baltimore, 55 Md. 457.

54. Philadelphia, etc., Mail Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200 [*affirming* 104 Pa. St. 109, and *overruling* Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 284, 21 L. ed. 164].

55. People *v.* New York, 48 Barb. (N. Y.) 157.

56. For taxation of particular phases of interstate commerce see *supra*, X, D, *et seq.*

57. Kolb *v.* Boonton, 64 N. J. L. 163, 44 Atl. 873.

Valid state regulations.— The states may impose a privilege tax on brokers, even though their principals are non-residents, as such tax is on the brokerage business within the state. Stockard *v.* Morgan, 105 Tenn. 412, 58 S. W. 1061. Hence a privilege tax on merchants proportioned to their taxable property is valid (Oliver Finney Grocery Co. *v.* Speed, 87 Fed. 408), as is also an occupation tax on railroads excepting all interstate traffic (York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065). The states may also tax any business carried on in the state where the property employed in the business is itself subject to local taxation. Sydow *v.* Territory, (Ariz. 1894) 36 Pac. 214; Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Com. *v.* Sandy Lick Gas, Coal & Coke Co., 1 Dauph. (Pa.) 314. A state license-fee on cigarette dealers has been held to be valid even as to importers selling in the original package. *In re* May, 82 Fed. 422.

Business in "futures" may be taxed by a state. Alexander *v.* State, 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859.

An auctioneer's tax requiring the auctioneer to collect and pay to the state treasurer a percentage tax on all goods sold, is a tax on the goods and invalid when applied to goods imported in the original packages. The tax is not on the privilege of selling by

of goods effected within its limits,[58] or on merchants doing business in the state,[59] if such regulations do not discriminate against the citizens or products of other states,[60] but the states may not lay a tax on interstate commerce under the guise of a license-tax or in any other way,[61] whether or not the same amount of tax is

auction. Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. ed. 1015.

The power to tax and regulate the trade of a brewer is a regulation of commerce and hence within the exclusive authority of the parliament of Canada under the British North America Act, section 91. Severn *v.* Reg., 2 Can. Supreme Ct. 70.

58. Padelford *v.* Savannah, 14 Ga. 438 (holding a tax on moneys received from commission sales of personal property good when applied to goods received from other states, as the tax is on the proceeds of the sale and not on the property); Harrison *v.* Vicksburg, 3 Sm. & M. (Miss.) 581, 41 Am. Dec. 633; State *v.* Pinckney, 10 Rich. (S. C.) 474; Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. ed. 1015 (where it was held that the Pennsylvania act of May 20, 1853, as amended April 9, 1859, requiring an auctioneer to collect certain taxes on sales of domestic and foreign articles was really a tax on goods sold and therefore invalid when applied to sales of imported goods in the original packages); Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382; *Ex p.* Brown, 48 Fed. 435.

When the goods are not in the state at the time of sale the tax is invalid. *In re* Flinn, 57 Fed. 496. See *supra*, IX, B, 1.

As to original packages see *supra*, VIII.

The goods must appear to be products from outside the state in order to allow a party taxed to raise the objection that the tax was unconstitutional as amounting to a regulation of commerce. Downham *v.* Alexandria Council, 10 Wall. (U. S.) 173, 19 L. ed. 929.

Sales on exchanges.— The United States revenue act of 1898 (30 U. S. Stat. at L. p. 458), taxing sales at exchanges is held to be a tax on the privilege of making the sales at the exchanges and is not a direct tax on interstate commerce. Nicol *v.* Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786 [*affirming* 89 Fed. 144].

59. Raquet *v.* Wade, 4 Ohio 107; Jenkins *v.* Ewin, 8 Heisk. (Tenn.) 456; Galveston County *v.* Gorham, 49 Tex. 279; Oliver Finney Grocery Co. *v.* Speed, 87 Fed. 408, upholding a Tennessee statute imposing on merchants an "*ad valorem* tax upon the capital invested in their business, equal to that levied upon taxable property," providing further that the valuation shall be at least as high as the average of his stock on hand during the previous year, ascertained by dividing by two the sum of the highest and lowest amounts of stock on hand during that time.

License-taxes on retailers even of goods imported from outside the state (Territory *v.* Farnsworth, 5 Mont. 303, 5 Pac. 869, 878; Biddle *v.* Com., 13 Serg. & R. (Pa.) 405; American Harrow Co. *v.* Shaffer, 68 Fed. 750), or on merchants doing a business extending beyond state limits are valid (Osborne *v.* Mobile, 16 Wall. (U. S.) 479, 21 L. ed. 470); and the same rule applies to a tax on a merchant on the total amount of his purchases in or out of the state (State *v.* Stevenson, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595; State *v.* French, 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590), or to a license-tax on packers and carriers of oysters for sale or transportation (State *v.* Applegarth, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812).

60. Lyng *v.* Michigan, 135 U. S. 161, 10 S. Ct. 725, 34 L. ed. 150 [*following* Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128, holding invalid a statute which levied an annual tax on the business of selling liquors, exempting a manufacturer who paid a smaller manufacturer's tax in the state]; Tiernan *v.* Rinker, 102 U. S. 123, 26 L. ed. 103; *Ex p.* Hanson, 28 Fed. 127; *Ex p.* Thornton, 4 Hughes (U. S.) 220, 12 Fed. 538. *Contra*, Ward *v.* State, 31 Md. 279, 1 Am. Rep. 50.

Examples of discrimination.—A state may not fix a penalty for selling goods without a license, excepting goods manufactured in the state (Ames *v.* People, 25 Colo. 508, 55 Pac. 725), or excepting merchants paying taxes in the state on the goods sold and traveling agents selling exclusively to regular state merchants (State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, 52 L. R. A. 198), and may not impose a license-tax on non-residents doing transient retail business in the state (Danville *v.* Leiberman, 4 Pa. Dist. 475, 16 Pa. Co. Ct. 394), or a higher tax on non-residents selling by sample intoxicating liquors than on residents (Sinclear *v.* State, 69 N. C. 47). It has been held that a state occupation tax on every dealer selling certain Sunday newspapers printed outside the state, or others "of like character" is not discriminating, as it applies to all persons selling any paper of a certain kind or class. Preston *v.* Finley, 72 Fed. 850.

A tax on wholesale dealers in liquors to be shipped into the state from outside, not having their principal place of business in the state, is an invalid interference with commerce, as a like tax is not imposed on goods manufactured in the state. State *v.* Zophy, 14 S. D. 119, 84 N. W. 391, 86 Am. St. Rep. 741; Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691 [*overruling* 53 Mich. 264, 18 N. W. 807].

A merchant's tax affecting equally goods and persons inside and outside the state is not discriminating. Raguet *v.* Wade, 4 Ohio 107.

61. Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394; Corson *v.* Maryland, 120 U. S. 502, 7 S. Ct. 655, 30 L. ed. 699; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Brown *v.* Maryland, 12 Wheat.

imposed on domestic commerce or that which is carried on solely within the state.[62]

F. Taxation of Creditor's Interest. A state may tax a creditor's claim against a non-resident.[63]

G. Inheritance Tax. A state may tax the devolution of property of decedents to parties outside the state.[64]

XI. INTERSTATE COMMERCE COMMISSION.

A. In General. The interstate commerce commission was created by an act of congress[65] modeled in part on English legislation,[66] and directed toward a minimizing of the evils resulting from the natural monopoly of common carriers and especially toward unfair discriminations made by carriers against certain localities or shippers.[67] Hence the act of congress should be construed in view of the English decisions upon similar sections which may be said to be incorporated in the act.[68] The interstate commerce commission is a body corporate

(U. S.) 419, 6 L. ed. 678; Clyde Steamship Co. *v.* Charleston, 76 Fed. 46; American Fertilizing Co. *v.* North Carolina Bd. of Agriculture, 43 Fed. 609, 11 L. R. A. 179.

A license-tax on the buying of produce with intent to send "out of said counties" was upheld as a tax on the articles before they began to be incorporated in interstate commerce, or at any rate as being valid as to business wholly within the state. Rothermel *v.* Meyerle, 136 Pa. St. 250, 26 Wkly. Notes Cas. (Pa.) 422, 20 Atl. 583, 9 L. R. A. 366. See also *supra*, IX, B, 1.

62. "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State." Per Bradley, J., in Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694 [*citing* Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146]. See also *supra*, IX, B, 1.

63. Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73; Com. *v.* Lehigh Coal, etc., Co., 162 Pa. St. 603, 29 Atl. 664; Philadelphia Sav. Fund Soc. *v.* Yard, 9 Pa. St. 359; Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558, holding such tax not to be an interference with the federal authority over commerce.

Credits on original packages.— Credits and bills receivable for the price of foreign imports on which the duties have been paid, and which were sold by the importer in unbroken original packages, are not subject to state or municipal taxation. Gelpi *v.* Schenck, 48 La. Ann. 1535, 21 So. 115.

64. Magee *v.* Grima, 8 How. (U. S.) 490, 12 L. ed. 1168. And see, generally, TAXATION.

65. 24 U. S. Stat. at L. p. 379, c. 104; U. S. Comp. Stat. (1901), p. 3154.

66. Model of the act.— "The 2d section of our act was modeled upon § 90 of the English 'railway clauses consolidation act' of 1845, known as the 'equality clause,' and the third section of our act was modeled upon the 2d section of the English act . . . of July 10, 1854, and the 11th section of the act of July 21, 1873." Shiras, J., in Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 222, 16 S. Ct. 666, 40 L. ed. 940.

67. The purpose of the act is, "equality of right to shippers" (Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 506, 17 S. Ct. 896, 42 L. ed. 243). "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, . . . it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail." Per Brown, J., in Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 276, 12 S. Ct. 844, 36 L. ed. 699.

"The purpose of the 2d section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." Shiras, J., in Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 166, 18 S. Ct. 45, 42 L. ed. 414 [*following* Wight *v.* U. S., 167 U. S. 512, 17 S. Ct. 822, 42 L. ed. 258].

The reinforcement of the tariff laws is not the purpose of the interstate commerce act. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

68. Incorporation of English decisions.— "These traffic acts [the English] do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of undue preference, it may be presumed that Congress, in adopt-

entitled to sue and be sued in its own name,[69] and is not a court but a non-judicial administrative commission.[70]

B. Authority and Functions — 1. In General. The commission has authority to investigate the management of railroad companies, even by compulsory process,[71] but has no power to fix rates or determine maximum and minimum charges or rates for the future, but may merely determine on the reasonableness of existing rates as the question is brought before it.[72] Nor may it order the discontinuance of certain practices by the carriers, as in furnishing gratuitous accessorial cartage to consignees to their places of business,[73] or compressing cotton

ing the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute." Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 284, 12 S. Ct. 844, 36 L. ed. 699 [*affirming* 43 Fed. 37, and *citing* McDonald *v.* Hovey, 110 U. S. 619, 4 S. Ct. 142, 28 L. ed. 269].

69. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

70. Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 16 S. Ct. 700, 40 L. ed. 935; Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. 803, 43 U. S. App. 308, 21 C. C. A. 103; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 612, 2 L. R. A. 289, where it is held that the commission is not an "inferior court" in the constitutional sense, in which the judges must hold office "during good behavior."

71. General authority.— "It [the commission] is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the Interstate Commerce Act, shall be secured to all shippers." Conclusions of Brewer, J., in giving the opinion of the court in Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 506, 17 S. Ct. 896, 42 L. ed. 243.

Functions inquisitorial only.— "The commission is charged with the duty of investigating and reporting upon complaints. . . . The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United States." Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

72. Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 18 S. Ct. 45, 42 L. ed. 414; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 499, 506, 17 S. Ct. 896, 42 L. ed. 243 (where it is said: "It is one thing to inquire whether the rates which have been charged and collected are reasonable,— that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future,— that is a legislative act. . . . These considerations convince us that under the Interstate Commerce Act the Commission has no power to prescribe the tariff of rates which shall control in the future." The court also explains its language in Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 196, 197, 16 S. Ct. 700, 40 L. ed. 935, where it said: "If the commission . . . itself fixes a rate, that rate is prejudged by the Commission to be reasonable"); Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699 [*affirming* 43 Fed. 37]; Interstate Commerce Commission *v.* Northeastern R. Co., 83 Fed. 611, 42 U. S. App. 603, 27 C. C. A. 631; Farmers L. & T. Co. *v.* Northern Pac. R. Co., 83 Fed. 249; Interstate Commerce Commission *v.* Lehigh Valley R. Co., 74 Fed. 784; Interstate Commerce Commission *v.* Northeastern R. Co., 74 Fed. 70.

Rates independent.— Before the determination of the proposition in the text it was held that the commission, if it has power to fix rates at all, should make them to each point independently and not make the rates to one point depend upon those to another. Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409.

A petition to enjoin certain charges is not obnoxious to this rule of law as an attempt by the commission indirectly to fix rates. Interstate Commerce Commission *v.* Chicago, etc., R. Co., 94 Fed. 272.

73. Accessorial cartage.—A direction to a railroad company to discontinue a long-established practice of furnishing cartage to consignees to their places of business was held "not a regulation of commerce, so much as an interference with the rights of property and its use, which possibly even congress could not, in this way, prohibit. At all events, it is an attempted exercise of a legislative power which congress has not, we think,

bales for the consignor;[74] and it has no power to issue general orders as rules of action to the carrier,[75] and may not enforce its own findings.[76]

2. CARRIERS SUBJECT TO THE COMMISSION. A common carrier is an interstate carrier under the authority of the commission if it transports freight under through interstate bills of lading, although its line is entirely within one state and it charges a separate rate for the part of the journey within the state.[77]

C. The Complaint — 1. WHO MAY COMPLAIN. The commission may proceed of its own motion to investigate, or on the complaint of any person, whether or not he is interested,[78] but a suit for damages under the statute can only be maintained by one actually injured.[79]

2. PROPER CONTENTS OF COMPLAINT. The complaint or petition presented to the commission should contain a statement of all the grounds for action relied on.[80]

D. The Hearing Before the Commission — 1. BURDEN OF PROOF. The burden of proving undue preference or prejudice rests upon the complaining party.[81]

2. CONSIDERATIONS PROPER FOR THE COMMISSION. In determining questions of dissimilarity of conditions or preferences in rates or the various other questions of fact within the supervision of the commission, it should consider all the circumstances that reasonably apply to the situation and keep in view the best interests of carriers, shippers, and the localities affected.[82] It should consider

conferred upon the commission." Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. 803, 841, 43 U. S. App. 308, 21 C. C. A. 103.

74. Cowan *v.* Bond, 39 Fed. 54.

75. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940, on the ground that the framing of such general orders is legislative in nature.

76. See *infra*, XI, G, 1, e.

77. Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 16 S. Ct. 700, 40 L. ed. 935.

78. 24 U. S. Stat. at L. p. 379, c. 104, §§ 13, 15, 16; Interstate Commerce Commission *v.* Detroit, etc., R. Co., 57 Fed. 1005.

A nominal party having no grievance, whose action is instigated by a competitor of the company complained against, may bring the complaint. Interstate Commerce Commission *v.* Detroit, etc., R. Co., 57 Fed. 1005.

79. Lehigh Valley R. Co. *v.* Rainey, 112 Fed. 487, holding that actual discrimination must be proven, that the mere offering a discrimination or making a discriminating rate is insufficient when not acted upon.

80. New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867 *semble*.

A charge of deprivation of equal facilities includes a charge of discrimination in rates where the petition contains allegations of discriminations. New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867.

81. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. 37 [*affirmed* without adverting to this question in 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699]; Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 11 App. Cas. 97, 50 J. P. 340, 55 L. J. Q. B. 181, 54 L. T. Rep. N. S. 1, 6 R. & Can. T. Cas. 133.

82. Proper considerations.— "The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: . . . That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment." Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 233, 16 S. Ct. 666, 40 L. ed. 940. "The interest of the seller at the point of departure, the rights of the carrier, and the rights or interest of the trader or consumer at the point of delivery are all concerned in a given transaction, and must be duly considered by a tribunal or court in the decision of any case involving the carrier's freight tariff." Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409, 419.

Interests of carriers to be considered.— "It was at one time thought doubtful whether the interests of the railway could be taken into account at all, but it is now established that they can be." Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409, 420 [*citing* Reagan *v.* Farmers L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014]; Ames *v.* Union Pac. R. Co., 64 Fed. 165; Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. 37.

circumstances obtaining without as well as within the United States,[83] and should consider also the competition of rival carriers,[84] except in the decision of questions between shippers over the same line,[85] whether or not these carriers are themselves within the jurisdiction of the commission,[86] and whether or not the apparent discrimination in rates on the ground of competition is made by the carrier itself without prior application to the commission,[87] and although the competition does not originate at the initial point of the traffic,[88] although such allowance for competition may seemingly create a discrimination against one point and a preference in favor of another,[89] and should receive evidence as to the materiality of that

83. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

84. East Tennessee R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 21 S. Ct. 516, 45 L. ed. 719; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 20 S. Ct. 209, 44 L. ed. 309; Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 18 S. Ct. 45, 42 L. ed. 414; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940; Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699 [*affirming* 43 Fed. 37]; Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. 803, 43 U. S. App. 308, 21 C. C. A. 103; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409; Behlmer *v.* Louisville, etc., R. Co., 71 Fed. 835; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 56 Fed. 925; Interstate Commerce Commission *v.* Atchison, etc., R. Co., 50 Fed. 295; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. 862; *Ex p.* Koehler, 12 Sawy. (U. S.) 446, 31 Fed. 315. See also the same result reached under a similar English statute in Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 3 N. & M. R. Cas. 441, 3 R. & Can. T. Cas. 426.

The conclusions of the court are well expressed as follows: "What was decided in the previous cases [before the supreme court] was that under the 4th section of the act substantial competition which materially affected transportation and rates might, under the statute, be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration." Per White, J., in Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 670, 20 S. Ct. 209, 44 L. ed. 309.

Competition is not necessarily an excuse for preferences, but the court means "only that these sections [the third and fourth of the Commerce Act] are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are substantially similar circumstances and conditions." Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 167, 18 S. Ct. 45, 42 L. ed. 414.

85. Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 18 S. Ct. 45, 42 L. ed. 414, where it is said that the conclusion that competition should be considered does not apply to the second section of the act which treats of shippers over the same line.

86. East Tennessee, etc., R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 21 S. Ct. 516, 45 L. ed. 719 (where the commission had decided that the competition of carriers subject to its orders could not be availed of as establishing substantially dissimilar circumstances without a prior application to the commission to obtain its sanction to taking such competitive conditions into consideration. The court say, however: "Competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute. . . . The dissimilarity of circumstance and condition pointed out by the statute . . . arises from the command of the statute, and not from the assent of the Commission"); Interstate Commerce Commission *v.* Southern R. Co., 105 Fed. 703.

87. East Tennessee, etc., R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 21 S. Ct. 516, 45 L. ed. 719 [*reversing* 99 Fed. 52, 39 C. C. A. 413]; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 20 S. Ct. 209, 44 L. ed. 309.

88. Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 20 S. Ct. 209, 44 L. ed. 309.

89. East Tennessee, etc., R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 18, 21 S. Ct. 516, 45 L. ed. 719 [*reversing* 99 Fed. 52, 39 C. C. A. 413], where it is said by White, J.: "The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a prefer-

competition as well as its nature.[90] The commission should also take into account the difference in population and volume of business at the termini of the carriage,[91] and the advantage to the carriers and to the public in securing by low rates forms of traffic which would otherwise move in other channels,[92] and the varying amount of business at different times of the year,[93] the difference between local and through transportation,[94] or between wholesale and retail trade, between large and small shippers, provided the same rates are offered to all large shippers,[95] and in passenger traffic between single passengers and those traveling together in parties,[96] and those traveling frequently,[97] the risk attendant in the transportation of certain articles,[98] or the carrier's train schedule, under a charge of the denial of equal facilities for the interchange of traffic,[99] and in fact all circumstances which carriers may properly regard as calling for a distinction in rates.[1] The commission should not, however, regard as material the length of time which a certain condition has lasted, nor the confusion which will result from a change.[2]

3. EVIDENCE. All material evidence[3] in the possession of the parties should be introduced before the commission.[4]

ence to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it."

90. Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 20 S. Ct. 209, 44 L. ed. 309.

91. Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. 803, 43 U. S. App. 308, 21 C. C. A. 103.

A reduced through rate between important stations less than the rate to intermediate stations is not necessarily a discrimination. Hozier *v.* Caledonian R. Co., 1 N. & M. R. Cas. 27.

92. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940, concerning the through traffic by rail from Europe to the Pacific coast by way of New Orleans, which would go in the absence of special inducement via Panama or Cape Horn. To the same effect under the English statute see Phipps *v.* London, etc., R. Co., [1892] 2 Q. B. 229, 61 L. J. Q. B. 379, 66 L. T. Rep. N. S. 721, 8 R. & Can. T. Cas. 83. But see Oxlade *v.* North Eastern R. Co., 1 C. B. N. S. 454, 3 Jur. N. S. 637, 26 L. J. C. P. 129, 87 E. C. L. 454, where it was held that a desire to introduce northern coke into a locality was not a legitimate ground for reduced rates.

93. Interstate Commerce Commission *v.* Louisville, etc R. Co., 73 Fed. 409.

94. Local and through transportation is distinguished in Union Pac. R. Co. *v.* U. S., 117 U. S. 355, 363, 6 S. Ct. 772, 29 L. ed. 920, where the court declared it could not say that "the service rendered in transporting a local passenger between the two points is in law identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line."

A disparity between local and through rates will not of itself, even though the disparity is considerable, "warrant the court in finding that such disparity constituted an undue discrimination." Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 239, 16 S. Ct. 666, 40 L. ed. 940.

95. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. 37 [*affirmed* in 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699]; Baxendale R. Co. *v.* Great Western R. Co., 5 C. B. N. S. 336, 28 L. J. C. P. 81, 94 E. C. L. 336; Nicholson *v.* Railway Co., 1 N. & M. R. Cas. 147.

96. Party rates.— It is not an unjust discrimination to allow special rates to parties traveling together. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699 [*affirming* 43 Fed. 37].

97. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699 *semble*.

98. Interstate Commerce Commission *v.* Delaware, etc., R. Co., 64 Fed. 723, window-shades.

99. New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867 *semble*, where it was claimed the running of respondent's trains afforded to the petitioner's competitor opportunities for forwarding traffic unfairly greater than those offered to petitioner.

1. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

2. East Tennessee, etc., R. Co. *v.* Interstate Commerce Commission, 99 Fed. 52, 63, 39 C. C. A. 413, where the court says: "We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole Southern schedule of rates, and create the greatest confusion. . . . The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the interstate commerce act was passed."

3. See, generally, EVIDENCE.

4. The court disapproves the withholding of evidence in the hearing before the commission on the ground that "the purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved." Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 196, 16 S. Ct. 700, 40 L. ed. 935.

4. PREFERENCES. The question what constitutes an undue preference or advantage is one of fact,[5] and the exclusion of competent evidence on this question is an error of law.[6]

E. Order of the Commission. The order of the commission should not in general terms outline lines of conduct[7] and may be definite in form without reservation of power to modify it.[8] The report of the commission should set forth the issues and facts found and not merely conclusions of fact or of law.[9] The order of the commission is binding upon the party served and its successors.[10]

F. Expenses of the Commission. The expenses of the commission are payable on the approval of its chairman, notwithstanding additional proof of disbursements is required by the auditing officer.[11]

G. Enforcement of Interstate Commerce Act — 1. On Finding by Commission — a. Nature of Proceeding. The court in considering the enforcement of the orders of the commission is acting judicially and proceeding in an original and independent proceeding.[12]

b. Jurisdiction of Court — (I) *In General.* The circuit court has jurisdiction of the complaint when the carrier complained against has its principal office within the district or if the violation of an order of the commission occurs within the jurisdiction of the court,[13] and in the latter case all parties to a joint agreement for unlawful rates are within the jurisdiction of the court,[14] and an allega-

5. Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 18 S. Ct. 45, 42 L. ed. 414; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

Under the English railway act of 1854, which forbids "any undue or unreasonable preference or advantage," it has been held that there could be no discrimination between persons shipping from the same point of departure to the same point of arrival (London, etc., R. Co. *v.* Evershed, 3 App. Cas. 1029, 48 L. J. Q. B. 22, 39 L. T. Rep. N. S. 306, 26 Wkly. Rep. 863; Budd *v.* London, etc., R. Co., 36 L. T. Rep. N. S. 802, 4 R. & Can. T. Cas. 393, 25 Wkly. Rep. 752); but these cases have been much modified, if not fully overruled by later cases where relief was denied in cases where the charges were not proportional to the distance traveled, as it was said that the question of undue preference was one of fact simply, to be settled in view of all the circumstances of such particular case and not merely on a mathematical basis (Phipps *v.* London, etc., R. Co., [1892] 2 Q. B. 229, 61 L. J. Q. B. 379, 66 L. T. Rep. N. S. 721, 8 R. & Can. T. Cas. 83; Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 11 App. Cas. 97, 50 J. P. 340, 55 L. J. Q. B. 181, 54 L. T. Rep. N. S. 1, 6 R. & Can. T. Cas. 133). See also Palmer *v.* London, etc., R. Co., L. R. 1 C. P. 588, 593, 12 Jur. N. S. 926, 35 L. J. C. P. 289, 15 L. T. Rep. N. S. 159, 15 Wkly. Rep. 11, where it was said by Erle, C. J.: "The question whether undue prejudice has been caused [is] a question of fact depending on the matters proved in each case."

6. Excluding evidence of competition is an error of law. Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409.

7. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

An authorization of lower rates for traffic between terminal points than for like traffic between intermediate points is too indefinite to be enforced. Farmers L. & T. Co. *v.* Northern Pac. R. Co., 83 Fed. 249.

8. Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409.

9. Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409.

10. Behlmer *v.* Louisville, etc., R. Co., 83 Fed. 898, 42 U. S. App. 581, 28 C. C. A. 229 [*reversing* 71 Fed. 835], holding that the order is binding, although served on the prior owner of the railroad line after its successor had taken possession where such possession was taken after the order was made. And see Farmers L. & T. Co. *v.* Northern Pac. R. Co., 83 Fed. 249; Interstate Commerce Commission *v.* Western New York, etc., R. Co., 82 Fed. 192.

11. Moseley *v.* U. S., 35 Ct. Cl. 347, where it was held that the disbursing agent of the commission is entitled to be credited in his account with payments made for telegrams for which itemized vouchers approved by the chairman of the commission are presented, although the claimant has not furnished the original telegrams as required by the officer appointed by 25 U. S. Stat. at L. p. 939, to audit the accounts of the commission. This statute was held not to supersede 25 U. S. Stat. at L. p. 855, providing that expenses shall be paid on presentation of itemized vouchers approved by the chairman of the commission.

12. Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 56 Fed. 925; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

13. 24 U. S. Stat. at L. p. 379, c. 104, § 16; U. S. Comp. Stat. (1901), p. 3154.

14. Interstate Commerce Commission *v.* Western New York, etc., R. Co., 82 Fed. 192; Interstate Commerce Commission *v.* Southern Pac. R. Co., 74 Fed. 42.

tion that one of the parties to a joint traffic agreement is violating the order of the commission is a sufficient complaint against all such parties, giving the court jurisdiction.[15] The enforcement of an order of the interstate commerce commission involves a federal question, giving the United States courts jurisdiction *ipso facto*,[16] and only as provided in the interstate commerce act.[17] When a case reaches the circuit court on complaint of the commission, this complaint is the basis of the jurisdiction of the court,[18] and the good faith of the complaint cannot be attacked by impeaching the good faith of those who petitioned the commission for action.[19] The state courts have no jurisdiction under the interstate commerce act to enforce the findings of the commission.[20]

(II) *LAW OR EQUITY.* Orders providing for reparation for injuries inflicted can be enforced only in the law side of the court.[21]

c. Parties. In proceeding against a carrier to enforce an order of the commission another carrier concerned with the defendant in jointly making the forbidden rate is a proper but not a necessary party defendant.[22]

d. Evidence — (I) *FINDINGS OF COMMISSION.* The provision that the findings of the commission shall be *prima facie* evidence in subsequent judicial proceedings is constitutional,[23] and does not mean that such findings are conclusive; but the court may review the findings of the commission on questions of fact as well as of law.[24] Such findings, however, are presumed to be correct unless error clearly appears, and the court will not ordinarily review findings of fact made by the commission,[25] which findings should not be given a narrow construction by the court,[26] but are entitled to the highest respect by the federal courts.[27] The finding of facts by the commission has no greater weight where the commission itself proceeds by petition than where the proceeding is instituted by an individual.[28] The transcript of evidence taken before the commission, if competent

15. Interstate Commerce Commission *v.* Western New York, etc., R. Co., 82 Fed. 192.

16. Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. 771; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

17. Central Stock Yards Co. *v.* Louisville, etc., R. Co., 112 Fed. 823, holding the remedy under the statute giving a suit for damages to a party injured by an unlawful discrimination to be exclusive.

18. Interstate Commerce Commission *v.* Detroit, etc., R. Co., 57 Fed. 1005.

19. Interstate Commerce Commission *v.* Detroit, etc., R. Co., 57 Fed. 1005.

20. Sheldon *v.* Wabash R. Co., 105 Fed. 785.

21. Interstate Commerce Commission *v.* Western New York, etc., R. Co., 82 Fed. 192.

22. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940 [*affirming* 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 1, and 52 Fed. 187, where the joint maker of the rate was without the jurisdiction].

23. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289 [*citing* Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381].

24. Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 18 S. Ct. 45, 42 L. ed. 414 (where the reason for the rule is stated to be that the statute expressly provides that the court shall proceed as a court of equity, to hear and determine the matter and in such manner as to do justice in the premises); Interstate Commerce Commission *v.* East Tennessee, etc., R. Co., 85 Fed. 107; Interstate Commerce Commission *v.* Atchison, etc., R. Co., 50 Fed. 295.

25. East Tennessee, etc., R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 21 S. Ct. 516, 45 L. ed. 719 [*reversing* 99 Fed. 52, 39 C. C. A. 413]; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 20 S. Ct. 209, 44 L. ed. 309; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

Conclusions presumed correct. — "The conclusions of the commission based upon such findings [of fact] are presumed to be well founded and correct, and they will not be set aside unless error clearly appears." Interstate Commerce Commission *v.* Louisville, etc., R. Co., 102 Fed. 709, 710.

When the lower court approves the commission's findings the supreme court will not feel disposed to review such findings of fact. Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 16 S. Ct. 700, 40 L. ed. 935.

26. Interstate Commerce Commission *v.* Chicago, etc., R. Co., 94 Fed. 272.

27. Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. 981, where the commission is called an administrative body exercising quasi-judicial functions whose decisions are entitled to the highest respect in the federal courts.

28. Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. 177; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

and relevant to the matters embraced in the petition, may be introduced in evidence before the court.[29]

(II) *New Evidence.* The court, in reviewing the finding of the commission, may hear new evidence not produced before the commission[30] and should hear all competent evidence[31] offered by either party.[32]

e. Proper Order of the Court — (I) *In General.* The court is limited to an approval or disapproval of the order of the commission and may not modify it.[33] The order of the commission forbidding discrimination should be enforced, even though some discrimination might be justifiable, when the rates actually charged are unlawful and the carrier does not show what would be a lawful discrimination,[34] or even though against receivers.[35]

(II) *Injunction.*[36] The court should in a proper case enforce by injunction an order of the commission declaring certain charges unreasonable.[37] A preliminary injunction to restrain a carrier from disobeying an order of the interstate commerce commission will not be granted in proceedings to enforce the order when the answer denies the facts,[38] or the conclusions of fact on which the order was based,[39] and the carrier ought not to be forced to keep an account of business done under the contested rates in the absence of a showing of right in favor of complainant which would authorize the granting of a preliminary injunction.[40]

(III) *In Case of Error by the Commission.* Where it appears that the action of the commission was based upon an erroneous view of the law the petition should be remanded without prejudice to the right of any party to take further proceedings,[41] and the court should not itself investigate the facts.[42]

29. Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. 981.

30. Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 18 S. Ct. 45, 42 L. ed. 414; Interstate Commerce Commission *v.* Chicago, etc., R. Co., 94 Fed. 272; Interstate Commerce Commission *v.* East Tennessee, etc., R. Co., 85 Fed. 107; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

Unfair train schedule. — Under the charge of a denial of "equal facilities" for the interchange of traffic, the conduct of respondent in so arranging the running of its trains that greater facilities for interchanging, forwarding, and delivering freight were afforded to a competing connecting line than to petitioner was proper to be shown to the court in a proceeding to enforce an order of the commission although no question of the hours of running trains was presented to the commission in express terms. New York, etc., R. Co. *v.* New York, etc., R. Co., 50 Fed. 867.

31. See, generally, Evidence.

32. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 614, 2 L. R. A. 289, where the court says by Jackson, J.: "It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

33. Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. 803, 43 U. S. App. 308, 21 C. C. A. 103 [*reversing* 57 Fed. 1005]; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. 409.

The correction of abuses is not within the power of the court, which can afford no relief to the carrier in a proceeding under the interstate commerce act unless a valid order of the commission has been made and broken. Farmers L. & T. Co. *v.* Northern Pac. R. Co., 83 Fed. 249.

A mistaken order cannot be substituted by the order the commission intended to make. Interstate Commerce Commission *v.* Delaware, etc., R. Co., 64 Fed. 723.

34. Interstate Commerce Commission *v.* Texas, etc., R. Co., 57 Fed. 948, 20 U. S. App. 1, 6 C. C. A. 653.

35. Farmers L. & T. Co. *v.* Northern Pac. R. Co., 83 Fed. 249, where it was held that receivers appointed by the court should in this proceeding be treated in the same manner as other parties and were not to be treated as court officers.

36. See, generally, Injunctions.

37. Interstate Commerce Commission *v.* Chicago, etc., R. Co., 94 Fed. 272.

38. Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. 177.

39. Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. 981; Shinkle, etc., Co. *v.* Louisville, etc., R. Co., 62 Fed. 690, where the answer denied that the rates charged are unreasonable.

40. Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. 981.

41. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940; Interstate Commerce Commission *v.* Southern R. Co., 105 Fed. 703.

42. Interstate Commerce Commission *v.* Clyde Steamship Co., 181 U. S. 29, 21 S. Ct. 512, 45 L. ed. 729 [*modifying* decree in 93 Fed. 83, 35 C. C. A. 217, the court's opinion proceeding on the ground that the statute

2. ON ORIGINAL PROCEEDING INDEPENDENT OF THE COMMISSION. Investigation by the commission is not a necessary prerequisite to direct governmental action against discrimination by carriers for the court's plenary jurisdiction to enforce an act of congress is not limited by the special procedural provisions of the interstate commerce act.[43]

H. Appeal.[44] An appeal from the order of the circuit court relating to the interstate commerce commission lies only to the circuit court of appeals[45] and does not in any way affect that order pending the appeal,[46] or deprive the circuit court of its general power over its own orders,[47] even when the case is appealed from the circuit court of appeals to the supreme court.[48] The supreme court will not on appeal reinvestigate the facts.[49]

COMMERCIA BELLI. War contracts; compacts entered into by belligerent nations to secure a temporary and limited peace;[1] contracts between nations at war, or their subjects.[2]

COMMERCIAL. Pertaining or relating to commerce or trade; of the nature of commerce.[3] (Commercial: Agency, see MERCANTILE AGENCIES. Agent, see AMBASSADORS AND CONSULS. Broker, see FACTORS AND BROKERS. Corporation, see CORPORATIONS. Domicile, see DOMICILE. Law, see COMMERCIAL LAW. Mark, see COMMERCIAL MARK. Name, see COMMERCIAL NAME. Paper, see COMMERCIAL PAPER. Traveler, see HAWKERS AND PEDDLERS.)

COMMERCIAL LAW. A law not peculiar to one state or dependent upon local authority, but one arising out of the usages of the commercial world;[4] a phrase employed to denote the branch of the law which relates to the rights of property

expressly provides that the preliminary investigation is a duty to be discharged by the commission]; East Tennessee, etc., R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 21 S. Ct. 516, 45 L. ed. 719 [*reversing* 99 Fed. 52, 39 C. C. A. 413]; Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, 20 S. Ct. 209, 44 L. ed. 309 [*reversing* 83 Fed. 898, 42 U. S. App. 581, 28 C. C. A. 229]; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940.

43. U. S. *v.* Missouri Pac. R. Co., 65 Fed. 903 (construing the amendments of March 2, 1889, and Feb. 10, 1891); Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. 771 (holding the special remedies supplementary). See also Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

Application to the commission is unnecessary to relieve the carrier from the provisions of the long and short haul clause when there is in fact competition or other circumstance creating dissimilarity. The argument *contra* was based on the words of the clause "upon application to the Commission . . . such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than shorter distances." Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 167, 18 S. Ct. 45, 42 L. ed. 414.

44. See, generally, APPEAL AND ERROR, 2 Cyc. 474 *et seq.*

45. Interstate Commerce Commission *v.* Atchison, etc., R. Co., 149 U. S. 264, 13 S. Ct. 837, 37 L. ed. 727. The decision is based on the judiciary act of March 3, 1891 (26 U. S. Stat. at L. p. 826, c. 517).

46. 24 U. S. Stat. at L. p. 379, c. 104, § 16, as amended by 25 U. S. Stat. at L. p. 855, c. 382.

47. Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146.

48. Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 18 S. Ct. 502, 42 L. ed. 889.

49. The supreme court will not, on appeal from a decree of the federal court refusing to demand compliance with an order of the commission, make an independent investigation of the facts in order to evolve new and substantive findings of fact on which the finding of the commission may be sustained, even if the record is in such condition as to permit such a course. Interstate Commerce Commission *v.* Chicago, etc., R. Co., 186 U. S. 320, 22 S. Ct. 824, 46 L. ed. 1182 [*affirming* 103 Fed. 249, 43 C. C. A. 209].

1. Black L. Dict. [*citing* 1 Kent Comm. 159].

2. Black L. Dict.

3. Century Dict. And *compare* "Zante Currants," 73 Fed. 183, 189 [*citing* Earnshaw *v.* Cadwalader, 145 U. S. 247, 258, 12 S. Ct. 851, 36 L. ed. 693; 18 Op. Atty.-Gen. 530, 532], where it is said: "The word 'commercial,' in this connection, is to be understood in its comprehensive sense of buying, selling, and exchange in the general sales or traffic of our own markets."

4. Williams *v.* Gold Hill Min. Co., 96 Fed. 454, 464 [*citing* Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 31, 26 L. ed. 61].

and the relations of persons engaged in commerce.[5] The term has come to be used occasionally as synonymous with "maritime law;" but, in strictness, the phrase "commercial law" is wider, and includes many transactions or legal questions which have nothing to do with shipping or its incidents.[6] (See also, generally, BANKS AND BANKING; CARRIERS; COMMERCE; COMMERCIAL PAPER; COURTS; FACTORS AND BROKERS; MERCANTILE AGENCIES; SALES; SHIPPING; TRADE-MARKS AND TRADE-NAMES.)

COMMERCIAL MARK. The mark of the dealer, of him who, receiving the product of the manufacturer, sells it, in his turn, to the consumer.[7] (See, generally, TRADE-MARKS AND TRADE-NAMES.)

COMMERCIAL NAME. The name of the individual, or any name which is the property of a merchant, without reference to its use as a mark, or trade-mark, in a distinctive form.[8] (See, generally, TRADE-MARKS AND TRADE-NAMES.)

5. Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61, 76 [*quoting* Bouvier L. Dict.]; Williams *v.* Gold Hill Min. Co., 96 Fed. 454, 464 [*quoting* Bouvier L. Dict.], where it is also said: "Persons engaged in commercial adventures, wherever they may have their domicile, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law except the law of nations."

A phrase used to designate the whole body of substantive jurisprudence applicable to the rights, intercourse, and relations of persons engaged in commerce, trade, or mercantile pursuits. It is not a very scientific or accurate term. Black L. Dict.

6. Black L. Dict.

7. La Republique Francaise *v.* Schultz, 57 Fed. 37, 41.

8. La Republique Francaise *v.* Schultz, 57 Fed. 37, 41 [*quoting* Pouillet, "Noms Commercial," § 374].

COMMERCIAL PAPER

By Joseph F. Randolph,* Assisted by the Editorial Staff

I. THE LAW MERCHANT, 520
A. *General Principles*, 520
1. *Definition*, 520
2. *History*, 520
3. *Negotiability*, 521
a. *In General*, 521
b. *Under Statutes*, 521
c. *Duration and Extent*, 522
(I) *Effect of Death of Original Payee*, 522
(II) *Effect of Express Restraint*, 522
(III) *Effect of Maturity*, 523
(IV) *Effect of Payment*, 523
(V) *Effect of Recovery of Judgment*, 524
4. *Assignability*, 524
a. *In General*, 524
b. *Subject to Defenses*, 525
B. *Instruments Governed by Law Merchant*, 525
1. *In General*, 525
2. *Negotiable Instruments*, 525
a. *Bills of Exchange*, 525
(I) *Definition*, 525
(II) *Form*, 526
(III) *Kinds*, 527
(A) *In General*, 527
(B) *Foreign*, 527
(C) *Inland*, 528
(D) *Presumptions From Date*, 529
b. *Checks*, 529
(I) *In General*, 529
(II) *Memorandum Check*, 531
(III) *Banker's Draft*, 532
c. *Promissory Notes*, 532
(I) *In General*, 532
(A) *Definition*, 532
(B) *Negotiability*, 533
(C) *Form*, 533
(II) *Bank-Notes*, 533
3. *Quasi-Negotiable Instruments*, 534
a. *Bills of Lading*, 534
b. *Certificates of Deposit*, 535
c. *Collateral Securities*, 536
d. *Corporation Bonds*, 536
(I) *In General*, 536
(II) *Municipal Bonds*, 537
(A) *Generally*, 537
(B) *Government and State Bonds*, 537
e. *Coupons*, 538
f. *Letters of Credit*, 539

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g. *Municipal Warrants*, 539
h. *Warehouse Receipts*, 541
4. *Non-Negotiable Instruments*, 541
a. *In General*, 541
b. *Guaranties*, 542
C. *Form and Requisites of Negotiable Instrument*, 542
1. *In General*, 542
a. *Necessity For Writing*, 542
b. *Date*, 542
(I) *In General*, 542
(A) *Necessity For*, 542
(1) *To Bill or Note*, 542
(a) *Generally*, 542
(b) *Local Date*, 543
(2) *To Indorsement or Acceptance*, 543
(B) *Effect of Date*, 543
(1) *In General*, 543
(2) *Not Dependent on Position*, 544
(3) *Where Date and Delivery Conflict*, 544
(C) *Effect of Executing in Blank*, 544
(II) *Antedating and Postdating*, 544
c. *Designation of Parties*, 545
(I) *Maker or Drawer*, 545
(A) *In General*, 545
(B) *Executors and Administrators*, 546
(C) *Guardians*, 547
(D) *Partnerships*, 547
(E) *Principal and Agent*, 549
(1) *Necessity For Disclosing Names*, 549
(2) *How Principal Disclosed*, 550
(a) *By Benefit Derived*, 550
(b) *By Form of Promise*, 551
(c) *By Request to Charge*, 554
(d) *By Signature*, 554
(F) *Public Officers*, 555
(II) *Payee*, 555
(A) *Necessity of*, 555
(1) *In General*, 555
(2) *Effect of Failure to Designate*, 556
(a) *In General*, 556
(b) *Execution in Blank*, 556
(B) *Who May Be*, 558
(1) *In General*, 558
(2) *Agents*, 558
(3) *Bearer*, 560
(4) *Drawee, Maker, or Drawer*, 560
(5) *Executors, Administrators, Trustees, or Guardians*, 563
(6) *Fictitious Persons*, 564
(7) *Joint Payees — Partners*, 566
(8) *Public Officers*, 566
(9) *State or Government*, 567
(C) *How Designated*, 567
(III) *Drawee*, 569
(A) *Who May Be*, 569
(1) *In General*, 569
(a) *Drawer*, 569

(b) *Fictitious Person*, 569
(c) *Payee*, 569
(2) *Several Drawees*, 570
(B) *How Designated*, 570
d. *Order or Promise to Pay*, 571
(I) *Necessity For*, 571
(II) *Form of Order or Promise*, 571
(A) *In General*, 571
(B) *Mere Acknowledgment of Debt*, 573
(C) *Must Be Unconditional*, 574
(1) *Rule Stated*, 574
(2) *What Is Conditional*, 575
(a) *In General*, 575
(b) *Direction For Payment Out of Particular Fund*, 578
aa. *In General*, 578
bb. *Reference For Reimbursement*, 580
(c) *Recital of Consideration*, 580
(d) *Return of Certificate*, 582
(D) " *Without Defalcation or Discount*," 582
e. *For Payment of Money*, 582
(I) *In General*, 582
(A) *Rule Stated*, 582
(B) *Effect of Additional Provisions*, 583
(1) *In General*, 583
(2) *Agreement as to Crediting Amount*, 584
(3) *Provision For Attorney's Fees and Costs of Collection*, 584
(a) *In General*, 584
(b) *How Amount Fixed*, 587
(4) *Reference to Collateral*, 587
(5) *Waiver of Exemption or Diligence*, 588
(6) *Warrant to Confess Judgment*, 589
(C) *Effect of Option For Alternative Payment*, 589
(II) *How Money Designated*, 589
(III) *Amount*, 592
(A) *Must Be Certain*, 592
(1) *In General*, 592
(2) *Effect of Executing in Blank*, 593
(3) *Provision For Interest or Exchange*, 595
(4) *Provision For Payment of Taxes*, 596
(B) *How Expressed*, 596
f. *Time of Payment*, 597
(I) *Must Be Certain*, 597
(A) *Rule Stated*, 597
(B) *Effect of Making Payable on Happening of Contingency*, 597
(C) *Effect of Provisions For Accelerating Maturity*, 599
(D) *Effect of Provisions For Extension or Renewal*, 600
(II) *At Fixed Time*, 601
(III) *On Demand, At Sight, or After Sight*, 601
(IV) *In Instalments*, 602
g. *Place of Payment*, 602

(I) *Necessity of Naming*, 602
(A) *Rule Stated*, 602
(B) *Place Left Blank*, 603
(II) *May Be Payable Where*, 604
(III) *May Be Designated in Memorandum*, 605
(IV) *Effect of Mistake in Designation*, 605
(V) *What Is Place of Payment*, 605
(A) *Where Place Not Expressed*, 605
(B) *For Accepter*, 606
(C) *Where Several Places Named*, 606
h. *Negotiable Words*, 606
i. *Words Expressing Consideration — "Value Received,"* 609
(I) *Necessity of*, 609
(A) *In General*, 609
(B) *Particular Statement of Consideration*, 611
(II) *Import of Words*, 612
j. *Signature*, 612
(I) *Necessity of*, 612
(II) *Form of*, 613
(III) *Position of*, 614
k. *Seal*, 614
(I) *Necessity and Effect of*, 614
(A) *In General*, 614
(B) *In Corporate Paper*, 616
(II) *What Is a Seal*, 617
l. *Attestation*, 618
2. *Blanks*, 619
a. *Implied Power to Fill*, 619
(I) *In General*, 619
(A) *Rule Stated*, 619
(B) *Depends Upon Voluntary Delivery*, 620
(II) *Sealed Instruments*, 620
b. *What Blanks May Be Filled*, 620
c. *Time For Filling*, 622
d. *Extent of Power*, 623
(I) *In General*, 623
(II) *Where Signature Blank*, 624
(III) *Effect of Exceeding Power*, 625
3. *Contemporaneous Agreements*, 626
4. *Memoranda*, 628
a. *When Part of Instrument*, 628
b. *Effect When Part of Instrument*, 629
5. *Parts or Sets*, 631
D. *Conflict of Laws*, 631
1. *General Principles*, 631
a. *In General*, 631
b. *Foreign Laws*, 632
(I) *Conflict of Public Policy*, 632
(II) *Proof of*, 632
(III) *Construction of*, 633
c. *State Law in Federal Courts*, 634
2. *What Law Governs*, 634
a. *In General*, 634
(I) *Lex Loci Solutionis*, 634
(A) *What Is Place of Payment*, 634
(1) *Place of Date*, 634
(2) *Place of Drawee's Address*, 634

(3) *Place of Holder's or Indorser's Residence*, 635
(B) *Election by Parties*, 635
(II) *Lex Loci Contractus*, 636
(A) *What Is Place of Contract*, 636
(1) *Prima Facie Shown by Date*, 636
(2) *Determined by Delivery*, 636
(a) *In General*, 636
(b) *Where Executed by Several*, 638
(c) *Where Delivered by Mail*, 638
(B) *Determines What*, 638
(III) *Lex Loci Rei Sitæ*, 640
(IV) *Lex Domicilii*, 640
(V) *Lex Fori*, 640
(VI) *Lex Temporis*, 641
b. *Negotiability*, 641
c. *Form of Instrument*, 641

II. THE ORIGINAL CONTRACT, 642
A. *Classification*, 642
B. *Particular Contracts*, 642
1. *Contract of Drawer*, 642
a. *Nature of Contract*, 642
(I) *Conditional Liability*, 642
(A) *General Principles*, 642
(B) *Non-Acceptance*, 643
(1) *Refusal by Drawee*, 643
(2) *Conditional Acceptance*, 643
(3) *Acceptance Supra Protest*, 643
(C) *Non-Payment*, 643
(1) *Refusal by Drawee*, 643
(2) *Payment Supra Protest*, 644
(D) *Certification of Check*, 644
(II) *Place of Payment*, 644
(III) *Consideration*, 644
(IV) *Liability to Drawee*, 645
(V) *Restricted Liability*, 646
(VI) *Joint Drawers*, 646
(VII) *Admissions Implied*, 646
(VIII) *Assignment of Fund*, 647
(IX) *Measure of Damages*, 647
(X) *Discharge of Drawer*, 647
b. *Revocability of Contract*, 647
(I) *Bills and Drafts*, 647
(II) *Checks*, 647
(A) *In General*, 647
(B) *What Amounts to Revocation*, 648
c. *Recourse to Accepter*, 648
d. *Conflict of Laws*, 648
2. *Contract of Drawee*, 648
a. *Acceptance Necessary*, 648
b. *Assignment of Fund*, 649
(I) *Bill or Draft*, 649
(II) *Check*, 650
3. *Contract of Maker*, 652
a. *Nature of*, 652
(I) *In General*, 652

(II) *Admissions*, 652
(III) *Joint Makers*, 653
(A) *Who Are*, 653
(1) *In General*, 653
(a) *Rule Stated*, 653
(b) *Presumption From Signatures*, 654
(2) *Payee Signing Below Maker*, 655
(3) *Person Signing After Delivery*, 655
(B) *Liability of*, 655
(1) *In General*, 655
(2) *On Death of Co-Maker*, 655
(IV) *Joint and Several Makers*, 656
b. *Conflict of Laws*, 657
4. *Contract of Guarantor*, 658
a. *Nature of*, 658
(I) *In General*, 658
(II) *Negotiability*, 658
b. *Form of Contract*, 659
(I) *In General*, 659
(A) *When Expressed*, 659
(B) *When Implied*, 660
(II) *Application of Statute of Frauds*, 661
(A) *Necessity of Writing*, 661
(B) *Necessity of Expressing Consideration*, 661
5. *Contract of Surety*, 662
a. *Nature of*, 662
(I) *In General*, 662
(II) *Admissions*, 663
b. *Form of Contract*, 663
(I) *When Expressed*, 663
(II) *When Implied*, 664
c. *Conflict of Laws*, 664
6. *Contract of Irregular or Anomalous Indorser*, 664
a. *Nature of*, 664
(I) *In General*, 664
(II) *Liability in General*, 664
(A) *As Indorser*, 664
(1) *In General*, 664
(a) "*New York Rule*," 664
(b) *Where Note Payable to Maker's Order*, 665
(2) *As Second Indorser*, 666
(B) *As Maker — "Massachusetts Rule,"* 666
(C) *As Surety*, 668
(D) *As Guarantor*, 668
(E) *According to Intent*, 669
(1) *Rule Stated*, 669
(2) *Filling Indorsement*, 672
(F) *Under Statutes*, 673
(G) *Where Instrument Non-Negotiable*, 673
(H) *Where Indorsement Made After Delivery*, 674
(1) *Rule Stated*, 674
(2) *Presumption as to Time of Indorsement*, 675
(III) *Liability to Payee*, 676
b. *Statute of Frauds*, 678
c. *Consideration*, 678

C. *Capacity of Parties*, 678
1. *In General*, 678
2. *Limited Capacity*, 679
a. *In General*, 679
b. *To Transfer Under Statute*, 679
3. *Conflict of Laws*, 679
D. *Completion of Contract*, 680
1. *Stamps*, 680
a. *Statute Law*, 680
b. *Application in United States*, 680
c. *Amount For Stamp*, 681
d. *Cancellation of Stamp*, 681
e. *Omission of Stamp*, 681
f. *Stamping After Delivery*, 682
g. *Conflict of Laws*, 682
2. *Delivery*, 683
a. *In General*, 683
(I) *Necessity of Delivery*, 683
(II) *Manner of Delivery*, 683
(A) *In General*, 683
(B) *Intention to Deliver*, 685
(III) *Time of Delivery*, 686
(IV) *To Whom Delivery Made*, 687
b. *Conditional Delivery*, 688

III. **THE CONSIDERATION**, 690
A. *Necessity For*, 690
1. *In General*, 690
2. *Between What Parties*, 690
a. *In General*, 690
b. *When Original Consideration Not Sufficient*, 691
(I) *In General*, 691
(II) *For Indorsement but Not For Transfer*, 692
3. *Conflict of Laws*, 693
B. *Sufficiency of Consideration*, 693
1. *In General*, 693
a. *Adequacy*, 693
b. *Worthless Consideration*, 694
2. *Valuable Consideration*, 695
a. *Money*, 695
(I) *Advances and Loans*, 695
(II) *Future Liability*, 696
(III) *Existing Debt*, 696
(A) *In General*, 696
(B) *Payment or Security of Other Note*, 697
(C) *Maker's Debt to Decedent*, 700
(D) *Debt of Another*, 701
(1) *In General*, 701
(a) *Rule Stated*, 701
(b) *With Forbearance*, 702
(c) *With Novation*, 792
(d) *With Release*, 703
(2) *Of Decedent*, 703
(3) *Of Near Relative or Ward*, 705
(IV) *Indemnity*, 705
b. *Property*, 706
(I) *Property Purchased*, 706

(A) *In General*, 706
(B) *Title and Value*, 708
(II) *Paper Exchanged*, 710
c. *Services*, 711
(I) *In General*, 711
(II) *Against Public Policy*, 712
d. *Executory Agreements*, 712
e. *Release*, 715
(I) *In General*, 715
(II) *Claim Barred by Limitation*, 717
(III) *Claim Already Discharged*, 718
(IV) *Doubtful or Disputed Claim*, 719
f. *Forbearance*, 721
3. *Accommodation Paper*, 723
a. *In General*, 723
b. *Liability of Accommodation Party*, 725
4. *Love and Affection*, 728
a. *In General*, 728
(I) *Gifts*, 728
(A) *Generally*, 728
(B) *Causa Mortis*, 729
(II) *Subscriptions*, 730
b. *Past Kindness*, 731
5. *Consideration For Extension*, 731
a. *Necessity For*, 731
b. *Sufficiency of Consideration*, 732
(I) *Payment of Money*, 732
(II) *Giving Additional Security*, 734
(III) *Executory Agreement*, 735
6. *Consideration For Modification*, 737
7. *Consideration For Release*, 737
8. *Consideration For Waiver*, 737
9. *Consideration For Guaranty and Suretyship*, 738
a. *In General*, 738
(I) *Guaranty*, 738
(II) *Suretyship*, 739
b. *Anomalous or Irregular Indorser*, 740
C. *Validity of Consideration*, 740
1. *What Contracts Are Invalid*, 740
a. *As Against Public Safety*, 740
(I) *Alien Enemy*, 740
(II) *Corruption in Public Contracts*, 741
(III) *Influence of Official Conduct*, 741
(IV) *Lobby Services*, 741
(V) *Sale of Public Office*, 741
b. *As Against Public Justice*, 741
(I) *Compounding Offenses*, 741
(II) *Divorce*, 742
c. *As Against Public Policy and Morality*, 743
(I) *Fraud*, 743
(II) *Immoral Consideration*, 743
(III) *Restraint of Marriage*, 744
(IV) *Restraint of Trade*, 744
(V) *Wagers*, 744
d. *As Against Express Statute*, 745
(I) *In General*, 745
(II) *Banking Act*, 746

(III) *License Laws*, 747
(IV) *Liquor Laws*, 747
(V) *Sunday Laws*, 747
2. *Rules of Construction*, 747
a. *In General*, 747
b. *Change of Contract*, 747
(I) *Original Illegality*, 747
(A) *In General*, 747
(B) *Illegality Purged*, 748
(C) *Illegality Merged*, 749
(II) *Subsequent Illegality*, 749
c. *Knowledge of Illegal Intention*, 749
d. *Partial Illegality*, 750
3. *Conflict of Laws*, 751

IV. PRESENTMENT FOR ACCEPTANCE, 752
A. *Necessity For*, 752
B. *Manner of Presentment*, 753
C. *By Whom Made*, 753
D. *To Whom Made*, 753
E. *Time For Presentment*, 754
1. *Must Be Within Reasonable Time*, 754
a. *Rule Stated*, 754
b. *What Is Reasonable Time*, 754
2. *Must Be Within Business or Usual Hours*, 755
F. *Place For Presentment*, 756
G. *Excuse and Waiver*, 756

V. ACCEPTANCE, 757
A. *In General*, 757
1. *Nature of*, 757
2. *Necessity For Acceptance*, 758
a. *In General*, 758
b. *Duty of Drawee to Accept*, 759
c. *Waiver*, 759
3. *By Whom Made*, 759
a. *In General*, 759
b. *Where Several Drawees Are Named*, 760
c. *Agent of Drawee*, 761
4. *Time For Acceptance*, 762
a. *In General*, 762
b. *Time For Consideration*, 762
5. *Manner of Acceptance*, 763
a. *In General*, 763
(I) *When Express*, 763
(A) *Necessity For Writing*, 763
(B) *Form of Writing*, 765
(1) *In General*, 765
(2) *Letter, Telegram, or Other Separate Writing*, 765
(II) *When Implied*, 766
(A) *By Agreement For Acceptance*, 766
(1) *Of Existing Bill*, 766
(2) *Of Bill to Be Drawn*, 767
(B) *By Authority to Draw*, 771
(C) *By Detention of Bill*, 773
(D) *By Purchase or Part Payment of Bill*, 773
(E) *By Receipt of Goods*, 773

b. *Where Drawn in Parts*, 774
6. *Delivery and Revocation*, 774
B. *Qualified or Conditional Acceptance*, 775
1. *Qualified Acceptance*, 775
2. *Conditional Acceptance*, 776
C. *Refusal to Accept*, 779
D. *Liability of Accepter and Effect of Acceptance*, 779
1. *In General*, 779
2. *Admissions*, 781
E. *What Law Governs*, 782

VI. TRANSFER, 783

A. *Parties*, 783
1. *By Whom Made*, 783
a. *In General*, 783
b. *Agents*, 784
(I) *In General*, 784
(II) *How Authority Conferred or Revoked*, 784
(III) *Form of Transfer*, 785
c. *Fictitious Payees*, 785
d. *Married Women*, 785
e. *Persons in Representative Capacity*, 786
f. *Public Officers*, 786
g. *Several Payees*, 786
2. *To Whom Made*, 788
a. *In General*, 788
b. *Previous Holder or Party to Paper*, 788
B. *Time of Transfer*, 789
1. *In General*, 789
a. *Before Maturity*, 789
b. *After Maturity*, 789
(I) *In General*, 789
(II) *After Suit Begun*, 790
(III) *Where Paper Has Been Paid*, 790
2. *From When Transfer Takes Effect*, 791
C. *Manner of Transfer*, 791
1. *By Indorsement*, 791
a. *In General*, 791
(I) *Necessity For*, 791
(II) *Formal Requisites*, 792
(A) *Necessity For Writing, Signature, and Seal*, 792
(B) *Position of Indorsement*, 793
(1) *In General*, 793
(2) *Order of Signatures*, 794
(C) *Language of Indorsement*, 794
(1) *In General*, 794
(2) *Guaranty*, 795
(III) *Striking Out Indorsements*, 796
(A) *In General*, 796
(B) *Where Retransferred to Former Holder*, 797
(C) *Effect of Striking Out*, 798
(IV) *Alteration of Indorsement*, 799
(V) *Revocation of Indorsement*, 799
b. *Blank Indorsement*, 799
(I) *Form*, 799

(II) *Nature and Effect*, 799
(III) *Filling Blank Indorsement*, 801
(A) *In General*, 801
(B) *By Whom Filled*, 802
(C) *How Filled*, 802
(D) *When Filled*, 805
c. *Special Indorsement*, 805
d. *Restrictive Indorsement*, 806
(I) *In General*, 806
(II) *How Restricted*, 806
(A) *As to Amount*, 806
(B) *As to Person*, 806
(C) *By Conditional Indorsement*, 807
(D) *By Indorsement "For Collection,"* 808
(E) *By Indorsement "Without Recourse,"* 809
2. *By Delivery*, 810
3. *By Assignment*, 812
a. *In Writing*, 812
(I) *Negotiable Paper*, 812
(A) *In General*, 812
(B) *Of Part of Instrument*, 813
(II) *Non-Negotiable Paper*, 813
b. *By Parol*, 814
D. *Delivery*, 814
1. *Necessity of*, 814
a. *In General*, 814
b. *Intent*, 815
2. *To Whom Made*, 815
E. *Consideration*, 815
F. *Operation and Effect Upon Equities Connected With Instrument*, 816
1. *In General*, 816
2. *As Affected by Manner of Transfer*, 817
a. *Transfer by Indorsement or by Delivery When Payable to Bearer*, 817
b. *Transfer Without Indorsement*, 818
3. *As Affected by Time of Transfer*, 820
G. *Liability of Transferrer*, 822
1. *In General*, 822
a. *Where Transferred by Indorsement*, 822
(I) *In General*, 822
(A) *Where Indorsed in Due Course*, 822
(1) *In General*, 822
(2) *As Maker and Indorser*, 824
(3) *As Surety*, 825
(B) *Where Indorsed After Maturity*, 826
(C) *Where Paper Non-Negotiable*, 826
(1) *In General*, 826
(2) *To Remote Indorsees*, 827
(II) *Successive Liability*, 828
(A) *In General*, 828
(B) *Where There Are Accommodation Parties*, 828
b. *Where Transferred by Delivery*, 829
c. *Where Transferred by Assignment*, 830
2. *Implied Warranties*, 830
a. *In General*, 830
(I) *Of Title*, 830
(II) *Of Validity*, 831

(III) *Of Genuineness*, 833
(IV) *Of Solvency*, 834
(V) *Of Good Faith*, 835
b. *How Conditioned or Excluded*, 835
H. *What Law Governs*, 836
1. *In General*, 836
2. *Validity of Indorsement*, 837
3. *Rights and Liabilities of Indorser and Indorsee*, 837
4. *Right of Action*, 838

VII. MATURITY AND GRACE, 838

A. *Maturity*, 838
1. *In General*, 838
2. *What Law Governs*, 839
3. *Paper Payable at a Fixed Time*, 839
a. *In General*, 839
b. *Parol Evidence*, 839
c. *Omission of Words*, 840
d. *Fixed Time After Date*, 840
e. *Mistake in Date*, 841
f. *Reckoning Time*, 841
(I) *Months*, 841
(II) *Usances*, 841
(III) *Days*, 842
(IV) *Including and Excluding Days*, 842
(A) *Day of Date*, 842
(B) *Day of Maturity*, 842
4. *Paper Payable On or Before Fixed Time*, 844
5. *Paper Payable On or After Fixed Time*, 844
6. *Paper Payable at a Bank*, 844
7. *Paper Payable On or After Demand*, 845
a. *What Paper Is Payable on Demand*, 845
(I) *In General*, 845
(II) *Provisions as to Interest*, 845
(III) *No Time of Payment Expressed*, 846
(IV) *Issue of Overdue Paper*, 847
(V) *In a Reasonable Time on Demand*, 847
b. *Maturity of Paper Payable on Demand*, 847
(I) *In General*, 847
(II) *Maturity For Purposes of Transfer*, 849
c. *Paper Payable a Certain Time After Demand*, 851
8. *Paper Payable At or After Sight*, 85
9. *Maturity of Checks*, 852
a. *In General*, 852
b. *Maturity For Purposes of Transfer*, 852
10. *Maturity of Certificates of Deposit*, 853
a. *In General*, 853
b. *Maturity For Purposes of Transfer*, 854
11. *Paper Payable in Instalments*, 854
12. *Paper Payable on Contingency or Conditionally*, 855
a. *In General*, 855
b. *Excluding Day of Maturity*, 857
c. *Maturity on Fixed Day, or Conditionally Before*, 857
d. *Maturity in a Reasonable Time*, 857
13. *Acceleration of Maturity by Other Default or Exercise of Option*, 858

a. *In General*, 858
b. *Purposes For Which the Paper Matures*, 859
(I) *In General*, 859
(II) *Indorsers and Guarantors*, 860
(III) *Notes Secured by Mortgage*, 860
c. *Exercise of Option*, 861
(I) *In General*, 861
(II) *Notice of Election*, 861
(III) *Time of Election*, 862
d. *Waiver or Loss of Option*, 862
e. *Warrant of Attorney to Confess Judgment*, 863
14. *Provision Postponing Maturity*, 863
15. *Paper Maturing on Sunday or Holiday*, 863
a. *In Absence of Statute*, 863
b. *Under Statutes*, 863
16. *Maturity of Interest*, 864
B. *Days of Grace*, 865
1. *In General*, 865
2. *Statutes Relating to Grace*, 866
a. *In General*, 866
b. *Statutes Abolishing Grace*, 866
3. *What Law Governs*, 866
4. *What Paper Is Entitled to Grace*, 866
a. *In General*, 866
b. *Bills of Exchange, Orders, and Checks*, 867
(I) *Bills of Exchange*, 867
(II) *Orders*, 867
(III) *Bills, Drafts, or Orders Payable at Sight*, 867
(IV) *Checks on Banks or Bankers*, 868
c. *Promissory Notes, Due-Bills, and Sealed Instruments*, 868
(I) *Promissory Notes*, 868
(II) *Notes Payable on Demand*, 869
(III) *Non-Negotiable Notes*, 870
(IV) *Instruments Under Seal*, 870
(V) *Notes Payable in Instalments*, 870
(VI) *Due-Bills*, 871
d. *Interest*, 871
e. *Stipulation Excluding Grace*, 871
f. *Waiver of Grace*, 871
5. *Persons Who Are Entitled to Grace*, 871
6. *Presumptions as to Grace*, 872
7. *Effect of Special Custom or Usage*, 872
8. *Effect of Days of Grace*, 872
a. *In General*, 872
b. *Presentment, Protest, and Notice*, 872
c. *Accrual of Cause of Action*, 873
d. *Confession of Judgment*, 874
e. *Transfer Before Maturity*, 874
f. *Interest "From Maturity,"* 874
9. *Computation of Days of Grace*, 874
a. *In Absence of Statute*, 874
b. *Under Statutes*, 875

VIII. EXTENSION, MODIFICATION, AND LACHES, 875
A. *Extension and Renewal*, 875
1. *In General*, 875

2. *Effect of Extension or Renewal as Between Parties*, 876
a. *Accrual of Cause of Action*, 876
b. *Renewal Does Not Extinguish or Change Debt*, 877
c. *Conditional Agreement For Extension*, 878
d. *On Negotiability*, 878
e. *Effect as to Stipulations*, 878
f. *Effect as to Securities and Liens*, 879
g. *Right to Attack Fraudulent Conveyances*, 880
h. *Defenses Against Renewal Notes*, 880
(I) *In General*, 880
(II) *Bona Fide Holders*, 881
3. *Effect of Extension or Renewal as Discharge of Other Parties*, 882
a. *In General*, 882
b. *Extension After Indorser's Liability Is Fixed*, 885
c. *Conditional Agreement For Extension*, 886
d. *Reservation of Rights Against Indorsers or Sureties*, 886
e. *Reservation of Right to Sue at Request of Indorsers*, 887
f. *Consent of Indorser or Surety*, 887
g. *Waiver of Discharge and Estoppel*, 887
4. *What Amounts to an Extension or Renewal*, 888
a. *In General*, 888
b. *Receiving Payment of Interest*, 890
c. *Taking New Notes or Other Securities*, 891
(I) *In General*, 891
(II) *Whether Renewal or Payment*, 893
(III) *Taking as Collateral Security*, 894
(IV) *Taking Mortgage as Security*, 895
d. *Taking Confession of Judgment or Power of Attorney to Confess Judgment*, 896
e. *Agreement to Renew*, 896
f. *Extension of Collateral Notes*, 896
g. *Stipulations or Agreements in Legal Proceedings*, 896
h. *Taking Cognovit and Staying Execution*, 897
i. *Agreements With Creditors*, 897
5. *Sufficiency of Agreement For Extension or Renewal*, 897
a. *In General*, 897
b. *Parol Agreement*, 898
c. *Consideration*, 899
(I) *Necessity For*, 899
(II) *Sufficiency of Consideration*, 900
(III) *Renewal*, 902
(IV) *Usurious Consideration*, 902
(A) *Promise to Pay Usury*, 902
(B) *Actual Payment of Usury*, 903
6. *Parties to Agreement*, 903
a. *In General*, 903
b. *Agents*, 904
B. *Laches*, 904
1. *Effect in Absence of Statute*, 904
a. *In General*, 904
b. *Special Agreement Requiring Diligence Against Maker*, 907
c. *What Constitutes Due Diligence*, 907
d. *Failure to Enforce Set-Off*, 909
e. *Failure of Bank to Apply Deposits*, 909
f. *Failure to Prove Debt Against Bankrupt Estate*, 909

g. *Failure to Issue or Enforce Execution*, 909
h. *Failure to Enforce Security*, 910
2. *Statutory Provisions*, 911
a. *In General*, 911
b. *Excuses For Failure to Sue*, 917
(I) *In General*, 917
(II) *Successful Defense or Set-Off*, 917
(III) *Death of Maker or Accepter*, 918
(IV) *Non-Residence or Absence*, 918
(A) *Of Maker or Accepter*, 918
(B) *Of Holder*, 920
(V) *Insolvency of Maker or Accepter*, 920
(VI) *Waiver and Estoppel*, 922

IX. BONA FIDE HOLDER FOR VALUE, 924
A. *Meaning of Term*, 924
1. *In General*, 924
2. *Usual Course of Business and For Value*, 925
a. *In General*, 925
(I) *Usual Course of Business*, 925
(A) *In General*, 925
(B) *Negotiation Before Maturity*, 925
(1) *In General*, 925
(2) *Transfer Before Acceptance*, 926
(C) *Indorsement*, 926
(D) *Delivery*, 926
(E) *Acquisition by Indorser*, 927
(F) *Payment by Accepter Before Maturity*, 927
(G) *Transfer on Sunday*, 927
(H) *Transfer by Operation of Law*, 927
(II) *Valuable Consideration*, 928
(A) *Necessity of*, 928
(B) *Sufficiency of*, 928
(1) *In General*, 928
(2) *Discounting, Crediting, and Paying*, 929
(C) *Adequacy of*, 930
b. *Transfer as Collateral Security*, 930
(I) *For Debt Created at Time of Transfer*, 930
(II) *For Preëxisting Debt*, 932
(A) *In General*, 932
(B) *Where Accompanied by Other Consideration or Benefit to Debtor*, 934
(C) *Where Instrument Is Given For Accommodation*, 936
c. *Transfer as Payment of Preëxisting Debt*, 936
3. *Notice*, 938
a. *In General*, 938
(I) *When Material*, 938
(II) *Form of Notice*, 940
(III) *Materiality of Source*, 941
(IV) *Necessity of Inquiry by Purchaser*, 941
(A) *In General*, 941
(B) *Extent of Inquiry When Required*, 942
(C) *Effect of Inquiry*, 942
(V) *Necessity of Notice of Particular Defect*, 943
(VI) *Necessity of Knowledge of Legal Effect of Notice*, 943
(VII) *Time of Receiving*, 943

b. *Facts or Circumstances Constituting or Implying Notice*, 943
(I) *Failure to Make Inquiry Under Suspicious Circumstances*, 943
(A) *Early Rule*, 943
(B) *Modern Rule*, 944
(II) *Knowledge of Failure of Consideration*, 947
(A) *Rule Stated*, 947
(B) *Application of Rule*, 947
(1) *Accommodation Paper*, 947
(2) *What Constitutes Notice*, 948
(a) *Recital in Instrument*, 948
(b) *Executory or Contingent Consideration*, 948
(c) *Patent Right*, 948
(III) *Inadequacy of Purchase-Price*, 949
(IV) *Irregularities or Defects Apparent From Paper*, 949
(A) *In General*, 949
(B) *Expression of Fiduciary Relationship in Signature or Indorsement*, 951
(C) *Instrument Overdue*, 952
(1) *Rule Stated*, 952
(2) *Application of Rule*, 952
(a) *In General*, 952
(b) *Overdue Interest*, 953
(c) *Instrument Taken With Overdue Notes For Single Consideration*, 953
(D) *Postdated Instrument*, 954
(E) *Restrictive Indorsement*, 954
(1) *In General*, 954
(2) "*For Collection*," 954
(3) "*Without Recourse*," 954
(V) *Lis Pendens*, 955
(VI) *Newspaper Publications*, 955
(VII) *Occupation of Transferrer or Maker*, 956
(VIII) *Purchase From Stranger*, 956
(IX) *Recitals in Collateral Paper*, 956
(X) *Relationship of Parties*, 956
(A) *In General*, 956
(B) *Partnership Notes*, 958
(XI) *Disabilities of Parties*, 959
c. *By Whom Received — Agent*, 959
B. *What Law Governs*, 959

X. PRESENTMENT FOR PAYMENT AND DEMAND, 959
A. *Necessity For*, 959
1. *In General*, 959
a. *To Fix Liability of Indorser*, 959
(I) *In General*, 959
(A) *Rule Stated*, 959
(B) *Paper Payable in Instalments*, 961
(II) *Accommodation Indorser*, 961
(III) *Indorser Before Delivery*, 962
(IV) *Indorser After Maturity or Dishonor*, 962
b. *To Fix Liability of Accepter or Maker*, 963
(I) *In General*, 963
(II) *Bringing Action as Demand*, 965

c. *To Fix Liability of Guarantor or Surety*, 967
d. *To Fix Liability of Drawer*, 968
(I) *In General*, 968
(II) *Of Check*, 969
(III) *Of Order*, 969
2. *Where Paper Given or Transferred as Payment or Collateral*, 969
3. *Statutory Provisions*, 970
B *Time For Presentment or Demand*, 970
1. *Paper Payable at a Fixed Time*, 970
2. *Paper Payable at Sight or on Demand*, 972
a. *In General*, 972
b. *What Is a Reasonable Time*, 975
3. *Paper Payable a Certain Time After Demand*, 977
4. *Notes Payable in Instalments*, 977
5. *Where Maturity Is Accelerated by Other Default*, 977
6. *Checks*, 977
a. *In General*, 977
b. *Certified Checks*, 980
7. *Non-Negotiable Paper*, 980
8. *Hour at Which Presentment Must Be Made*, 981
a. *In General*, 981
b. *What Are Reasonable Hours*, 981
(I) *Paper Not Payable at a Bank*, 981
(II) *Paper Payable at a Bank*, 982
C. *Place of Presentment or Demand*, 983
1. *Where Place Is Specified*, 983
a. *In General*, 983
b. *Necessity For Presentment at Place Specified*, 984
(I) *As to Accepter or Maker*, 984
(II) *As to Drawers, Indorsers, and Sureties*, 985
(III) *Memorandum Address*, 986
(IV) *Place Designated and Acceptance Generally*, 986
(V) *Place Designated in Acceptance*, 987
(VI) *Paper Payable at a Bank*, 987
(VII) *Place of Payment Uncertain, and Election*, 988
c. *Designation of City at Large*, 989
2. *Where No Place of Payment Is Designated*, 989
a. *In General*, 989
b. *Presentment on Street*, 991
c. *What Constitutes Place of Business*, 991
d. *Absence of Maker or Accepter*, 992
e. *Change of Residence or Place of Business*, 993
f. *Notes Dated at Particular Place*, 994
g. *Agreement as to Place of Presentment*, 995
D. *Manner of Presentment or Demand*, 995
1. *In General*, 995
2. *Paper Payable Generally*, 996
3. *Paper Payable at a Bank or Other Place*, 996
4. *Production of Bill or Note*, 997
5. *Demand by Letter or Written Notice*, 998
E. *To Whom Presentment Should Be Made*, 999
1 *In General*, 999
2. *To Bank Officers and Employees*, 1001
3. *To Joint, or Joint and Several, Promisors*, 1001
a. *In General*, 1001
b. *Partners*, 1002

4. *To Personal Representatives*, 1002
F. *By Whom Presentment May Be Made*, 1003
1. *In General*, 1003
2. *Party in Possession of Paper*, 1004
3. *Notary and Notary's Deputy*, 1004

XI. PAYMENT AND DISCHARGE, 1005
A. *Mode and Sufficiency of Payment*, 1005
1. *In General*, 1005
2. *Acceptance of, or Realizing on, Collateral Security*, 1005
3. *Application of Fund or Deposit*, 1006
4. *Cancellation*, 1007
5. *Check, Draft, Certificate of Deposit Etc.*, 1007
6. *Credits*, 1008
7. *Deposit in Court*, 1009
8. *Executory Agreement*, 1009
9. *Legacy or Appointment as Executor*, 1009
10. *Money, Currency, Etc.*, 1009
a. *In General*, 1009
b. *Bank-Notes*, 1010
(I) *In General*, 1010
(II) *Of Insolvent Bank*, 1010
c. *Confederate Notes*, 1010
d. *Counterfeit Coin or Money*, 1011
11. *New Bill or Note*, 1011
a. *In General*, 1011
b. *For Less Amount*, 1012
c. *Of Part of Promisors*, 1012
d. *Of Third Person*, 1013
e. *Effect of Invalidity of New Note*, 1013
f. *Necessity of Surrender or Cancellation of Old Note*, 1014
12. *Property*, 1014
13. *Services*, 1014
14. *Payment of One Part of Bill*, 1015
15. *Partial Payments*, 1015
a. *In General*, 1015
b. *By Joint Maker, Drawer, or Accepter*, 1016
c. *By Indorser*, 1016
16. *Surrender of Instrument and Tender of Payment*, 1017
a. *In General*, 1017
b. *Payment Before Maturity*, 1017
17. *Failure to Take Up Instrument*, 1018
B. *By Whom Payment May Be Made and Effect of Payment*, 1018
1. *In General*, 1018
2. *By Accepter*, 1018
a. *In General*, 1018
b. *Accommodation Accepter*, 1018
3. *By Bank Where Payable*, 1019
4. *By Drawer*, 1019
5. *By Guarantor*, 1020
6. *By Indorser*, 1020
a. *In General*, 1020
b. *After Suit or Judgment*, 1022
7. *By Maker*, 1022
a. *In General*, 1022
b. *Agent of Maker*, 1022
c. *Joint Maker*, 1023
d. *Maker as Agent of Third Person*, 1024

8. *By Payee*, 1024
9. *By Principal or Surety*, 1024
10. *By Third Person*, 1025
11. *Discount by Drawee*, 1026
12. *Payment Supra Protest*, 1026
13. *Right to Reissue Paper*, 1027

C. *To Whom Payment Should Be Made*, 1028
1. *In General*, 1028
2. *Agent of Holder*, 1029
a. *In General*, 1029
b. *Implied and Ostensible Authority*, 1031
c. *Ratification*, 1032
3. *Attaching Creditor of Holder*, 1032
4. *Designated Payee*, 1032
5. *Drawer*, 1032
6. *Indorsee or Assignee*, 1032
7. *Joint Payee*, 1033
8. *Pledgee*, 1033
9. *Trustee*, 1034
10. *Forged Indorsement*, 1034
11. *Note Payable at Particular Place*, 1035
12. *Note Payable to Bearer or Order or Indorsed in Blank*, 1035
13. *Payment to Original Holder After Indorsement or Transfer*, 1036

D. *Time For Making Payment*, 1038
1. *Before Maturity*, 1038
2. *At Maturity*, 1038
3. *After Maturity*, 1038

E. *Indorsement of Payments*, 1039
1. *Necessity of*, 1039
2. *Erasure of*, 1039

F. *Recovery of Payments*, 1039
1. *Duress*, 1039
2. *Failure of Consideration*, 1039
3. *Fraud*, 1040
4. *Mistake*, 1040
5. *Payments Not Indorsed or Applied*, 1041
6. *Payments on Forged or Altered Instruments*, 1041
7. *Payment After Discharge*, 1044
8. *As Affected by Knowledge of Defenses*, 1044

G. *Discharge*, 1044
1. *Who May Discharge*, 1044
2. *What Constitutes Discharge*, 1045
a. *In General*, 1045
b. *Refusal to Receive Part Payment*, 1045
c. *Acceptance of Security*, 1045
d. *Refusal to Accept Security*, 1045
e. *Failure to Enforce Security*, 1046
f. *Release, Surrender, or Impairment of Security*, 1046
g. *Performance of Conditions*, 1047
h. *Recovery and Satisfaction of Judgment*, 1047
i. *Release of Prior Parties*, 1047
j. *Release of Subsequent Parties*, 1048
k. *Rescission of Contract*, 1048
l. *Surrender or Cancellation of Instrument*, 1048
m. *Discharge of Accepter*, 1049

(I) *In General*, 1049
(II) *By Waiver*, 1050
n. *Discharge of Drawer by Release of Accepter*, 1050
3. *What Law Governs*, 1051

XII. DISHONOR AND PROTEST, 1051

A. *Dishonor*, 1051
B. *Protest*, 1051
1. *Definition and Scope of Term*, 1051
2. *Necessity of*, 1052
a. *On Negotiable Paper*, 1052
(I) *Bills of Exchange*, 1052
(A) *In General* 1052
(1) *Foreign Bills*, 1052
(2) *Inland Bills*, 1052
(a) *In General*, 1052
(b) *Checks, Drafts, and Orders*, 1053
(B) *As Against Accepter*, 1053
(C) *For Better Security*, 1053
(II) *Promissory Notes*, 1053
b. *On Non-Negotiable Paper*, 1054
3. *By Whom Made*, 1054
a. *In General*, 1054
b. *Effect of Officer's Illegal Appointment*, 1055
c. *Effect of Officer's Interest in Paper*, 1055
4. *Where Made*, 1055
5. *Time of Making*, 1055
a. *In General*, 1055
(I) *Noting*, 1055
(A) *Foreign Bills*, 1055
(1) *In General*, 1055
(2) *Where Grace Is Allowed*, 1056
(3) *Where Due on Sunday or Holiday*, 1056
(B) *Inland Bills*, 1056
(II) *Extending Protest*, 1056
b. *Premature Protest*, 1057
6. *Form and Requisites*, 1057
a. *In General*, 1057
b. *Particular Statements*, 1057
(I) *Presentment and Demand*, 1057
(A) *In General*, 1057
(B) *Time and Place of*, 1058
(II) *Dishonor of Paper*, 1059
(III) *Notice of Dishonor*, 1059
(A) *In General*, 1059
(B) *Where Sent by Mail*, 1060
c. *Verification*, 1061
d. *By What Law Governed*, 1061
7. *Acceptance Supra Protest*, 1061
a. *When Allowable*, 1061
b. *By Whom Made*, 1062
c. *How Made*, 1062
d. *Effect of*, 1062
(I) *In General*, 1062
(II) *Rights of Accepter*, 1062
(III) *Liabilities of Accepter*, 1063
8. *Payment Supra Protest*, 1063

a. *By Whom Made*, 1063
b. *When Made*, 1063
c. *Effect of*, 1064
(I) *In General*, 1064
(II) *Rights and Duties of Payer*, 1064

XIII. NOTICE OF DISHONOR — EXCUSE AND WAIVER OF DEMAND AND NOTICE, 1064

A. *Necessity For Notice*, 1064
1. *In General*, 1064
2. *As Affected by Character of Paper*, 1065
a. *Negotiable Paper*, 1065
(I) *In General*, 1065
(II) *Checks*, 1066
b. *Non-Negotiable Paper*, 1066
B. *To Whom Notice Given*, 1066
1. *In General*, 1066
2. *Parties to Paper*, 1068
a. *Drawer*, 1068
(I) *In General*, 1068
(II) *Accommodation Drawer*, 1069
(III) *Where Accepted or Indorsed For Drawer's Accommodation*, 1069
(IV) *Where Accepted or Paid Supra Protest*, 1069
(V) *Where Drawer and Accepter Are Identical*, 1070
b. *Indorser*, 1070
(I) *In General*, 1070
(A) *Rule Stated*, 1070
(B) *Where Indorsed After Maturity*, 1071
(C) *Where Indorser Interested With Maker or Drawer*, 1072
(D) *Where Instrument Is Void*, 1073
(E) *Where Paper Given For Indorser's Accommodation*, 1073
(II) *Accommodation Indorser*, 1073
(III) *Agent For Collection*, 1074
(IV) *Anomalous or Irregular Indorser*, 1074
(V) *Joint Indorsers*, 1075
(A) *In General*, 1075
(B) *Partners*, 1075
c. *Assignor Without Indorsement*, 1076
d. *Maker*, 1076
e. *Accepter*, 1076
3. *Persons in Representative Capacity*, 1077
a. *Agents*, 1077
b. *Assignees*, 1077
c. *Executors or Administrators*, 1078
C. *By Whom Notice Given*, 1078
1. *Parties to or in Possession of Paper*, 1078
a. *In General*, 1078
b. *Agents*, 1079
(I) *In General*, 1079
(II) *For Collection*, 1080
c. *Personal Representatives*, 1081
2. *Strangers*, 1081
D. *Time of Giving Notice*, 1081
1. *In General*, 1081

a. *Rule Stated*, 1081
(I) *In General*, 1081
(II) *Where Paper Indorsed After Maturity*, 1082
b. *What Is Reasonable Time*, 1082
(I) *Rule Stated*, 1082
(II) *Application of Rule*, 1084
(A) *In General*, 1084
(1) *To Indorsers*, 1084
(2) *To Agents*, 1085
(3) *Where Indorsed For Collection*, 1085
(B) *Where Given at Place of Business*, 1086
(C) *Where Given at Place of Residence*, 1086
(D) *Where Parties Reside in Same Place*, 1086
(E) *Where Receipt of Notice Unavoidably Delayed*, 1086
(F) *Where Sent by Mail*, 1086
(1) *In General*, 1086
(2) *Foreign Mail*, 1088
(G) *Where Sent by Special Messenger*, 1088
(H) *Where Sunday or Legal Holiday Follows Day of Protest*, 1088
2. *Premature Notice*, 1089
3. *What Law Governs*, 1089
E. *Place of Giving Notice*, 1089
1. *In General*, 1089
a. *Rule Stated*, 1089
b. *Application of Rule*, 1090
(I) *In General*, 1090
(A) *Office or Place of Business*, 1090
(1) *In General*, 1090
(2) *What Constitutes*, 1090
(B) *Residence*, 1091
(1) *In General*, 1091
(2) *Where Mail Is Received at Several Offices*, 1092
(3) *Where Only County or Parish of Residence Known*, 1093
(4) *Where Party Is Attending Congress*, 1093
(5) *What Constitutes*, 1093
(C) *With Whom Left*, 1094
(II) *Where Given to Insolvent Firm*, 1094
2. *Where Place Expressly Designated*, 1094
3. *Where Residence Unknown*, 1095
a. *In General*, 1095
b. *What Constitutes Due Diligence*, 1096
(I) *In General*, 1096
(II) *Inquiry of Interested or Informed Parties*, 1097
(A) *In General*, 1097
(B) *Extent of Inquiry Required*, 1098
(III) *Sending Notice to Place of Indorsement*, 1098
F. *Manner of Giving Notice*, 1099
1. *In General*, 1099
2. *Where Parties Reside in Different Places*, 1099
a. *By Mail*, 1099
(I) *In General*, 1099
(II) *Mode of Posting*, 1101

(A) *Delivery to Postman*, 1101
(B) *Depositing in Letter-Box*, 1101
b. *By Special Messenger*, 1102
3. *Where Parties Reside in Same Place*, 1102
a. *Rule Stated*, 1102
(I) *In General*, 1102
(II) *By Mail*, 1103
b. *What Constitutes Same Place*, 1103
G. *Form and Requisites of Notice*, 1104
5. *In General*, 1104
a. *Whether Written or Oral*, 1104
b. *Address*, 1105
c. *Language Employed*, 1106
(I) *In General*, 1106
(II) *Particular Statements*, 1107
(A) *Due Presentment*, 1107
(B) *Dishonor*, 1107
(1) *In General*, 1107
(2) *Statement of Non-Payment*, 1108
(C) *Intent to Look to Indorser*, 1109
(D) *Description of Instrument*, 1109
(1) *In General*, 1109
(2) *Misstatement of Amount*, 1110
(3) *Omission or Misstatement of Date*, 1110
(4) *Omission or Misnomer of Parties*, 1110
d. *Copy of Protest*, 1111
e. *Signature*, 1111
2. *What Law Governs*, 1111
H. *Excuses For Omission of, or Delay in, Demand or Notice*, 1112
1. *In General*, 1112
2. *Absconding, Removal, or Absence*, 1113
a. *Of Maker or Accepter*, 1113
b. *Of Indorser*, 1114
3. *Absence of Funds With Drawee and No Reasonable Expectation of Acceptance*, 1114
a. *Rule Stated*, 1114
(I) *In General*, 1114
(II) *What Constitutes Reasonable Expectation*, 1116
b. *Application to Accommodation Drawers or Indorsers*, 1117
4. *Absence of Knowledge of Party's Residence or Address*, 1117
5. *Bankruptcy or Insolvency*, 1118
a. *Of Maker or Accepter*, 1118
(I) *In General*, 1118
(II) *Effect of Knowledge on Part of Indorser*, 1119
b. *Of Drawee*, 1120
6. *Closing or Abandonment of Residence or Place of Payment*, 1120
7. *Countermand of Payment*, 1120
8. *Death of Maker*, 1121
9. *Epidemic or Disease*, 1121
10. *Illness or Death of Holder*, 1121
11. *Loss or Destruction of Paper*, 1122
12. *Protest For, and Notice of Non-Acceptance*, 1122
13. *Want of Injury*, 1122
a. *To Principal Debtor*, 1122
b. *To Indorser*, 1123
14. *War or Interdiction of Commerce*, 1123

I. *Waiver of Demand or Notice*, 1124
1. *Right to Waive*, 1124
2. *Who May Waive*, 1124
3. *Time of Waiver*, 1125
4. *Necessity For New Consideration*, 1125
5. *Necessity For Writing*, 1126
6. *What Constitutes Waiver*, 1126
a. *In General*, 1126
b. *Acceptance of Indemnity or Collateral Security*, 1129
(I) *In General*, 1129
(II) *For Payment of Particular Obligation*, 1130
c. *Allowing Judgment to Be Entered*, 1130
d. *Anticipation of Dishonor*, 1131
e. *Extension of Time*, 1131
f. *Fraudulent Transfer of Instrument*, 1131
g. *Indorsement or Writing in Separate Instrument*, 1131
(I) *Indorsement*, 1131
(A) *In General*, 1131
(1) *Specially*, 1131
(2) *Beneath Waiver*, 1132
(3) *Of Instrument Containing Waiver*, 1132
(B) *Of Void Instrument*, 1132
(II) *Separate Instrument*, 1133
h. *Partial Payment*, 1133
i. *Promise of Payment*, 1134
j. *Renewal of Instrument*, 1137
7. *Effect of Waiver*, 1137
a. *In General*, 1137
b. *Construction of Words Employed*, 1137
c. *To Whom Waiver Inures*, 1139

XIV. ACTIONS. [See 8 Cyc.]
A. *Right of Action.* [See 8 Cyc.]
B. *Defenses.* [See 8 Cyc.]
C. *Parties.* [See 8 Cyc.]
D. *Pleadings.* [See 8 Cyc.]
E. *Evidence.* [See 8 Cyc.]
F. *Trial.* [See 8 Cyc.]
G. *Amount Recoverable.* [See 8 Cyc.]
H. *Appeal and Review.* [See 8 Cyc.]

CROSS-REFERENCES

For Matters Relating to:
Arbitration Notes, see ARBITRATION AND AWARD.
Bills of Exchange or Promissory Notes:
Acceptance of as Accord and Satisfaction, see ACCORD AND SATISFACTION.
Alteration of, see ALTERATIONS OF INSTRUMENTS.
Assignment of, see ASSIGNMENTS.
Cancellation of, see CANCELLATION OF INSTRUMENTS.
Collaterally Secured, see CHATTEL MORTGAGES; MORTGAGES; PLEDGES.
Collection of, see ATTORNEY AND CLIENT; BANKS AND BANKING.
Contribution Between Makers of, see CONTRIBUTION.
Conversion of, see TROVER AND CONVERSION.
Discounting, see BANKS AND BANKING.
Effect of:
As Accord and Satisfaction, see ACCORD AND SATISFACTION.
As Account Stated, see ACCOUNTS AND ACCOUNTING.
As Assignment of Fund, see ASSIGNMENTS.

For Matters Relating to — (*continued*)
Bills of Exchange or Promissory Notes — (*continued*)
Effect of — (*continued*)
As Compromise and Settlement, see COMPROMISE AND SETTLEMENT.
As Evidence, see EVIDENCE.
As Gift of Amount Represented, see GIFTS.
As Payment, see PAYMENT.
As Settlement of Account, see ACCOUNTS AND ACCOUNTING.
Erasures in, see ALTERATIONS OF INSTRUMENTS.
Estoppel to Deny Validity of, see ESTOPPEL.
False Pretenses on Giving, see FALSE PRETENSES.
Forgery of, see FORGERY.
Garnishment of Debt Evidenced by, see GARNISHMENT.
Guaranty of Payment of, see GUARANTY.
Illegality of, see GAMING; SUNDAY; USURY.
Lost, see LOST INSTRUMENTS.
Merged in Account Stated, see ACCOUNTS AND ACCOUNTING.
Of Administrator, see EXECUTORS AND ADMINISTRATORS.
Of Building and Loan Society, see BUILDING AND LOAN SOCIETIES.
Of City, see MUNICIPAL CORPORATIONS.
Of Corporation, see CORPORATIONS.
Of County, see COUNTIES.
Of Executor, see EXECUTORS AND ADMINISTRATORS.
Of Infant, see INFANTS.
Of Insane Person, see INSANE PERSONS.
Of Married Women, see HUSBAND AND WIFE.
Of Partnership, see PARTNERSHIP.
Of Town, see TOWNS.
Of School District, see SCHOOLS AND SCHOOL DISTRICTS.
Of Unincorporated Associations, see ASSOCIATIONS; JOINT-STOCK COMPANIES.
Payable in Goods, Merchandise, or Services, see CONTRACTS.
Payment and Discharge of, see ACCORD AND SATISFACTION; BANKS AND BANKING; COMPROMISE AND SETTLEMENT; INSOLVENCY; PAYMENT; RELEASE.
Pledged, see PLEDGES.
Reformation of, see REFORMATION OF INSTRUMENTS.
Signature of, see SIGNATURES.
Taxation of, see COMMERCE; TAXATION.
With Stipulation for Allowing Fees, see CHATTEL MORTGAGES; MORTGAGES.
Bills of Lading, see BILL OF LADING; CARRIERS; SHIPPING.
Bonds Generally, see BONDS.
Certificates:
Of Receiver, see RECEIVERS.
Of Stock, see CORPORATIONS.
Checks Generally, see BANKS AND BANKING.
Compromise Notes, see COMPROMISE AND SETTLEMENT.
Contracts Generally, see CONTRACTS.
County Warrants, see COUNTIES.
Coupons, see BONDS.
Guarantor Generally, see GUARANTY.
Insurance Notes, see INSURANCE.
Interest, see INTEREST; USURY.
Interest Coupons, see BONDS.
Judgment Notes, see JUDGMENTS.
Land Certificates, see SCHOOLS AND SCHOOL DISTRICTS.
Letters of Credit, see BANKS AND BANKING.

For Matters Relating to — (*continued*)
Lost Commercial Paper, see LOST INSTRUMENTS.
Municipal Bonds, see MUNICIPAL CORPORATIONS.
Novation, see NOVATION.
Pledged Commercial Paper, see PLEDGES.
Premium Notes, see INSURANCE.
Purchase-Money Notes, see SALES; VENDOR AND PURCHASER.
Receiver's Certificates, see RECEIVERS.
Stipulations For Attorney's Fees, see CHATTEL MORTGAGES; MORTGAGES.
Stock Certificates, see CORPORATIONS.
Subrogation, see SUBROGATION.
Sureties Generally, see PRINCIPAL AND SURETY.
Usury, see USURY.
Warehouse Receipts, see WAREHOUSEMEN.

I. THE LAW MERCHANT.

A. General Principles — 1. DEFINITION. The law merchant, which originated in the unwritten customs of merchants and was at first confined to mercantile transactions between merchants[1] residing in different places,[2] is a body of law relating to certain mercantile transactions and instruments[3] of wide-spread use[4] now incorporated into, and regarded by us as part of, the common law.[5]

2. HISTORY. Bills of exchange came to England from continental cities where their use is traced to the twelfth or thirteenth century.[6] In the seventeenth century the law of bills of exchange was codified in France,[7] but in England no general codification took place until 1882.[8] In the United States the earliest general codification is found in the California Civil Code in 1872,[9] but this has been followed within the last decade by a more wide-spread adoption of the Negotiable Instruments Law on the general lines of the English Bills of Exchange Act.[10]

1. Sarsfield *v.* Witherly, Carth. 82; Oaste *v.* Taylor, Cro. Jac. 306. See also Scrutton Merc. L. 12, 13, 29.

2. Bromwich *v.* Loyd, 2 Lutw. 1582, 1585, where Treby, C. J., said: "Bills of exchange at first extended only to merchant strangers trafficking with English merchants; and afterward to inland bills between merchants trafficking the one with the other in England; and afterward to all traders, and then to all persons whether traders or not; and there was then no need to allege any custom of merchants."

3. It will be here considered only in its application to bills and notes and other instruments possessing one or more of their peculiar characteristics. For instruments affected by the law merchant see *infra*, I, B.

4. 3 Kent Comm. 2, where it is defined: "A system of law, which does not rest essentially on the positive institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade, which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world."

5. Woodbury *v.* Roberts, 59 Iowa 348, 13 N. W. 312, 44 Am. Rep. 685. See also 1 Bl. Comm. 75, where it is said: "A particular system of customs used only among one set of the king's subjects, . . . which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions." See, generally, COMMON LAW.

6. Cockburn, C. J., in Goodwin *v.* Robarts, L. R. 10 Exch. 337.

7. Chalmers Dig., introduction to first edition, where it is stated that the French code forms the basis of nearly all the continental codes. A translation of the French code will be found in 3 Randolph Comm. Pap. together with translations of the German exchange law of 1848 and the Spanish code of 1829.

8. Bills of Exchange Act (45 & 46 Vict. c. 61), the complete text of which will be found in Byles Bills, Appendix, and 3 Randolph Comm. Pap. 2737. It has been copied substantially in the Canadian Bills of Exchange Act.

9. This statute was afterward adopted in North Dakota, Utah, and Wyoming, but has been superseded in the first two states by the Negotiable Instruments Law. The full text is to be found in 3 Randolph Comm. Pap. 2713.

10. This act has now been adopted in nineteen of the states. Its full text will be found in most of the recent text-hooks. It was adopted in 1897 in Colorado, Connecticut, Florida, and New York; in 1898 in Maryland, Massachusetts, and Virginia; in 1899 in the District of Columbia, North Carolina,

In about three fifths of the United States, however, the unwritten law merchant, as incorporated into the English common law, still governs, although it has been modified in various ways by judicial construction and statute in the several states.

3. NEGOTIABILITY — a. In General. The principal distinguishing feature of commercial paper is its negotiability.[11] This means not only that the instrument may be assigned and that the assignee may sue upon it in his own name, but also that he takes it free from equities that may exist between prior parties, and that out of the acceptance and transfer of the paper (often by mere signature or delivery) shall arise the well-established relations and liabilities that are created by the law merchant.[12] Negotiability is not, however, essential to the validity of a bill of exchange.[13] Non-negotiable bills and notes have a validity and an effect of their own as common-law contracts[14] and it is a question of law whether they are negotiable or not,[15] except where the *lex mercatoria* is uncertain.[16]

b. Under Statutes. The negotiability of foreign bills of exchange has been left in general as it was by the law merchant.[17] Promissory notes, however,

North Dakota, Oregon, Rhode Island, Tennessee, Utah, Washington, and Wisconsin; in 1901 in Pennsylvania; and in 1902 in Iowa, New Jersey, and Ohio.

References to the law in this article are to the New York Negotiable Instruments Law.

11. The term "negotiable" is one of classification, and does not of necessity imply anything more than that the paper possesses the negotiable quality. Robinson *v.* Wilkinson, 38 Mich. 299, 301. In its enlarged signification it applies to any written security transferable by indorsement or delivery, so as to vest in the indorsee the legal title, and a right to sue thereon in his own name. Odell *v.* Gray, 15 Mo. 337, 342, 55 Am. Dec. 147. See also BONDS, 5 Cyc. 777, note 91. Throughout the present article, however, the words "negotiable" and "negotiability" will be used in their strict commercial sense unless otherwise noted.

12. Bowen, L. J., in Picker *v.* London, etc., Banking Co., 18 Q. B. D. 515, 519, 56 L. J. Q. B. 299, 35 Wkly. Rep. 469; Miller *v.* Race, 1 Burr. 452, 1 Smith Lead. Cas. (9th ed.) 750; Scrutton Merc. L. 26. See also Chitty Bills 224; Story Prom. Notes, § 131.

13. *Maine.*— Bates *v.* Butler, 46 Me. 387; Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Maryland.—Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299.

Massachusetts.— Sibley *v.* Phelps, 6 Cush. (Mass.) 172; Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750.

New York.—Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Downing v. Backenstoes, 3 Cai. (N. Y.) 137.

Pennsylvania.— Coursin *v.* Ledlie, 31 Pa. St. 506; Leidy *v.* Tammany, 9 Watts (Pa.) 353.

Vermont.— Arnold *v.* Sprague, 34 Vt. 402.

Virginia.— Averett *v.* Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

Wisconsin.— Corbett *v.* Clark, 45 Wis. 403, 30 Am. Rep. 763; Mehlberg *v.* Tisher, 24 Wis. 607.

England.— Smith *v.* Kendal, 1 Esp. 231, 6 T. R. 123; Rex *v.* Box, R. & R. 223, 6 Taunt. 325.

See 7 Cent. Dig. tit. "Bills and Notes," § 2.

14. As between the parties such a note is valid. Reed *v.* Murphy, 1 Ga. 236.

As between the maker or drawer and indorsee the indorsement of non-negotiable paper does not render the former liable at common law to the latter, as in case of negotiable paper.

Connecticut.—Backus *v.* Danforth, 10 Conn. 297.

Delaware.— Fernon *v.* Farmer, 1 Harr. (Del.) 32.

Georgia.— Reed *v.* Murphy, 1 Ga. 236.

Iowa.— Warren *v.* Scott, 32 Iowa 22.

Maryland.— Noland *v.* Ringgold, 3 Harr. & J. (Md.) 216, 5 Am. Dec. 435.

Nebraska.— Hosford *v.* Stone, 6 Nebr. 378.

New York.— Maule *v.* Crawford, 14 Hun (N. Y.) 193; Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637.

Pennsylvania.— Raymond *v.* Middleton, 29 Pa. St. 529; Barriere *v.* Nairac, 2 Dall. (Pa.) 249, 1 L. ed. 368; Gerard *v.* La Coste, 1 Dall. (Pa.) 194, 1 L. ed. 96, 1 Am. Dec. 236.

South Carolina.— Pratt *v.* Thomas, 2 Hill (S. C.) 654.

Tennessee.— Hackney *v.* Jones, 3 Humphr. (Tenn.) 612.

England.— Hill *v.* Lewis, 1 Salk. 132.

Liability of transferrer to transferree see *infra*, VI, G, 1, a, (I), (C).

In New York the distinction previously existing between negotiable and non-negotiable notes has not been done away with by the code. Richards *v.* Warring, 39 Barb. (N. Y.) 42.

15. Grant *v.* Vaughan, 3 Burr. 1516; Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295.

16. Carrick *v.* Vickery, 2 Dougl. 653.

17. The Mississippi statute making "all promissory notes and other writings for the payment of money or other thing" transferable by indorsement subject to defense has been held to apply to inland bills of exchange (Kershaw *v.* Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70), but not to apply to accommodation paper (Meggett *v.*

have been enlarged in some states to include notes which are payable in property or work,[18] and which include other additional agreements and conditions;[19] and in some their negotiability has been conditioned on their being made payable in bank[20] or on their recital of "value received."[21] In some states negotiability has been expressly conferred by statute on corporation bonds,[22] bills of lading,[23] and warehouse receipts.[24]

e. Duration and Extent — (I) *Effect of Death of Original Payee.* The death of the original payee does not affect the negotiability of the paper.[25]

(II) *Effect of Express Restraint.* Further negotiation of a bill or note[26] may be restricted by apt words of indorsement,[27] but the indorsement of paper "without recourse" does not affect its negotiability.[28] A special indorsement without negotiable words will not affect the negotiability of the instrument,[29] and conversely an indorsement to order or to bearer will not give negotiability to a non-negotiable instrument.[30] Adding to the indorsement a guaranty of payment[31] or a provision as to time of payment, rendering it payable on a contingency,[32]

Baum, 57 Miss. 22), to a foreign bill (Harrison *v.* Pike, 48 Miss. 46; Coffman *v.* Kentucky Bank, 41 Miss. 212, 90 Am. Dec. 371), or to a Mississippi note payable in another state (Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385). But of the similar Alabama statute, which originated in the same law of Mississippi territory and was in force from 1812 to 1828, it was held that the act of 1828, which made bills and notes payable in banks subject to the law merchant as to "grace, protest and notice" and other instruments assignable so that the assignee might sue in his own name, by implication made bills and notes assignable by the law merchant. Smyth *v.* Strader, 4 How. (U. S.) 404, 11 L. ed. 1031.

18. See *infra*, I, C, 1, e, (I), (A).

Where negotiability is derived from the statute only the instrument must comply with all the statutory requirements. St. Charles First Nat. Bank *v.* Hunt, 25 Mo. App. 170.

19. See *infra*, I, C, 1, e, (I), (B).

20. See *infra*, I, C, 1, g, (I), (A).

21. See *infra*, I, C, 1, i, (I).

22. See *infra*, I, B, 3, d; I, C, 1, k.

23. See *infra*, I, B, 3, a.

24. See *infra*, I, B, 3, h.

25. To subject it to the defense that payment had been made to an indorsee under a fraudulent indorsement by the payee's agent. Brennan *v.* Merchants', etc., Nat. Bank, 62 Mich. 343, 28 N. W. 881.

26. Bonds.— The negotiability of a government bond payable to bearer cannot be so restrained by an act of the legislature of the state which holds the bonds as to affect them in the hands of a *bona fide* purchaser (after they had been stolen). Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044. In New York special provision is made for rendering corporation bonds payable to bearer only negotiable by indorsement, where the owner has indorsed and subscribed on the bond a statement that it is his property. Neg. Instr. L. § 332.

Checks.—A stipulation stamped on the face of a check that it will not be paid to a certain company or its agents is valid. Commercial Nat. Bank *v.* Gastonia First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, 32 L. R. A. 713.

27. See *infra*, VI, C, 1, d.

28. See *infra*, VI, C, 1, d, (II), (E).

29. To subject the indorsee to defense (Halbert *v.* Ellwood, 1 Kan. App. 95, 41 Pac. 67) or to prevent action in the indorsee's name (Muldrow *v.* Caldwell, 7 Mo. 563; Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199]. *Contra*, Lawrance *v.* Fussell, 77 Pa. St. 460; Holmes *v.* Hopper, 1 Bay (S. C.) 160 [an indorsement to A with power to sue in his name, and to appropriate the money to his own use when recovered]. So *a fortiori* of a restriction on the face of a check that it "will positively not be paid to the Gastonia Banking Company or its agents." Commercial Nat. Bank *v.* Gastonia First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, 32 L. R. A. 712).

Effect of transfer by delivery where payable to order see *infra*, VI, F, 2, b.

Effect of transfer by assignment where payable to order or to bearer see *infra*, VI, C, 3.

30. *Massachusetts.*— Belcher *v.* Smith, 7 Cush. (Mass.) 482; Tuttle *v.* Bartholomew, 12 Metc. (Mass.) 452; True *v.* Fuller, 21 Pick. (Mass.) 140.

New Jersey.—Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551.

New York.— Leggett *v.* Raymond, 6 Hill (N. Y.) 639; Miller *v.* Gaston, 2 Hill (N. Y.) 188; McLaren *v.* Watson, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260; Ketchell *v.* Burns, 24 Wend. (N. Y.) 456; Lamourieux *v.* Hewit, 5 Wend. (N. Y.) 307.

Pennsylvania.— McDoal *v.* Yeomans, 8 Watts (Pa.) 361.

Texas.— Gregg *v.* Johnson, 37 Tex. 558.

31. Of the principal (Halbert *v.* Ellwood, 1 Kan. App. 95, 41 Pac. 67) or of the interest (Upham *v.* Prince, 12 Mass. 14). *Contra*, of an indorsement of parts of the note in severalty to two persons with a guaranty and a reservation of the balance to the indorser. Goldman *v.* Blum, 58 Tex. 630.

32. Tappan *v.* Ely, 15 Wend. (N. Y.) 362.

Indorsing a receipt for goods, "the net pro-

or indorsing a note under seal[33] or at a usurious rate of discount,[34] does not render it non-negotiable.

(III) *Effect of Maturity.* The mercantile character of the original bill or note as a negotiable instrument and of the contracts of the several parties to it continues after its maturity and until it is paid.[35] One who purchases by indorsement after maturity is subject to certain defenses which are not admissible as against a *bona fide* purchaser before maturity. He takes the rights of the person who held the instrument at its maturity and is subject to any defense that was available against him,[36] but is not subject to a set-off arising against an earlier holder out of matter wholly extraneous to the instrument,[37] unless acquired, under the statute, before notice of transfer.[38]

(IV) *Effect of Payment.*[39] The payment of a bill or note puts an end to its negotiability, whether the payment is made by the maker,[40] by his agent [41] or surety,[42]

ceeds to be credited" on the note, does not affect its negotiability. Ege *v.* Kyle, 2 Watts (Pa.) 222.

33. Ege *v.* Kyle, 2 Watts (Pa.) 222.

34. Nicholson *v.* Nat. Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223.

35. See *infra*, VI, B, 1, b, (I).

One who takes by indorsement after maturity may by virtue of such indorsement bring suit in his own name against the maker (Dean *v.* Hewit, 5 Wend. (N. Y.) 257; Havens *v.* Huntington, 1 Cow. (N. Y.) 387) or against a remote indorser (Long *v.* Crawford, 18 Md. 220; Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199]).

The liability of one who indorses after maturity is that of an indorser of a demand note. Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75.

36. The title of his indorser may be attacked in his hands. Sagory *v.* Metropolitan Bank, 42 La. Ann. 627, 7 So. 633.

The maker may set up payment to an earlier party, made without notice of transfer (Ainsworth *v.* Ainsworth, 24 Miss. 145; Cochran *v.* Wheeler, 7 N. H. 202, 26 Am. Dec. 732), but he cannot set up the defense that he was an accommodation maker (Renwick *v.* Williams, 2 Md. 356; Seyfert *v.* Edison, 45 N. J. L. 393). An indorser, however, who had indorsed the note without other consideration for the accommodation of his indorsee can set up the defense against a later holder who took from the first indorsee after maturity. Chester *v.* Dorr, 41 N. Y. 279 [*reversing* 3 Rob. (N. Y.) 275]. So the owner who delivers an overdue note to his agent for collection cannot set up the agent's fraud in defense against a purchaser in good faith from the agent. Eversole *v.* Maull, 50 Md. 95.

"The true test to determine whether a note is subject to an equity set up by the maker is this: Could the payee at the time he transferred the note have maintained a suit upon it against the maker, if it had then been mature? Subject to such equities, the holder by indorsement after the maturity of the note, will be clothed with the same rights and advantages as were possessed by the indorser, and may avail himself of them accordingly." Thayer, J., in Eversole *v.* Maull, 50 Md. 95, 104.

"The only defenses against which an indorsee has to guard in accepting over-due bills, are first, those which have arisen since the execution of the note, and which are not collateral, but which relate to the note itself; and secondly those which are inherent in the note, and which would show it to have been void *ab initio* such as fraud, mistake, absence of a sufficient consideration, &c." Renwick *v.* Williams, 2 Md. 356, 364.

37. Williams *v.* Banks, 11 Md. 198; Annan *v.* Houck, 4 Gill (Md.) 325, 45 Am. Dec. 133; Cumberland Bank *v.* Hann, 18 N. J. L. 222; Adair *v.* Lenox, 15 Oreg. 489, 16 Pac. 182; Stewart *v.* Tizzard, 3 Phila. (Pa.) 362, 16 Leg. Int. (Pa.) 132.

38. Robinson *v.* Crenshaw, 2 Stew. & P. (Ala.) 276; Ritchie *v.* Moore, 5 Munf. (Va.) 388, 7 Am. Dec. 688.

39. As to payment generally see *infra*, XI, B, 13. See also *infra*, VI, B, 1, b, (III).

40. Long *v.* Cynthiana Bank, 1 Litt. (Ky.) 290, 13 Am. Dec. 234; Claiborne *v.* Planters' Bank, 2 How. (Miss.) 727.

Payment by one co-maker amounts to extinguishment. Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874; Davis *v.* Stevens, 10 N. H. 186.

If the payee on receiving payment fails to surrender the note and transfers it in fraud of the maker, his indorsee cannot recover against the maker. American Bank *v.* Jenness, 2 Metc. (Mass.) 288. So the maker cannot take up a note after its payment by the second indorser and bring suit in the name of such indorser against a prior indorser who had indorsed for the maker's accommodation. Blake *v.* Sewell, 3 Mass. 556.

41. Where a third party takes up a note as agent for the maker he cannot take an indorsement to himself and bring suit against a co-maker who was in fact surety for the first maker. Moran *v.* Abbey, 63 Cal. 56.

42. Pray *v.* Maine, 7 Cush. (Mass.) 253 (where payment was made by one who indorsed the note before delivery); Hopkins *v.* Farwell, 32 N. H. 425 (holding that one maker cannot take up a note and reissue it as against his co-maker, although the former

or by the accepter;[43] and after payment by the party primarily liable the reissue of the bill or note[44] neither revives old rights nor creates new ones against the existing parties to the paper.[45] Payment by an indorser does not in general extinguish it or destroy its negotiability as against himself and parties liable to him.[46] Payment by the drawer of a bill, which is payable to his own order, does not extinguish the bill as against the accepter, but if it is payable to a third person and not indorsed by the payee the drawer cannot reissue it.[47]

(v) *Effect of Recovery of Judgment.* The recovery by the payee[48] of judgment on a note against the maker destroys its further negotiability.[49] Proof of a note as a claim against the estate of a deceased maker[50] or the maker's discharge in insolvency[51] is equivalent in this respect to a judgment.

4. Assignability — a. In General. Non-negotiable instruments were always transferable in equity, if not at law, and the assignee could bring suit in equity in his own name not only against his assignor but against prior parties.[52] At common law, however, he could bring suit in his own name against his immediate assignor only[53] and could not sue prior parties in his own name.[54] He could sue

was surety and the latter principal debtor); Gourdin *v.* Trenholm, 25 S. C. 362 (where a corporation bond was paid by the guarantor and reissued after its maturity). But it has been held that a surety for the maker may take up the note and maintain his action in the payee's name against the maker. Rockingham Bank *v.* Claggett, 29 N. H. 292.

43. Savage *v.* Merle, 5 Pick. (Mass.) 83. And his indorsee takes subject to defense. Walton *v.* Young, 26 La. Ann. 164; Connery *v.* Kendall, 5 La. Ann. 515.

Where the accepter discounts a bill before maturity and transfers it his indorsee may maintain an action in his own name against prior parties. Rogers *v.* Gallagher, 49 Ill. 182, 95 Am. Dec. 583.

44. Negotiable municipal certificates which have been taken up and canceled are discharged and of no further validity for reissue. District of Columbia *v.* Cornell, 130 U. S. 655, 9 S. Ct. 694, 32 L. ed. 1041.

A town order which has been presented by the payee to the town treasurer and paid cannot be again negotiated in payment of other debts owing by the town. Mitchell *v.* Albion, 81 Me. 482, 17 Atl. 546.

45. Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874 [*affirming* 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125]; Tucker *v.* Peaslee, 36 N. H. 167; Kneeland *v.* Miles, (Tex. Civ. App. 1894) 24 S. W. 1113.

A bill may be negotiated after it is paid where no person would thereby be made liable who would otherwise be discharged (Eaton *v.* McKown, 34 Me. 510) and a party knowingly negotiating a note after payment binds himself (Mabry *v.* Matheny, 10 Sm. & M. (Miss.) 323, 48 Am. Dec. 753). So if an accommodation note has been once discounted, and subsequently taken up by the accommodated party, it may be assigned before maturity to a third party as collateral security for a preëxisting debt. Washington Bank *v.* Krum, 15 Iowa 53; Levy *v.* Ford, 41 La. Ann. 873, 6 So. 671.

46. His indorsee may sue the maker (Kirksey *v.* Bates, 1 Ala. 303; Eaton *v.* Carey, 10 Pick. (Mass.) 211; Guild *v.* Eager, 17 Mass. 615; Havens *v.* Huntington, 1 Cow. (N. Y.) 387) or an earlier indorser (Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62; McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162. But see Swann *v.* Schofield, 2 Cranch C. C. (U. S.) 140, 23 Fed. Cas. No. 13,676).

47. Neg. Instr. L. § 202; Bills Exch. Act, § 59.

Payment by drawer after it has been taken up at maturity by an indorser will not enable the drawer to reissue the bill as against the accepter, where the payee's indorsement remains uncanceled and the note has thereby become non-negotiable (Gardner *v.* Maynard, 7 Allen (Mass.) 456, 83 Am. Dec. 699) and his indorsee cannot maintain an action against the accepter (Price *v.* Sharp, 24 N. C. 417), although the drawee in such case has his action against the accepter for money paid (Beck *v.* Robley, 1 H. Bl. 89 note).

48. After recovery of judgment against the maker by an indorsee the indorser cannot take up the note and bring a fresh action against the maker. Prest *v.* Vanarsdalen, 11 N. J. L. 194.

49. A subsequent indorsee cannot maintain an action in his own name against an earlier indorser (Brown *v.* Foster, 4 Ala. 282) or surety (Sawyer *v.* Bradford, 6 Ala. 572).

Of an assignee of the judgment this is also true. Cole *v.* Matchett, 78 Ind. 601; Kelsey *v.* McLaughlin, 76 Ind. 379; Ward *v.* Haggard, 75 Ind. 381.

50. Weathered *v.* Smith, 9 Tex. 622, 60 Am. Dec. 186.

51. Moore *v.* Viele, 4 Wend. (N. Y.) 420; Depuy *v.* Swart, 3 Wend. (N. Y.) 135, 20 Am. Dec. 673.

52. Dorsey *v.* Hadlock, 7 Blackf. (Ind.) 113; Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286; Stevenson *v.* Shaver, 3 J. J. Marsh. (Ky.) 547; Weaver *v.* Beard, 21 Mo. 155; Smith *v.* Harley, 8 Mo. 559; Halsey *v.* Dehart, 1 N. J. L. 93.

53. Jones *v.* Fales, 4 Mass. 245.

54. *Alabama.*—Prewitt *v.* Chapman, 6 Ala. 86.

Connecticut.—Backus *v.* Danforth, 10 Conn. 297.

the maker only in the name of the original payee.[55] In many of the United States suit must now be brought in all cases in the name of the party in interest and the distinction between law and equity actions is greatly modified or wholly removed.[56]

b. Subject to Defenses.[57] Like other choses in action, to which negotiable paper under the law merchant forms the most common exception, non-negotiable instruments are transferable subject to defenses existing against prior holders, the assignee taking no greater right or title than that of his predecessor;[58] and, in some cases, even a purchaser takes subject to defenses that may arise against a prior party before notice of transfer.[59]

B. Instruments Governed by Law Merchant — 1. In General. Negotiable instruments regulated wholly by the law merchant include foreign and inland bills of exchange, checks, and promissory notes. Other quasi-negotiable instruments having some of the same features and governed in part by the law merchant are bills of lading, certificates of deposit, collateral securities, corporation and municipal bonds, coupons, letters of credit, municipal warrants, and warehouse receipts.[60]

2. Negotiable Instruments — a. Bills of Exchange — (I) *Definition.* A bill of exchange is an open letter by one person to a second, directing him in effect to pay absolutely, and at all events, a certain sum of money therein named to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to bearer and to the drawer himself.[61] As the term bill

Delaware.— Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 288, 89 Am. Dec. 230.
Georgia.— Reed *v.* Murphy, 1 Ga. 236.
Illinois.— Kingsbury *v.* Wall, 68 Ill. 311.
Massachusetts.— Costelo *v.* Crowell, 127 Mass. 293, 34 Am. Rep. 367.
New Hampshire.— Wiggin *v.* Damrell, 4 N. H. 69; Sanborn *v.* Little, 3 N. H. 539.
New York.—Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256; Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637.
North Carolina.— Sutton *v.* Owen, 65 N. C. 123; Warren *v.* Brown, 64 N. C. 381.
Pennsylvania.— Johnston *v.* Speer, 92 Pa. St. 227, 37 Am. Rep. 675.
South Carolina.— Pratt *v.* Thomas, 2 Hill (S. C.) 654.

55. *Georgia.*—Goodman *v.* Fleming, 57 Ga. 350.
Mississippi.— Owen *v.* Moody, 29 Miss. 79.
New Jersey.— Matlack *v.* Hendrickson, 13 N. J. L. 263.
New York.— Prescott *v.* Hull, 17 Johns. (N. Y.) 284.
Virginia.— Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126; Caton *v.* Lenox, 5 Rand. (Va.) 31.

56. See, generally, Assignments, 4 Cyc. 1.

57. As to defenses generally see *infra*, XIV, B [8 Cyc.].

58. *California.*— Bouche *v.* Louttit, 104 Cal. 230, 37 Pac. 902; Graves *v.* Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.
Florida.— Reddish *v.* Ritchie, 17 Fla. 867.
Georgia.— Cohen *v.* Prater, 56 Ga. 203.
Illinois.— Haskell *v.* Brown, 65 Ill. 29.
Indiana.— Herod *v.* Snyder, 48 Ind. 480; Summers *v.* Hutson, 48 Ind. 228.
Kansas.— South Bend Iron-Works *v.* Paddock, 37 Kan. 510, 15 Pac. 574.
Massachusetts.— Dyer *v.* Homer, 22 Pick. (Mass.) 253.
New Hampshire.— Sanborn *v.* Little, 3 N. H. 539.
North Carolina.— Havens *v.* Potts, 86 N. C. 31.
Pennsylvania.— Wetter *v.* Kiley, 95 Pa. St. 461, 40 Am. Rep. 670; Miller *v.* Kreiter, 76 Pa. St. 78; White *v.* Heylman, 34 Pa. St. 142; Thompson *v.* McClelland, 29 Pa. St. 475.
Texas.— Sonnenthiel *v.* Skinner, 67 Tex. 453, 3 S. W. 686.
United States.— Lawrence *v.* U. S., 8 Ct. Cl. 252.

59. Guerry *v.* Perryman, 6 Ga. 119; White *v.* Heylman, 34 Pa. St. 142.

60. It is the purpose of this article to touch upon quasi-negotiable instruments only so far as they are affected by the rules of the law merchant.

"Commercial paper is defined to be 'bills of exchange, promissory notes, bank checks and other negotiable instruments for the payment of money which, by their form and on their face, purport to be such instruments as are by the law merchant recognized as falling under the designation of commercial paper.'" Black L. Dict. [*quoted* in Newport Bank *v.* Cook, 60 Ark. 288, 296, 30 S. W. 35, 46 Am. St. Rep. 171, 29 L. R. A. 761].

61. Daniel Neg. Instr. § 27 [*quoted* in Culbertson *v.* Nelson, 93 Iowa 187, 191, 61 N. W. 854, 57 Am. St. Rep. 266, 27 L. R. A. 222].

Other definitions are: "An order drawn by one person on another to pay a third a certain sum of money, absolutely and at all events." Munger *v.* Shannon, 61 N. Y. 251, 255 [*quoted* in Schmittler *v.* Simon, 101 N. Y. 554, 560, 5 N. E. 452, 54 Am. Rep. 737].

"An order or request by one to another to pay a specified sum of money to a person." Newman *v.* Frost, 52 N. Y. 422, 425.

of exchange is generally used in the books it includes drafts,[62] orders,[63] and checks.[64]

(II) *FORM.* In its simplest form a bill of exchange names precisely the time and place of payment as well as the amount and the parties to it.[65] Informal instruments, however, are often construed to be bills of exchange and are so in effect.[66]

"An order in writing, drawn by one party on another, requesting the latter to pay a certain sum of money to a third party, at all events; depending upon no contingency, and payable out of no particular fund." Hoyt *v.* Lynch, 2 Sandf. (N. Y.) 328, 332.

"A written order or request by one person to another, for the payment, absolutely and at all events, of a specified sum of money to a third person." Luff *v.* Pope, 5 Hill (N. Y.) 413, 416 [*affirmed* in 7 Hill (N. Y.) 577].

"An order drawn by one man on another requesting him to pay a sum of money to a third." Pratt *v.* Thomas, 2 Hill (S. C.) 654, 656.

"An open letter of request by one person to another to pay money." Rice *v.* Ragland, 10 Humphr. (Tenn.) 545, 550, 53 Am. Dec. 737.

"An open letter of request from one person to another, desirlng him to pay, on his account, a sum of money therein mentioned, to a third person." Chittenden *v.* Hurlburt, 2 Aik. (Vt.) 133, 135.

"Instruments purporting a request, or order, from one person to another, to pay a certain sum of money to a third person therein named, or his order." Dunlop *v.* Harris, 5 Call (Va.) 16, 28.

"An unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer." Bills Exch. Act, § 3.

"An open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account." 2 Bl. Comm. 466 [*quoted* in Henderson *v.* Pope, 39 Ga. 361, 363].

"An open letter of request from, and order by, one person on another, to pay a sum of money therein mentioned to a third person." Bouvier L. Dict. [*quoted* in Biesenthall *v.* Williams, 1 Duv. (Ky.) 329, 333, 85 Am. Dec. 629].

"A written order or request by one person to another for the payment of money absolutely and at all events." 3 Kent Comm. 74 [*quoted* in Adams *v.* Boyd, 33 Ark. 33, 47; Henderson *v.* Pope, 39 Ga. 361, 363; Ivory *v.* State Bank, 36 Mo. 475, 478, 88 Am. Dec. 150]; Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 186, 21 Am. Rep. 209.

"A written order for the payment of a certain sum of money unconditionally. Smith Merc. L. 362 [*quoted* in Adams *v.* Boyd, 33 Ark. 33, 47].

"An open letter of request addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid, or it may be payable to bearer." Story Bills Exch. [*quoted* in Ivory *v.* State Bank, 36 Mo. 475, 478, 88 Am. Dec. 150].

Distinguished from "bill obligatory."— "'Bills of exchange' and 'bills obligatory' are very different things. Each have their particular privileges or advantages, but there is no privilege or advantage which is common to both." Farmers', etc., Bank *v.* Greiner, 2 Serg. & R. (Pa.) 114, 115.

62. Cole *v.* Dalton, 6 Daly (N. Y.) 484 (where it is held that there is no important distinction between the terms "draft" and "bill of exchange," except that "draft" is more particularly used for an inland bill); Union Nat. Bank *v.* Rowan, 23 S. C. 339, 55 Am. Rep. 26.

63. Hunter *v.* Simrall, 5 Litt. (Ky.) 62.

64. Hewitt *v.* Goodrich, 10 La. Ann. 340 (holding that checks, like bills, are negotiable instruments, requiring, as essentials, a drawer, drawee, and payee); Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632. See also *infra*, I, B, 2, b, (I).

65. Form of bill.— "New York, Jan. 2, 1902.
Three months after date pay to A B or order five hundred dollars. Value Received.
Payable at Charing Cross Bank, London.
To Messrs. C. C. N. H."
London.

The various modifications in form by additions or omissions are considered *infra*, I, C.

66. Instruments construed to be bills.— It is a bill, although the order reads, "Please pay," etc. (Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522) or "Please pay . . . and charge the same to me" (Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18). So is a request to B to pay A's note written under the note and accepted by B (Leonard *v.* Mason, 1 Wend. (N. Y.) 522) or to pay a bill for goods, written under the bill (O'Donnell *v.* Smith, 2 E. D. Smith (N. Y.) 124), and the drawee need not be a banker (Champion *v.* Gordon, 70 Pa. St. 474, 10 Am. Rep. 681) and may even be the drawer himself (Randolph *v.* Parish, 9 Port. (Ala.) 76). So the drawer may be the payee (Bank of British North America *v.* Barling, 46 Fed. 357; Wildes *v.* Savage, 1 Story (U. S.) 22, 29 Fed. Cas. No. 17,653, 3 Law Rep. 1), or the drawee and payee (Com. *v.* Butterick, 100 Mass. 12), and the bill may be payable at the place where it is drawn (Southern Bank *v.* Brashears, 1 Disn. (Ohio) 207, 12 Ohio Dec. (Reprint) 578). So an indorsement is in effect a bill; e. g., on a certificate of deposit (Kilgore *v.* Bulkley, 14 Conn. 362) or of indebtedness (Bowes *v.* Industrial Bank, 58 Ill. App.

(III) *KINDS*—(A) *In General.* Bills of exchange are either foreign or inland.[67]

(B) *Foreign.* In England, under the present statute,[68] all bills are foreign except those which are drawn in the British Islands and drawn on a resident of the British Islands or payable there.[69] What shall be considered a foreign bill is provided by statute in many of the United States.[70] In general, however, in distinguishing between inland and foreign bills the United States are regarded as foreign to one another,[71] and a bill of exchange drawn in one of the United

498); or on a promissory note (Irvin *v.* Maury, 1 Mo. 194), a non-negotiable note (Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 264), or bond (Bay *v.* Freazer, 1 Bay (S. C.) 66). And even the following writing: "Thomas Williams, Esq.: Please let the bearer have $50.00. I will arrange it with you this noon. Yours, most obedient, S. R. Biesenthall" has been held to be an inland bill of exchange. Biesenthall *v.* Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629.

Instruments construed not to be bills.— On the other hand an order to A to pay the writer's note to B is not a bill. Cook *v.* Satterlee, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432. Nor is a letter to A requesting him to pay such note (Gillilan *v.* Myers, 31 Ill. 525), a letter to A requesting him to make a payment to B (Woolley *v.* Sergeant, 8 N. J. L. 262, 14 Am. Dec. 419), an order by a partnership on its clerk to pay bearer on his presenting certain tickets (Dillahunty *v.* Parry, 1 Stew. (Ala.) 251), a receipt for wool, payable in six months, at a bank (Martin *v.* Butler, Wright (Ohio) 553), a receipt for coal "for which I promise to pay . . . three hundred and sixty-five dollars and seventy-four cents" (Smith *v.* Cromer, 66 Miss. 157, 5 So. 619), or a receipt for a note to be collected (Runnels *v.* Spencer, Walk. (Miss.) 362; Eason *v.* Dickson, 24 N. C. 243).

Instrument susceptible of double interpretation.— Where a writing is capable of being interpreted as a bill of exchange or promissory note, as in the case of a note addressed to a third person and accepted by him, the person who receives it may, at his option, treat it as a bill of exchange or as a note against the maker. Brazelton *v.* McMurray, 44 Ala. 323, where the accepter was sued as such.

67. "The difference between foreign bills and inland bills is that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest" (Lord Holt in Buller *v.* Crips, 6 Mod. 29), "notice of dishonor being sufficient" (Scrutton Merc. L. 30). And see *infra*, XII, B, 2, a, (I).

Distinction not abolished by statute.— In Alabama the statute providing that the remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the rules of the law merchant as to days of grace, protest, and notice, does not destroy any distinction recognized by the law merchant between foreign and inland bills and promissory notes, but its intention is that the law merchant as applicable to each class shall prevail. Quigley *v.* Primrose, 8 Port. (Ala.) 247.

68. Bills Exch. Act, § 4; 33 & 34 Vict. c. 97.

Until a recent date (1 & 2 Geo. IV) bills were foreign that were drawn between Ireland and Scotland (Mahoney *v.* Ashlin, 2 B. & Ad. 478, 22 E. C. L. 202) or between other countries of the British realm (Heywood *v.* Pickering, L. R. 9 Q. B. 428, 43 L. J. Q. B. 145; Godfray *v.* Coulman, 13 Moore P. C. 11, 15 Eng. Reprint 5); but since 19 & 20 Vict. c. 97, bills between all parts of the United Kingdom are inland bills (Griffin *v.* Weatherby, L. R. 3 Q. B. 753, 9 B. & S. 726, 37 L. J. Q. B. 280, 18 L. T. Rep. N. S. 881, 17 Wkly. Rep. 8).

69. **If delivered in a foreign country** it is a foreign bill, although blanks are left to be filled and are filled in London. Barker *v.* Sterne, 2 C. L. R. 1020, 9 Exch. 684, 23 L. J. Exch. 201, 2 Wkly. Rep. 418; Snaith *v.* Mingay, 1 M. & S. 87.

If drawn in England on another country it is a foreign bill if it is payable in the other country (Rothschild *v.* Currie, 1 Q. B. 43, 5 Jur. 865, 10 L. J. Q. B. 77, 4 P. & D. 737, 41 E. C. L. 428), but it is an inland bill if drawn and payable in England, although drawn on another country (Amner *v.* Clark, 2 C. M. & R. 468, 1 Gale 191, 4 L. J. Exch. 254, 5 Tyrw. 942). Formerly, however, a bill drawn in England on a Boston house was a foreign bill, although actually accepted by the drawee in England and payable there. Grimshaw *v.* Bender, 6 Mass. 157.

70. **By section 213 of the Negotiable Instruments Law,** for example, all bills are foreign except those which are both drawn and payable in the enacting state.

Special statute in bank charter.— In some of the states special statutes are contained in bank charters. Thus the provision of the charter of the bank of Kentucky that all bills discounted by it shall be considered as foreign bills of exchange applies, although all the parties to the bill are residents of the state. Battertons *v.* Porter, 2 Litt. (Ky.) 388: State Bank *v.* Brooking, 2 Litt. (Ky.) 41; Farmers', etc., Bank *v.* Turner, 2 Litt. (Ky.) 13.

71. Ocean Nat. Bank *v.* Williams, 102 Mass. 141; Commercial Bank *v.* Varnum, 49 N. Y. 269; U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 9 L. ed. 989; Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538; Buckner *v.* Finley, 2 Pet. (U. S.) 586, 7 L. ed. 528.

States upon a drawee residing in another state[72] or made payable in another state[73] is a foreign bill. So an indorsement executed in one state and made payable in another is in effect a foreign bill.[74]

(c) *Inland.* A bill drawn and payable in the same state or country is an inland bill,[75] although it is drawn on another state or addressed to a person in another state, if it is made expressly payable in the state where it is drawn.[76] At common law inland bills included only bills that were drawn and payable in England and Wales and Berwick on Tweed. These limits are now extended to the whole body of the British Islands but not to other realms of the British

72. *Alabama.*— Turner *v.* Patton, 49 Ala. 406; Todd *v.* Neal, 49 Ala. 266; Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275.

Georgia.— Hartridge *v.* Wesson, 4 Ga. 101.

Illinois.— Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368, holding that a bill of exchange drawn in Michigan in favor of a Michigan payee on a person residing and having his place of business in Illinois, and which was accepted in Illinois, is a foreign, and not an inland, bill, notwithstanding the drawee also had a place of business in Michigan, where he spent a portion of his time.

Kentucky.—Harmon *v.* Wilson, 1 Duv. (Ky.) 322; Chenowith *v.* Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145 (especially if it is expressly payable in the drawee's state); Rice *v.* Hogan, 8 Dana (Ky.) 133.

Louisiana.— Schneider *v.* Cochrane, 9 La. Ann. 235, 61 Am. Dec. 204; New Orleans City Bank *v.* Girard Bank, 10 La. 562.

Maine.— Warren *v.* Coombs, 20 Me. 139; Green *v.* Jackson, 15 Me. 136.

Massachusetts.— Phœnix Bank *v.* Hussey, 12 Pick. (Mass.) 483.

Missouri.— Linville *v.* Welch, 29 Mo. 203.

New Hampshire.— Carter *v.* Burley, 9 N. H. 558.

New York.— Commercial Bank *v.* Varnum, 49 N. Y. 269; Halliday *v.* McDougall, 20 Wend. (N. Y.) 81; Wells *v.* Whitehead, 15 Wend. (N. Y.) 527. But see Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372.

Pennsylvania.— Lennig *v.* Ralston, 23 Pa. St. 137, holding that a bill drawn and dated in Pennsylvania with blanks to be filled by a partner in London, who negotiated it there, is a foreign bill.

Rhode Island.— Ahorn *v.* Bosworth, 1 R. I. 401.

South Carolina.— Cape Fear Bank *v.* Stinemetz, 1 Hill (S. C.) 44.

Tennessee.—Gardner *v.* State Bank, 1 Swan (Tenn.) 420.

Virginia.— Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707, but not if payable where drawn.

United States.— Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Knickerbocker L. Ins. Co. *v.* Pendleton, 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866; Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538; Buckner *v.* Finley, 2 Pet. (U. S.) 586, 7 L. ed. 528; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386; Lonsdale *v.* Brown, 4 Wash. (U. S.) 148, 15 Fed. Cas. No. 8,494.

Presumption as to place of drawing.—If the bill does not designate the place where it was drawn, but the evidence and circumstances show that the drawer resided in Kentucky and the drawee in Ohio, the legal presumption is that it was drawn at the drawer's residence. Harmon *v.* Wilson, 1 Duv. (Ky.) 322.

73. *Florida.*— Joseph *v.* Salomon, 19 Fla. 623.

Indiana.— State Bank *v.* Hayes, 3 Ind. 400.

Kentucky.— Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537.

Maine.— Ticonic Bank *v.* Stackpole, 41 Me. 302; Warren *v.* Coombs, 20 Me. 139; Freeman's Bank *v.* Perkins, 18 Me. 292.

New Hampshire.— Grafton Bank *v.* Moore, 14 N. H. 142.

New York.— Halliday *v.* McDougall, 22 Wend. (N. Y.) 264.

Oklahoma.— Morrison *v.* Farmers', etc., Bank, 9 Okla. 697, 60 Pac. 273.

Although all the parties reside in the state where it was drawn, this is still true. State Bank *v.* Rodgers, 3 Ind. 53; Freeman's Bank *v.* Perkins, 18 Me. 292; Atwater *v.* Streets, 1 Dougl. (Mich.) 455; Grafton Bank *v.* Moore, 14 N. H. 142.

74. Piner *v.* Clary, 17 B. Mon. (Ky.) 645 (a certificate of deposit issued in one state and indorsed by the payee in another state); Ticonic Bank *v.* Stackpole, 41 Me. 302; Simpson *v.* White, 40 N. H. 540 (the indorsement of a note which is payable in another state); Carter *v.* Burley, 9 N. H. 558 (the indorsement of a note payable to a person residing in another state). But in Case *v.* Heffner, 10 Ohio 180, where a bill was drawn in New York on a New York resident, and afterward indorsed in Ohio to an Ohio resident, the latter in suing his indorser in Ohio was allowed to elect to treat it as an inland bill.

75. Young *v.* Bennett, 7 Bush (Ky.) 474. And see Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

76. Amner *v.* Clark, 2 C. M. & R. 468, 1 Gale 191, 4 L. J. Exch. 254, 5 Tyrw. 942. And such a bill drawn on another state and naming no other place of payment was formerly held to be an inland bill. Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372.

The actual place of drawing may be controlled by the intention of the parties as shown by the local date of the bill. Strawbridge *v.* Rohinson, 10 Ill. 470, 50 Am. Dec. 420.

Under the Mississippi statute, if drawn on

Empire.[77] In the United States all bills are inland bills which are drawn and payable in the same state, unless the local statute provides otherwise.[78]

(D) *Presumptions From Date.* The place of drawing is in general indicated by the date of the bill,[79] but a place of date will not be judicially recognized as foreign and must be proved to be such.[80]

b. Checks — (I) *In General.* A check is a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds[81] for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.[82] A check

a person in the same state it is a "domestic bill," although payable in another state. Ragsdale *v.* Franklin, 25 Miss. 143.

As to presumption of place of payment see *infra*, XIV, E [8 Cyc.].

As to parol evidence of intention as to place of payment see *infra*, XIV, E [8 Cyc.].

77. Bills Exch. Act, § 4. So by the earlier statute 19 & 20 Vict. c. 97.

78. Neg. Instr. L. § 213. See also Cal. Civ. Code, § 8224.

Virginia formerly made the bill a foreign bill by the law merchant if drawn in another state and payable in Virginia, and an inland bill by statute if drawn in Virginia and payable in another state. Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707.

79. Strawbridge *v.* Robinson, 10 Ill. 470, 50 Am. Dec. 420; Lennig *v.* Ralston, 23 Pa. St. 137; Gompertz *v.* Bartlett, 2 C. L. R. 395, 2 E. & B. 849, 18 Jur. 266, 23 L. J. Q. B. 65, 2 Wkly. Rep. 43, 75 E. C. L. 849. And see *infra*, I, C, 1, b.

This presumption is a conclusive one in favor of a *bona fide* holder. Towne *v.* Rice, 122 Mass. 67. So in England as to a foreign date under existing stamp acts (Siordet *v.* Kuczynski, 17 C. B. 251, 25 L. J. C. P. 2, 4 Wkly. Rep. 153, 84 E. C. L. 251), although it was otherwise under former statutes (Steadman *v.* Duhamel, 1 C. B. 888, 4 L. J. C. P. 270, 50 E. C. L. 888; Jordaine *v.* Lashbrooke, 7 T. R. 601).

80. Riggin *v.* Collier, 6 Mo. 568; Yale *v.* Ward, 30 Tex. 17; Andrews *v.* Hoxie, 5 Tex. 171; Cook *v.* Crawford, 4 Tex. 420.

81. Drawn upon a deposit.—A check differs in this respect from a bank draft, which is not necessarily drawn against a deposit of funds, although it may be drawn on a bank and payable on demand (see Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540; Norton Bills & N. 404), a feature ignored in many judicial definitions (see *infra*, next note).

82. 2 Daniel Neg. Instr. 583 [*quoted* in Ridgely Nat. Bank *v.* Patton, 109 Ill. 479, 484; Connor *v.* Becker, 56 Nebr. 343, 345, 76 N. W. 893; Cincinnati Oyster, etc., Co. *v.* National Lafayette Bank, 51 Ohio St. 106, 109, 36 N. E. 833; Rogers *v.* Durant, 140 U. S. 298, 11 S. Ct. 754, 35 L. ed. 481; Bowen *v.* Needles Nat. Bank, 87 Fed. 430, 437]; State *v.* Warner, 60 Kan. 94, 96, 55 Pac. 342; State *v.* Murphy, 141 Mo. 267, 269, 42 S. W. 936; Farmersville First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

Other definitions are: "A written order, or request, for the payment of money, addressed to a bank or banker." Thompson *v.* State, 49 Ala. 16, 18.

"An order to the bank to pay the money of the drawer to the payee." Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 491, 12 Am. Rep. 590.

"An order for the payment of money." State *v.* Crawford, 13 La. Ann. 300 [*citing* Burrill L. Dict.; Edwards Bills & N. pp. 57, 1].

"An order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money." Bullard *v.* Randall, 1 Gray (Mass.) 605, 606, 61 Am. Dec. 433 [*quoted* in Minot *v.* Russ, 159 Mass. 458, 459, 31 N. E. 489, 32 Am. St. Rep. 472, 16 L. R. A. 510; Hawley *v.* Jette, 10 Oreg. 31, 35, 45 Am. Rep. 129].

"A bill of exchange, drawn by a customer upon his banker, payable on demand." People *v.* Kemp, 76 Mich. 410, 415, 43 N. W. 439; 2 Lawson Rights, Rem. & Prac. § 530 [*quoted* in Connor *v.* Becker, 56 Nebr. 343, 345, 76 N. W. 893].

"A bill of exchange payable on demand." Duncan *v.* Berlin, 60 N. Y. 151, 153; Chapman *v.* White, 6 N. Y. 412, 417, 57 Am. Dec. 464; Harker *v.* Anderson, 21 Wend. (N. Y.) 372, 373.

"A written order, or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment, to a person named therein, or to him or bearer, or order, a named sum of money." Hawley *v.* Jette, 10 Oreg. 31, 34, 45 Am. Rep. 129.

"A written order on a bank directing it to pay a certain sum of money." Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 364, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273.

"An inland bill of exchange drawn on a banker, payable to bearer on demand." Byles Bills (Sharswood's ed.) 84 [*quoted* in Rogers *v.* Durant, 140 U. S. 298, 11 S. Ct. 754, 35 L. ed. 481].

"A written order or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment, to a person named therein, or to him, or bearer, or order, a named sum of money." Burrill L. Dict. [*quoted* in Bowen *v.* Newell, 5 Sandf. (N. Y.) 326, 328].

"A written order or request addressed to

is negotiable by the law merchant[83] and is substantially a bill of exchange,[84] being

persons carrying on the business of bankers, drawn on them by a party having money in their hands, requesting them to pay, on presentment to a person therein named, or to bearer, a specified sum of money." Chitty Bills 322 [*quoted* in Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637, 643].

"A written order of a depositor to his bank to make a certain payment." Morse Banking, § 398 [*quoted* in Framell *v.* Farmers' Nat. Bank, 11 Ky. L. Rep. 900, 901; Carroll Exch. Bank *v.* Carrollton First Nat. Bank, 58 Mo. App. 17, 26].

"A brief draft or order upon a bank or banking house, directing it to pay a certain sum of money." 2 Parsons Notes & B. [*quoted* in Ridgely Nat. Bank *v.* Patton, 109 Ill. 479, 484; Connor *v.* Becker, 56 Nebr. 343, 345, 76 N. W. 893; Rogers *v.* Durant, 140 U. S. 298, 11 S. Ct. 754, 35 L. ed. 481].

"A written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." Story Prom. N. 487 [*quoted* in Connor *v.* Becker, 56 Nebr. 343, 345, 76 N. W. 893; Rogers *v.* Durant, 140 U. S. 298, 11 S. Ct. 754, 35 L. ed. 481].

"A check is a bill of exchange drawn on a bank payable on demand." Neg. Instr. L. § 321. So in effect, Bills Exch. Act, § 73; Cal. Civ. Code, § 8254.

"Occasionally the expression is used 'payable on presentation,' but evidently — except perhaps in Story on Bills — as synonymous with 'payable on demand.'" Harrison *v.* Nicollet Nat. Bank, 41 Minn. 488, 489, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746.

83. Gate City Bldg., etc., Assoc. *v.* National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 47 Am. St. Rep. 633, 27 L. R. A. 401; Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97; McLean *v.* Clydesdale Banking Co., 9 App. Cas. 95, 50 L. T. Rep. N. S. 457. See also ASSIGNMENTS, 4 Cyc. 8, note 8.

84. *Indiana.*— Henshaw *v.* Root, 60 Ind. 220, holding that it may be sued on as such.

Kentucky.— Humphries *v.* Bicknell, 2 Litt. (Ky.) 296, 13 Am. Dec. 268.

Louisiana.— Barbour *v.* Bayon, 5 La. Ann. 304, 52 Am. Dec. 593.

Maryland.— Laird *v.* State, 61 Md. 309; Moses *v.* Franklin Bank, 34 Md. 574; Woods *v.* Schroeder, 4 Harr. & J. (Md.) 276.

Nebraska.— German Nat. Bank *v.* Beatrice Nat. Bank, 63 Nebr. 246, 88 N. W. 480.

New Hampshire.—Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

New York.— Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126.

South Carolina.— Sutcliffe *v.* McDowell, 2 Nott & M. (S. C.) 251.

Tennessee.— Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

See also *supra*, I, B, 2, a, (I), note 64.

It is generally covered by the term "bills of exchange," as used in statutes.

Alabama.—Montgomery First Nat. Bank *v.* Nelson, 105 Ala. 180, 16 So. 707.

Illinois.— Merchants' Nat. Bank *v.* Ritzinger, 118 Ill. 484, 8 N. E. 834, although in different states.

Indiana.— Harrison *v.* Wright, 100 Ind. 515, 58 Am. Rep. 805.

Iowa.— Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146.

Maryland.— Hawthorn *v.* State, 56 Md. 530.

New York.— Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421.

United States.—Rogers *v.* Durant, 140 U. S. 298, 11 S. Ct. 754, 35 L. ed. 481; Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97; Garrettson *v.* North Atchison Bank, 47 Fed. 867. *Contra*, Levy *v.* Laclede Bank, 18 Fed. 193.

See also Neg. Instr. L. § 321; Bills Exch. Act, § 73.

It may be drawn in parts, like a bill, although this is not usual. Merchants' Nat. Bank *v.* Ritzinger, 118 Ill. 484, 8 N. E. 834.

"The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are (as it seems to me), that they are always drawn on a bank or banker; that they are payable immediately on presentment, without the allowance of any days of grace; and that they are never presentable for mere acceptance; but only for payment." Story, J., in *In re* Brown, 2 Story (U. S.) 502, 512, 4 Fed. Cas. No. 1,985, 1 Hunt. Mer. Mag. 377, 6 Law Rep. 508 [*quoted* in Bowen *v.* Newell, 5 Sandf. (N. Y.) 326, 328; Hawley *v.* Jette, 10 Oreg. 31, 34, 45 Am. Rep. 129]. See also Weiand *v.* Maysville State Nat. Bank, 23 Ky. L. Rep. 1517, 65 S. W. 617, 66 S. W. 26; Chicago, etc., R. Co. *v.* Burns, 61 Nebr. 793, 86 N. W. 483; Keene *v.* Beard, 8 C. B. N. S. 372, 381, 6 Jur. N. S. 1248, 29 L. J. C. P. 287, 2 L. T. Rep. N. S. 240, 8 Wkly. Rep. 469, 98 E. C. L. 372 (where Byles, J., said: "I conceive that a check is in the nature of an inland bill of exchange payable to the bearer on demand. It has nearly all the incidents of an ordinary bill of exchange. In one thing it differs from a bill of exchange: it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas, it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange. There is another difference between the two instruments,— in the case of a bill of exchange, the drawer is dis-

in effect, if not in all respects, an inland bill drawn on a banker, payable on demand.[85] A check may, however, be payable at a future day without ceasing to be a check.[86] It does not usually express any time or place of payment,[87] nor is it usually presented for acceptance.[88]

(II) *Memorandum Check.* A memorandum check is in the ordinary form of a bank check, with the word "memorandum" written across its face, and is not intended for immediate presentation, but simply as evidence of an indebtedness by the drawer to the holder.[89] In other respects and as to other parties, however, it is an ordinary check.[90]

charged by default of a due presentment to the acceptor; but, in the case of a check, the drawer is not discharged by a delay in the presentment, unless it he shown that he has been prejudiced thereby, for instance, by the failure of the banker on whom it is drawn. In all other respects a check is precisely like an inland bill of exchange").

85. *Iowa.*— Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146.

Kentucky.— Lester *v.* Given, 8 Bush (Ky.) 357.

Maryland.—Exchange Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Laird *v.* State, 61 Md. 309.

Massachusetts.— Minot *v.* Russ, 156 Mass. 458, 31 N. E. 489, 32 Am. St. Rep. 472, 16 L. R. A. 510.

Missouri.— State *v.* Vincent, 91 Mo. 662, 4 S. W. 430.

Nebraska.— Wood River Bank *v.* Omaha First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

New York.— Bowen *v.* Newell, 8 N. Y. 190 [*reversing* 5 Sandf. (N. Y.) 326]; Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464; Salt Springs Bank *v.* Syracuse Sav. Inst., 62 Barb. (N. Y.) 101; Harker *v.* Anderson, 21 Wend. (N. Y.) 372.

Virginia.—Blair *v.* Wilson, 28 Gratt. (Va.) 165; Purcell *v.* Allemong, 22 Gratt. (Va.) 739.

United States.— Swayne, J., in Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

England.— Hopkinson *v.* Forster, L. R. 19 Eq. 76, 23 Wkly. Rep. 301; Parke, B., in Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 14 Eng. Reprint 215.

Drawn on bank or banker.— A check is always drawn on a bank or banker (McDonald *v.* Stokey, 1 Mont. 388), although this may be the case with a bill of exchange as well (Bowen *v.* Newell, 8 N. Y. 190 [*reversing* 5 Sandf. (N. Y.) 326]). So an order for payment indorsed on an architect's certificate, against the bank holding the fund, is a check (Industrial Bank *v.* Bowes, 165 Ill. 70, 46 N. E. 10, 56 Am. St. Rep. 228), but a sight bill drawn on a bank and concluding with a request to charge to the drawer's account is said to be a bill and not a check (Pope *v.* Albion Bank, 57 N. Y. 126 [*reversing* 59 Barb. (N. Y.) 226]; Olshausen *v.* Lewis, 1 Biss. (U. S.) 419, 18 Fed. Cas. No. 10,507).

86. Way *v.* Towle, 155 Mass. 374, 29 N. E. 506, 31 Am. St. Rep. 552; Taylor *v.* Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180; Andrew *v.* Blachly, 11 Ohio St. 89; Champion *v.* Gordon, 70 Pa. St. 474, 10 Am. Rep. 681; *In re* Brown, 2 Story (U. S.) 502, 4 Fed. Cas. No. 1,985, 10 Hunt. Mer. Mag. 377, 6 Law Rep. 508.

The distinction between a check payable in future and a bill is more nominal than real, and it is often said that such an instrument is a bill rather than a check (Minturn *v.* Fisher, 4 Cal. 35; Work *v.* Tatman, 2 Houst. (Del.) 304; Bradley *v.* Delaplaine, 5 Harr. (Del.) 305; Henderson *v.* Pope, 39 Ga. 361; Culter *v.* Reynolds, 64 Ill. 321; Whitehouse *v.* Whitehouse, 90 Me. 468, 38 Atl. 374, 60 Am. St. Rep. 278; Harrison *v.* Nicollet Nat. Bank, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746; Ivory *v.* State Bank, 36 Mo. 475, 88 Am. Dec. 150; Bowen *v.* Newell, 8 N. Y. 190 [*reversing* 5 Sandf. (N. Y.) 326]; Andrew *v.* Blachly, 11 Ohio St. 89; Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632; Hawley *v.* Jette, 10 Oreg. 31, 45 Am. Rep. 129; Lawson *v.* Richards, 6 Phila. (Pa.) 179, 23 Leg. Int. (Pa.) 348; Brown *v.* Lusk, 4 Yerg. (Tenn.) 210), especially where it is in the more formal language of a bill (Merchants' Bank *v.* Woodruff, 6 Hill (N. Y.) 174; Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673; Hawley *v.* Jette, 10 Oreg. 31, 45 Am. Rep. 129), or that it raises a presumption to that effect (Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632).

Postdated check.— Postdating a check does not affect its negotiability. Burns *v.* Kahn, 47 Mo. App. 215. It is a bill of exchange (Bradley *v.* Delaplaine, 5 Harr. (Del.) 305; Allen *v.* Keeves, 1 East 435) and is payable on demand after the day of its date (Taylor *v.* Sip, 30 N. J. L. 284; Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304 [*affirmed* in 13 Wend. (N. Y.) 133, 27 Am. Dec. 192]; Hill *v.* Gaw, 4 Pa. St. 493).

Right to grace of check payable at future day see *infra*, VII, B, 4, b, (IV).

87. Lester *v.* Given, 8 Bush (Ky.) 357.

88. See *infra*, IV, A, note 72.

If accepted it must be accepted in the manner required for bills of exchange. Duncan *v.* Berlin, 60 N. Y. 151.

89. U. S. *v.* Isham, 17 Wall. (U. S.) 496, 502, 21 L. ed. 728.

90. Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612, holding that the insertion of the word "mem." in a bank check does not affect the right of the holder to present it to the bank and demand payment immediately, and that the bank will be protected

(III) *BANKER'S DRAFT.* A draft drawn by one bank upon another is properly speaking a bill of exchange and not a check. It is, however, often called a check, is such in form, and is in general treated as a check.[91]

c. Promissory Notes — (I) *IN GENERAL* — (A) *Definition.* A promissory note or, as it is frequently called, a note of hand,[92] is a written promise by one person to pay to another person therein named or order a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive.[93]

in the payment of such check to the same extent that it would had not that word been inserted. See also BANKS AND BANKING, 5 Cyc. 529.

Demand and notice are waived by the drawer and his liability is unconditional. Franklin Bank *v.* Freeman, 16 Pick. (Mass.) 535; Turnball *v.* Osborne, 12 Abb. Pr. N. S. (N. Y.) 200.

It is an evidence of debt against the drawer although not intended to be presented. Cushing *v.* Gore, 15 Mass. 69.

91. Harrison *v.* Wright, 100 Ind. 515, 58 Am. Rep. 805; Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146.

A check may be drawn by one bank on another (Garthwaite *v.* Tulare Bank, 134 Cal. 237, 66 Pac. 326; Exchange Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; Little *v.* Phenix Bank, 2 Hill (N. Y.) 425) or on a bank in another state (Cincinnati First Nat. Bank *v.* Coates, 3 McCrary (U. S.) 9, 8 Fed. 540).

92. Byles Bills 4 [*quoted* in Blood *v.* Northrup, 1 Kan. 28, 35].

93. Dorsey *v.* Wolff, 142 Ill. 589, 593, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428 [*quoted* in Gehlbach *v.* Carlinville Nat. Bank, 83 Ill. App. 129, 134; Clarke *v.* Hunter, 83 Ill. App. 100, 106; Miller *v.* Western College, 71 Ill. App. 587, 597].

Other definitions are: "A written promise, made by a certain person, to pay a certain sum of money to a certain person, at a certain time." Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 577, 18 N. E. 56.

"A written promise, not under seal, to pay a certain sum of money unconditionally." Maryland Fertilizing, etc., Co. *v.* Newman, 60 Md. 584, 585, 45 Am. Rep. 750.

"An unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer, or to a person therein designated or his order." Altman *v.* Rittershofer, 68 Mich. 287, 36 N. W. 74, 13 Am. St. Rep. 341.

"A written engagement under seal or not, wherein the maker stipulates and promises to pay a person therein named, absolutely and unconditionally, a certain sum of money, at a time therein specified." Salisbury First Nat. Bank *v.* Michael, 96 N. C. 53, 57, 1 S. E. 855, under statute.

"The written promise to pay another a certain sum of money at a certain time." Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 364, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273.

"Instruments purporting an absolute promise, by the maker, to pay to a person therein named, or his order, a sum of money therein named." Dunlop *v.* Harris, 5 Call (Va.) 16, 28.

"A written promise for the payment of money, absolutely and at all events." Bayley Bills 1 [*quoted* in Ring *v.* Foster, 6 Ohio 540].

"A plain and direct engagement in writing to pay a sum specified at the time therein limited, to a person therein named, or sometimes to his order or often to the bearer at large." 2 Bl. Comm. 467 [*quoted* in Baker *v.* Leland, 9 N. Y. App. Div. 365, 366, 41 N. Y. Suppl. 399, 75 N. Y. St. 812; Ring *v.* Foster, 6 Ohio 540].

"A plain and direct engagement in writing, to pay a specified sum, at the time therein limited, to a person therein named, or sufficiently indicated, or to his order, or to bearer." 2 Broom & H. Comm. (Am. ed.) 163 [*quoted* in Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 287, 4 N. W. 995].

"An absolute promise in writing, signed but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer." Byles Bills 4 [*quoted* in Blood *v.* Northrup, 1 Kan. 28, 35].

"A promise or agreement in writing to pay a specified sum, at a time therein limited or on demand, or at sight, to a person therein named, or his order, or to bearer." Chitty Bills 516 [*quoted* in Walters *v.* Short, 10 Ill. 252, 259; Baker *v.* Leland, 9 N. Y. App. Div. 365, 367, 41 N. Y. Suppl. 399, 75 N. Y. St. 812].

"A written promise, by one person to another, for the payment of money, at a specified time, and at all events." 3 Kent Comm. 74 [*quoted* in Currier *v.* Lockwood, 40 Conn. 349, 355, 16 Am. Rep. 40; Hobbs *v.* State, 9 Mo. 855, 858; Baker *v.* Leland, 9 N. Y. App. Div. 365, 367, 41 N. Y. Suppl. 399, 75 N. Y. St. 812].

"A written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money, at a time specified therein." Story Prom. N. c. 1, § 1 [*quoted* in Walker *v.* Thompson, 108 Mich. 686, 688, 66 N. W. 584; Cayuga County Nat. Bank *v.* Purdy, 56 Mich. 6, 7, 22 N. W. 93; McDowell *v.* Keller, 4 Coldw. (Tenn.) 258, 261; Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303, 304].

"A negotiable promissory note . . . is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in

(B) *Negotiability.* At common law promissory notes were mere evidences of debt[94] and the statute of Anne[95] first made them "assignable or indorsible over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants."[96] This statute has been enacted in substance in nearly all of the United States and was probably originally adopted in the common-law states as part of the English common law received by them from England.[97] In some states, however, the negotiability of promissory notes has been somewhat restricted by statute.[98]

(C) *Form.* The usual form of a promissory note is a "promise" to pay in express words,[99] but an instrument in the form of a bill is often in effect the note of one or more of the parties.[1]

(II) *Bank-Notes.* A bank-note is the promissory note of a bank payable to bearer on demand and intended to circulate as money;[2] and of the same general character are United States treasury notes.[3]

money to order or to bearer." Neg. Instr. L. § 320. So Bills Exch. Act, § 83.

94. They were neither transferable at law nor actionable in themselves before the statute of Anne. Clerke *v.* Martin, 2 Ld. Raym. 757; Buller *v.* Crips, 6 Mod. 29. See also ASSIGNMENTS, 4 Cyc. 8, note 8. So in Virginia, where the statute of Anne was not adopted, and until the act of 1807, it was held that the assignee of a note could not sue a remote indorser, but could only sue the maker and his immediate indorser. Caton *v.* Lenox, 5 Rand. (Va.) 31. But in Alabama it has been held that promissory notes are, under the common law, negotiable instruments. Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42. So too in Missouri, irrespective of the statute of Anne, after indorsement. Irvin *v.* Maury, 1 Mo. 194.

95. 3 & 4 Anne, c. 9, § 1.

This statute now repealed in England has given place to the ampler provisions of the Bills of Exchange Act, sections 83–89.

96. The statute referred in its preamble only to notes made payable to a designated person "or order," but was applied without hesitation to a note payable to "the ship Fortune, or bearer" in Grant *v.* Vaughan, 3 Burr. 1516, Lord Mansfield saying in this case that such notes are by law negotiable. It applied also to foreign notes (Milne *v.* Graham, 1 B. & C. 192, 2 D. & R. 293, 1 L. J. K. B. O. S. 91, 8 E. C. L. 82; Houriet *v.* Morris, 3 Campb. 303; Bentley *v.* Northouse, 1 M. & M. 66), although this had been questioned at first (Carr *v.* Shaw, Bayley Bills Exch. 23), and to foreign transfers of English notes (De la Chaumette *v.* Bank of England, 9 B. & C. 208, 17 E. C. L. 100).

97. In California promissory notes are expressly included in the enumeration of negotiable instruments. Cal. Civ. Code, § 8095.

The Negotiable Instruments Law, section 20 (defining "negotiable instruments") enumerates "promises" as well as "orders" and section 320 expressly defines "negotiable promissory notes."

The spirit of the statute making notes negotiable in North Carolina has been extended to notes executed and payable in other states. Hatcher *v.* McMorine, 15 N. C. 122.

98. Expression of consideration as condition of negotiability see *infra*, I, C, 1, i, (I), (A), note 77.

Place of payment as condition of negotiability see *infra*, I, C, 1, g, (I), (A).

Other notes which are negotiable at common law and not by statute may be transferred and the holder may bring an action in his own name, subject, however, to defense. Musselman *v.* McElhenny, 23 Ind. 4, 85 Am. Dec. 445. So in Alabama under the statute of Mississippi territory (1807–1812). Smith *v.* Pettus, 1 Stew. & P. (Ala.) 107. The act of 1812 enabled the assignee to bring suit, subject to defense, on bills and notes payable in bank, and the act of 1828 made them subject to the law merchant as to "grace, protest and notice" and other instruments assignable so that the assignee might sue and by implication made bills and notes assignable by the law merchant. Smyth *v.* Strader, 4 How. (U. S.) 404, 11 L. ed. 1031. And in Indiana an indorsee could not bring an action against a remote indorser as such under the act of 1852, which applied only to notes which were negotiable under the common law. Hays *v.* Gwin, 19 Ind. 19.

99. See *infra*, I, C, 1, d, (II).

1. As where the drawer is himself payee and indorser (Planters' Bank *v.* Evans, 36 Tex. 592) or drawee (Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193; McCandlish *v.* Cruger, 2 Bay (S. C.) 377).

It may in some cases be construed as a bill or note at the option of the holder (Brazelton *v.* McMurray, 44 Ala. 323; Bradley *v.* Mason, 6 Bush (Ky.) 602), as in the case of a bill drawn by one agent of a corporation on another for the corporation (Western Min. Co. *v.* Toole, (Ariz. 1886) 11 Pac. 119; Rio Grande Extension Co. *v.* Coby, 7 Colo. 299, 3 Pac. 481).

2. Byles Bills 10.

A forged paper purporting to be a bank-note is a note, and equally so, if there is no such bank as that named. Reg. *v.* McDonald, 12 U. C. Q. B. 543.

3. Frazer *v.* D'Invilliers, 2 Pa. St. 200, 44 Am. Dec. 190; U. S. *v.* Hardyman, 13 Pet. (U. S.) 176, 10 L. ed. 113.

3. Quasi-Negotiable Instruments — a. Bills of Lading. Bills of lading[4] purporting to be receipts for goods shipped, with agreement to deliver to the consignor or his order, have some of the qualities of negotiable paper. Such a bill represents the goods, and property in them passes by its transfer,[5] and in many states bills of lading have a so-called negotiability by statute.[6] At common law the indorsement of a bill of lading may be explained or modified by parol evidence[7] and the transfer does not vest title to the goods in a *bona fide* purchaser of the bill so as to exclude defenses by the drawer of the bill,[8] although the purchaser may maintain his title against an earlier purchaser of the goods who has become estopped by his laches.[9] Under some statutes, however, a *bona fide* purchaser for value of the bill of lading is free from defense to the extent of the value paid.[10] Where it is attached to a draft drawn on the consignee it is a pledge of the goods for the security of the accepter of the draft.[11] The right to such security passes with the draft by its absolute transfer or pledge,[12] and the

4. **Bill of lading defined** see Bill of Lading, 5 Cyc. 707.

5. Brent *v.* Miller, 81 Ala. 309, 8 So. 219; Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761; Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Milwaukee Merchants' Exch. Bank *v.* McGraw, 76 Fed. 930, 48 U. S. App. 55, 22 C. C. A. 622; Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545. See also Carriers, 6 Cyc. 424, note 27.

Parol evidence of a contrary intention has been held to be inadmissible. Mercantile Banking Co. *v.* Landa, (Tex. Civ. App. 1896) 33 S. W. 681.

Effect of transfer.— The transfer does not, however, at common law, carry the consignor's contract obligations, e. g., as to payment of freight (Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97), especially where the purchaser took a bill of lading marked "duplicate" which was itself notice to put him on inquiry for the "original" (Castanola *v.* Missouri Pac. R. Co., 24 Fed. 267); and the consignor has no right, as against a *bona fide* holder of the bill of lading, to change the destination of the goods named in the bill (Western, etc., R. Co. *v.* Ohio Valley Banking, etc., Co., 107 Ga. 512, 33 S. E. 821) or otherwise to change the carrier's agreement, e. g., by requiring delivery of the goods to another person (Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761) and without production of the bill of lading (Chester Nat. Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216).

6. **In many states indorsement is necessary** to carry title to the goods (Louisville, etc., R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534; Turner *v.* Israel, 64 Ark. 244, 41 S. W. 806; Kansas City First Nat. Bank *v.* Mt. Pleasant Milling Co., 103 Iowa 518, 72 N. W. 689; Douglas *v.* People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276), but the mere indorsement of an order to pay demurrage will not render a bill of lading negotiable (Falkenburg *v.* Clark, 11 R. I. 278).

7. Thus it may be shown that the indorsee was not to surrender the bill of lading without payment of the draft attached to it. Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151.

8. Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629; National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263; Pollard *v.* Vinton, 105 U. S. 7, 26 L. ed. 998. See also Carriers, 6 Cyc. 424, note 24.

9. Pollard *v.* Reardon, 65 Fed. 848, 21 U. S. App. 639, 13 C. C. A. 171.

10. Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75.

11. Brent *v.* Miller, 81 Ala. 309, 8 So. 219.

12. Western Union Cold Storage Co. *v.* Bankers' Nat. Bank, 176 Ill. 260, 52 N. E. 30; Union Nat. Bank *v.* Rowan, 23 S. C. 339, 55 Am. Rep. 26; Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702. So as against an attaching creditor of the consignor (American Trust, etc., Sav. Bank *v.* Austin, 25 Misc. (N. Y.) 454, 55 N. Y. Suppl. 561; Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702), and notwithstanding the fact that the pledgee had turned over the bill of lading and the goods to the consignor as his agent for the purpose of sale (Coker *v.* Memphis First Nat. Bank, 112 Ga. 71, 37 S. E. 122).

The purchaser has a lien on the goods which he may be required to enforce for the protection of others, holders of checks drawn against the credit given by the purchaser to his indorser. German Nat. Bank *v.* Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951. His claim is subject, however, to the conditions of the bill of lading, e. g., for delivery of the goods by the consignee without the production of the bill unless it contain the words "or order" (Weisman *v.* Philadelphia, etc., R. Co., 22 R. I. 128, 47 Atl. 318) or for surrender to the consignee on his acceptance of the draft (*Ex p.* Dever, 13 Q. B. D. 766, 51 L. T. Rep. N. S. 437, 33 Wkly. Rep. 290); but the purchaser of the draft with the bill of lading does not assume the responsibility of the consignor on a sale of the goods made by him with a warranty (Tolerton, etc., Co. *v.* Anglo-California Bank, 112 Iowa 706, 84 N. W. 930, 50 L. R. A. 777), although his right of recovery against the consignee is subject to abatement for defect in the goods shipped (Finch *v.* Gregg, 126 N. C. 176, 35

drawee is entitled to the goods on payment of the draft or on securing its payment.[13]

b. Certificates of Deposit. A certificate of deposit is a receipt for money deposited, with a promise to hold it or pay it in a designated manner.[14] When made negotiable in form such a certificate is negotiable and subject in general to the rules of negotiable paper,[15] being in effect a promissory note[16] and a note within the meaning of the Banking Act[17] and statutes as to pleading,[18] but where

S. E. 251, 49 L. R. A. 679; Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48).

13. *Georgia.*— Coker *v.* Memphis First Nat. Bank, 112 Ga. 71, 37 S. E. 122.

Illinois.—Commercial Bank *v.* Chicago, etc., R. Co., 160 Ill. 401, 43 N. E. 756, on his acceptance.

Michigan.— W. & A. McArthur Co. *v.* Old Second Nat. Bank, 122 Mich. 223, 81 N. W. 92.

Minnesota.— Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151.

England.— Shepherd *v.* Harrison, L. R. 5 H. L. 116, 40 L. J. Q. B. 148.

Delivery of the bill of lading on acceptance of the draft passes title to the goods. Hoffman *v.* Lake Shore, etc., R. Co., 125 Mich. 201, 84 N. W. 55.

14. Robinson *v.* State, 6 Wis. 585, 586.

Instrument held to be certificate.— A receipt for money, stating that the sum named therein is specially deposited, and due on demand, is a certificate of deposit. Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186.

15. *Maine.*— Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.

Michigan.— Birch *v.* Fisher, 51 Mich. 36, 16 N. W. 220.

New York.— *In re* Baldwin, 170 N. Y. 156, 63 N. E. 62.

North Carolina.—Johnson *v.* Henderson, 76 N. C. 227.

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

See also BANKS AND BANKING, 5 Cyc. 521, notes 80, 83.

Negotiable by indorsement.— It is negotiable by indorsement (Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176), although this has been denied so far as it might enable the indorser to sue in his own name (Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390) or to claim the deposit in preference to an attachment against the indorser levied before transfer (Lebanon Bank *v.* Mangan, 28 Pa. St. 452 [*following* Patterson *v.* Poindexter, 6 Watts & S. (Pa.), 227, 40 Am. Dec. 554]), and the indorser is liable as indorser (Carey *v.* McDougald, 7 Ga. 84).

Not subject to defenses.— As a negotiable instrument the certificate is not subject to defense or attack against a *bona fide* holder. Scollans *v.* Rollins, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386; Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444; Rapid City First Nat. Bank *v.* Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386; Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747.

Necessity of surrender on payment see BANKS AND BANKING, 5 Cyc. 521.

Effect on negotiability of provision for return see *infra*, I, C, 1, d, (II), (C), (2), (d).

Effect on negotiability of specifying medium of payment see *infra*, I, C, 1, e, (II).

Effect of necessity of demand before action. — The negotiable character of a certificate of deposit issued by a bank, payable to the order of the depositor, is not affected by the fact that a demand is necessary before an action can be maintained on it. Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176.

16. *Alabama.*— Renfro *v.* Merchants', etc., Bank, 83 Ala. 425, 3 So. 776.

California.— Coye *v.* Palmer, 16 Cal. 158; McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Florida.— Maxwell *v.* Agnew, 21 Fla. 154.

Illinois.— Swift *v.* Whitney, 20 Ill. 144. Especially where it is made "payable" at a given time. Hunt *v.* Divine, 37 Ill. 137.

Maryland.— Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

Michigan.— Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173.

Minnesota.— Mitchell *v.* Easton, 37 Minn. 335, 33 N. W. 910; Cassidy *v.* Faribault First Nat. Bank, 30 Minn. 86, 14 N. W. 363.

Montana.— Fultz *v.* Walters, 2 Mont. 165.

New York.— Baldwin's Estate, 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122.

North Carolina.—Johnson *v.* Henderson, 76 N. C. 227.

Ohio.— Cuyahoga Steam Furnace Co. *v.* Lewis, 4 Ohio Dec. (Reprint) 17, Clev. L. Rec. 15.

Wisconsin.— Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827.

See also BANKS AND BANKING, 5 Cyc. 520, note 79.

17. Darden *v.* Banks, 21 Ga. 297; Peru Bank *v.* Farnsworth, 18 Ill. 563; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333 [*affirming* 5 Barb. (N. Y.) 9]; Orleans Bank *v.* Merrill, 2 Hill (N. Y.) 295; Hazleton Coal Co. *v.* Megargel, 4 Pa. St. 324. But this does not apply to time certificates of deposit, representing an actual loan (Logan Nat. Bank *v.* Williamson, 2 Ohio Cir. Ct. 118), to a certificate payable in another state (Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309), or to certificates of deposit payable to order with interest from date (Hargroves *v.* Chambers, 30 Ga. 580).

18. Cate *v.* Patterson, 25 Mich. 191, within the act as to pleading by means of a copy of the instrument.

it lacks the ordinary form of a negotiable certificate or note it will not be regarded as such.[19]

c. Collateral Securities. Mortgages and other securities given as collateral to negotiable paper are held in some states to partake of the negotiability of the instrument secured to the exclusion of defenses by the maker as against *bona fide* purchasers of the note and security,[20] but in other states a different rule is followed.[21]

d. Corporation Bonds[22]—(1) *In General.* Coupon bonds executed by a corporation under its corporate seal in negotiable form possess many of the qualities of negotiable paper.[23] They pass by indorsement and delivery like a bill of

19. *Kentucky.*— Robertson *v.* Jones, 6 Ky. L. Rep. 71, where it would not be negotiable as a note under the statute.

New Jersey.— Gutch *v.* Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473, where the certificate read: "I hereby certify that I hold in trust, . . . and I promise to refund . . . on demand."

New York.— Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186, a receipt declaring that the sum named is "due on demand," and that it is "especially deposited."

Pennsylvania.— Hegeman *v.* McCall, 1 Phila. (Pa.) 529, 12 Leg. Int. (Pa.) 29, holding that a certificate of the deposit at the mint of the United States of a certain amount of silver bullion, the weight of which is stated and the net value ascertained, is not a negotiable instrument.

Wisconsin.— O'Neill *v.* Bradford, 1 Pinn. (Wis.) 390, 42 Am. Dec. 574, a certificate payable in specie "on return of this certificate."

United States.—Modern Woodmen of America *v.* Union Nat. Bank, 108 Fed. 753, 47 C. C. A. 667, holding that where it is not negotiable in form or supported in fact by any actual deposit the payee cannot recover upon it as such, and his remedy in case of fraud is by action of deceit.

20. *Alabama.*— Thompson *v.* Maddux, 117 Ala. 468, 23 So. 157.

Colorado.— Cowing *v.* Cloud, (Colo. App. 1901) 65 Pac. 417.

Illinois.— Laws (1901), 248. But the rule was formerly *contra.* Buehler *v.* McCormick, 169 Ill. 269, 48 N. E. 287; Towner *v.* McClelland, 110 Ill. 542; Bryant *v.* Vix, 83 Ill. 11; Petillon *v.* Noble, 73 Ill. 567; White *v.* Sutherland, 64 Ill. 181; Olds *v.* Cummings, 31 Ill. 188. See also Swett *v.* Stark, 31 Fed. 858, where, however, the federal court refused to follow the Illinois rule.

Indiana.—Gabbert *v.* Schwartz, 69 Ind. 450.

Iowa.—Updegraft *v.* Edwards, 45 Iowa 513.

Kentucky.— Duncan *v.* Griswold, 13 Bush (Ky.) 378.

Michigan.— Cox *v.* Cayan, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585; Barnum *v.* Phenix, 60 Mich. 388, 27 N. W. 577; Judge *v.* Vogel, 38 Mich. 568; Helmer *v.* Krolick, 36 Mich. 371.

Missouri.— Borgess Invest. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Mauch Chunk First Nat. Bank *v.* Rohrer, 138 Mo. 369, 39 S. W. 1047; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543; Mayes *v.* Robinson, 93 Mo. 114, 5 S. W. 611; Hagerman *v.* Sutton, 91 Mo. 519, 4 S. W. 73; Logan *v.* Smith, 62 Mo. 455.

New York.—Gould *v.* Marsh, 1 Hun (N. Y.) 566.

North Dakota.— St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867.

Wisconsin.— Croft *v.* Bunster, 9 Wis. 503.

United States.— Carpenter *v.* Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313; O'Rourke *v.* Wahl, 109 Fed. 276, 48 C. C. A. 360; Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47.

21. Pertuit *v.* Damare, 50 La. Ann. 893, 24 So. 681; Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762; Butler *v.* Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265; Bouligny *v.* Fortier, 17 La. Ann. 121; Watkins *v.* Goessler, 65 Minn. 118, 67 N. W. 796; Baily *v.* Smith, 14 Ohio St. 396, 84 Am. Dec. 385; Dearman *v.* Trimmier, 26 S. C. 506, 2 S. E. 501 (especially after the note secured becomes barred by the statute of limitations and ceases to exist as a negotiable instrument).

The negotiability of the note is not affected by the fact that it is secured by a mortgage. Blumenthal *v.* Jassoy, 29 Minn. 177, 12 N. W. 517.

22. Distinguished from commercial paper see Bonds, 5 Cyc. 777, note 91.

23. *Alabama.*— Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; State *v.* Cobb, 64 Ala. 127.

Indiana.— Junction R. Co. *v.* Cleneay, 13 Ind. 161.

Massachusetts.— Chapin *v.* Vermont, etc., R. Co., 8 Gray (Mass.) 575.

New Jersey.— Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York.— McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 6 Am. St. Rep. 397, 1 L. R. A. 299; Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Birdsall *v.* Russell, 29 N. Y. 220; Brainerd *v.* New York, etc., R. Co., 25 N. Y. 496 [*affirming* 10 Bosw. (N. Y.) 332]; Grand Rapids, etc., R. Co. *v.* Sanders, 17 Hun (N. Y.) 552; Wickes *v.* Adirondack Co., 2 Hun (N. Y.) 112, 4 Thomps. & C. (N. Y.) 250; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9.

Pennsylvania.— Carr *v.* Le Fevre, 27 Pa. St. 413.

Rhode Island.— American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103; National Exch. Bank *v.* Hartford, etc.,

exchange,[24] the indorsee or bearer takes them free from defenses available between earlier parties,[25] and he may sue upon the instrument in his own name.[26] On the other hand many of the attributes of commercial paper do not belong to them. They are not entitled to grace[27] and the rules as to protest and notice of dishonor do not apply to them;[28] nor in general do the rules as to procedure,[29] joinder of defendants,[30] or limitation of action.[31]

(II) *Municipal Bonds*—(A) *Generally.* The negotiability of municipal bonds corresponds with that of other corporation bonds.[32] In the hands of a *bona fide* holder before maturity they are, like bills of exchange, not subject to defenses,[33] and they fall, like notes, within the statute as to jurisdiction of federal courts over notes transferred.[34]

(B) *Government and State Bonds.* This is also true of government and state

R. Co., 8 R. I. 375, 91 Am. Dec. 237, 5 Am. Rep. 582.

South Carolina.— Langston *v.* South Carolina R. Co., 2 S. C. 248.

United States.—Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645; Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857; Moran *v.* Miami County, 2 Black (U. S.) 722, 17 L. ed. 342; White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208.

A blank left for the payee's name destroys the negotiability of the bond in England (Hibblewhite *v.* McMorine, 9 L. J. Exch. 217, 6 M. & W. 200, 2 R. & Can. Cas. 51 [*overruling* Texira *v.* Evans (*cited* in Master *v.* Miller, 1 Anstr. 225, 228)]), but in the United States such bonds have been held to be negotiable (Chapin *v.* Vermont, etc., R. Co., 8 Gray (Mass.) 575; Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51 [a municipal bond]; Hubbard *v.* New York, etc., R. Co., 36 Barb. (N. Y.) 286. See also Bonds, 5 Cyc. 779, note 97.

24. Maddox *v.* Graham, 2 Metc. (Ky.) 56. See also Bonds, 5 Cyc. 782.

25. Grand Rapids, etc., R. Co. *v.* Sanders, 17 Hun (N. Y.) 552; Atlantic Trust Co. *v.* Crystal Water Co., 76 N. Y. Suppl. 647; Kneeland *v.* Lawrence, 140 U. S. 209, 11 S. Ct. 786, 35 L. ed. 543. *Contra,* Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

In Kentucky they are on the same footing as notes and are subject to defense unless payable and discounted at a bank in the state. Ritchie *v.* Cralle, 22 Ky. L. Rep. 160, 56 S. W. 963; Louisville Ins. Co. *v.* Hoffman, 20 Ky. L. Rep. 2016, 50 S. W. 979.

26. Louisville Ins. Co. *v.* Hoffman, 20 Ky. L. Rep. 2016, 50 S. W. 979. See also Bonds, 5 Cyc. 793, note 84.

Effect of seal on negotiability generally see *infra,* I, C, l, k, (I).

27. See *infra,* VII, B, 4, c, (IV).

28. As to dishonor and protest generally see *infra,* XII.

As to notice of dishonor generally see *infra,* XIII.

29. As to actions on commercial paper see *infra,* XIV [8 Cyc.].

30. See *infra,* XIV, C [8 Cyc.].

31. Statute of limitations as defense see *infra,* XIV, B [8 Cyc.].

32. *Connecticut.*— Savings Soc. *v.* New London, 29 Conn. 174.

Illinois.— Eagle *v.* Kohn, 84 Ill. 292.

Indiana.— Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

Mississippi.— Craig *v.* Vicksburg, 31 Miss. 216.

Nebraska.— Stanton County School Dist. No. 16 *v.* State Bank, 8 Nebr. 168.

New Jersey.— Boyd *v.* Kennedy, 38 N. J. L. 146, 20 Am. Rep. 376; Force *v.* Elizabeth, 28 N. J. Eq. 403.

New York.— Gould *v.* Sterling, 23 N. Y. 439; Rome Bank *v.* Rome, 19 N. Y. 20, 75 Am. Dec. 272; Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51; Marsh *v.* Little Valley, 1 Hun (N. Y.) 554, 4 Thomps. & C. (N. Y.) 116; Lindsley *v.* Diefendorf, 43 How. Pr. (N. Y.) 357.

North Carolina.— Belo *v.* Forsythe County Com'rs, 76 N. C. 489; Weith *v.* Wilmington, 68 N. C. 24.

Texas.— Board *v.* Texas, etc., R. Co., 46 Tex. 316; San Antonio *v.* Lane, 32 Tex. 405.

United States.— New Providence Tp. *v.* Halsey, 117 U. S. 336, 6 S. Ct. 764, 29 L. ed. 904; Ackley School-Dist. *v.* Hall, 113 U. S. 135, 5 S. Ct. 371, 28 L. ed. 954; Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 342, 26 L. ed. 1204; Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Thomson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Gelpecke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Durant *v.* Iowa County, 1 Woolw. (U. S.) 69, 8 Fed. Cas. No. 4,189.

Contra, Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429; Hopper *v.* Covington, 10 Biss. (U. S.) 488, 8 Fed. 777. And a county bond in the form of a sealed bill payable to a named person or his assigns is not negotiable. Cronin *v.* Patrick County, 89 Fed. 79.

33. Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681.

34. New Providence Tp. *v.* Halsey, 117 U. S. 336, 6 S. Ct. 764, 29 L. ed. 904; McLean *v.* Valley County, 74 Fed. 389.

Such bonds will be treated as sealed although the seal has been altogether omitted. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462.

bonds in negotiable form as regards the title of the *bona fide* purchaser of lost or stolen bonds.[35]

e. Coupons. Interest coupons in the form of a note or due-bill and payable to order or to bearer are negotiable, at least to the same extent as the bond to which they belong. This is true while they are attached to the bond[36] and after they are separated from it.[37] While attached to the bond they are part of it and are governed by the same statute of limitations.[38] When separated from it they are no longer part of the same contract and will not be covered by a guaranty of payment of the bond and interest;[39] the title to the detached coupons passes by delivery, if they are payable to bearer,[40] and is not subject to equities;[41] they fall within the statute as to recovery on lost negotiable instruments;[42] and constitute separate contracts, which may be sued as such.[43] Judgment on coupons is not *res judicata* as to other coupons from the same bond or series of bonds so as to exclude new defenses.[44] As separate contracts they are principal debts and reckoned as such in making up the jurisdictional amount "exclusive of interest,"[45] and are themselves like other notes entitled to interest[46] and to days of grace.[47] They must, however, be negotiable in form[48] and will be rendered non-

35. *Missouri.*— Ringling *v.* Kohn, 4 Mo. App. 59.

New York.—Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Seybel *v.* National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Finnegan *v.* Lee, 18 How. Pr. (N. Y.) 186; Delafield *v.* Illinois, 2 Hill (N. Y.) 159.

Pennsylvania.— Frazer *v.* D'Invilliers, 2 Pa. St. 200, 44 Am. Dec. 190.

South Carolina.—Bond Debt Cases, 12 S. C. 200.

United States.—Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609.

But see Goodwin *v.* Roharts, 1 App. Cas. 476, 45 L. J. Exch. 748, 35 L. T. Rep. N. S. 179, 24 Wkly. Rep. 987 (as to bond scrip); Gorgier *v.* Mieville, 3 B. & C. 45, 4 D. & R. 641, 2 L. J. K. B. O. S. 206, 27 Rev. Rep. 290, 10 E. C. L. 30 (as to foreign bonds); Glyn *v.* Baker, 13 East 509, 12 Rev. Rep. 414 (as to East India bonds).

36. Arents *v.* Com., 18 Gratt. (Va.) 750. See also BONDS, 5 Cyc. 781, note 3.

37. *Connecticut.*— Fox *v.* Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871.

Minnesota.— Welsh *v.* First Div. St. Paul, etc., R. Co., 25 Minn. 314.

New York.— Especially where the collateral mortgage makes them transferable by delivery. Haskins *v.* Albany, etc., R., etc., Co., 69 N. Y. App. Div. 358, 76 N. Y. Suppl. 667.

North Carolina.— Burroughs *v.* Richmond County, 65 N. C. 234.

Pennsylvania.— Beaver County *v.* Armstrong, 44 Pa. St. 63.

Rhode Island.— National Exch. Bank *v.* Hartford, etc., R. Co., 8 R. I. 375, 91 Am. Dec. 237, 5 Am. Rep. 582.

United States.— Thompson *v.* Perrine, 106 U. S. 589, 1 S. Ct. 564, 568, 27 L. ed. 298; Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868; Clark *v.* Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 427; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Gelpecke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520. See also BONDS, 5 Cyc. 781, note 4.

When proof of intention to make negotiable necessary.— The assignee of a coupon naming no payee, the bond being payable to bearer, cannot bring suit on it in his own name without proof of intention to make it negotiable. Jackson *v.* York, etc., R. Co., 48 Me. 147.

38. Philadelphia Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 590, 28 Atl. 960.

39. Clokey *v.* Evansville, etc., R. Co., 16 N. Y. App. Div. 304, 44 N. Y. Suppl. 631. But the admission of validity of bonds implied in the execution of substitute bonds has been held to extend to coupons already detached from the original bonds. Coolidge *v.* General Hospital Soc., (Kan. App. 1899) 58 Pac. 562.

40. Thompson *v.* Perrine, 106 U. S. 589, 1 S. Ct. 564, 568, 27 L. ed. 298; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526. See also BONDS, 5 Cyc. 782, note 5.

41. Trustees Internal Imp. Fund *v.* Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209, 26 L. R. A. 743.

This does not apply to coupons more than to notes transferred after maturity. Stern *v.* Germania Nat. Bank, 34 La. Ann. 1119.

42. Rolston *v.* Central Park, etc., R. Co., 20 Misc. (N. Y.) 656, 46 N. Y. Suppl. 383.

43. Philadelphia, etc., R. Co. *v.* Fidelity Ins., etc., Co., 105 Pa. St. 216; Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195; Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562.

44. Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562.

45. Edwards *v.* Bates County, 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155.

46. Fox *v.* Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871; Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362; Philadelphia, etc., R. Co. *v.* Fidelity Ins., etc., Co., 105 Pa. St. 216; Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195. Unless the fund provided by statute for the bonds and coupons makes no provision for such interest. Davis *v.* Sacramento, 82 Cal. 562, 22 Pac. 1118.

47. See *infra*, VII, B, 4.

48. Augusta Bank *v.* Augusta, 49 Me. 507; Jackson *v.* York, etc., R. Co., 48 Me. 147;

negotiable if they refer to the bond and it contains conditions which render it so.[49] Coupons will not carry interest so long as they are attached to the bonds or are held by the holder of the bonds and not negotiated.[50]

f. Letters of Credit. A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement.[51] Such an instrument is in effect a guaranty,[52] or an agreement to accept drafts or bills to be drawn by the payee.[53] They are not in general negotiable except so far as a promise to accept a bill to be drawn follows the bill in the hands of successive holders.[54]

g. Municipal Warrants. Warrants and orders drawn by one municipal officer on another and certificates of indebtedness in payment of municipal debts, although they may be transferable by indorsement or delivery,[55] are not negotiable instru-

Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Enthoven *v.* Hoyle, 13 C. B. 373, 16 Jur. 272, 21 L. J. C. P. 100, 76 E. C. L. 373. Except while attached to the bond. McCoy *v.* Washington County, 3 Wall. Jr. (U. S.) 381, 15 Fed. Cas. No. 8,731, 7 Am. L. Reg. 193, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388. *Compare* Smith *v.* Clark County, 54 Mo. 58.

49. McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 6 Am. St. Rep. 397, 1 L. R. A. 299.

50. Bailey *v.* Buchanan County, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562; Columbus, etc., R. Co.'s Appeals, 109 Fed. 177, 48 C. C. A. 275.

51. 2 Daniel Neg. Instr. [*quoted* in Lafargue *v.* Harrison, 70 Cal. 380, 384, 9 Pac. 259, 11 Pac. 636, 59 Am. Rep. 416.]

Other definitions are: "An open or sealed letter from one merchant in one place, directed to another in another place, requiring him, that if the person therein named or the bearer of the letter shall have occasion to buy commodities or to want moneys, he will procure the same, or pass his promise, bill or other engagement for it, on the writer of the letter undertaking that he will provide him the money for the goods, or repay him by exchange, or give him such satisfaction as he shall require." 3 Chitty Com. Law 336 [*quoted* in Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 630, 4 Duer (N. Y.) 480, 586].

"A letter written by one merchant or correspondent to another, requesting him to credit the bearer with a sum of money." McCulloch Commercial Dict. [*quoted* in Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 630, 4 Duer (N. Y.) 480, 586].

"General" and "special" letters.—"It is called a 'general' letter of credit when it is addressed to all persons in general, requesting such advance to a third, and a 'special' letter of credit when addressed to a particular person by name." 2 Daniel Neg. Instr. 666 [*quoted* in Lafargue *v.* Harrison, 70 Cal. 380, 384, 11 Pac. 636, 59 Am. Rep. 416]. See also Union Bank *v.* Coster, 3 N. Y. 203, 214, 53 Am. Dec. 280 [*affirming* 1 Sandf. (N. Y.) 563]; Birckhead *v.* Brown, 5 Hill (N. Y.) 634, 642 [*quoted* in Roman *v.* Serna, 40 Tex. 306, 316. See also Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204.

52. Birckhead *v.* Brown, 5 Hill (N. Y.) 634 [*affirmed* in 2 Den. (N. Y.) 375]. See also BANKS AND BANKING, 5 Cyc. 522, note 88.

53. Roman *v.* Serna, 40 Tex. 306, holding that letters of credit are special contracts, not negotiable in the full sense of that term or to be construed as actual acceptances of bills or orders drawn under them, but rather as agreements to accept such as may be drawn in good faith, and within the limits of the credit or deposit specified.

54. Agreement for acceptance see *infra*, V, A, 5, a, (II), (A).

55. *California.*—Dana *v.* San Francisco, 19 Cal. 486; People *v.* El Dorado County, 11 Cal. 170.

District of Columbia.— Talty *v.* Freedman's Trust Co., 1 MacArthur (D. C.) 522.

Illinois.— People *v.* Johnson, 100 Ill. 537, 39 Am. Rep. 63 [*distinguishing* Garvin *v.* Wiswell, 83 Ill. 215, where the instrument was put upon the market by the county authorities as a negotiable instrument].

Indiana.— Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184. But see Brownlee *v.* Madison County, 81 Ind. 186 [*followed* in Broyles *v.* Madison County, 83 Ind. 599]; Sheffield School Tp. *v.* Andress, 56 Ind. 157; Floyd County *v.* Day, 19 Ind. 450.

Iowa.— Boardman *v.* Hayne, 29 Iowa 339; Clark *v.* Polk County, 19 Iowa 248.

Kansas.— Garfield Township *v.* Crocker, 63 Kan. 272, 65 Pac. 273.

Louisiana.— State *v.* Dubuclet, 23 La. Ann. 267. But see Guilfont *v.* Ascension Parish, 28 La. Ann. 413.

Maine.— Furgerson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470; Emery *v.* Mariaville, 56 Me. 315; Sturtevant *v.* Liberty, 46 Me. 457. But see Willey *v.* Greenfield, 30 Me. 452 (holding that selectmen may make a town order negotiable in form); Varner *v.* Nobleborough, 2 Me. 121, 11 Am. Dec. 48.

Massachusetts.—Smith *v.* Cheshire, 13 Gray (Mass.) 318.

Michigan.— Miner *v.* Vedder, 66 Mich. 101, 33 N. W. 47; Fox *v.* Shipman, 19 Mich. 218 (school district warrant).

Missouri.— State *v.* Huff, 63 Mo. 288 (school district warrant); Matthis *v.* Cameron, 62 Mo. 504.

ments, especially where the warrant is payable out of a particular designated fund.[56] The assignee may sue in his own name,[57] but the transfer is subject to existing equities.[58] As against the municipality such orders are in effect its promissory notes.[59]

Nebraska.— State *v.* Cook, 43 Nebr. 318, 61 N. W. 693; Burlington, etc., R. Co. *v.* Clay County, 13 Nebr. 367, 13 N. W. 628; Dixon County School Dist. No. 2 *v.* Stough, 4 Nebr. 357 (school district warrant).

New Hampshire.— Eaton *v.* Berlin, 49 N. H. 219.

New Jersey.—Knapp *v.* Hoboken, 39 N. J. L. 394.

New York.— Oatman *v.* Taylor, 29 N. Y. 649; Bull *v.* Sims, 23 N. Y. 570; Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606; Kelley *v.* Brooklyn, 4 Hill (N. Y.) 263.

North Dakota.— Goose River Bank *v.* Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605.

Ohio.— State *v.* Liberty Tp., 22 Ohio St. 144.

Oklahoma.— Crawford *v.* Noble County, 8 Okla. 450, 58 Pac. 616.

Pennsylvania.— Snyder Tp. *v.* Bovaird, 122 Pa. St. 442, 15 Atl. 910, 9 Am. St. Rep. 118; East Union Tp. *v.* Ryan, 86 Pa. St. 459; Northumberland First Nat. Bank *v.* Rush School Dist., *81 Pa. St. 307; Allison *v.* Juniata County, 50 Pa. St. 351; Dyer *v.* Covington Tp., 19 Pa. St. 200; Warner *v.* Com., 1 Pa. St. 154, 44 Am. Dec. 114; O'Donnell *v.* Philadelphia, 2 Brewst. (Pa.) 481. *Contra,* prior to the Pennsylvania act of 1849. Craig *v.* Richmond Dist., 1 Phila. (Pa.) 33, 7 Leg. Int. (Pa.) 26.

Tennessee.— Camp *v.* Knox County, 3 Lea (Tenn.) 199.

Texas.— Stringer *v.* Morris, 82 Tex. 39, 17 S. W. 926; Sonnenthiel *v.* Skinner, 67 Tex. 453, 3 S. W. 686; Lane *v.* Hunt County, 13 Tex. Civ. App. 315, 35 S. W. 10.

Vermont.— Hyde *v.* Franklin County, 27 Vt. 185 [*followed* in Taft *v.* Pittsford, 28 Vt. 286], under statute. *Contra,* Blaisdell *v.* Westmore School Dist. No. 2, 72 Vt. 63, 47 Atl. 173; Dalrymple *v.* Whitingham, 26 Vt. 345.

United States.— Ouachita County *v.* Wolcott, 103 U. S. 559, 26 L. ed. 505; Wall *v.* Monroe County, 103 U. S. 74, 26 L. ed. 430; Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164; Aylesworth *v.* Gratiot County, 43 Fed. 350; Shirk *v.* Pulaski County, 4 Dill. (U. S.) 209, 21 Fed. Cas. No. 12,794, 4 Centr. L. J. 390; Jerome *v.* Rio Grande County, 5 McCrary (U. S.) 639, 18 Fed. 873.

See 7 Cent. Dig. tit. "Bills and Notes," § 386.

56. *California.*— Shakespear *v.* Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327. Or where payable "as ordered by the board of supervisors." Dana *v.* San Francisco, 19 Cal. 486.

Iowa.— Shepherd *v.* Richland Dist. Tp., 22 Iowa 595.

Michigan.— Miner *v.* Vedder, 66 Mich. 101, 33 N. W. 47; Lansing Second Nat. Bank *v.* Lansing, 1 Mich. N. P. 181.

New Hampshire.—Eaton *v.* Berlin, 49 N. H. 219.

New York.— Read *v.* Buffalo, 67 Barb. (N. Y.) 526; Lake *v.* Williamsburgh, 4 Den. (N. Y.) 520.

Pennsylvania.— Dyer *v.* Covington Tp., 19 Pa. St. 200.

West Virginia.— Shinn *v.* Board of Education, 39 W. Va. 497, 20 S. E. 604.

United States.—Bayerque *v.* San Francisco, 1 McAll. (U. S.) 175, 2 Fed. Cas. No. 1,137.

This is not the case where it is payable "out of any funds belonging to the city, not before specially appropriated," and "chargeable to general city funds." Bull *v.* Sims, 23 N. Y. 570.

57. Crawford County *v.* Wilson, 7 Ark. 214; Carnegie *v.* Beattyville, 13 Ky. L. Rep. 431; Dalrymple *v.* Whitingham, 26 Vt. 345; Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264. *Contra,* Fox *v.* Shipman, 19 Mich. 218; Snyder Tp. *v.* Bovaird, 122 Pa. St. 442, 15 Atl. 910, 9 Am. St. Rep. 118; Northumberland First Nat. Bank *v.* Rush School Dist., *81 Pa. St. 307; Hyde *v.* Franklin County, 27 Vt. 185 (under statute).

58. *Indiana.*— Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184.

Iowa.— Boardman *v.* Hayne, 29 Iowa 339.

Michigan.— Miner *v.* Vedder, 66 Mich. 101, 33 N. W. 47.

Missouri.— State *v.* Huff, 63 Mo. 288; Matthis *v.* Cameron, 62 Mo. 504.

Nebraska.— State *v.* Cook, 43 Nebr. 318, 61 N. W. 693.

New Hampshire.—Eaton *v.* Berlin, 49 N. H. 219.

North Dakota.— Goose River Bank *v.* Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605.

Ohio.— State *v.* Liberty Tp., 22 Ohio St. 144.

Oklahoma.— Crawford *v.* Noble County, 8 Okla. 450, 58 Pac. 616.

Texas.— Lane *v.* Hunt County, 13 Tex. Civ. App. 315, 35 S. W. 10.

Washington.—Fidelity Trust Co. *v.* Palmer, 22 Wash. 473, 61 Pac. 158, 79 Am. St. Rep. 953.

United States.— Ouachita County *v.* Wolcott, 103 U. S. 559, 26 L. ed. 505; Wall *v.* Monroe County, 103 U. S. 74, 26 L. ed. 430; Watson *v.* Huron, 97 Fed. 449, 38 C. C. A. 264; Aylesworth *v.* Gratiot County, 43 Fed. 350; Shirk *v.* Pulaski County, 4 Dill (U. S.) 209, 21 Fed. Cas. No. 12,794, 4 Centr. L. J. 390; Jerome *v.* Rio Grande County, 5 McCrary (U. S.) 639, 18 Fed. 873.

59. Floyd County *v.* Day, 19 Ind. 450; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; Bull *v.* Sims, 23 N. Y. 570; Read *v.* Buffalo, 67 Barb. (N. Y.) 526.

h. Warehouse Receipts. Warehouse receipts are in many states made negotiable by statute,[60] while others make them negotiable, unless the words "not negotiable" are marked or stamped thereon.[61] As such they are transferable by[62] or without[63] indorsement and the transfer of the receipt carries the right to the goods;[64] but indorsement in blank is a mere transfer and carries no such indorser's liability as on a bill of exchange.[65]

4. Non-Negotiable Instruments — a. In General. Neither a deposit bank-book,[66] a certificate of stock,[67] nor a receiver's certificate issued by order of the court[68] is a negotiable instrument, and this is true in general of certificates issued as vouchers[69] such as warrants on a state treasurer or commissary or quarter-

The relation of the individuals who execute the order is that of drawer and indorser. Carran *v.* Little, 40 Ohio St. 397.

60. In Oregon at least they are negotiable irrespective of form. State *v.* Koshland, 25 Oreg. 178, 35 Pac. 32. But in Illinois they are not within the statute relating to negotiable instruments (Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281) and the statutes do not apply to receipts executed by a private corporation as security on its own property (Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725; Moors *v.* Jagode, 195 Pa. St. 163, 45 Atl. 723; Tradesmen's Nat. Bank *v.* Thomas Kent Mfg. Co., 186 Pa. St. 556, 40 Atl. 1018, 65 Am. St. Rep. 876), but they have been applied to a United States bonded warehouse (Marks *v.* Bridges, 106 Tenn. 540, 62 S. W. 153).

In the hands of a bona fide holder the warehouseman cannot set up want of authority in his agent to execute the paper (Smith *v.* Capital Elevator Co., (Kan. App. 1899) 58 Pac. 483), fraud on the part of his agent in issuing it (Corn Exch. Bank *v.* American Dock, etc., Co., 14 N. Y. App. Div. 453, 43 N. Y. Suppl. 1028; Fletcher *v.* Great Western Elevator Co., 12 S. D. 643, 82 N. W. 184), or fraud in procurement of it by the payee (Early Times Distilling Co. *v.* Earle, 21 Ky. L. Rep. 1709, 56 S. W. 13).

61. See Commercial Bank *v.* Hurt, 99 Ala. 130, 12 So. 558, 42 Am. St. Rep. 38, 19 L. R. A. 701.

62. Jemison *v.* Birmingham, etc., R. Co., 125 Ala. 378, 28 So. 51; Danforth *v.* McElroy, 121 Ala. 106, 25 So. 840; Toner *v.* Citizens' State Bank, 25 Ind. App. 29, 56 N. E. 731; Erie, etc., Dispatch *v.* St. Louis Cotton Compress Co., 6 Mo. App. 172.

If transferred without indorsement they lose their negotiability. Fourth Nat. Bank *v.* St. Louis Cotton Compress Co., 11 Mo. App. 333.

63. State *v.* Loomis, 27 Minn. 521, 8 N. W. 758. But it is subject to defense if transferred by delivery only. Toner *v.* Citizens' State Bank, 25 Ind. App. 29, 56 N. E. 731.

64. Danforth *v.* McElroy, 121 Ala. 106, 25 So. 840; Allen *v.* Maury, 66 Ala. 10; Toner *v.* Citizens' State Bank, 25 Ind. App. 29, 56 N. E. 731. And with the goods the right to sue the warehouseman for damage to them (Sargent *v.* Central Warehouse Co., 15 Ill. App. 553) and the liability for storage charges (Driggs *v.* Dean, 2 N. Y. App. Div. 124, 37 N. Y. Suppl. 871).

It carries the goods as against a subsequent purchaser of the goods (Dolliff *v.* Robbins, 83 Minn. 498, 86 N. W. 772, 85 Am. St. Rep. 466) or the holder of a prior receipt, which had been withdrawn, but not canceled (Block *v.* Oliver, 102 Ky. 269, 19 Ky. L. Rep. 1278, 43 S. W. 238).

65. Mida *v.* Geissmann, 17 Ill. App. 207.

66. McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 22 Atl. 568, 25 Am. St. Rep. 323, 13 L. R. A. 737; Mills *v.* Albany Exch. Sav. Bank, 28 Misc. (N. Y.) 251, 59 N. Y. Suppl. 149; Howard *v.* Windham County Sav. Bank, 40 Vt. 597. Although the by-laws of the bank made it transferable to order. Witte *v.* Vincenot, 43 Cal. 325.

Its possession constitutes no evidence of a right to draw money thereon (Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653) and the assignee cannot maintain an action on it in his own name against the bank (Howard *v.* Windham County Sav. Bank, 40 Vt. 597).

67. Neither at common law (Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599 [*reversing* 4 Duer (N. Y.) 480]; Towle *v.* American Bldg., etc., Assoc., 75 Fed. 938), under the California code (Barstow *v.* Savage Min. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705), nor under the Negotiable Instruments Law (Cowles *v.* Kiehel, 65 N. Y. Suppl. 349), although it is transferable by delivery under a blank indorsement (Graves *v.* Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665), and a holder under such indorsement may maintain his title as a *bona fide* purchaser as against the real owner (Westinghouse *v.* Germania Nat. Bank, 196 Pa. St. 249, 46 Atl. 380). See as to stock scrip in negotiable form Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194, 46 L. J. Q. B. 346, 36 L. T. Rep. N. S. 240, 25 Wkly. Rep. 366.

68. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. 513.

69. *California.*— D. O. Mills, etc., Nat. Bank *v.* Herold, 74 Cal. 603, 16 Pac. 507, 5 Am. St. Rep. 476, a warrant drawn by the state comptroller on the state treasurer.

Illinois.— Olson *v.* Peterson, 50 Ill. App. 327, a certificate by the superintendent of a building that a person who did work thereon is entitled to a certain sum.

masters' vouchers. A note may be made non-negotiable in express terms or by an indorsement to that effect.[70]

b. Guaranties. A guaranty written on a negotiable note is negotiable in the sense that it inures to the benefit of successive holders;[71] but it is not negotiable in the strict commercial sense, and the assignee takes only the rights of his assignor in the guaranty.[72] It does not become negotiable by being indorsed on a negotiable note.[73] That the guaranty of a note or bill made in a separate instrument will pass by the transfer of the note or bill has been held in England,[74] but American authorities have held to the contrary.[75] A collateral guaranty does not inure to successive holders and is not negotiable.[76]

C. Form and Requisites of Negotiable Instrument — 1. In General — a. Necessity For Writing. Every negotiable instrument must be in writing.[77] It has been held, however, that the writing may be in pencil[78] or lithographed, engraved, or printed.[79]

b. Date — (I) *In General* — (A) *Necessity For* — (1) To Bill or Note — (a) Generally. Neither by the English common law[80] nor by statute in the

Missouri.— Koch *v.* Branch, 44 Mo. 542, 100 Am. Dec. 324, a United States commissary voucher.

Montana.—Creighton *v.* Black, 2 Mont. 354.

New Jersey.— Headly *v.* Vanness, 3 N. J. L. 294, an acknowledgment by one person that he had bought goods of another person, which the former was to settle with the latter's creditors.

Ohio.— Smurr *v.* Forman, 1 Ohio 272, an order drawn by the colonel of a military regiment on the regimental paymaster.

United States.— Lawrence *v.* U. S., 8 Ct. Cl. 252, quartermaster's vouchers.

Contra, as to acknowledgment of a purchaser which was still unpaid and due. Lowe *v.* Murphy, 9 Ga. 338. And certificates issued by the secretary of the treasury under the treaty with Mexico are legally assignable, and possession under a blank indorsement is *prima facie* evidence of right to receive payment. Baldwin *v.* Ely, 9 How. (U. S.) 580, 13 L. ed. 266.

70. By being drawn payable to a named person "only" (Hackney *v.* Jones, 3 Humphr. (Tenn.) 612) or by indorsement that "this note is not transferable" (Freidman *v.* Wagner, 1 Tex. App. Civ. Cas. § 734); but not by the indorsement by a subsequent holder of his personal promise not to transfer it (Leland *v.* Parriott, 35 Iowa 454. See also *supra,* I, A, 3, c, (II)).

71. Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225. See also *infra,* II, B, 4, *a,* (II).

72. See *infra,* II, B, 4, a, (II), note 98.

73. See *infra,* II, B, 4, a, (II), note 97.

74. *In re* Barrington, 2 Sch. & Lef. 112, 9 Rev. Rep. 61.

75. McLaren *v.* Watson, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260; Watson *v.* McLaren, 19 Wend. (N. Y.) 557.

76. Gamwell *v.* Pomeroy, 121 Mass. 207; Weed *v.* Clark, 4 Sandf. (N. Y.) 31; Columbiana Bank *v.* Dixon, Tapp. (Ohio) 327, 1 Ohio Dec. (Reprint) 278; Sandford *v.* Norton, 14 Vt. 228.

77. Thomas *v.* Bishop, 2 Str. 955. And this is expressly required or necessarily implied in the language of the statutes of most of the states. See for example Neg. Instr. L. § 20.

78. Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; Reed *v.* Roark, 14 Tex. 329, 65 Am. Dec. 127; Closson *v.* Stearns, 4 Vt. 11, 23 Am. Dec. 245; Geary *v.* Physic, 5 B. & C. 234, 7 D. & R. 653, 4 L. J. K. B. O. S. 147, 29 Rev. Rep. 225, 11 E. C. L. 442.

To the effect that it is gross negligence to write a note partly in ink with a material condition in pencil see Seibel *v.* Vaughan, 69 Ill. 257; Harvey *v.* Smith, 55 Ill. 224.

79. Pennington *v.* Baehr, 48 Cal. 565; Weston *v.* Myers, 33 Ill. 424; Farmers' Bank *v.* Ewing, 78 Ky. 264, 39 Am. Rep. 231; Zimmerman *v.* Rote, 75 Pa. St. 188.

80. *California.*—Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244.

Illinois.— Archer *v.* Claflin, 31 Ill. 306.

Indiana.— Seldonridge *v.* Connable, 32 Ind. 375.

Kentucky.— Stout *v.* Cloud, 5 Litt. (Ky.) 205.

Massachusetts.— Weld *v.* Eliot Five Cents Sav. Bank, 158 Mass. 339, 33 N. E. 519.

Mississippi.— Dean *v.* De Lezardi, 24 Miss. 424.

New Hampshire.— Pierce *v.* Richardson, 37 N. H. 306.

New Jersey.— Vandeveer *v.* Ogburn, 2 N. J. L. 63.

Tennessee.— State Bank *v.* Funding Bd., 16 Lea (Tenn.) 46.

Texas.— Wexel *v.* Cameron, 31 Tex. 614.

Vermont.— Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

Virginia.— Whiting *v.* Daniel, 1 Hen. & M. (Va.) 390.

England.— Hague *v.* French, 3 B. & P. 173; Giles *v.* Boune, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646; De la Courtier *v.* Bellamy, 2 Show. 422.

But it was pointed out in Mitchell *v.* Culver, 7 Cow. (N. Y.) 336, that a date "is necessary to its free and uninterrupted negotiability."

United States[81] is a date essential to the validity or negotiability of a bill of exchange or promissory note.

(b) LOCAL DATE. It is usual to express a place as well as a time of making by the date, and this is generally required by foreign statutes, but is not required by American statutes,[82] or by the English common law.[83]

(2) TO INDORSEMENT OR ACCEPTANCE. In like manner the common law does not require an express date for an indorsement[84] or, except in the case of bills payable at a specified time after sight, for an acceptance.[85]

(B) *Effect of Date* — (1) IN GENERAL. If, however, the instrument is dated,[86] the date becomes in general a material part of it and an alteration thereof a material alteration,[87] although this may not be so in the case of the

See 7 Cent. Dig. tit. "Bills and Notes," § 42.

By the Bills of Exchange Act, section 3, it is provided that a bill shall not be invalidated by reason of the fact that it is not dated.

By 26 & 27 Vict. c. 105, promissory notes for more than 20s. and less than £5, payable to bearer on demand, must bear date at or before time of issue. This is true also of negotiable bills and drafts, but not of checks on a banker under 7 Geo. IV, c. 6. By 55 Geo. III, c. 184, and 9 Geo. IV, c. 49, checks specifying the place of issue and bearing date on or before the day of issue were exempted from stamp duty.

Printed dates, formerly prohibited in England in case of notes payable to bearer on demand (55 Geo. III, c. 184, § 18), are now allowed (23 & 24 Vict. c. 111, § 19).

81. The Negotiable Instruments Law, section 25, provides that "the validity and negotiable character of an instrument are not affected by the fact that it is not dated" and section 36 provides that "where the instrument is not dated, it will be considered to be dated as of the time it was issued."

By Cal. Civ. Code, § 309, "a negotiable instrument may be with or without date;" and section 3094 provides that "the instrument is not invalidated" by the death or incapacity of the maker at the time of the nominal date.

82. See Neg. Instr. L. § 76.

Effect of local date to save note from effect of usury law at the place of its delivery see Davis *v.* Coleman, 29 N. C. 424.

83. The English statutes (55 Geo. III, c. 184 and 9 Geo. IV, c. 49) required this so far as regarded the exemption of checks from stamp duty, and a false statement of the place avoided the instrument under the statutes. Field *v.* Woods, 7 A. & E. 114, 34 E. C. L. 82, 8 C. & P. 52, 34 E. C. L. 604, 6 Dowl. P. C. 23, 1 Jur. 496, 6 L. J. K. B. 209, 2 N. & P. 117, W. W. & D. 482; Rex *v.* Pooley, 3 B. & P. 311; Bopart *v.* Hicks, 3 Exch. 1; Waters *v.* Brogden, 1 Y. & J. 457. Under this rule "Dorchester Old Bank. Established 1876," printed on a check was held sufficient (Stickland *v.* Mansfield, 8 Q. B. 675, 55 E. C. L. 675), but not the heading "Oxford, Worcester, and Wolverhampton Railway Company" (Ward *v.* Oxford, etc., Co., 2 De G. M. & G. 750, 22 L. J. Ch. 905, 1 Wkly. Rep. 9, 51 Eng. Ch. 588).

84. Sanger *v.* Sumner, 13 Ark. 280.

Presumption arising from date or absence of date see *infra*, XIV, E [8 Cyc.].

85. 1 Parsons Notes & B. 282.

Presumption as to written date.— A written date, although in a different handwriting, is presumptively the accepter's act. Glossop *v.* Jacob, 4 Camph. 227, 1 Stark. 69.

Maturity of bills payable fixed time after sight see *infra*, VII, A, 8.

86. Impossible date.— A note dated the thirty-first of September will be considered as made the thirtieth. Wagner *v.* Kenner, 2 Rob. (La.) 120.

87. *Arkansas.*—Lemay *v.* Williams, 32 Ark. 166.

Indiana.— Hamilton *v.* Wood, 70 Ind. 306.

Maryland.— Lewis *v.* Kramer, 3 Md. 265; Mitchell *v.* Ringgold, 3 Harr. & J. (Md.) 159, 5 Am. Dec. 433.

Missouri.— Owings *v.* Arnot, 33 Mo. 406.

New York.— Crawford *v.* West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152.

Ohio.— Newman *v.* King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705, 35 L. R. A. 471.

Pennsylvania.— Heffner *v.* Wenrich, 32 Pa. St. 423; Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485.

England.— Bathe *v.* Taylor, 15 East 412.

This is especially true where the time of maturity is altered (Hirschman *v.* Budd, L. R. 8 Exch. 171, 42 L. J. Exch. 113, 28 L. T. Rep. N. S. 602, 21 Wkly. Rep. 582; Master *v.* Miller, 4 T. R. 320), although the alteration is material even if the time of maturity be not changed thereby (Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485), and is true even of a *bona fide* holder, and if made after indorsement will discharge the indorser (Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528). An alteration of this sort discharges a surety (Britton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553; Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725), unless made before delivery and authorized by him (Prather *v.* Zulauf, 38 Ind. 155), and the surety will be discharged although the change be but the correction of a mistake in day and year (Miller *v.* Gilleland, 19 Pa. St. 119); but neither drawer nor accepter is discharged by the correction of a mistake before delivery by the agent of both (Brutt *v.* Picard, R. & M. 37, 27 Rev. Rep. 727), and so where the alteration was not a mere correction but was mistakenly supposed by the agent to be within his au-

date of an indorsement,[88] for which, as we have seen, the common law does not require an express date.

(2) NOT DEPENDENT ON POSITION. The position of the date, whether at the beginning or the end of the instrument, is immaterial.[89]

(3) WHERE DATE AND DELIVERY CONFLICT. An instrument takes effect from its delivery and not from its date,[90] and the law of the place of actual delivery governs and not that of the place of date expressed;[91] but if the date and the time of delivery differ, the construction in general follows its express date.[92]

(c) *Effect of Executing in Blank.* The date may be left blank and filled by the holder as in the case of other blanks.[93]

(II) *ANTEDATING AND POSTDATING.* A bill or note[94] may be lawfully antedated or postdated[95] unless such antedating or postdating is done in fraudulent evasion of

thority (Van Brunt *v.* Eoff, 35 Barb. (N. Y.) 501).

88. Griffith *v.* Cox, 1 Overt. (Tenn.) 210.

89. Sheppard *v.* Graves, 14 How. (U. S.) 505, 14 L. ed. 518.

90. *Alabama.*— Flanagan *v.* Meyer, 41 Ala. 132.

Illinois.— King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131.

Maine.— Hilton *v.* Houghton, 35 Me. 143.

Massachusetts.—So a note dated before, but delivered after, a statute making it illegal is void. Bayley *v.* Taber, 5 Mass. 286, 4 Am. Dec. 57.

Missouri.— Fritsch *v.* Heislen, 40 Mo. 555.

New Hampshire.—Smith *v.* Foster, 41 N. H. 215; Pierce *v.* Richardson, 37 N. H. 306; Clough *v.* Davis, 9 N. H. 500.

New York.— Powell *v.* Waters, 8 Cow. (N. Y.) 669; Marvin *v.* McCullum, 20 Johns. (N. Y.) 288; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422.

Vermont.—Chamberlain *v.* Hopps, 8 Vt. 94; Woodford *v.* Dorwin, 3 Vt. 82, 21 Am. Dec. 573, the latter case holding that a partnership note drawn and dated before the dissolution of the firm, but not delivered till after, cannot relate back so as to bind a partner having no share in making or delivering it.

England.— *Ex p.* Hayward, L. R. 6 Ch. 546, 40 L. J. Bankr. 49, 24 L. T. Rep. N. S. 782, 19 Wkly. Rep. 833; Abrey *v.* Crux, L. R. 5 C. P. 42, 39 L. J. C. P. 9, 21 L. T. Rep. N. S. 377, 18 Wkly. Rep. 63; Cox *v.* Troy, 5 B. & Ald. 474, 1 D. & R. 38, 24 Rev. Rep. 460, 7 E. C. L. 260.

See also *infra*, II, D, 2, a, (I); and 7 Cent. Dig. tit. "Bills and Notes," § 105.

Effect of statute passed between date and delivery.— A statute regulating the amount of damages recoverable on bills will not be applied to a bill which was delivered after its passage but dated before. Lennig *v.* Ralston, 23 Pa. St. 137.

Effect of delivery at expiration of nominal life of instrument.— If a note payable six months after date is not delivered till the end of the six months it will be construed as in effect a demand note. Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Date as frequently used can mean only delivery, as where reference is to the date of an undated instrument. Hague *v.* French, 3 B. & P. 173; Giles *v.* Boune, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646; Armitt *v.* Breame, 2 Ld. Raym. 1076; De la Courtier *v.* Bellamy, 2 Show. 422.

Intention may be shown.— Parol evidence is admissible to show that an undated instrument containing no provision on the point was to take effect at a date other than its delivery. Davis *v.* Jones, 17 C. B. 625, 25 L. J. C. P. 91, 4 Wkly. Rep. 248, 84 E. C. L. 625.

Time of delivery is a question of fact for the jury. Hill *v.* Dunham, 7 Gray (Mass.) 543.

91. **Whether the local date is expressed** (Leavenworth Second Nat. Bank *v.* Smoot, 2 MacArthur (D. C.) 371; Hart *v.* Wills, 52 Iowa 56, 2 N. W. 619, 35 Am. Rep. 255; Overton *v.* Bolton, 9 Heisk. (Tenn.) 762, 24 Am. Rep. 367) or not (Evans *v.* Anderson, 78 Ill. 558; Hyde *v.* Goodnow, 3 N. Y. 266). So a bill of exchange is a Pennsylvania contract if drawn and dated in Philadelphia with the intention of making it such, although the day and year are filled in in London where it is sent (Lennig *v.* Ralston, 23 Pa. St. 137), but parol evidence is not admissible to show against a *bona fide* holder for value that a note dated at Boston was delivered in New York where it would be void for usury (Towne *v.* Rice, 122 Mass. 67).

92. Luce *v.* Shoff, 70 Ind. 152; Powell *v.* Waters, 8 Cow. (N. Y.) 669; Bumpass *v.* Timms, 3 Sneed (Tenn.) 459 (where a note was made payable six months after date and postdated a year).

If no date is expressed in a note payable so many days after date the time begins to run from delivery (Richardson *v.* Ellett, 10 Tex. 190), and the date of delivery may be shown by parol evidence (Davis *v.* Jones, 17 C. B. 625, 25 L. J. C. P. 91, 4 Wkly. Rep. 248, 84 E. C. L. 625; Giles *v.* Boune, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646).

93. See *infra*, I, C, 2, b, note 57.

94. **In like manner a check** may be postdated. Bill *v.* Stewart, 156 Mass. 508, 31 N. E. 386; Burns *v.* Kahn, 47 Mo. App. 215; Frazier *v.* Trow's Printing, etc., Co., 24 Hun (N. Y.) 281; Gatty *v.* Fry, 2 Ex. D. 265, 46 L. J. Exch. 605, 36 L. T. Rep. N. S. 182, 25 Wkly. Rep. 305.

95. *Alabama.*—Aldridge *v.* Decatur Branch Bank, 17 Ala. 45.

Indiana.— Luce *v.* Shoff, 70 Ind. 152.

Louisiana.— Union Bethel African M. E. Church *v.* Civil Sheriff, 33 La. Ann. 1461.

a statute,[96] and even the death of one of the parties before the day of its date will not render a postdated bill invalid in the hands of a *bona fide* holder for value.[97]

c. Designation of Parties — (I) *Maker or Drawer* — (A) *In General.* It is necessary to the negotiable character of a promissory note or bill that the name of the maker or drawer be expressed with certainty in it.[98] This is generally effected by his signature subscribed at the end of the note or bill[99] and this is required in nearly all of the United States.[1] The name cannot be stated in the alternative — one or other of several persons named.[2] It may, however, be an assumed name,[3] although such a name has been held not to create liability as an

Maine.— Drake *v.* Rogers, 32 Me. 524.

Maryland.— Gray *v.* Wood, 2 Harr. & J. (Md.) 328.

Massachusetts.— Bayley *v.* Taber, 5 Mass. 286, 4 Am. Dec. 57.

Mississippi.— Dean *v.* De Lezardi, 24 Miss. 424.

New York.—Brewster *v.* McCardell, 8 Wend. (N. Y.) 478.

Pennsylvania.— Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

England.— Forster *v.* Mackreth, L. R. 2 Exch. 163; Bull *v.* O'Sullivan, L. R. 6 Q. B. 209, 40 L. J. Q. B. 141, 24 L. T. Rep. N. S. 130; Emanuel *v.* Robarts, 9 B. & S. 121, 17 L. T. Rep. N. S. 646; Usher *v.* Dauncey, 4 Campb. 97, 15 Rev. Rep. 729; Barker *v.* Sterne, 2 C. L. R. 1020, 9 Exch. 684, 23 L. J. Exch. 201, 2 Wkly. Rep. 418; Pasmore *v.* North, 13 East 517, 12 Rev. Rep. 420.

See also Neg. Instr. L. § 31; Bills Exch. Act, § 13.

96. As where the intention is to evade a prohibitory law prohibiting figures in small bills (Bayley *v.* Taber, 5 Mass. 286, 4 Am. Dec. 57), a statute against usury (Williams *v.* Williams, 15 N. J. L. 255), or stamp duties (Field *v.* Woods, 7 A. & E. 114, 34 E. C. L. 82, 8 C. & P. 52, 34 E. C. L. 604, 6 Dowl. P. C. 23, 1 Jur. 496, 6 L. J. K. B. 209, 2 N. & P. 117, W. W. & D. 482; Serle *v.* Norton, 9 M. & W. 309).

No presumption of fraud.— The antedating of a note will not be presumed to be fraudulent (Ohio L. Ins., etc., Co. *v.* Winn, 4 Md. Ch. 253); and in the absence of fraud proof that it was antedated by mistake is no defense, although it affected the amount of interest to be reckoned on it (Royce *v.* Barnes, 11 Metc. (Mass.) 276).

97. Pasmore *v.* North, 13 East 517, 12 Rev. Rep. 420.

98. One who is not a party cannot in general be held because of his interest in the consideration. Union Nat. Bank *v.* Forstall, 41 La. Ann. 113, 6 So. 32; Keck *v.* Sedalia Brewing Co., 22 Mo. App. 187; Heman *v.* Francisco, 12 Mo. App. 559; Grinnell *v.* Suydam, 3 Sandf. (N. Y.) 132.

99. It may, however, appear in the body of the note (May *v.* Miller, 27 Ala. 515; Tevis *v.* Young, 1 Metc. (Ky.) 197, 71 Am. Dec. 474), although this is unusual and should be avoided.

1. See Neg. Instr. L. §§ 20, 320.

As to necessity of signature see *infra*, I, C, 1, j, (I).

2. Ferris *v.* Bond, 4 B. & Ald. 679, 23 Rev. Rep. 443, 6 E. C. L. 651. And see Wilkinson *v.* Lutwidge, 1 Str. 648.

3. *Illinois.*— Weston *v.* Myers, 33 Ill. 424; Stony Island Hotel Co. *v.* Johnson, 57 Ill. App. 608.

Indiana.— Singer Mfg. Co. *v.* Paul, 48 Ind. 98.

Iowa.— Turner *v.* Potter, 56 Iowa 251, 9 N. W. 208 [*following* U. S. Rolling Stock Co. *v.* Potter, 48 Iowa 56], holding that an individual may adopt or assume the name of a company.

Massachusetts.— Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59.

New York.— Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27, holding that even a corporation may be bound by an assumed or adopted name.

Wisconsin.—Jewett *v.* Whalen, 11 Wis. 124.

See also Neg. Instr. L. § 37; Bills Exch. Act, § 23.

The assumed name may be by the inadvertent omission of the suffix "Jr." (State Bank *v.* Batty, 5 Ill. 200), or it may be a mere misnomer such as "village" for "city" (Cornell University *v.* Maumee, 68 Fed. 418), or "Max Melsheimer & Co." for "Melsheimer & Co." (Melsheimer *v.* Hommel, 15 Colo. 475, 24 Pac. 1079). It may even be signed by matter of description if the promisors can be ascertained, e. g., "Steamboat Ben Lee." Sanders *v.* Anderson, 21 Mo. 402.

A note signed by one without authority in the name of another may be treated as an assumed name and be binding as such on the person who executed it (Grafton Bank *v.* Flanders, 4 N. H. 239), and evidence is admissible to prove the adoption by the real maker of a signature which was not his own (Salomon *v.* Hopkins, 61 Conn. 47, 23 Atl. 716).

Liability of parties.— The maker of a note is liable as maker only where he has used the fictitious name with intent to bind himself or has adopted it for business or other purposes. Otherwise he is liable in a special action on the case but not as maker on the note. Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240. But the drawer of a bill of exchange who uses a fictitious name and procures the discount of the bill has been held to be liable as drawer (Williamson *v.* Johnson, 1 B. & C. 146, 2 D. & R. 281, 1 L. J. K. B. O. S. 65, 25 Rev. Rep. 336, 8 E. C. L. 64), and the accepter of a bill drawn in a fictitious name and payable to the drawer's order makes himself liable as accepter to pay on the or-

accommodation maker, as it received no credit in the transaction;[4] and even initials have been held to be a sufficient signature, although the maker's name may not appear elsewhere on the paper.[5]

(B) *Executors and Administrators.* Executors and administrators make only themselves liable by executing notes in their official name,[6] although the estate which they represent is designated by name,[7] and although the promise in the body of the note is made as executor or administrator.[8] The estate, however,

der of the person who actually drew the bill (Cooper *v.* Meyer, 10 B. & C. 468, 8 L. J. K. B. O. S. 171, 21 E. C. L. 202).

4. Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240.

5. See *infra*, I, C, 1, j, (II).

6. *Alabama.*— Christian *v.* Morris, 50 Ala. 585; Greening *v.* Sheffield, Minor (Ala.) 276.

Georgia.— Hopson *v.* Johnson, 110 Ga. 283, 34 S. E. 848; Harrison *v.* McClelland, 57 Ga. 531. But see Jordan *v.* Brown, 72 Ga. 495, holding that the signature of an administrator, as such, to a note given in payment for corn furnished an estate to sustain live stock belonging thereto is sufficient to indicate that it was for the debt of the estate. Where, however, the note was signed in his individual name a complaint alleging consideration to, and liability of, the estate is demurrable. Lynch *v.* Kirby, 65 Ga. 279.

Indiana.— Cornthwaite *v.* Rockville First Nat. Bank, 57 Ind. 268.

Iowa.— Tryon *v.* Oxley, 3 Greene (Iowa) 289.

Kansas.— Hostetter *v.* Hoke, 17 Kan. 81.

Louisiana.— Livingston *v.* Gaussen, 21 La. Ann. 286, 99 Am. Dec. 731; Gillet *v.* Rachal, 9 Rob. (La.) 276; Russell *v.* Cash, 2 La. 185.

Maine.— White *v.* Thompson, 79 Me. 207, 9 Atl. 118; Walker *v.* Patterson, 36 Me. 273.

Massachusetts.— Plimpton *v.* Goodell, 126 Mass. 119.

Mississippi.— Yerger *v.* Foote, 48 Miss. 62.

Missouri.— But the executor or administrator may show that, as his individual contract, the note was without consideration, and that the payee had agreed to look only to the estate. Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215.

New York.— Jenkins *v.* Phillips, 41 N. Y. App. Div. 389, 58 N. Y. Suppl. 788.

North Carolina.— Kessler *v.* Hall, 64 N. C. 60.

Pennsylvania.— Tassey *v.* Church, 4 Watts & S. (Pa.) 346.

South Carolina.— McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687.

Tennessee.— Boyd *v.* Johnston, 89 Tenn. 284, 14 S. W. 804 (but he may show that the assets received were less than the indebtedness of the decedent, and his liability on the note proportionally reduced unless some other consideration is shown); East Tennessee Iron Mfg. Co. *v.* Gaskell, 2 Lea (Tenn.) 742.

Texas.— Gregory *v.* Leigh, 33 Tex. 813.

United States.— Peter *v.* Beverly, 10 Pet. (U. S.) 532, 9 L. ed. 522.

England.— Child *v.* Monins, 2 B. & B. 460, 5 Moore C. P. 282, 23 Rev. Rep. 513; Gibson *v.* Minet, 2 Bro. P. C. 48, 1 H. Bl. 569, 3 T. R. 481, 1 Rev. Rep. 750; Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24, 61 Eng. Ch. 19; Searle *v.* Waterworth, 6 Dowl. P. C. 684, 2 Jur. 745, 7 L. J. Exch. 202, 4 M. & W. 9; Nelson *v.* Serle, 1 H. & H. 456, 3 Jur. 290, 8 L. J. Exch. 305, 4 M. & W. 795.

See 7 Cent. Dig. tit. "Bills and Notes," § 260.

So of an acceptance (Aspinall *v.* Wake, 10 Bing. 51, 2 L. J. C. P. 227, 3 Moore & S. 423, 25 E. C. L. 33; Ridout *v.* Bristow, 1 Cr. & J. 231, 9 L. J. Exch. O. S. 48, 1 Tyrw. 90; King *v.* Thom, 1 T. R. 487) or of an acceptance by an executor of a draft drawn by a distributee against his distributive share (Wisdom *v.* Becker, 52 Ill. 342; Mills *v.* Kuykendall, 2 Blackf. (Ind.) 47; Schmittler *v.* Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737 [*reversing* 25 Hun (N. Y.) 76]).

A fortiori where no descriptive words are added a decedent's estate is not bound by a note signed by the executor without any words indicating his representative character. Martin *v.* Fitch, 65 Ind. 216. If, however, the instrument is for the benefit of the estate the maker may have reimbursement (Peter *v.* Beverly, 10 Pet. (U. S.) 532, 9 L. ed. 522), and in Louisiana in such a case the executor may exonerate himself and charge the estate (Livingston *v.* Gaussen, 21 La. Ann. 286, 99 Am. Dec. 731).

Such executor will not become liable individually where he is personally incapable, as an infant or otherwise, of becoming liable by his contracts as an individual.

Alabama.— Kirkman *v.* Benham, 28 Ala. 501.

Georgia.— Poole *v.* Hines, 52 Ga. 500.

Missouri.— Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215.

Tennessee.— Erwin *v.* Carroll, 1 Yerg. (Tenn.) 145.

Virginia.— Snead *v.* Coleman, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

England.— Bradley *v.* Heath, 3 Sim. 543, 30 Rev. Rep. 217, 6 Eng. Ch. 543.

7. *Alabama.*— Christian *v.* Morris, 50 Ala. 585.

Florida.— Higgins *v.* Driggs, 21 Fla. 103.

Georgia.— McFarlin *v.* Stinson, 56 Ga. 396; Lovelace *v.* Smith, 39 Ga. 130.

Iowa.— Winter *v.* Hite, 3 Iowa 142.

Maryland.— Curtis *v.* Somerset Bank, 7 Harr. & J. (Md.) 25.

Tennessee.— East Tennessee Iron Mfg. Co. *v.* Gaskell, 2 Lea (Tenn.) 742.

England.— Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24, 61 Eng. Ch. 19.

8. *Missouri.*— Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101.

Tennessee.— East Tennessee Iron Mfg. Co. *v.* Gaskell, 2 Lea (Tenn.) 742.

may be made liable without personal liability on the part of the executor or administrator by using proper words to that effect.[9]

(c) *Guardians.* In like manner the note of a guardian will bind only himself individually,[10] even though he makes his promise as guardian.[11]

(d) *Partnerships.* Where the note is made by a partnership, its firm-name should be used, and when it is used the paper is *prima facie* the note of the partnership.[12] Otherwise the name must substantially describe the firm in order to be binding upon its members.[13] A firm may, however, like an individual maker, use an assumed name and be bound by it,[14] or it may use the joint names of the several partners,[15] and this is the usual form of execution for joint mak-

Texas.— Gregory *v.* Leigh, 33 Tex. 813.

England.— Childs *v.* Monins, 2 B. & B. 460, 5 Moore C. P. 282, 23 Rev. Rep. 513; Ashby *v.* Ashby, 7 B. & C. 444, 14 E. C. L. 202.

Canada.— Kerr *v.* Parsons, 11 U. C. C. P. 513.

Contra, Davis *v.* French, 20 Me. 21, 37 Am. Dec. 36; Steele *v.* McDowell, 9 Sm. & M. (Miss.) 193. And in Alabama under statute the rule is different if the note is made for a debt of the estate and under a statutory order of the probate court. McCalley *v.* Wilburn, 77 Ala. 549.

9. As by stipulating for payment out of the estate only (Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101) or by providing that it shall not bind the maker individually (Grafton Nat. Bank *v.* Wing, 172 Mass. 513, 52 N. E. 1067, 70 Am. St. Rep. 303, 43 L. R. A. 831; Morehead Banking Co. *v.* Morehead, 116 N. C. 413, 21 S. E. 191).

10. *Georgia.*— Poole *v.* Wilkinson, 42 Ga. 539.

Louisiana.— Lapeyre *v.* Weeks, 28 La. Ann. 664; Coons *v.* Kendall, 27 La. Ann. 443. But the ward's estate is bound by a note authorized by the probate court and signed, "P. F. Kendall, tutor." Coons *v.* Kendall, 27 La. Ann. 443.

Mississippi.— Robertson *v.* Banks, 1 Sm. & M. (Miss.) 666.

Tennessee.— Carter *v.* Wolfe, 1 Heisk. (Tenn.) 694.

Texas.— Gibson *v.* Irby, 17 Tex. 173.

The fact that the guardian has been discharged, and cannot look for reimbursement does not affect the liability. Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61.

11. Forster *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87.

12. *Indiana.*— Ensminger *v.* Marvin, 5 Blackf. (Ind.) 210.

Kansas.— Adams *v.* Ruggles, 17 Kan. 237.

Kentucky.— Hamilton *v.* Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509.

Maryland.— Manning *v.* Hays, 6 Md. 5; Thurston *v.* Lloyd, 4 Md. 283.

Michigan.— Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192.

New York.— National Union Bank *v.* Landon, 66 Barb. (N. Y.) 189; Whitaker *v.* Brown, 16 Wend. (N. Y.) 505.

Pennsylvania.— Mifflin *v.* Smith, 17 Serg. & R. (Pa.) 165. So as to indorsements. Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435.

13. Sufficient description.—"Proprietors of the Union Bank" instead of "the Union Bank." Forbes *v.* Marshall, 11 Exch. 166, 24 L. J. Exch. 305, 4 Wkly. Rep. 480. So an indorsement, "Elwyn & Co." has been held to be binding on the two persons who were partners trading in the name of "Elwyn & Co." Drake *v.* Elwyn, 1 Cai. (N. Y.) 184.

Insufficient description.—"W. B. Seawell" for "W. B. Seawell & Co." Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476. "Newcastle Coal Company" for the "Newcastle and Sunderland Wall's End Coal Company." Faith *v.* Richmond, 11 A. & E. 339, 9 L. J. Q. B. 97, 3 P. & D. 187, 39 E. C. L. 197. "Habgood & Fowler" instead of "Habgood & Co." Williamson *v.* Johnson, 1 B. & C. 146, 2 D. & R. 281, 1 L. J. K. B. O. S. 65, 25 Rev. Rep. 336, 8 E. C. L. 64, the former name being also used by the firm for some purposes. "John Blurton & Co." for "John Blurton." Kirk *v.* Blurton, 12 L. J. Exch. 117, 9 M. & W. 284.

Where one seal is added it will *prima facie* bind only the partner who executed it, as against a surety, even, who supposed he was signing as surety for the firm. Harter *v.* Moore, 5 Blackf. (Ind.) 367.

14. Melsheimer *v.* Hommel, 15 Colo. 475, 24 Pac. 1079; Markham *v.* Hazen, 48 Ga. 570 (where a firm was formed to publish a paper called "The Opinion," and it was held that the firm was liable on an acceptance given by one partner "For the Opinion newspaper" for goods afterward used by the firm); Moffat *v.* McKissick, 8 Baxt. (Tenn.) 517; Thicknesse *v.* Bromilow, 2 Cr. & J. 425.

Where there is no firm and a firm-name is used by one person in a joint transaction with the knowledge of the other it will bind both. Smith *v.* Hill, 45 Vt. 90, 12 Am. Rep. 189.

15. *Connecticut.*— Filley *v.* Phelps, 18 Conn. 294.

Kentucky.— National Exch. Bank *v.* Wilgus, 95 Ky. 309, 15 Ky. L. Rep. 763, 25 S. W. 2.

Massachusetts.— Trowbridge *v.* Cushman, 24 Pick. (Mass.) 310.

Ohio.— Meier *v.* Cardington First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907.

United States.— *In re* Warren, 2 Ware (U. S.) 322, 29 Fed. Cas. No. 17,191, 5 N. Y. Leg. Obs. 327.

England.— Maclae *v.* Sutherland, 3 E. & B. 1, 77 E. C. L. 1.

Effect of having firm-name.— This is true

ers who are not partners.[16] The partnership may also assume and use the name of an individual partner as the firm-name, and will be bound in such case by a note for its benefit in that name,[17] but the inconvenience of this practice is obvious and such paper will be presumed to be that of the individual and not that of the firm,[18] unless it is shown to have been adopted as the firm-name;[19] and even where the individual name is not the firm-name a partner may use it in ways that will bind the firm,[20] although in general a note which is executed in the name of an individual partner will not bind the firm.[21]

even after the adoption and publication of a firm-name (Norton *v.* Seymour, 3 C. B. 792, 11 Jur. 312, 16 L. J. C. P. 100, 54 E. C. L. 792), and *a fortiori* before adoption of such a name (Kitner *v.* Whitlock, 88 Ill. 513). On the other hand such an instrument has been held not *prima facie* firm paper (Gay *v.* Johnson, 45 N. H. 587; Richardson *v.* Huggins, 23 N. H. 106), unless the firm is shown to have no firm-name (McGregor *v.* Cleveland, 5 Wend. (N. Y.) 475).

16. Waite *v.* Foster, 33 Me. 424.

17. Bentley *v.* Clark, 3 Dana (Ky.) 564; Kinsman *v.* Dallam, 5 T. B. Mon. (Ky.) 382; South Carolina Bank *v.* Case, 8 B. & C. 427, 6 L. J. K. B. O. S. 364, 2 M. & R. 459, 15 E. C. L. 213; Smith *v.* Craven, 1 Cr. & J. 500, 9 L. J. Exch. O. S. 174, 1 Tyrw. 308; Wintle *v.* Crowther, 1 Cr. & J. 316, 9 L. J. Exch. O. S. 65, 1 Tyrw. 210. So four partners can use a firm-name including only the individual names of two partners. Voorhees *v.* Jones, 29 N. J. L. 270.

Must be given and received as firm note.— In order to make a note signed in the individual name of one of the partners binding upon the firm, it must be made to appear affirmatively that it was given and received as a firm note, binding upon all the partners (Hubbell *v.* Woolf, 15 Ind. 204; U. S. Bank *v.* Binney, 5 Mason (U. S.) 176, 28 Fed. Cas. No. 16,791), and where money is obtained on one partner's note the mere fact that it is applied to firm purposes does not make it a partnership note (Graeff *v.* Hitchman, 5 Watts (Pa.) 545).

Name for special purpose.— Where the name of one partner is used only for the bank account of the firm, the firm will be liable on a check drawn by him on the firm business (Crocker *v.* Colwell, 46 N. Y. 212) and on a note made in the partnership business (Buckner *v.* Lee, 8 Ga. 285), especially if supported by admissions of the other partner (Seekell *v.* Fletcher, 53 Iowa 330, 5 N. W. 200; Brannon *v.* Hursell, 112 Mass. 63); and the death of the partner in whose name the business was transacted and the note given will not relieve the surviving dormant partner from liability to an indorsee (Scott *v.* Colmesnil, 7 J. J. Marsh. (Ky.) 416. And see *In re* Warren, 2 Ware (U. S.) 322, 29 Fed. Cas. No. 17,191, 5 N. Y. Leg. Obs. 327).

18. *Maine.*— Mercantile Bank *v.* Cox, 38 Me. 500.

Massachusetts.—Manufacturers', etc., Bank *v.* Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369.

New York.— Chemung Nat. Bank *v.* Ingraham, 58 Barb. (N. Y.) 290; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

Ohio.—Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Wkly. L. Gaz. 188.

United States.— Nicholson *v.* Patton, 2 Cranch C. C. (U. S.) 164, 18 Fed. Cas. No. 10,250.

England.— Furze *v.* Sharwood, 2 Q. B. 388, 2 G. & D. 116, 6 Jur. 554, 11 L. J. Q. B. 119, 42 E. C. L. 726; *Ex p.* Bolitho, Buck. 100; Wintle *v.* Crowther, 1 Cr. & J. 316, 9 L. J. Exch. O. S. 65, 1 Tyrw. 210.

But partnership liability was presumed where the individual partner had no separate business. Yorkshire Banking Co. *v.* Beatson, 5 C. P. D. 109, 49 L. J. C. P. 380, 42 L. T. Rep. N. S. 455, 28 Wkly. Rep. 879 [*affirming* 4 C. P. D. 204, where, however, the note was shown to have been given by authority of the firm and in its business].

19. Palmer *v.* Stephens, 1 Den. (N. Y.) 471.

If such individual name is used by the firm and a bill is drawn in that name, and accepted by the partner in his individual name and both partners become bankrupt, their separate estates will be liable individually to a holder without notice. *Ex p.* Husband, 2 Glyn. & J. 4, 5 Madd. 419.

20. As by drawing in his individual name on the firm for a firm debt (Dougal *v.* Cowles, 5 Day (Conn.) 511) or by accepting, in his own name, a bill drawn on the firm (Pannell *v.* Phillips, 55 Ga. 618; Tolman *v.* Hanrahan, 44 Wis. 133; Mason *v.* Rumsey, 1 Campb. 384; Stephens *v.* Reynolds, 2 F. & F. 147, 5 H. & N. 513, 29 L. J. Exch. 278, 2 L. T. Rep. N. S. 222; Jenkins *v.* Morris, 16 M. & W. 877. *Contra*, Heenan *v.* Nash, 8 Minn. 407, 83 Am. Dec. 790, holding that there is no liability of individual or firm on such an acceptance. But the firm may be held liable for the money had and received by its authority and to its use. Denton *v.* Rodie, 3 Campb. 493, 14 Rev. Rep. 823. See, however, Emly *v.* Lye, 15 East 7, 13 Rev. Rep. 347).

21. Bank of Commerce *v.* Selden, 3 Minn. 155; Siffkin *v.* Walker, 2 Campb. 308, 11 Rev. Rep. 715; *In re* Adansonia Fibre Co., 9 Ch. App. 635; Smith *v.* Craven, 1 Cr. & J. 500, 9 L. J. Exch. O. S. 174, 1 Tyrw. 308; Emly *v.* Lye, 15 East 7, 13 Rev. Rep. 347; Nicholson *v.* Ricketts, 2 E. & E. 497, 6 Jur. N. S. 422, 29 L. J. Q. B. 55, 1 L. T. Rep. N. S. 544, 8 Wkly. Rep. 211, 105 E. C. L. 497. Especially where the instrument was drawn in violation of an express agreement between the part-

(E) *Principal and Agent* — (1) NECESSITY FOR DISCLOSING NAMES. Where the maker of a note executes it by his agent, it is not necessary that the agent's name[22] or authority to act[23] should appear; but the principal's name should appear, and if it does not the agent is individually liable as maker,[24] although the payee knows him to be acting merely as agent[25] and the name of the principal was disclosed,[26] although the instrument was given in the principal's business

ners. Granby Min., etc., Co. *v.* Laverty, 159 Pa. St. 287, 28 Atl. 207.

A joint business of several firms will not make bills drawn in the business by either firm the joint obligation of all. *In re* Adansonia Fibre Co., 9 Ch. App. 635.

An agent, although authorized to make notes for the firm, cannot, by a note in the name of one partner, bind either the firm or the individual, unless the firm adopts such name. Palmer *v.* Stephens, 1 Den. (N. Y.) 471.

Effect of benefit to partnership.— The firm is not liable on the note, by reason merely of its liability for the debts for which it was given (Ontario Bank *v.* Hennessey, 48 N. Y. 545), because the bill is expressly drawn "on account of" the firm (Cunningham *v.* Smithson, 12 Leigh (Va.) 32), or because the proceeds go to the firm or are applied to pay its debts (McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68; Logan *v.* Bond, 13 Ga. 192; Macklin *v.* Crutcher, 6 Bush (Ky.) 401, 99 Am. Dec. 680 [*overruling* Hikes *v.* Crawford, 4 Bush (Ky.) 19]; Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Tallmadge *v.* Penoyer, 35 Barb. (N. Y.) 120; Holmes *v.* Burton, 9 Vt. 252, 31 Am. Dec. 621).

Intention governs.— Whether the liability is that of the firm or of the individual is often a question of intention. Smith *v.* Turner, 9 Bush (Ky.) 417. This may appear by subsequent consent of the partners (Carter *v.* Mitchell, 94 Ky. 261, 15 Ky. L. Rep. 53, 22 S. W. 83) or by their use of the proceeds (Whitaker *v.* Brown, 16 Wend. (N. Y.) 505), but only where credit was given the firm and the benefit received by it (Salem Nat. Bank *v.* Thomas, 47 N. Y. 15; Puckett *v.* Stokes, 2 Baxt. (Tenn.) 442). Thus where one partner, representing that he was acting for the partnership, gave a note for goods sold to both, both were held liable. Seekell *v.* Fletcher, 53 Iowa 330, 5 N. W. 200; Woodward *v.* Winship, 12 Pick. (Mass.) 430; Ontario Bank *v.* Hennessey, 48 N. Y. 545. Frequently the intention not to hold the firm is apparent, as where a partnership debt is paid by the note of an individual partner secured by outside collateral (Adams *v.* Reid, 56 Ga. 214), and this intention may be presumed, if there is neither credit given to the firm nor benefit received by it (Foster *v.* Hall, 4 Humphr. (Tenn.) 346).

Where an individual uses his individual name and also an assumed partnership name and contracts debts in both capacities his assets will be distributed *pro rata*. McDermott *v.* Halleck, 61 Kan. 486, 59 Pac. 1074.

22. Rock Island First Nat. Bank *v.* Loyhed, 28 Minn. 396, 10 N. W. 421; Youngs *v.* Perry, 42 N. Y. App. Div. 247, 59 N. Y. Suppl. 19.

23. Bettis *v.* Bristol, 56 Iowa 41, 8 N. W. 808; Neaves *v.* North State Min. Co., 90 N. C. 412, 47 Am. Rep. 529. See also Neg. Instr. L. § 38.

24. *Georgia.*— Graham *v.* Campbell, 56 Ga. 258.

Maine.— Hancock *v.* Fairfield, 30 Me. 299; Snow *v.* Goodrich, 14 Me. 235.

Massachusetts.— Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Minnesota.— Bass *v.* Randall, 1 Minn. 404.

Nebraska.— Webster *v.* Wray, 19 Nebr. 558, 27 N. W. 644, 56 Am. Rep. 754 [*overruling* 17 Nebr. 579, 24 N. W. 207].

New York.— Snelling *v.* Howard, 51 N. Y. 373 [*affirming* 7 Rob. (N. Y.) 400]; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

Virginia.— Hopkins *v.* Blane, 1 Call (Va.) 361.

England.—Alexander *v.* Sizer, L. R. 4 Exch. 102; Sowerby *v.* Butcher, 2 Cr. & M. 368, 3 L. J. Exch. 80, 4 Tyrw. 320; Leadbitter *v.* Farrow, 5 M. & S. 345, 17 Rev. Rep. 345.

Canada.— Hamilton *v.* Jones, 10 Quebec Super. Ct. 496.

See also Neg. Instr. L. § 39; Bills Exch. Act, § 26.

It must clearly appear from the instrument, not only that the party is agent but that he means to act for and bind his principal, and not to draw, accept, or indorse the bill on his own account or he will be deemed to have contracted in his personal capacity. Sydnor *v.* Hurd, 8 Tex. 98. Nothing can be looked to but the instrument itself. Knott *v.* Venable, 42 Ala. 186.

25. French *v.* Price, 24 Pick. (Mass.) 13; Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; Goupy *v.* Harden, Holt 342, 3 E. C. L. 139, 2 Marsh. 454, 7 Taunt. 159, 2 E. C. L. 306, 17 Rev. Rep. 478. *Contra,* Hicks *v.* Hinde, 9 Barb. (N. Y.) 528, 6 How. Pr. (N. Y.) 1.

26. Andrews *v.* Allen, 4 Harr. (Del.) 452; Bedford Commercial Ins. Co. *v.* Covell, 8 Metc. (Mass.) 442; Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612; Arnold *v.* Sprague, 34 Vt. 402. *Contra,* in Louisiana. Milligan *v.* Lyle, 24 La. Ann. 144. And see Roberts *v.* Austin, 5 Whart. (Pa.) 313 (where the drawer acted as agent for the drawee, in his individual name, with knowledge of the payee); Lockwood *v.* Coley, 22 Fed. 192 [*following* Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665] (where the principal was known and recognized as such in the execution of the note,

and the consideration was beneficial to him,[27] notwithstanding a direction in the instrument to charge to the principal's account,[28] and although the agent was authorized by the principal[29] and the principal is not liable on the paper,[30] notwithstanding the agent acted by authority[31] although he may be bound by ratification.[32]

(2) How Principal Disclosed — (a) By Benefit Derived. The fact that the consideration for the paper was some benefit to the principal is not sufficient of itself to control the ordinary conclusion from the signature of the agent and make the bill or note the obligation of the principal;[33] but an expression to that effect on the face of the bill or note, being some indication of the intention of the parties, is often held to be sufficient to make it the note or bill of the principal.[34]

and authorized the agent to sign notes in that way in the course of the principal's business).

27. Crum *v.* Boyd, 9 Ind. 289; Snow *v.* Goodrich, 14 Me. 235; Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347.

28. Snow *v.* Goodrich, 14 Me. 235; Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45; Bass *v.* O'Brien, 12 Gray (Mass.) 477; Bank of British North America *v.* Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390; Mayhew *v.* Prince, 11 Mass. 54; Goupy *v.* Harden, Holt 342, 3 E. C. L. 139, 2 Marsh. 454, 7 Taunt. 159, 2 E. C. L. 306, 17 Rev. Rep. 306; Leadbitter *v.* Farrow, 5 M. & S. 345, 17 Rev. Rep. 345. But see Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68 [*disapproving* Tannatt *v.* Rocky Mountain Nat. Bank, 1 Colo. 278, 9 Am. Rep. 156]; Maher *v.* Overton, 9 La. 115.

29. Snow *v.* Goodrich, 14 Me. 235; Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347. *Contra,* if he signed as agent, under authority. Cape Fear Bank *v.* Wright, 48 N. C. 376.

Subsequent ratification by the principal does not relieve the agent. Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409.

30. Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150; Bolles *v.* Walton, 2 E. D. Smith (N. Y.) 164; New York State Banking Co. *v.* Van Antwerp, 23 Misc. (N. Y.) 38, 51 N. Y. Suppl. 653; Ezell *v.* Edwards, 2 Tex. App. Civ. Cas. § 767; Bult *v.* Morrell, 12 A. & E. 745, 40 E. C. L. 369; Ducarry *v.* Gill, 4 C. & P. 121, 19 E. C. L. 436.

The principal is liable for goods purchased for him by his authority for which the note is given, although he does not authorize the note (Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Sauer *v.* Brinker, 77 Mo. 289; Ruffin *v.* Mebane, 41 N. C. 507; Harper *v.* Tiffin Nat. Bank, 54 Ohio St. 425, 44 N. E. 97); and in Indiana on the note itself (Second Baptist Church *v.* Furber, 109 Ind. 492, 10 N. E. 118).

31. Thurston *v.* Mauro, 1 Greene (Iowa) 231; Brown *v.* Parker, 7 Allen (Mass.) 337. *Contra,* Rope *v.* Van Wagner, 3 N. Y. St. 156, where the note was given in the principal's business. And although a resolution of a corporation, authorizing defendants to make the note in the name of, and as the note of, the corporation, was attached to the note. San Bernardino Nat. Bank *v.* Andreson, (Cal. 1893) 32 Pac. 168.

32. Paul *v.* Berry, 78 Ill. 158; Walter *v.* School Trustees, 12 Ill. 63; Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430; Dow *v.* Spenny, 29 Mo. 386.

33. The cases holding the principal liable have involved some other circumstance indicating an intent to bind the principal, e. g., the official title of the agent following his signature (Johnson *v.* Smith, 21 Conn. 627; Thompson *v.* Tioga R. Co., 36 Barb. (N. Y.) 79; Markley *v.* Quay, 14 Phila. (Pa.) 164, 37 Leg. Int. (Pa.) 14) or the agent's character as a public official (Monticello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139; Great Falls Bank *v.* Farmington, 41 N. H. 32). So where the receiver accepted a draft drawn on him as such for the corporation business. Orpherts *v.* Smith, 62 N. Y. Suppl. 409. In several cases the agent's name has been held to have been adopted for business purposes by the principal (Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27; Davenport *v.* West Virginia Oil, etc., Co., 17 W. Va. 135; Lockwood *v.* Coley, 22 Fed. 192), or recognized by a long course of procedure (Mead *v.* Keeler, 24 Barb. (N. Y.) 20; Hailey First Nat. Bank *v.* G. V. B. Min. Co., 89 Fed. 439) or by its conduct in the particular transaction (McGarry *v.* Tanner, etc., Co., 21 Utah 16, 59 Pac. 93). And in Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59, the principal had estopped himself by conduct which deceived the payee as to the real character of the paper.

34. *California.*—Haskell *v.* Cornish, 13 Cal. 45.

Indiana.— McHenry *v.* Duffield, 7 Blackf. (Ind.) 41. *A fortiori* in the case of a note by a public officer. Sheffield School Tp. *v.* Andress, 56 Ind. 157, township trustee.

Kentucky.— Carson *v.* Lucas, 13 B. Mon. (Ky.) 213.

Massachusetts.— Chipman *v.* Foster, 119 Mass. 189.

Michigan.— Bailey *v.* Tompkins, 127 Mich. 74, 86 N. W. 400.

Missouri.— Klostermann *v.* Loos, 58 Mo. 290; McClellan *v.* Reynolds, 49 Mo. 312; Tutt *v.* Hobbs, 17 Mo. 486, the last case holding the rule applicable both to private agents and public officers.

New Hampshire.— Dow *v.* Moore, 47 N. H. 419.

New York.— Horton *v.* Garrison, 23 Barb. (N. Y.) 176.

South Carolina.— Ligon *v.* Irvine, 1 Rich. (S. C.) 502.

This is not always the case, however, and in many such instances the agent is held to be bound personally.[35]

(b) By Form of Promise. If the promise is made in the body of the note in the principal's name it is his note, whether the agent's signature discloses the principal's name[36] or not,[37] but it is not enough that the principal's name appear in the agent's official title, even though this is in the instrument itself.[38] If the

Virginia.— Richmond, etc., R. Co. *v.* Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670, where parol evidence was admitted to show the intention.

35. *Arkansas.*—Anderson *v.* Pearce, 36 Ark. 293, 38 Am. Rep. 39.

Georgia.— Cleaveland *v.* Stewart, 3 Ga. 283.

Indiana.—Wiley *v.* Shank, 4 Blackf. (Ind.) 420.

Maine.— Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68. Especially where the agent, a town treasurer, had no authority to bind the principal. Ross *v.* Brown, 74 Me. 352.

Massachusetts.— Haverhill Mut. F. Ins. Co. *v.* Newhall, 1 Allen (Mass.) 130.

36. Millard *v.* St. Francis Xavier Female Academy, 8 Ill. App. 341; Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515; Armstrong *v.* Kirkpatrick, 79 Ind. 527; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Whitney *v.* Stow, 111 Mass. 368; Jefts *v.* York, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392, 50 Am. Dec. 791.

Principal liable.— In the following cases the principal was held to be liable: "The President and Directors of the Woodstock Glass Co. promise" signed "Whitfield Hicks President" (Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. See also Yowell *v.* Dodd, 3 Bush (Ky.) 581, 96 Am. Dec. 256) especially if executed under the corporate seal (Pitman *v.* Kintner, 5 Blackf. (Ind.) 250, 33 Am. Dec. 461). "We, the subscribers for the Carmel Cheese Manufacturing Co., promise," etc., signed with the individual names of the directors, and given for a corporation purpose and by its authority. Simpson *v.* Garland, 72 Me. 40, 39 Am. Rep. 297. "I promise to pay, as president of the Transit Oil and Mining Company," etc., and signed "A. B. Snyder, President of the Transit Oil and Mining Co." and delivered to plaintiff, who knew of defendant's agency, and that, in making the note, he intended to charge only the company. Randall *v.* Snyder, 1 Lans. (N. Y.) 163. "We, the undersigned directors of school district No. 4," etc., signed with the names only. Baker *v.* Chambles, 4 Greene (Iowa) 428. "We the undersigned committee for the" district, signed "Richard Estes, . . . Committee." Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521. "I, C. W. Larramore, director of sub-district," etc., signed "C. W. Larramore, Director." McGee *v.* Larramore, 50 Mo. 425. "We, as trustees of School District No. 10," etc. Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502. *Contra*, a bond describing the obligor both in instrument and signature as "Trustee of Columbus township." Hobbs *v.* Cowden, 20 Ind. 310.

37. *Alabama.*— Wagner *v.* Brinkerhoff, 123 Ala. 516, 26 So. 117.

Arkansas.— Hite *v.* Kendall, 2 Ark. 338.

California.— Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64; Hall *v.* Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75; Shaver *v.* Ocean Min. Co., 21 Cal. 45.

Indiana.— Akron Second Nat. Bank *v.* Midland Steel Co., 155 Ind. 581, 58 N. E. 833; Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515 (reciting consideration to principal).

Kentucky.— Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171.

Massachusetts.—Whitney *v.* Stow, 111 Mass. 368; Ellis *v.* Pulsifer, 4 Allen (Mass.) 165.

New Hampshire.— Moor *v.* Wilson, 26 N. H. 332.

New Jersey.— Shotwell *v.* McKown, 5 N. J. L. 973.

New York.— Utica Bank *v.* Magher, 18 Johns. (N. Y.) 341.

Pennsylvania.— Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126.

Contra, in Iowa (Day *v.* Ramsdell, 90 Iowa 731, 52 N. W. 208, 57 N. W. 630), although the corporate seal be used (Tama Water Power Co. *v.* Ramsdell, 90 Iowa 747, 52 N. W. 209, 57 N. W. 631).

See 7 Cent. Dig. tit. "Bills and Notes," § 261.

All the members of a voluntary association are liable on a note, "The Machias Mining Co. promise," etc., signed "John Chandler, . . . Directors." McGreary *v.* Chandler, 58 Me. 537. See also Walker *v.* Wait, 50 Vt. 668.

Extrinsic evidence.— A note in the name of the corporation signed "B. Frankland, Gen. Sup't" may charge either as maker on extrinsic evidence. Frankland *v.* Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234.

38. Agent individually liable.— In the following cases the agents were held to be liable personally on their contract: Where the promise ran "We, the trustees," etc., "promise," or the like, and the instrument was signed by the trustees or agents individually (Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71; McKensey *v.* Edwards, 88 Ky. 272, 10 Ky. L. Rep. 854, 10 S. W. 815, 21 Am. St. Rep. 339, 3 L. R. A. 397; Pack *v.* White, 78 Ky. 243; Moffett *v.* Hampton, 17 Ky. L. Rep. 534, 31 S. W. 881; Fogg *v.* Virgin, 19 Me. 352, 36 Am. Dec. 757; Bank of British North America *v.* Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390 [principal indicated in body by request to charge to his account]; Packard *v.* Nye, 2 Metc. (Mass.) 47; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Traynham *v.* Jack-

promise is made "on behalf of" the principal, it will have in general the same effect as if made in the principal's name,[39] especially if the note also indicates that the consideration inured to the principal,[40] and of the same force is a note "on account of,"[41] "for the use of,"[42] or by the "authority of"[43] the principal. To make the promise as agent will not ordinarily relieve the agent and charge the principal, in the absence of other determining features.[44] Nor is the distinc-

son, 15 Tex. 170, 65 Am. Dec. 152, the last case holding parol evidence admissible *contra*), even where the instrument recited a consideration to the principal (Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68) or where it was sealed with the seal of the corporation principal (Dutton *v.* Marsh, L. R. 6 Q. B. 361, 40 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754). Where the promise was in similar form and the instrument signed, "A. H. Briggs, . . . Trustees" (Powers *v.* Briggs, 79 Ill. 493, 22 Am. Rep. 175; Vliet *v.* Simanton, 63 N. J. L. 458, 43 Atl. 738, 61 N. J. L. 595, 40 Atl. 595. The contrary was held as to a note, I, "G. L. C., treasurer of the Dorchester Turnpike Corporation, promised," etc., signed, "Gardner L. Chandler, treasurer of the Dorchester Turnpike Corporation." Mann *v.* Chandler, 9 Mass. 335. This case, although never expressly overruled, is discredited in Barlow *v.* Lee Cong. Soc., 8 Allen (Mass.) 460) or signed "John W. Graham, . . . Trustees of the M. E. Church" (Mears *v.* Graham, 8 Blackf. (Ind.) 144; McClure *v.* Bennett, 1 Blackf. (Ind.) 189, 12 Am. Dec. 223. *Contra*, New Market Sav. Bank *v.* Gillet, 100 Ill. 254, 39 Am. Rep. 39; Aimen *v.* Hardin, 60 Ind. 119; Pearse *v.* Welborn, 42 Ind. 331). Where the promise was "We or either of us, . . . Directors of . . . Turnpike Co., promise," etc., and was signed, "Jas. Cantrell, Prest., Levi G. Sudduth, . . ." Whitney *v.* Sudduth, 4 Metc. (Ky.) 296. So "We, the trustees of school-district No. 20, . . . promise," signed "Walter Stewart, . . . Trustees," is *prima facie* an individual contract, subject to explanation by parol evidence (Bingham *v.* Stewart, 13 Minn. 106), and *a fortiori* this is true where the officers have without authority made their note (Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82).

39. *California.*—Jones *v.* Clark, 42 Cal. 180 (where the principal had received the consideration and had made payments on the note after the agent's death); Haskell *v.* Cornish, 13 Cal. 45.

Iowa.— Harvey *v.* Irvine, 11 Iowa 82, "We, or either of us, promise . . . in behalf," etc.

Maine.— Simpson *v.* Garland, 76 Me. 203. So as to the members of an unincorporated association. Kierstead *v.* Bennett, 93 Me. 328, 45 Atl. 42.

Massachusetts.— Jefts *v.* York, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392, 50 Am. Dec. 791.

England.— Aggs *v.* Nicholson, 1 H. & N. 165, 25 L. J. Exch. 348, 4 Wkly. Rep. 776. So as to corporation bills and notes by 25 & 26 Vict. c. 89.

Contra, where the note was signed by the maker's individual name only (Morrell *v.* Codding, 4 Allen (Mass.) 403; Pomeroy *v.* Slade, 16 Vt. 220) or where the signature was by official title without the principal's name (Kendall *v.* Morton, 21 Ind. 205; McCalla *v.* Rigg, 3 A. K. Marsh. (Ky.) 259; Steele *v.* McElroy, 1 Sneed (Tenn.) 341; Healey *v.* Story, 3 Exch. 3, 18 L. J. Exch. 8) or with the principal's name disclosed in the signature also (Dennison *v.* Austin, 15 Wis. 334).

40. Haskell *v.* Cornish, 13 Cal. 45; Tiller *v.* Spradley, 39 Ga. 35; McHenry *v.* Duffield, 7 Blackf. (Ind.) 41; Chipman *v.* Foster, 119 Mass. 189 (an order drawn by the agents on their principal and signed by their individual signature, the agency being indicated only by the letter head and by a recital of consideration to the principal). *Contra*, Cooley *v.* Esteban, 26 La. Ann. 515 (upon the promise of the agents to "pay *in solido*"); Herald *v.* Connah, 34 L. T. Rep. N. S. 885 (an order drawn on a "general agent" of a designated company and accepted in his individual name "on behalf of the company").

41. Lindus *v.* Melrose, 3 H. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. 326, 6 Wkly. Rep. 441. So by 25 & 26 Vict. c. 89, as to corporation notes and bills.

42. Pearse *v.* Welborn, 42 Ind. 331; Dow *v.* Moore, 47 N. H. 419. *Contra*, as to a request to "place to the account" of a person named. Witte *v.* Derby Fishing Co., 2 Conn. 260; Goupy *v.* Harden, Holt 342, 3 E. C. L. 139, 2 Marsh. 454, 7 Taunt. 160, 2 E. C. L. 306, 17 Rev. Rep. 478.

"For . . . Emerson & Little."— A note in the form, "I promise," etc., "for" a corporation, signed "Roberts," is the note of the corporation. Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66. "For" may be construed, however, as "for the use of" the principal and leave the agent individually liable. John *v.* John, Wright (Ohio) 584. And see to like effect Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347.

43. New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. (Mass.) 56. And so "by order of" the principal. Caphart *v.* Dodd, 3 Bush. (Ky.) 584, 96 Am. Dec. 258; Eastwood *v.* Bain, 3 H. & N. 738, 28 L. J. Exch. 74, 7 Wkly. Rep. 90.

44. Principal bound.— In the following cases an intention to bind the principal and not the agent was held to be clear:

California.— Blanchard *v.* Kaull, 44 Cal. 440.

Illinois.— Little *v.* Bailey, 87 Ill. 239.

Massachusetts.— Shoe, etc., Nat. Bank *v.* Dix, 123 Mass. 148, 25 Am. Rep. 49 (where the note read: "We as trustees but not individually promise"); Barlow *v.* Lee Cong. Soc., 8 Allen (Mass.) 460.

tion between "I promise" and "we promise"[45] or the making of a joint promise[46] of itself sufficient to fix the liability upon principal or agent; but a joint

Minnesota.— Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502, exempted, however, as public officers.

Mississippi.— Leach *v.* Blow, 8 Sm. & M. (Miss.) 221.

Missouri.— Klostermann *v.* Loos, 58 Mo. 290.

New York.— Randall *v.* Snyder, 1 Lans. (N. Y.) 163.

Agent bound.— In the following cases, with little to distinguish them from the former, the agents were held individually liable.

Georgia.— Printup *v.* Trammel, 25 Ga. 240.

Iowa.— Bayliss *v.* Pearson, 15 Iowa 279.

Kentucky.— Trask *v.* Roberts, 1 B. Mon. (Ky.) 201, a joint and several promise.

New York.— Stearns *v.* Allen, 25 Hun (N. Y.) 558; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664.

Ohio.— Titus *v.* Kyle, 10 Ohio St. 444, we or either of us, promise.

Wisconsin.— Dennison *v.* Austin, 15 Wis. 334 (where the trustees signing the note as such were not "lawfully convened"); Rupert *v.* Madden, 1 Chandl. (Wis.) 146.

England.— Eaton *v.* Bell, 5 B. & Ald. 34, 7 E. C. L. 30; Nicholls *v.* Diamond, 9 Exch. 154 (bills drawn by several persons "as commissioners"); Bottomley *v.* Fisher, 1 H. & C. 211, 27 J. P. 23, 8 Jur. N. S. 895, 31 L. J. Exch. 417, 6 L. T. Rep. N. S. 688, 10 Wkly. Rep. 669.

45. "I promise" has been construed to hold the individual agent rather than the corporation.

Illinois.— Burlingame *v.* Brewster, 79 Ill. 515, 22 Am. Rep. 177.

Maine.— Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409.

Massachusetts.— Haverhill Mut. Ins. Co. *v.* Newhall, 1 Allen (Mass.) 130, where the note signed "Cheever Newhall, Pres't of the Dorchester Avenue R. R. Co.," purported to be for value received by the company.

New York.— Barker *v.* Mechanics' F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664.

Wisconsin.— Rupert *v.* Madden, 1 Chandl. (Wis.) 146.

On the contrary notes reading "I promise" have been held binding upon the corporate principal and not the agent who signed them.

California.— Jones *v.* Clark, 42 Cal. 180, consideration to company and promise "for and on behalf of it."

Connecticut.—Hovey *v.* Magill, 2 Conn. 680, signed "Noyes Darling, agent C. C."

Iowa.— Lacy *v.* Dubuque Lumber Co., 43 Iowa 510, where the note was shown to have been executed for the company.

Missouri.— McGee *v.* Larramore, 50 Mo. 425 (director of school district); McClellan *v.* Reynolds, 49 Mo. 312 (school director and consideration to principal recited).

New Hampshire.— Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203, note made for the corporation and secured by its mortgage.

New York.—"I promise to pay, as president." Randall *v.* Snyder, 1 Lans. (N. Y.) 163, although the note was *ultra vires*.

"We promise" has been construed to create a liability of the corporation principal rather than of the agent. Means *v.* Swormstedt, 32 Ind. 87, 2 Am. Rep. 330 (sealed with the corporate seal); Wilson *v.* Fite, (Tenn. Ch. 1897) 46 S. W. 1056; McIlhenny Co. *v.* Blum, 68 Tex. 197, 4 S. W. 367. So where the promise was "for ourselves and our successors," and for a consideration to the corporation (Creswell *v.* Holden, 3 MacArthur (D. C.) 579), where the note was signed "For the Montgomery Iron Works, J. S. Winter, President, Sanders Irving, Secretary" (Roney *v.* Winter, 37 Ala. 277), where the note read, "We promise," etc., and was signed "Sam'l L. Keith, Pres't Chicago Ready Roof'g Co.," "W. H. Kretzinger, Sec'y" (Scanlan *v.* Keith, 102 Ill. 634, 40 Am. Rep. 624), and *a fortiori* of a similar note and signature "John Roach, Treasurer," and stamped with a circular corporate seal, containing the name of the corporation printed in a circle (Miller *v.* Roach, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71). So a note signed by the corporation and several persons as "stock-holders" binds both it and them (San Diego County Sav. Bank *v.* Central Market Co., 122 Cal. 28, 54 Pac. 273), but a note signed with the corporation name "T. A. Huston, Treas." binds the corporation only (Gleason *v.* Sanitary Milk Supply Co., 93 Me. 544, 45 Atl. 825, 74 Am. St. Rep. 370). On the other hand in Dutton *v.* Marsh, L. R. 6 Q. B. 361, a note reading, "We the directors of the Isle of Man Slate and Flag Company, Limited, do promise," and signed with their individual names was held to bind the directors personally, although sealed with the corporate seal. And of a note, "We promise," etc., "Pendleton Glass Company by B. F. Aiman, President, A. B. Taylor, . . . Directors" bound A. B. Taylor, . . . who were directors jointly with the company. Taylor *v.* Reger, 18 Ind. App. 466, 48 N. E. 262, 63 Am. St. Rep. 352.

Question for jury.— It was held in Sherwood *v.* Snow, 46 Iowa 481, 26 Am. Rep. 155, that a note reading, "I promise," and signed, "Samuel W. Snow," and "Snow Foote & Co.," might be construed as making the individual *prima facie* liable but that the question was for the jury.

46. Thus in Lindus *v.* Melrose, 3 H. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. 326, 6 Wkly. Rep. 441, a note, "We jointly promise," etc., "on account of the London and Birmingham Iron and Hardware Company, Limited," signed "James Melrose, . . . Directors" and attested by the secretary was held to be the note of the corporation. And a joint note signed "William Slyfield, for himself and George Little," binds both if authority to sign for George Little is shown. Olcott *v.* Little, 9 N. H. 259, 32 Am. Dec. 357. But a

and several promise seems to indicate more clearly the contract of the persons signing as agents.[47]

(c) By Request to Charge. The liability of the principal in a note or bill executed by an agent may be indicated and established by a request to charge it to the account of the principal;[48] especially where this conclusion is fortified by a date or mark on the paper indicating the office of the principal.[49]

(d) By Signature. In general, if the note is signed in the principal's name, it is sufficient to bind him, although his name does not appear in the body of the note;[50] but if the agent has signed the note in his principal's name without due

note reading, "The Butchers' Benevolent Association *v.* The Crescent City Live Stock and Slaughterhouse Company, . . . We, the undersigned, hereby bind ourselves to pay, *in solido*," etc., and signed with the individual names only was held in Cooley *v.* Esteban, 26 La. Ann. 515, to be an individual note.

47. "Jointly and severally promise," generally indicates a personal promise of the signers. Trask *v.* Roberts, 1 B. Mon. (Ky.) 201 (the promise being "as trustees"); Savage *v.* Rix, 9 N. H. 263 (where a note signed, "Eben'r Rix, . . . Whitefield Road Committee" was made expressly "in official capacity"); Healey *v.* Story, 3 Exch. 3, 18 L. J. Exch. 8 (although "for and on behalf of" the principal).

"We or either of us" promise generally indicates a personal promise of the signers. Whitney *v.* Sudduth, 4 Metc. (Ky.) 296; Titus *v.* Kyle, 10 Ohio St. 444, in which latter case the promise was made "as directors." But in Rice *v.* Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724, where such a joint and several note was signed "Patten & Johnson, for Ira Gove," Gove was held as maker; and in a note reading, "We, or either of us promise . . . in behalf the School District," etc., the principal was held in Harvey *v.* Irvine, 11 Iowa 82.

48. Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280; Maher *v.* Overton, 9 La. 115; Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179 [*affirmed in* 27 N. Y. 546, 84 Am. Dec. 298]; Amison *v.* Ewing, 2 Coldw. (Tenn.) 366, the last case being an order drawn upon a person named, treasurer of a named company, with a direction to "charge to February estimates," and "accepted," payable on return of March estimates. "John O. Ewing, Treas."

Such direction is not alone sufficient to make the party to be charged liable as drawer. Bass *v.* O'Brien, 12 Gray (Mass.) 477; Bank of British North America *v.* Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390; Safford *v.* Wyckoff, 1 Hill (N. Y.) 11. So too the direction to "charge as ordered" (Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182 [*reversing* 20 N. J. L. 425]) or to charge "to account of David Fairbanks & Co., Agts. Piscataqua F. & M. Ins. Co." (Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101) is not sufficient.

49. *California.*— Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280.

Massachusetts.— Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Fuller *v.* Hooper, 3 Gray (Mass.) 334.

Nevada.— Gillig *v.* Lake Bigler Road Co., 2 Nev. 214.

New York.— Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298 [*affirming* 40 Barb. (N. Y.) 179].

United States.— Hitchcock *v.* Buchanan, 105 U. S. 416, 26 L. ed. 1078.

50. It may be signed in the principal's name "by A B, agent" (Sanders *v.* Anderson, 21 Mo. 402; Davis *v.* McGehee, 24 Tex. 209) or "by her trustee C. T. Shelton" (Taylor *v.* Shelton, 30 Conn. 122), "for" the principal with the agent's name and title (Roney *v.* Winter, 37 Ala. 277; Wheelock *v.* Winslow, 15 Iowa 464; Cook *v.* Sanford, 3 Dana (Ky.) 237), or "for" the principal followed by the individual name and signature of the agent (Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160). *Contra*, as to a promissory note signed "Robert H. Early [For Sam'l H. Early]." Early *v.* Wilkinson, 9 Gratt. (Va.) 68. It may also read, "we promise," etc., and be signed by the principal's name followed by the agent's name and official title (Miers *v.* Coates, 57 Ill. App. 216; Castle *v.* Belfast Foundry Co., 72 Me. 167; Atkins *v.* Brown, 59 Me. 90; Draper *v.* Massachusetts Steam Heating Co., 5 Allen (Mass.) 338; Reeve *v.* Glassboro First Nat. Bank, 54 N. J. L. 208, 23 Atl. 853, 33 Am. St. Rep. 675, 16 L. R. A. 143; Union Nat. Bank *v.* Scott, 53 N. Y. App. Div. 65, 66 N. Y. Suppl. 145; Latham *v.* Houston Flour Mills, 68 Tex. 127, 3 S. W. 462; Armstrong *v.* Cache Valley Land, etc., Co., 14 Utah 450, 48 Pac. 690; Liebscher *v.* Kraus, 74 Wis. 387, 43 N. W. 166, 17 Am. St. Rep. 171, 5 L. R. A. 496. But in Iowa even where the note reads, "we promise," etc., and is signed by the principal's name "Dubuque Mattress Co., John Kapp, Pt.," the agent is held to be individually liable. Mathews *v.* Dubuque Mattress Co., 87 Iowa 246, 54 N. W. 225, 19 L. R. A. 676; McCandless *v.* Belle Plaine Canning Co., 78 Iowa 161, 42 N. W. 635, 16 Am. St. Rep. 429, 4 L. R. A. 396 [*following* Heffner *v.* Brownell, 75 Iowa 341, 39 N. W. 640]), especially where the consideration went to the principal and that fact was known to the payee (Bean *v.* Pioneer Min. Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106). *A fortiori* this is so where the principal is named both in the body of the note and in this manner in the signature (Gillet *v.* New Market Sav. Bank, 7 Ill. App. 499) or where the note is not only so signed, but the principal is named in the body of the note and the in-

authority he may become individually liable as maker on the note itself[51] or as the drawer of a bill.[52]

(F) *Public Officers.* Where the note is made by a public officer acting as such, the principal and not the agent is liable, although the principal's name does not appear in the paper,[53] and such officer may be an agent of the federal government, of a state, or of a municipality;[54] but even a public officer may make himself liable by his fraud[55] or by executing an instrument without authority.[56]

(II) *PAYEE*—(A) *Necessity of*—(1) IN GENERAL. In a negotiable bill or note there must be certainty as to the designation of the payee.[57]

strument is also sealed with the seal of the corporation (Pitman *v.* Kintner, 5 Blackf. (Ind.) 250, 33 Am. Dec. 461).

51. Coffman *v.* Harrison, 24 Mo. 524; Byars *v.* Dooers, 20 Mo. 283; Savage *v.* Rix, 9 N. H. 263; Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82; Walker *v.* State Bank, 9 N. Y. 582; Palmer *v.* Stephens, 1 Den. (N. Y.) 471; Warren *v.* Harrold, 92 Tex. 417, 49 S. W. 364. *Contra,* Lander *v.* Castro, 43 Cal. 497; Kansas Nat. Bank *v.* Bay, 62 Kan. 692, 64 Pac. 596, 54 L. R. A. 408.

The agent will also be liable where, although the promise itself is in the principal's name, he executed the note without authority (Hite *v.* Kendall, 2 Ark. 338), where the agent has assumed the principal's debt (Forbes *v.* Whittemore, 62 Ark. 229, 35 S. W. 223), or where he represents himself to be one of the firm whose name he signed (Dodd *v.* Bishop, 30 La. Ann. 1178).

52. Wilson *v.* Barthrop, 1 Jur. 949, L. J. Exch. 251, M. & H. 81, 2 M. & W. 863.

53. It is presumed that one dealing with a public officer gives credit to the government represented by such officer.

Kentucky.— State Bank *v.* Sanders, 3 A. K. Marsh. (Ky.) 184, 13 Am. Dec. 149.

New York.— Fox *v.* Drake, 8 Cow. (N. Y.) 191.

Tennessee.— Amison *v.* Ewing, 2 Coldw. (Tenn.) 366.

Texas.— Zacharie *v.* Bryan, 2 Tex. 274.

United States.— Jones *v.* Le Tombe, 3 Dall. (U. S.) 384, 1 L. ed. 647.

England.— Gidley *v.* Palmerston, 3 B. & B. 275, 7 Moore C. P. 91, 24 Rev. Rep. 668, 7 E. C. L. 727; Rice *v.* Chute, 1 East 579; Myrtle *v.* Beaver, 1 East 135; Prosser *v.* Allen, Gow. 117, 5 E. C. L. 889; Allen *v.* Waldegrave, 2 Moore C. P. 621; Unwin *v.* Wolseley, 1 T. R. 674; Macbeath *v.* Haldimand, 1 T. R. 172, 1 Rev. Rep. 177.

Where there was no authority in the municipality to execute such an instrument a town will not become liable. Exchange Bank *v.* Lewis County, 28 W. Va. 273, where bonds executed by "Jas. Bennett, Agent for Lewis county," were *ultra vires.*

54. *Indiana.*— Bingham *v.* Kimball, 17 Ind. 396, superintendent of state fair grounds.

Massachusetts.— Dawes *v.* Jackson, 9 Mass. 490, superintendent of state prison.

New York.—Allen *v.* Sisson, 66 Hun (N. Y.) 140, 20 N. Y. Suppl. 971 [*affirmed* in 148 N. Y. 728, 42 N. E. 721 (commissioners for river improvement and this notwithstanding misnomer of official title)]; Nichols *v.* Moody, 22 Barb. (N. Y.) 611 (a collector of the treasury); Osborne *v.* Kerr, 12 Wend. (N. Y.) 179 (superintendent of canals); Fox *v.* Drake, 8 Cow. (N. Y.) 191 (building commissioners); Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193 (municipal committee appointed for a special purpose); Olney *v.* Wickes, 18 Johns. (N. Y.) 122 (overseer of the poor); Walker *v.* Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334 (army officer).

Ohio.— Smurr *v.* Forman, 1 Ohio 272, army officer.

Tennessee.— Enloe *v.* Hall, 1 Humphr. (Tenn.) 303, sheriff.

Virginia.— Syme *v.* Butler, 1 Call (Va.) 105, deputy commissary-general.

United States.— Pierce *v.* U. S., 7 Wall. (U. S.) 666, 19 L. ed. 169 (secretary of war); Hodgson *v.* Dexter, 1 Cranch (U. S.) 345, 2 L. ed. 130 (secretary of war); Jones *v.* Le Tombe, 3 Dall. (U. S.) 384, 1 L. ed. 647 (a consul).

55. Freeman *v.* Otis, 9 Mass. 272, 6 Am. Dec. 66.

56. School Trustees *v.* Rautenberg, 88 Ill. 219 (after his official term had expired); American Ins. Co. *v.* Stratton, 59 Iowa 696, 13 N. E. 763; Ross *v.* Brown, 74 Me. 352; Savage *v.* Rix, 9 N. H. 263; Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82.

57. *Alabama.*— Prewitt *v.* Chapman, 6 Ala. 86.

Illinois.— Mayo *v.* Chenoweth, 1 Ill. 200; Smith *v.* Bridges, 1 Ill. 18.

Indiana.— Rich *v.* Starbuck, 51 Ind. 87.

Massachusetts.— Brown *v.* Gilman, 13 Mass. 158.

Mississippi.— Matthews *v.* Redwine, 23 Miss. 233.

New York.— Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9 [*reversing* 4 Hun (N. Y.) 692]; Hoyt *v.* Lynch, 2 Sandf. (N. Y.) 328 (holding that an order indorsed on a bill of goods to pay it "and charge to our account," althongh a bill of exchange, is not negotiable for want of a payee's name); Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637.

Tennessee.— Seay *v.* State Bank, 3 Sneed (Tenn.) 558, 67 Am. Dec. 579.

England.— Gibson *v.* Minet, 2 Bro. P. C. 48, 1 H. Bl. 569, 3 T. R. 487, 1 Rev. Rep. 754; Yates *v.* Nash, 8 C. B. N. S. 581, 6 Jur. N. S. 1343, 29 L. J. C. P. 306, 2 L. T. Rep. N. S. 430, 8 Wkly. Rep. 764, 98 E. C. L. 581.

See 7 Cent. Dig. tit. "Bills and Notes," § 45.

(2) Effect of Failure to Designate — (a) In General. If no payee is designated the instrument is not, properly speaking, a negotiable instrument.[58] This is frequently illustrated by an interest warrant[59] or a due-bill[60] with no payee named.

(b) Execution in Blank. The payee's name may be left blank, which makes the instrument payable in effect to bearer,[61] and in such case the holder may put his own name into the blank and sue upon the instrument as payee, or may fill it with that of a third person;[62] but as against the accepter of a bill the holder must

section 20, subsection 4, a negotiable instrument "must be payable to order or to bearer." Section 27 provides as follows: "The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of: 1. A payee who is not maker, drawer or drawee; or 2. The drawer or maker; or 3. The drawee; or 4. Two or more payees jointly; or 5. One or some of several payees; or 6. The holder of an office for the time being. Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty." By section 28 "the instrument is payable to bearer: 1. When it is expressed to be so payable; or 2. When it is payable to a person named therein or bearer; or 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or 4. When the name of the payee does not purport to be the name of any person; or 5. When the only or last indorsement is an indorsement in blank."

Addition of words "et al."— A note payable to a named payee "*et al.* or order" is not negotiable, either at common law or under the Iowa code. Gordon *v.* Anderson, 83 Iowa 224, 49 N. W. 86, 32 Am. St. Rep. 302, 12 L. R. A. 483.

Sufficient designation.— A writing, "Due James Foster one hundred and forty-one dollars 75/100, which I promise to pay Thomas Carson, Sheriff . . . to satisfy an attachment," etc., signed "Joseph Bates," to Thomas Carson, is a promissory note. Bowie *v.* Foster, Minor (Ala.) 264. And an instrument: "For value received, I promise to pay to the order of Shubael D. Childs two hundred dollars, with interest, payable to F. Vose, or bearer, on the first day of July next, at Messrs. Forrest Brothers & Co.'s banking house, Chicago City, Illinois," with the indorsement of "Shubael D. Childs, Jr." is a negotiable promissory note. Childs *v.* Davidson, 38 Ill. 437.

58. Prewitt *v.* Chapman, 6 Ala. 86, holding that an instrument purporting to be a bill of exchange, which does not direct to whom payment shall be made, may be the foundation of a suit by the person from whom the consideration moved, but has not the effect of a bill payable to bearer, and that a third person cannot maintain an action thereon. So of a bill payable "to the order of" and no blank left. McIntosh *v.* Lytle, 26 Minn. 336, 3 N. W. 983.

Treated as payable to fictitious payee.— But such a note is sometimes considered as payable to a fictitious payee. Davega *v.* Moore, 3 McCord (S. C.) 482.

59. Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Enthoven *v.* Hoyle, 13 C. B. 373, 16 Jur. 272, 21 L. J. C. P. 100, 76 E. C. L. 373.

60. Brown *v.* Gilman, 13 Mass. 158; Biskup *v.* Oberle, 6 Mo. App. 583; Rush *v.* Haggard, 68 Tex. 674, 5 S. W. 683. But a due-bill with no payee named was treated as a note with blank for payee's name in Weston *v.* Myers, 35 Ill. 424, and the holder was allowed to sue on it as a note, after inserting "to myself or order."

61. *Maryland.*— Dunham *v.* Clogg, 30 Md. 284.

Missouri.— Schooler *v.* Tilden, 71 Mo. 580.

New York.— Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Wood *v.* Wellington, 30 N. Y. 218.

Ohio.— Simmons *v.* Brown, 4 Ohio Dec. (Reprint) 29, Clev. L. Rec. 33.

Pennsylvania.— Boyd *v.* Bockenkamp, 3 Wkly. Notes Cas. (Pa.) 25, a due-bill.

United States.— Steel *v.* Rathbun, 42 Fed. 390.

England.— Wookey *v.* Pole, 4 B. & Ald. 1, 22 Rev. Rep. 594, 6 E. C. L. 365; Cruchley *v.* Clarance, 2 M. & S. 90, 14 Rev. Rep. 596.

If drawn to "—— order" and indorsed by the drawer, it will be valid as a bill to the order of the drawer. Chamberlain *v.* Young, [1893] 2 Q. B. 206, 63 L. J. Q. B. 28, 69 L. T. Rep. N. S. 332, 4 Reports 497, 42 Wkly. Rep. 72.

62. *Alabama.*— Decatur First Nat. Bank *v.* Johnston, 97 Ala. 655, 11 So. 690.

Delaware.— Townsend *v.* France, 2 Houst. (Del.) 441; Farmers, etc., Bank *v.* Horsey, 2 Houst. (Del.) 385, which hold that the holder's only authority is to write his own name in the blank.

Illinois.— Weston *v.* Myers, 33 Ill. 424.

Indiana.— Gothrupt *v.* Williamson, 61 Ind. 599; Rich *v.* Starbuck, 51 Ind. 87; Greenhow *v.* Boyle, 7 Blackf. (Ind.) 56. And in an action against an indorser of a note he is estopped to deny that the payee's name was lawfully inserted (Alleman *v.* Wheeler, 101 Ind. 141), although a different payee is inserted instead of the name originally intended (Wilson *v.* Kinsey, 49 Ind. 35).

Kentucky.—State Bank *v.* Garey, 6 B. Mon. (Ky.) 626.

Maryland.— Sittig *v.* Birkestack, 38 Md. 158; Elliott *v.* Chesnut, 30 Md. 562; Dunham *v.* Clogg, 30 Md. 284; Boyd *v.* McCann, 10 Md. 118.

Missouri.— Schooler *v.* Tilden, 71 Mo. 580.

New York.— Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Hardy *v.* Norton, 66 Barb. (N. Y.) 527.

prove authority from the drawer to himself to fill the blank with his own name as payee.[63] As in other blanks, however, the intention to leave a blank may be more apparent than real,[64] or the name intended for the blank may be indicated in a collateral agreement;[65] and in some cases the holder may even sue on a bill or note without filling the blank left for the payee's name.[66] In general authority to fill in the blank left for the payee's name is implied in the delivery of a bill or note with such blank by a maker to his co-maker,[67] or by a surety to his principal.[68]

Pennsylvania.— Stahl *v.* Berger, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666.

South Carolina.—Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294; Aiken *v.* Cathcart, 3 Rich. (S. C.) 133, 45 Am. Dec. 764.

Tennessee.— Seay *v.* State Bank, 3 Sneed (Tenn.) 558, 67 Am. Dec. 579.

Texas.— Close *v.* Fields, 2 Tex. 232.

Virginia.— Brummel *v.* Enders, 18 Gratt. (Va.) 873.

Wisconsin.— Van Etta *v.* Evenson, 28 Wis. 33, 9 Am. Rep. 486.

England.— Usher *v.* Dauncey, 4 Campb. 97, 15 Rev. Rep. 729; Powell *v.* Duff, 3 Campb. 182; Atwood *v.* Griffin, 2 C. & P. 368, R. & M. 425, 31 Rev. Rep. 669, 12 E. C. L. 622; Crutchly *v.* Mann, 2 Marsh. 29, 5 Taunt. 529, 1 E. C. L. 272; Cruchley *v.* Clarance, 2 M. & S. 90, 14 Rev. Rep. 596.

See 7 Cent. Dig. tit. "Bills and Notes," § 88.

If indorsed by the original payee the blank may be filled with his name. Elliott *v.* Chesnut, 30 Md. 562.

Where indorsed before delivery by another than he to whom promise was originally made a subsequent holder for value cannot fill with his own name a blank left for the payee's, thereby making the first indorser a guarantor. Riddle *v.* Stevens, 32 Conn. 378, 87 Am. Dec. 181. But as to this now see Neg. Instr. L. §§ 113, 114. In Louisiana it could be so filled and leave the indorser liable only as an indorser (Weaver *v.* Marvel, 12 La. Ann. 517), and in Virginia he will be liable as indorser to the holder, although the holder fills in his own name as payee (Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377). And see *infra*, II, B, 6, a, (II), (E), (2).

The holder, by inserting his own name in the blank left for the payee's, does not become an original party. He is a "subsequent holder," and as such unable to sue in federal courts under the act of congress. Steel *v.* Rathbun, 42 Fed. 390. So where one buys a note at a usurious rate of interest and fills the blank with his own name the maker cannot set up the defense of usury against him (Brummel *v.* Enders, 18 Gratt. (Va.) 873), but the burden of proof in such case is upon the holder (Nelson *v.* Cowing, 6 Hill (N. Y.) 336).

Sealed bonds.— A bond with payee's name left blank is in effect a negotiable instrument payable to bearer (Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51 [*affirmed* in 170 N. Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640]) and falls as such within the statutory exception as to jurisdiction of federal courts over such instruments to bearer irrespective of the residence of prior holders (Lyon County *v.* Keene Five-Cent Sav. Bank, 100 Fed. 337, 40 C. C. A. 391 [*affirming* 90 Fed. 523]); but a sealed bond to a railroad company "or its assigns," is non-negotiable and cannot be assigned "to ——, or bearer" (Clarke *v.* Janesville, 1 Biss. (U. S.) 98, 5 Fed. Cas. No. 2,854, 4 Am. L. Reg. 591), and in general if the payee's name is left blank in a non-negotiable sealed bond it cannot be filled by the holder (Barden *v.* Southerland, 70 N. C. 528). See also BONDS, 5 Cyc. 779, note 97.

63. Atwood *v.* Griffin, 2 C. & P. 368, R. & M. 425, 31 Rev. Rep. 669, 12 E. C. L. 622; Awde *v.* Dixon, 6 Exch. 869, 20 L. J. Exch. 295; Crutchly *v.* Mann, 2 Marsh. 29, 5 Taunt. 529, 1 E. C. L. 272.

64. In Weston *v.* Myers, 33 Ill. 424, it was held that a due-bill "good for 50 cents" was a promissory note without filling the blank, although the holder might add "to myself or order."

65. As in a mortgage securing the note. Elliott *v.* Deason, 64 Ga. 63.

66. As where a draft is payable "to order of ——" and signed and indorsed by the drawer (Usry *v.* Saulsbury, 62 Ga. 179; Chamberlain *v.* Young, [1893] 2 Q. B. 206, 63 L. J. Q. B. 28, 69 L. T. Rep. N. S. 332, 4 Reports 497, 42 Wkly. Rep. 72) and actually delivered by the maker to plaintiff (Rich *v.* Starbuck, 51 Ind. 87) or in case of a due-bill (Weston *v.* Myers, 33 Ill. 424). So if indorsed "Pay ——." Wood *v.* Wellington, 30 N. Y. 218. But in general to render the instrument formally complete it is necessary to fill the blank. Greenhow *v.* Boyle, 7 Blackf. (Ind.) 56; Thompson *v.* Rathbun, 18 Oreg. 202, 22 Pac. 837; Seay *v.* State Bank, 3 Sneed (Tenn.) 558, 67 Am. Dec. 579; Brummel *v.* Enders, 18 Gratt. (Va.) 873. But the filing of a judgment note in which the name of the payee is left blank with an affidavit that the note is due plaintiff is equivalent to filling up the blank with plaintiff's name and entitles him to a judgment. Winton *v.* Collins, 4 Kulp (Pa.) 491. In an English case it has been held that a note with the payee's name blank will not sustain an indictment for forgery. Rex *v.* Randall, R. & R. 145. But see *contra*, Harding *v.* State, 54 Ind. 359.

67. Wilson *v.* Kinsey, 49 Ind. 35; Jenkins *v.* Bass, 88 Ky. 397, 10 Ky. L. Rep. 987, 11 S. W. 293, 21 Am. St. Rep. 344.

68. Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665.

(B) *Who May Be* — (1) IN GENERAL. The payee must be an existing person, firm, or corporation. Paper cannot be made payable to a dead man.[69]

(2) AGENTS. Who is the actual payee of a bill comes in question most frequently in determining who can transfer it or who can bring suit upon it, and it will be particularly considered in its place in connection with those questions.[70] Thus in many cases where the payee is an agent his principal may transfer the instrument[71] or bring an action upon it,[72] although he has not been disclosed,[73] or

69. Wayman *v.* Torreyson, 4 Nev. 124; U. S. *v.* Coffeyville First Nat. Bank, 82 Fed. 410. But see Grant *v.* Wilson, 2 Rev. Lég. 29, holding that a note to one who is absent and who, as it happens, is dead, is not void, and that his executors may maintain action upon it.

Renewed accommodation note.— If on the other hand an accommodation note to A be renewed after his death, an indorsement in that name by his widow, carrying on business in his name, will bind her at suit of a *bona fide* holder. Van Etten *v.* Hemann, 35 Mich. 513.

70. **Agent or payee.**— Thus a note may be taken by an agent in his principal's business, but in his own name individually (Heubach *v.* Rother, 2 Duer (N. Y.) 227) or "for account of" his principal (Ridgely Nat. Bank *v.* Patton, 109 Ill. 479), and in general he may indorse such note to his principal without individual liability (Sharp *v.* Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 530), unless he is otherwise liable by agreement with his principal (Mackenzie *v.* Scott, 6 Brown P. C. 280, 2 Eng. Reprint 1081; Goupy *v.* Harden, Holt 342, 3 E. C. L. 139, 2 Marsh. 454, 7 Taunt. 106, 17 Rev. Rep. 478, 2 E. C. L. 306).

A note to an individual as officer of the company is a note to the individual and not to the company. Night Hawks Burlesque Co. *v.* Louisville, etc., R. Co., 40 Ill. App. 49. But a note executed by the agent in the principal's name to himself individually is *prima facie* void. Porter *v.* Winona, etc., Grain Co., 78 Minn. 210, 80 N. W. 965.

71. Sayers *v.* Crawfordsville First Nat. Bank, 89 Ind. 230 (where the title was held to vest in the corporation and to pass *prima facie* by an indorsement, "Trustees of Indiana Asbury University, by John W. Ray, treas."); Mann *v.* Springfield Second Nat. Bank, 34 Kan. 746, 10 Pac. 150 (where it was payable to "Amos Whitely, president"); Farmington Sav. Bank *v.* Fall, 71 Me. 49 (when a note payable to "C. B. Mahan, agent," was transferred by the indorsement "Granite Agricultural Works. C. B. Mahan, Agent").

72. Hazard *v.* Planters', etc., Bank, 4 Ala. 299; Little *v.* Bradley, (Fla. 1902) 31 So. 342; Friedline *v.* Carthage College, 23 Ill. App. 494; Overman *v.* Grier, 70 N. C. 693 (where A made a note to C for B's debt to C which was not accepted or credited by C and B was held *prima facie* C's agent and was allowed to sue in C's name). Especially where the principal's business is habitually done in the agent's name. Societe des Mines, etc., *v.* Mackintosh, 5 Utah 568, 18 Pac. 363. But in Grist *v.* Backhouse, 20 N. C. 496, it was held that a note to "Richard Grist, agent of his assignees, or order," could not be sued by the assignees. And at common law the principal can neither sue upon nor transfer a note to "A, or to the use of B" (Evans *v.* Cramlington, Carth. 5; Cramlington *v.* Evans, 2 Vent. 307), or to "Reuben Hause, agent for Reed, Brothers & Thomas" (Clark *v.* Reed, 12 Sm. & M. (Miss.) 554).

A fortiori the principal may bring suit on a note to "Frederick J. Waldo, agent of the Enterprise Insurance Company" (Black *v.* Enterprise Ins. Co., 33 Ind. 223; Bean *v.* Dolliff, 67 Me. 228); to "D. A. Neale, president of the Eastern Railroad Company" (Eastern R. Co. *v.* Benedict, 5 Gray (Mass.) 561, 66 Am. Dec. 384); or to "Charles W. Smith, Treasurer of" a designated company (Vater *v.* Lewis, 36 Ind. 288, 10 Am. Rep. 29; McBroom *v.* Lebanon, 31 Ind. 268; Trustees Ministerial, etc., Fund *v.* Parks, 10 Me. 441; Rutland, etc., R. Co. *v.* Cole, 24 Vt. 33); and this is true although the payee's official character be designated by initial letters only (Dupont *v.* Mt. Pleasant Ferry Co., 9 Rich. (S. C.) 255), but the contrary was held of a note payable to a person named, "superintendent of the Decatur Agricultural Works" (Durfee *v.* Morris, 49 Mo. 55). Still stronger is the case of a note to a corporation officer "or his successors in office" (Tainter *v.* Winter, 53 Me. 348; Trustees Ministerial, etc., Fund *v.* Parks, 10 Me. 441); and more especially if it is a municipal corporation (Garland *v.* Reynolds, 20 Me. 45; Arlington *v.* Hinds, 1 D. Chipm. (Vt.) 431, 12 Am. Dec. 704). In such a case suit may be brought by the municipality in the name of the payee's successor (Fisher *v.* Ellis, 3 Pick. (Mass.) 322), or by such successor (Packard *v.* Nye, 2 Metc. (Mass.) 47; Fisher *v.* Ellis, 3 Pick. (Mass.) 322) although this has been denied (Upton *v.* Starr, 3 Ind. 508).

If the payee be designated by official title only and not named suit on the note may be by the corporation (State Bank *v.* Jenkins, 7 Ark. 389; Bower *v.* State Bank, 5 Ark. 234; Vermont Cent. R. Co. *v.* Clayes, 21 Vt. 30), and in some cases, it is held, by the corporation only (Alston *v.* Heartman, 2 Ala. 699; Vater *v.* Lewis, 36 Ind. 288, 10 Am. Rep. 29; Nichols *v.* Frothingbam, 45 Me. 220, 71 Am. Dec. 539). But if the principal has changed its corporate name as used in the note it must aver and prove its identity. Madison College *v.* Burke, 6 Ala. 494.

73. Jacobs *v.* Benson, 39 Me. 132, 63 Am. Dec. 609; National L. Ins. Co. *v.* Allen, 116 Mass. 398 (where the note was made to "J. T. Phelps, agent"); Taunton, etc., Turnpike

has been disclosed as the creditor but not as the payee;[74] and this is the case by well established usage of banks as to paper made payable to the bank cashier by his official title.[75] In other cases the agent named may make a sufficient transfer[76] or may sue upon it in his own name.[77]

Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124.

74. As in a note acknowledging a debt to be "due James Foster, . . . which I promise to pay Thomas Carson, Sheriff." Bowie *v.* Foster, Minor (Ala.) 264.

75. Lookout Bank *v.* Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934. See also *infra*, XIV, C [8 Cyc.].

The bank may sue upon such paper without indorsement (Nave *v.* Lebanon First Nat. Bank, 87 Ind. 204; Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280), although it be not named in the instrument (Stamford Bank *v.* Ferris, 17 Conn. 259; Nave *v.* Lebanon First Nat. Bank, 87 Ind. 204; Nave *v.* Hadley, 74 Ind. 155; Pratt *v.* Topeka Bank, 12 Kan. 570; Haynes *v.* Beckman, 6 La. Ann. 224; Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Garton *v.* Union City Nat. Bank, 34 Mich. 279; Lacey *v.* Central Nat. Bank, 4 Nebr. 179; Angelica First Nat. Bank *v.* Hall, 44 N. Y. 395, 4 Am. Rep. 698; State Bank *v.* Ohio State Bank, 29 N. Y. 619; Wright *v.* Boyd, 3 Barb. (N. Y.) 523; Rutland, etc., R. Co. *v.* Cole, 24 Vt. 33; Manchester Bank *v.* Slason, 13 Vt. 334 [*contra*, U. S. Bank *v.* Lyman, 20 Vt. 666]; Newbury Bank *v.* Baldwin, 1 Cliff. (U. S.) 519, 2 Fed. Cas. No. 892 [*affirmed* in 1 Wall. (U. S.) 234, 17 L. ed. 534]; Blair *v.* Mansfield First Nat. Bank, 2 Flipp. (U. S.) 111, 3 Fed. Cas. No. 1,485, 12 Bankers' Mag. (3d S.) 721, 2 Browne Nat. Bank Cas. 173, 10 Chic. Leg. N. 84, 5 Reporter 40).

The cashier may also sue in his own name whether the bank be designated (Porter *v.* Nekervis, 4 Rand. (Va.) 359) or not (McHenry *v.* Ridgely, 3 Ill. 309, 35 Am. Dec. 110; Barney *v.* Newcomb, 9 Cush. (Mass.) 46; Fairfield *v.* Adams, 16 Pick. (Mass.) 381; Garton *v.* Union City Nat. Bank, 34 Mich. 279; Horah *v.* Long, 20 N. C. 416, 34 Am. Dec. 278; Johnson *v.* Catlin, 27 Vt. 87, 62 Am. Dec. 622), or he may sue for the use of the bank (Davis *v.* Baker, 71 Ga. 33), or his successor may sue (Dutch *v.* Boyd, 81 Ind. 146).

76. Even where it is payable to him as "cashier" (St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421), as "treasurer" (Shaw *v.* Stone, 1 Cush. (Mass.) 228), or as "president of . . . the American Pottery Company" (Van Buskirk *v.* Day, 32 Ill. 260).

77. Tooke *v.* Newman, 75 Ill. 215, where a wife took a note as agent for her husband for a loan made by him. This has been held even where the principal was clothed with a quasi-public character, as, "Durkee, agent of the proprietors of the town of Sand Hill" (Bryant *v.* Durkee, 9 Mo. 169), and in a suit by the successor in office on a note to "J. L. May, common school commissioner of township eighteen south, or his successor in office" (Kelly *v.* Ware, 22 Ark. 449).

Words describing the official position of the payee may be disregarded as being mere description, such as "agent" (Preston *v.* Dunham, 52 Ala. 217; Toledo Agricultural Works *v.* Heisser, 51 Mo. 128; Coffin *v.* Grand Rapids Hydraulic Co., 61 N. Y. Super. Ct. 51, 18 N. Y. Suppl. 782, 46 N. Y. St. 851 [*affirmed* in 136 N. Y. 655, 32 N. E. 1076, 50 N. Y. St. 15]; Johnson *v.* Catlin, 27 Vt. 87, 62 Am. Dec. 622), "treasurer" (Shaw *v.* Stone, 1 Cush. (Mass.) 228. But see Alston *v.* Heartman, 2 Ala. 699; McBroom *v.* Lebanon, 31 Ind. 268; Babcock *v.* Beman, 11 N. Y. 200), "president" (Lester *v.* McIntosh, 101 Ga. 675, 29 S. E. 7 [corporation named in his title]; Hately *v.* Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304; Wolcott *v.* Standley, 62 Ind. 198; Van Ness *v.* Forrest, 8 Cranch (U. S.) 30, 3 L. ed. 478), or "manager" (Chase *v.* Behrman, 1 N. Y. City Ct. 352); and this is so although in such description the principal be named, as a note to "W. W. Austell, lawful attorney for Francis Bomer" (Austell *v.* Rice, 5 Ga. 472), to a person named, agent of a named company (Night Hawks Burlesque Co. *v.* Louisville, etc., R. Co., 40 Ill. App. 49; Buffum *v.* Chadwick, 8 Mass. 103; Savage *v.* Carter, 64 N. C. 196, the last case before the present statute as to party in interest), to "J. D. Fennell, agent for G. A. Kelly or bearer" (Castleberry *v.* Fennell, 4 Ala. 642), to "James G. McCreery, treasurer of the R. I. & A. R. R. Co." (Chadsey *v.* McCreery, 27 Ill. 253; Clap *v.* Day, 2 Me. 305, 11 Am. Dec. 99), to a particular person "superintendent of the Decatur Agricultural Works" (Durfee *v.* Morris, 49 Mo. 55), to "a particular person, "receiver of the estate of" another designated person (McLain *v.* Onstott, 3 Ark. 478), or to a person named "for the benefit" of his principal (Turner *v.* Eldridge, 6 Ala. 821).

Effect of expiration of term of office.— In Whitcomb *v.* Smart, 38 Me. 264, the case of a note to "Ebenezer Whitcomb, P. S. of the Adelphian Lodge," the party mentioned was allowed to sue in his own name, by authority of the members of the lodge, after he had ceased to be secretary. And where a note was made to "Joseph M. White, . . Trustees of the Apalachicola Land Company [a voluntary association] or their successors in office, or order," the survivors were allowed to sue, although their term of office had expired and their successors had been appointed. Davis *v.* Garr, 6 N. Y. 124, 55 Am. Dec. 387.

If the note is payable to the treasurer of a society, not by name, his assignee may bring suit on it in the name of his successor in office. McDonald *v.* Laughlin, 74 Me. 480.

(3) Bearer. A negotiable bill or note may be made payable to bearer,[78] and this is a sufficient designation of a payee as well as of all subsequent holders of the paper.[79] Corporation bonds are generally made payable in this way,[80] and detached interest coupons so payable are negotiable and pass by delivery.[81] In general negotiable instruments payable to bearer are transferable by delivery without indorsement,[82] but in some of the United States the negotiability of such instruments is restricted by statute.[83] A paper payable to a designated person "or bearer" is in effect the same as a paper to bearer.[84] Its validity does not depend on an original delivery to the person designated,[85] and if he is one of the makers, although he could not as payee sue his co-makers, the bearer may sue both makers.[86] In some of the United States, however, notes so payable are distinguished as to manner of transfer from notes to bearer.[87] On the other hand a note to a designated person, "bearer," is a note to the person designated only and is not negotiable.[88]

(4) Drawee, Maker, or Drawer. The drawee of a bill may be its payee,[89] and a promissory note may be made payable to the maker's order,[90] such a note

78. "Holder" is equivalent to "bearer." Putnam *v.* Crymes, 1 McMull. (S. C.) 9, 36 Am. Dec. 250; Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488.

79. New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Melton *v.* Gibson, 97 Ind. 158; Craig *v.* Vicksburg, 31 Miss. 216. So a check may be made payable to "Sapphire Mill, or bearer." State *v.* Cleavland, 6 Nev. 181.

80. McCoy *v.* Washington County, 3 Wall. Jr. C. C. (U. S.) 381, 15 Fed. Cas. No. 8,731, 7 Am. L. Reg. 193, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388. Although it was formerly held that a bond could not be made to bearer but might be indorsed by the payee so as to become payable to bearer. Marsh *v.* Brooks, 33 N. C. 409; Clarke *v.* Janesville, 1 Biss. (U. S.) 98, 5 Fed. Cas. No. 2,854, 4 Am. L. Reg. 591. See also Bonds, 5 Cyc. 779, note 97.

81. North Bennington First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734; Concord *v.* Derby Line Nat. Bank, 51 Vt. 144; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526. See also Bonds, 5 Cyc. 781, note 4; 782, note 5.

82. See *infra*, VI, C, 2, note 48.

83. See *infra*, VI, C, 2.

84. *Florida.*— Maxwell *v.* Agnew, 21 Fla. 154.

Indiana.— Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316. And a note so payable is negotiable in Indiana if payable at a bank in that state. Melton *v.* Gibson, 97 Ind. 158.

Maine.— Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767.

Massachusetts.— Ellis *v.* Wheeler, 3 Pick. (Mass.) 18.

Michigan.— Bitzer *v.* Wagar, 83 Mich. 223, 47 N. W. 210.

Missouri.— McDonald *v.* Harrison, 12 Mo. 447.

South Carolina.— Putnam *v.* Crymes, 1 McMull. (S. C.) 9, 36 Am. Dec. 250, a note to "Mancil Owens or holder."

Texas.— Smith *v.* Clopton, 4 Tex. 109.

Canada.— Exchange Bank *v.* Quebec Bank, 6 Montreal Super. Ct. 10.

See also *infra*, VI, C, 2.

85. Gage *v.* Sharp, 24 Iowa 15.

86. Devore *v.* Mundy, 4 Strobh. (S. C.) 15.

87. See *infra*, VI, C, 2.

88. Warren *v.* Scott, 32 Iowa 22; Bloomingdale *v.* National Butchers', etc., Bank, 33 Misc. (N. Y.) 594, 68 Suppl. 35. So of an instrument reading: "Due the bearer hereof, 3*l* 18s. 10*d.*, which I promise to pay to Abraham Thompson, or order." Cock *v.* Fellows, 1 Johns. (N. Y.) 143.

89. Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294; Wildes *v.* Savage, 1 Story (U. S.) 22, 29 Fed. Cas. No. 17,653, 3 Law Rep. 1; Holdsworth *v.* Hunter, 10 B. & C. 449, 8 L. J. K. B. O. S. 149, 5 M. & R. 393, 21 E. C. L. 193. Or it may be to the order of the accepter. White *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294. But an order on a person named to pay to his own order, accepted, but not indorsed, is not a bill of exchange for forging or uttering which an indictment will lie. Reg. *v.* Bartlett, 2 M. & Rob. 362.

A bank which is named as the place of payment may be the payee. De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46.

90. *Alabama.*— Mayberry *v.* Morris, 62 Ala. 113.

Illinois.— Wilder *v.* De Wolf, 24 Ill. 190.

Kentucky.— It was formerly held that a note executed by one payable to himself was not negotiable and created no liability of the maker to the assignee when assigned or indorsed. Muhling *v.* Sattler, 3 Metc. (Ky.) 285, 77 Am. Dec. 172. But under Ky. Gen. Stat. c. 22, § 13, such a note, signed on the back by the obligor and then delivered, operates as a promise to pay the face of the note at maturity to the person to whom it is delivered (Bramblett *v.* Caldwell, 105 Ky. 202, 20 Ky. L. Rep. 1123, 48 S. W. 982), and the holder may fill up the indorsement and sue as upon a fresh promise, or may sue without filling the indorsement (Pace *v.* Welmending, 12 Bush. (Ky.) 141).

being in effect payable to bearer, when indorsed in blank by the maker.[91] Where.

Pennsylvania.— Miller *v.* Weeks, 22 Pa. St. 89.

South Carolina.— Rambo *v.* Metz, 5 Strobh. (S. C.) 108, 53 Am. Dec. 694. Although it has been held that a note payable to maker or bearer can be sued in equity only. Keith *v.* Keith, 11 Rich. Eq. (S. C.) 83; Glenn *v.* Caldwell, 4 Rich. Eq. (S. C.) 168.

Tennessee.— Woods *v.* Ridley, 11 Humphr. (Tenn.) 194.

See 7 Cent. Dig. tit. "Bills and Notes," § 46.

Although made by two persons it may be payable to the "order of myself." Jenkins *v.* Bass, 88 Ky. 397, 10 Ky. L. Rep. 987, 11 S. W. 293, 21 Am. St. Rep. 344; Warren First Nat. Bank *v.* Fowler, 36 Ohio St. 524, 38 Am. Rep. 610, the latter case holding that such note is equivalent to a note "to the order of ourselves or either of us."

91. *California.*— Lassen County Bank *v.* Sherer, 108 Cal. 513, 41 Pac. 415.

Illinois.— Chicago Trust, etc., Bank *v.* Nordgren, 157 Ill. 663, 42 N. E. 148 (but not within the statute as to indorsement of notes payable to bearer); Hall & Burton, 29 Ill. 321, 81 Am. Dec. 310; Wilder *v.* De Wolf, 24 Ill. 190.

Louisiana.— Mathe *v.* McCrystal, 11 La. Ann. 4.

Maine.— Bishop *v.* Rowe, 71 Me. 263; Roberts *v.* Lane, 64 Me. 108, 18 Am. Rep. 242.

Mississippi.— Columbus Ins., etc., Co. *v.* Columbus First Nat. Bank, 73 Miss. 96, 15 So. 138; Winona Bank *v.* Wofford, 71 Miss. 711, 14 So. 262.

Missouri.— Muldrow *v.* Caldwell, 7 Mo. 563; Lowrie *v.* Zunkel, 49 Mo. App. 153.

New York.— Smith *v.* Gardner, 4 Bosw. (N. Y.) 54; Odell *v.* Clyde, 23 Misc. (N. Y.) 734, 53 N. Y. Suppl. 61.

North Carolina.— Norfolk Nat. Bank *v.* Griffin, 107 N. C. 173, 11 S. E. 1049, 22 Am. St. Rep. 868.

Ohio.— Ewan *v.* Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094, 60 Am. St. Rep. 719, 35 L. R. A. 786.

Texas.— Lyon *v.* Kempinski, 1 Tex. App. Civ. Cas. § 79.

Vermont.— Blackman *v.* Green, 24 Vt. 17.

United States.— Jones *v.* Shapera, 57 Fed. 457, 13 U. S. App. 481, 6 C. C. A. 423; Towne *v.* Smith, 1 Woodb. & M. (U. S.) 115, 24 Fed. Cas. No. 14,115, 9 Law Rep. 12.

England.— Masters *v.* Baretto, 8 C. B. 433, 2 C. & K. 715, 13 Jur. 1124, 19 L. J. C. P. 50, 65 E. C. L. 433; Brown *v.* De Winton, 6 C. B. 336, 6 D. & L. 62, 12 Jur. 678, 17 L. J. C. P. 281, 60 E. C. L. 336. And a note "to our and each of our order" when indorsed is within the statute of Anne. Absolon *v.* Marks, 11 Q. B. 19, 11 Jur. 1016, 17 L. J. Q. B. 7, 63 E. C. L. 19.

Canada.— See Wallace *v.* Henderson, 7 U. C. Q. B. 88; Burns *v.* Harper, 6 U. C. Q. B. 509, which hold that a note payable to the maker's own order, and indorsed by the maker cannot be declared upon as payable to plaintiff or bearer.

See 7 Cent. Dig. tit. "Bills and Notes," § 46.

Necessity of indorsement.— Until a note payable to the maker's order is indorsed by him the note is incomplete and without effect.

Alabama.— Lea *v.* Mobile Branch Bank, 8 Port. (Ala.) 119.

Arkansas.— Scull *v.* Edwards, 13 Ark. 24, 56 Am. Dec. 294.

California.— But if the note is payable to the order of the maker and another, and is issued by the maker indorsed by such other only, it may be binding on the maker by way of estoppel. Main *v.* Hilton, 54 Cal. 110.

Illinois.— Kayser *v.* Hall, 85 Ill. 511, 28 Am. Rep. 624.

Indiana.— Pickering *v.* Cording, 92 Ind. 306, 47 Am. Rep. 145.

Louisiana.— Rabasse's Succession, 49 La. Ann. 1405, 22 So. 767, holding mere delivery insufficient.

Massachusetts.— Roby *v.* Phelon, 118 Mass. 541; Little *v.* Rogers, 1 Metc. (Mass.) 108.

New York.— Under the Revised Statutes the maker of a note payable to the maker's order and not indorsed by him was held liable to a *bona fide* holder as the maker of a note payable to bearer (Brooklyn Cent. Bank *v.* Lang, 1 Bosw. (N. Y.) 202; Plets *v.* Johnson, 3 Hill (N. Y.) 112) and the accommodation indorser of such a note is liable as on a note payable to bearer if he knows the note to be payable "to the order of the maker, or of a fictitious person" (Irving Nat. Bank *v.* Alley, 79 N. Y. 536); but under section 320 of the Negotiable Instruments Law which has now superseded the provisions of the Revised Statutes, "where a note is drawn to the maker's own order, it is not complete until indorsed by him." This statute does not apply to a note which was negotiable before it took effect. Odell *v.* Clyde, 23 Misc. (N. Y.) 734, 53 N. Y. Suppl. 61.

Pennsylvania.— Aughinbaugh *v.* Roberts, 4 Wkly. Notes Cas. (Pa.) 181.

Virginia.— And if not indorsed by the maker the erasure of his name and substitution of another payee and indorsement, although made to carry into effect an intended renewal, is a material alteration and discharges the maker. Hoffman *v.* Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134.

United States.— Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743.

England.— Wood *v.* Mytton, 10 Q. B. 805, 11 Jur. N. S. 967, 16 L. J. Q. B. 446, 59 E. C. L. 805 [*overruling* on this point Flight *v.* Maclean, 16 L. J. Exch. 23, 16 M. & W. 51].

Canada.— Ennis *v.* Hastings, 9 N. Brunsw. 482; Trenholme *v.* Coutu, 2 Quebec Q. B. 387. But see Myers *v.* Wilkins, 6 U. C. Q. B. 421, holding that a note payable to the order of plaintiff need not be indorsed by him to him-

however, maker and payee are two different persons of the same name, the note is of course not payable to the maker — and this is said to be the presumption until the identity of person is proved.[92] So one or more makers may be identical with one or more of the payees, and while one who is both maker and payee cannot in general[93] sue on the note[94] his co-payee may sue the other maker[95] and his indorsee may bring suit on it against all the makers,[96] or the identity may be unintended and apparent only — as where the payee, intending to indorse the note for transfer, writes his name on its face below that of the maker.[97] A bill of exchange may be made payable to the drawer's own order,[98] and in such case may

self to give it the effect of a note payable to him.

See also Neg. Instr. L. § 320; Bills Exch. Act, § 83.

92. Cooper *v.* Poston, 1 Duv. (Ky.) 92, 85 Am. Dec. 610.

93. **Joint and several note.**— If A, B, and C make a joint and several note to B and C, the payees can sue A on the several obligation. Fisher *v.* Diehl, 94 Md. 112, 50 Atl. 432; Beecham *v.* Smith, E. B. & E. 442, 96 E. C. L. 442.

"Or bearer."— Where a note was made by A and B payable to "L. H. Mundy [the defendant] or bearer" it was held in Devore *v.* Mundy, 4 Strobh. (S. C.) 15, that a subsequent holder or "bearer" could sue both makers.

94. Moore *v.* Randolph, 70 Ala. 575 (holding that an administrator cannot maintain an action on a note payable to himself in his representative character, and signed by him as surety for the principal maker); Glenn *v.* Sims, 1 Rich. (S. C.) 34, 42 Am. Dec. 405 (holding that on a note by A and B to B neither B nor his personal representative may sue).

95. Quisenberry *v.* Artis, 1 Duv. (Ky.) 30.

96. *Indiana.*— Schmidt *v.* Archer, 113 Ind. 365, 14 N. E. 543.

Kansas.— Walker *v.* Sims, (Kan. App. 1899) 64 Pac. 81.

Massachusetts.— Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306. Where a note is made jointly and severally by several promisors, payable to the order of one of them, and is by him indorsed and negotiated, it is to be deemed a joint and several debt due to the holder from the promisors, in the same manner as if the payee had not been one of them. American Bank *v.* Doolittle, 14 Pick. (Mass.) 123.

Missouri.— Smith *v.* Gregory, 75 Mo. 121; Muldrow *v.* Caldwell, 7 Mo. 563.

New Hampshire.— Heywood *v.* Wingate, 14 N. H. 73.

South Carolina.— Rambo *v.* Metz, 5 Strobh. (S. C.) 108, 53 Am. Dec. 694.

Tennessee.— Woods *v.* Ridley, 11 Humphr. (Tenn.) 194.

See 7 Cent. Dig. tit. "Bills and Notes," § 46.

If the payee's signature as maker is added after he had transferred the note, it may be available as evidence to render him liable as guarantor. Cason *v.* Wallace, 4 Bush (Ky.) 388.

Joint note of firm to partner.— A partner cannot sue on a joint note of the firm to him, although his assignee or indorsee may.

Maine.— Woodman *v.* Boothby, 66 Me. 389; Hapgood *v.* Watson, 65 Me. 510; Davis *v.* Briggs, 39 Me. 304.

Michigan.— Wintermute *v.* Torrent, 83 Mich. 555, 47 N. W. 358; Carpenter *v.* Greenop, 74 Mich. 664, 42 N. W. 276, 16 Am. St. Rep. 662, 4 L. R. A. 241.

Missouri.— Knaus *v.* Givens, 110 Mo. 58, 19 S. W. 535; Young *v.* Chew, 9 Mo. App. 387. But the indorsee cannot sue if the note be non-negotiable. Hill *v.* McPherson, 15 Mo. 204, 55 Am. Dec. 142.

New York.— Smith *v.* Lusher, 5 Cow. (N. Y.) 688.

Vermont.— Walker *v.* Wait, 50 Vt. 668; Ormsbee *v.* Kidder, 48 Vt. 361; Tucker *v.* Bradley, 33 Vt. 324; Norton *v.* Downer, 15 Vt. 569.

England.— See Neale *v.* Turton, 4 Bing. 149, 13 E. C. L. 442, a joint partnership acceptance of a bill of exchange.

Note of one firm to another with common partner.— So if a note is made by one firm to another firm having one partner in common the payees cannot sue the makers, although their indorsee may do so. Murdock *v.* Caruthers, 21 Ala. 785. Nor can the payees who are not members of the firm of makers sue the makers who do not belong to the payee firm, although their indorsee can do so. Merchants' Nat. Bank *v.* Randall, Wils. (Ind.) 166.

If one partner makes a note in the firm-name to the other partner it will be treated as a note by one individually to the other. Morrison *v.* Stockwell, 9 Dana (Ky.) 172.

97. Cason *v.* Wallace, 4 Bush (Ky.) 388.

As to parol evidence in such case see *infra*, XIV, E [8 Cyc.].

98. *Alabama.*— Hart *v.* Shorter, 46 Ala. 453; Randolph *v.* Parish, 9 Port. (Ala.) 76.

Illinois.— Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

Kentucky.— Rice *v.* Hogan, 8 Dana (Ky.) 133.

Michigan.— Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193.

England.— Butler *v.* Crips, 1 Salk. 130.

A bill drawn by one partner in favor of his firm is in effect such a bill, and the firm's indorsement is necessary for its completion. Capital City Ins. Co. *v.* Quinn, 73 Ala. 558.

be treated as a note[99] or after its acceptance as an accepted bill.[1] The indorsement of the drawer is not, however, essential to the completeness of an acceptance in his favor.[2]

(5) Executors, Administrators, Trustees, or Guardians. A bill or note made payable to one who is described as "executor," "administrator,"[3] "trustee,"[4] or "guardian"[5] is none the less payable to the person named in his individual capacity, the official words being treated as mere description, and the payee may sue upon it in his individual right. That the paper is so payable does not destroy its negotiability[6] and the payee may transfer it by his individual indorsement.[7]

99. *Alabama.*— Randolph *v.* Parish, 9 Port. (Ala.) 76.

Georgia.— Lewis *v.* Harper, 73 Ga. 564.

Indiana.— St. James Church *v.* Moore, 1 Ind. 289.

Texas.— Planters' Bank *v.* Evans, 36 Tex. 592.

England.— Davis *v.* Clarke, 6 Q. B. 16, 1 C. & K. 177, 8 Jur. 688, 13 L. J. Q. B. 305, 47 E. C. L. 177; Dickinson *v.* Valpy, 10 B. & C. 128, 8 L. J. K. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63; Robinson *v.* Bland, 2 Burr. 1077; Starke *v.* Cheesman, Carth. 509; Roach *v.* Ostler, 1 M. & R. 120, 17 E. C. L. 646; Block *v.* Bell, 1 M. & Rob. 149; Butler *v.* Crips, 1 Salk. 130; Dehers *v.* Harriot, 1 Show. 163.

Canada.— Golding *v.* Waterhouse, 16 N. Brunsw. 313.

See 7 Cent. Dig. tit. "Bills and Notes," § 15.

1. Rice *v.* Hogan, 8 Dana (Ky.) 133; Cunningham *v.* Wardwell, 12 Me. 466; Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65; Bank of British North America *v.* Barling, 46 Fed. 357; Wildes *v.* Savage, 1 Story (U. S.) 22, 29 Fed. Cas. No. 17,653, 3 Law Rep. 1.

2. Huling *v.* Hugg, 1 Watts & S. (Pa.) 418; Smith *v.* McClure, 5 East 476, 2 Smith K. B. 43, 7 Rev. Rep. 750.

If accepted and not indorsed he may hold the accepter, giving him notice that he holds as payee. Rice *v.* Hogan, 8 Dana (Ky.) 133.

3. *Alabama.*— Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527.

Arkansas.— Cravens *v.* Logan, 7 Ark. 103. See also Duke *v.* Crabtree, 5 Ark. 478; Perkins *v.* Crabtree, 5 Ark. 475, which hold that where A executes a note to B, "administrator," B cannot maintain an action thereon as administrator. The money when collected would not be assets.

Georgia.— Saffold *v.* Banks, 69 Ga. 289.

Indiana.— Speelman *v.* Culbertson, 15 Ind. 441.

Louisiana.— Clampitt *v.* Newport, 8 La. Ann. 124; Gilman *v.* Horseley, 5 Mart. N. S. (La.) 661; Urquhart *v.* Taylor, 5 Mart. (La.) 200.

Maryland.— An action instituted by a person named upon a single bill, payable to "John Llewellin, executor of Jeremiah Boothe," is an action in his own right, to which a debt due from him may be set off; and he cannot go into evidence of the consideration of the bill to show that it was given for a debt due B, in order to exclude the set-off. Turner *v.* Plowden, 2 Gill & J. (Md.) 455.

Massachusetts.—Hill *v.* Whidden, 158 Mass. 267, 33 N. E. 526 (holding that where an estate furnished the consideration for a note, but it is made payable to the executrix in her own name, she may recover thereon in her own name, and account therefor to the estate); Plimpton *v.* Goodell, 126 Mass. 119.

Mississippi.— Carter *v.* Saunders, 2 How. (Miss.) 851.

Missouri.— Thomas *v.* Relfe, 9 Mo. 377.

New York.— Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58; Reznor *v.* Webb, 36 How. Pr. (N. Y.) 353, the latter case holding that where a note is given to the payee as "administrator," in payment of a debt due to others than the payee, he can recover upon it for the benefit of those who may be entitled.

Oregon.— Burrell *v.* Kern, 34 Oreg. 501, 56 Pac. 809.

Texas.— Moss *v.* Witcher, 35 Tex. 388; Gayle *v.* Ennis, 1 Tex. 184.

And see *infra*, XIV, C [8 Cyc.].

See 7 Cent. Dig. tit. "Bills and Notes," § 267.

"As administrator."— This is equally true of a note made to a particular person, "as administrator." Gilman *v.* Horseley, 5 Mart. N. S. (La.) 661; Gunn *v.* Hodge, 32 Miss. 319.

4. Rice *v.* Rice, 106 Ala. 636, 17 So. 628 ("party really interested" under the statute); Bush *v.* Peckard, 3 Harr. (Del.) 385.

5. Bingham *v.* Calvert, 13 Ark. 399; Baker *v.* Ormsby, 5 Ill. 325; McLean *v.* Dean, 66 Minn. 369, 69 N. W. 140; Walker *v.* State Trust Co., 40 N. Y. App. Div. 55, 57 N. Y. Suppl. 525 ("special guardian of Lulu E. Semcken").

6. Central State Bank *v.* Spurlin, 111 Iowa 187, 82 N. W. 493, 82 Am. St. Rep. 511, 49 L. R. A. 661; Sherman Bank *v.* Apperson, 4 Fed. 25.

7. *Georgia.*— Zellner *v.* Cleveland, 69 Ga. 631.

Indiana.— Speelman *v.* Culbertson, 15 Ind. 441.

Maine.— Dorr *v.* Davis, 76 Me. 301.

Mississippi.— Jenkins *v.* Sherman, 77 Miss. 884, 28 So. 726.

Missouri.— Thornton *v.* Rankin, 19 Mo. 193, 59 Am. Dec. 338.

See also *infra*, VI, A, 1, e.

It has been held, however, that a trustee cannot transfer such paper except subject to the trust.[8]

(6) Fictitious Persons. A bill of exchange or note may be made payable to the order of a fictitious person, and this makes it in effect payable to bearer.[9] The name assumed as a fictitious payee may be that of an actual person used as such without interest on his part or intention on the maker's part to make him a party in fact;[10] it may be the name of a fictitious person fraudulently imposed on the drawer or maker as a real person and afterward personated by the fraudulent indorser;[11] it may be the name of a partnership that has been dissolved,[12] of a fictitious firm,[13] or of a corporation that has no existence;[14] or it may be a mere misnomer.[15] A misnomer is immaterial if no doubt exists as to the identity of the

8. Baltimore Third Nat. Bank *v.* Lange, 51 Md. 138, 34 Am. Rep. 304; Sturtevant *v.* Jaques, 14 Allen (Mass.) 523.

9. *Indiana.*— Farnsworth *v.* Drake, 11 Ind. 101.

Kansas.— Kohn *v.* Watkins, 26 Kan. 691, 40 Am. Rep. 336.

Michigan.— Shaw *v.* Brown, 128 Mich. 573, 87 N. W. 757.

Nebraska.— Rogers *v.* Ware, 2 Nebr. 29.

New Hampshire.— Foster *v.* Shattuck, 2 N. H. 446.

New York.— Phillips *v.* Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 37 Am. St. Rep. 596, 23 L. R. A. 584 [*affirming* 67 Hun (N. Y.) 378, 22 N. Y. Suppl. 254]; Stevens *v.* Strang, 2 Sandf. (N. Y.) 138. Independently of the Revised Statutes. Plets *v.* Johnson, 3 Hill (N. Y.) 112.

Ohio.— Forbes *v.* Espy, 21 Ohio St. 474.

Pennsylvania.—Hunter *v.* Blodget, 2 Yeates (Pa.) 480, if indorsed by the nominal payee.

England.— Phillips *v.* Im Thurn, L. R. 1 C. P. 463, 18 C. B. N. S. 694, 11 Jur. N. S. 489, 12 L. T. Rep. N. S. 457, 13 Wkly. Rep. 750, 114 E. C. L. 694; Hunter *v.* Jeffery, Peake Add. Cas. 146; *Ex p.* Royal Bank of Scotland, 2 Rose 197, 19 Ves. Jr. 310. So under Bills Exch. Act, § 87. Clutton *v.* Attenborough, [1897] A. C. 90, 66 L. J. Q. B. 221, 75 L. T. Rep. N. S. 556, 45 Wkly. Rep. 276.

See also *infra*, VI, C, 2; and 7 Cent. Dig. tit. "Bills and Notes," §§ 8, 49.

Illustrations.— So a note is in effect payable to bearer if payable to a fictitious person "or bearer" (State *v.* Cleavland, 6 Nev. 181), "to Ship Fortune, or bearer" (Grant *v.* Vaughan, 3 Burr. 1516), "to No. 100 or bearer" (Ball *v.* Allen, 15 Mass. 433), "to the order of 1658" (Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121), "to bills payable" (Mechanics' Bank *v.* Straiton, 3 Abb. Dec. (N. Y.) 269, 3 Keyes (N. Y.) 365, 1 Transcr. App. (N. Y.) 201, 5 Abb. Pr. N. S. (N. Y.) 11, 36 How. Pr. (N. Y.) 190; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121), "to order" simply (Davega *v.* Moore, 3 McCord (S. C.) 482), or "to the order of the indorser's name" (U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374); but "Garden City Veneer Mills" is not a fictitious payee where it is employed as the style or designation of a firm (Edgerton *v.* Preston, 15 Ill. App. 23). So a note payable to "the order of estate of Wm. N. Beach," for money of the estate loaned by the executors without authority, is not an obligation to the executors in their representative capacity, but should be regarded as a note payable to a fictitious person and so to bearer. Scott *v.* Parker, 5 N. Y. Suppl. 753.

Where payable to a fictitious payee, and not to his order or bearer, a person receiving it from a third party for value cannot declare against the maker as on a note payable to bearer. Williams *v.* Noxon, 10 U. C. Q. B. 259.

Knowledge of maker not essential.— It is not necessary for the maker's liability that he have put the note into circulation with knowledge that the name of the payee is fictitious. Anderson *v.* Dundee State Bank, 66 Hun (N. Y.) 613, 21 N. Y. Suppl. 925, 50 N. Y. St. 447 [*reversing* 20 N. Y. Suppl. 511, 47 N. Y. St. 447].

10. Rogers *v.* Ware, 2 Nebr. 29; Foster *v.* Shattuck, 2 N. H. 446. See also Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227.

11. In such case the drawer cannot be treated as drawer of a check to a fictitious payee and the drawee paying it on such indorsement cannot charge the drawer, as in case of a fictitious payee known by the drawer to be such. Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791 [*affirming* 59 Hun (N. Y.) 621, 13 N. Y. Suppl. 475, 36 N. Y. St. 966]; Armstrong *v.* Pomeroy Nat. Bank, 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. Rep. 655, 6 L. R. A. 625. But *contra*, where the drawer was chargeable with want of due diligence. Smith *v.* Mechanics', etc., Bank, 6 La. Ann. 610; Burnet Woods Bldg., etc., Co. *v.* German Nat. Bank, 4 Ohio S. & C. Pl. Dec. 290, 3 Ohio N. P. 84. See too Bank of England *v.* Vagliano, [1891] A. C. 107 [*reversing* 23 Q. B. D. 243, 53 J. P. 564, 58 L. J. Q. B. 357, 61 L. T. Rep. N. S. 419, 37 Wkly. Rep. 640].

12. Cavitt *v.* James, 39 Tex. 189.

13. Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501; Blodgett *v.* Jackson, 40 N. H. 21.

14. Farnsworth *v.* Drake, 11 Ind. 101.

15. Shaw *v.* Brown, 128 Mich. 573, 87 N. W. 757; Stevens *v.* Strang, 2 Sandf. (N. Y.) 138, in which latter case such a note was held to be within the New York statute relating to fictitious payees. It is probably within the

intended payee,[16] as in case of a mere misspelling of the name in the indorsement;[17] but the name (used by mistake) of an actual person, who was not the person intended, is not a mere misnomer and cannot be treated as such by the intended payee.[18] The fictitious payee may be an actual person originally intended for payee but never actually made such, the instrument being diverted from its original purpose and discounted by another person.[19] Even the name of a real payee may be made fictitious, as against the maker of a note, by the maker's own action in indorsing the note in that name,[20] or, as against the accepter of a bill, by the accepter's action in paying the bill to one who holds it under an indorsement of such payee's name by the drawer;[21] and even where a real payee is fraudulently personated by one who obtains the paper as such, the maker of the paper may become liable by estoppel to a *bona fide* holder, although he had no knowledge of the fraud.[22] If a bill is payable to a fictitious payee it may be indorsed by the holder to whom it is delivered,[23] or he may recover without

cases enumerated in section 28 of the Negotiable Instruments Law: "When the name of the payee does not purport to be the name of any person" or "when it is payable to the order of a fictitious or non-existing person."

16. Rex *v.* Box, R. & R. 300, 6 Taunt. 325, 1 E. C. L. 635.

Party may show that he was intended.— Where a note is executed to one in another than his real name he may recover by showing that he was the payee intended. Chenot *v.* Lefevre, 8 Ill. 637; Middle Parish Charitable Assoc. *v.* Baldwin, 1 Metc. (Mass.) 359; State Bank *v.* Burke, 1 Coldw. (Tenn.) 623.

17. Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496. But under a declaration on a note to "Bartholomew Whalen" it has been held that a note to "Bart. Whalen" cannot be proved. Rives *v.* Marrs, 25 Ill. 315.

18. Bolles *v.* Stearns, 11 Cush. (Mass.) 320, where John was named and Joseph intended.

An indorsement by a person of the same name as the payee, not being the person intended, is a forgery, and does not effect a transfer. Mead *v.* Young, 4 T. R. 28, 2 Rev. Rep. 314.

19. Meeker *v.* Shanks, 112 Ind. 207, 13 N. E. 712; Rhyan *v.* Dunnigan, 76 Ind. 178; Hunt *v.* Aldrich, 27 N. H. 31; Cross *v.* Rowe, 22 N. H. 77; Hortsman *v.* Henshaw, 11 How. (U. S.) 177, 13 L. ed. 653. But in Illinois such a note is invalid. Centralia First Nat. Bank *v.* Strang, 72 Ill. 559. And in Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227, it was held that the holder could not sue as indorsee, although he had procured the nominal payee's indorsement after the maturity of the note.

20. The maker being thereby estopped. Meacher *v.* Fort, 3 Hill (S. C.) 227, 30 Am. Dec. 364.

The drawer of a check may be estopped by the act of his agent (cashier) in fraudulently indorsing and issuing such check. Phillips *v.* Mercantile Nat. Bank, 140 N. Y. 556, 562, 35 N. E. 982, 37 Am. St. Rep. 596, 23 L. R. A. 584 [*affirming* 67 Hun (N. Y.) 378, 51 N. Y. St. 918, 22 N. Y. Suppl. 254], where Gray, J., said: "The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority." And see Coggill *v.* American Exch. Bank, 1 N. Y. 113, 49 Am. Dec. 310.

21. Hortsman *v.* Henshaw, 11 How. (U. S.) 177, 13 L. ed. 653. In like manner the bank which certifies a check that has been indorsed with the payee's name by the drawer cannot question the indorsee's title under such indorsement. Merchants' L. & T. Co. *v.* Metropolis Bank, 7 Daly (N. Y.) 137. And the accepter of a draft is liable to a *bona fide* indorsee, although the drawer has been induced by fraud to deliver it to one who personated the real payee and had stopped the payment of the draft on discovering the fraud. Ft. Worth First Nat. Bank *v.* American Exch. Nat. Bank, 170 N. Y. 88, 62 N. E. 1089.

22. Lane *v.* Krekle, 22 Iowa 399.

So as to the drawer of a bill of exchange (Kohn *v.* Watkins, 26 Kan. 691, 40 Am. Rep. 336), as where the drawer delivered it to the party intended but not named as payee (Emporia Nat. Bank *v.* Shotwell, 35 Kan. 360, 11 Pac. 141, 57 Am. Rep. 171), or only named by a fictitious and assumed name (Meridian Nat. Bank *v.* Shelbyville First Nat. Bank, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450), or where he delivered it to a third party who fraudulently personated the payee that was named and intended (Levy *v.* Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124; Robertson *v.* Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471. *Contra*, Western Union Tel. Co. *v.* Bimetallic Bank, (Colo. App. 1903) 68 Pac. 115; Rogers *v.* Ware, 2 Nebr. 29; Tolman *v.* American Nat. Bank, 22 R. I. 462, 48 Atl. 480, 84 Am. St. Rep. 850, 52 L. R. A. 877).

23. Blodgett *v.* Jackson, 40 N. H. 21. But under the New York Revised Statutes to entitle the indorsee to recover it must appear

indorsement if it is payable to such payee "or bearer."[24] At common law, as against parties having no knowledge of such fictitious character, a bill to a fictitious payee cannot be treated as a bill to bearer;[25] but in many of the United States bills and notes payable to a fictitious payee are in effect payable to bearer and transferable as such.[26]

(7) JOINT PAYEES — PARTNERS. A bill or note may be made payable to several persons jointly in their individual names,[27] to several persons in designated shares, which is in effect a joint note,[28] or to a partnership in its firm-name;[29] but where the firm-name is the name of an individual partner, the presumption is that the paper was made to that partner as an individual.[30]

(8) PUBLIC OFFICERS. A public officer who takes a bill or note as such cannot bring an action upon it in his individual name,[31] although it has been held

affirmatively that the payee is a fictitious person, and that the holder was ignorant thereof at the time he received the note. Maniort *v.* Roberts, 4 E. D. Smith (N. Y.) 83. As to what knowledge is sufficient see Irving Nat. Bank *v.* Alley, 79 N. Y. 536.

24. Lane *v.* Krekle, 22 Iowa 399.

25. Bennett *v.* Farnell, 1 Campb. 130, where a recovery was allowed for money had and received. This rule is changed by the English Bills of Exchange Act, § 7.

26. **The Negotiable Instruments Law, section 28,** provides that "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable," the instrument is payable to bearer.

27. **Only surnames may be used.**— Two or more persons who are not partners may take a note payable to themselves by their surnames only, which will be good evidence of a debt, upon sufficient proof of identity. To show this evidence of partnership is not necessary. Rogers *v.* Reed, 18 Me. 257.

Such a note raises the presumption of a joint ownership, but not of a partnership (Armstrong *v.* Johnson, 93 Mo. App. 492, 67 S. W. 733; Pearce *v.* Strickler, 9 N. M. 467, 54 Pac. 748), and of a coequal interest in them, but this does not preclude proof that their interests were separate and unequal (Tisdale *v.* Maxwell, 58 Ala. 40); and the survivor may bring suit on such note (Sessions *v.* Peay, 19 Ark. 267; Woodman *v.* Barker, 2 N. H. 479; Lippincott *v.* Stokes, 6 N. J. Eq. 122. But to the effect that husband and wife, payees, are *prima facie* owners in equal shares without survivorship see Armstrong *v.* Johnson, 93 Mo. App. 492, 67 S. W. 733).

28. Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615.

29. **Such a note is evidence** of the promise, but not of the persons who compose the firm (Bell *v.* Rhea, 1 Ala. 83); but the maker cannot deny the existence of the firm (Rice *v.* Goodenow, Tapp. (Ohio) 126), or the personal capacity of one of its members as indorser (Dulty *v.* Brownfield, 1 Pa. St. 497), and the survivor may indorse in the firm-name to himself and recover on the money counts in his own name (Fowle *v.* Harrington, 1 Cush. (Mass.) 146).

In Michigan the statute requiring use of full partnership name in its notes does not apply to notes to it, a misnomer being in effect a note to bearer. Shaw *v.* Brown, 128 Mich. 573, 87 N. W. 757.

30. Boyle *v.* Skinner, 19 Mo. 82. And if the partner to whom the note is made sues for the use of the firm, the other partners need not be joined as plaintiffs and a counter-claim against the firm is not available as a defense. Mynderse *v.* Snook, 1 Lans. (N. Y.) 488. But if a note payable to A belongs in part to B, B can protect himself in equity against A's assignee and creditors. Cooper *v.* Perdue, 114 Ind. 207, 16 N. E. 140. So *a fortiori* if a factor takes a note in his own name for money due the principal and becomes bankrupt his creditors cannot claim such note. Messier *v.* Amery, 1 Yeates (Pa.) 533, 1 Am. Dec. 316.

31. So of a note to an Indian agent (Balcombe *v.* Northrup, 9 Minn. 172), to a state land agent (State *v.* Boies, 11 Me. 474; Irish *v.* Webster, 5 Me. 171), or to a tax-collector (Dickson *v.* Gamble, 16 Fla. 687. But if a note is given to a tax-collector in consideration of his having paid the maker's taxes it will not bar a suit on the original consideration, although the note was made originally to A, and subsequently rendered void by adding "collector" to his name. York *v.* Janes, 43 N. J. L. 332); but not of a note to "Durkee, agent for the proprietors of the town of Sand Hill" (Bryant *v.* Durkee, 9 Mo. 169) and on a promissory note payable to "James Thompson, school-commissioner of the county of," etc., under the express provisions of Ind. Rev. Stat. (1843), c. 13, § 108, the person named may sue in his own name (Thompson *v.* Weaver, 7 Blackf. (Ind.) 552). See also McCann *v.* State, 4 Nebr. 324, holding that a draft payable to "Hon. W. H. James, Acting Governor, or Order," for a debt due the state, gives the person named no interest that he could transfer except to the state treasurer. See also *infra*, XIV, C [8 Cyc.].

On the other hand a state may sue on a note improperly taken by its agent in his own name and afterward ratified by the legislature (State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395), and the United States may sue on a bill of exchange payable to the treasurer of the United States by name and official title (Crowell *v.* Osborne, 43 N. J. L.

that he may execute a valid transfer even after he has ceased to hold the office.[32]

(9) STATE OR GOVERNMENT. A state or government is a juristic person and may be the payee of such an instrument.[33]

(c) *How Designated.* While the simplest and best way to designate the payee is by his name the paper may be so drawn as to designate a payee by implication.[34] The payee is sufficiently named by making the bill payable to his order, this phrase being equivalent to making it payable to him or his order,[35] or where he can be ascertained or identified from the description used instead of a name;[36]

335; Dugan *v.* U. S., 3 Wheat. (U. S.) 170, 4 L. ed. 362).

32. Soares *v.* Glyn, 8 Q. B. 24, 9 Jur. 881, 14 L. J. Q. B. 313, 55 E. C. L. 24.

33. Esley *v.* Illinois, 23 Kan. 510 (holding that a note may be executed in one state, payable to the people of another state); Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378 (holding that a state is a corporation within the statute of Anne as enacted in New York).

34. As where, on a note naming a payee, a blank order for payment is indorsed (Leonard *v.* Mason, 1 Wend. (N. Y.) 522) or a new promise written (Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21).

Note following receipt.— A note naming no payee, following a receipt naming the person from whom the consideration proceeds, is payable to such person. Cummings *v.* Gassett, 19 Vt. 308; Green *v.* Davies, 4 B. & C. 235, 1 C. & P. 451, 6 D. & R. 306, 3 L. J. K. B. O. S. 185, 28 Rev. Rep. 230, 10 E. C. L. 557; Ashby *v.* Ashby, 3 M. & P. 186; Chadwick *v.* Allen, 1 Str. 706. So an instrument reciting "Received of C. W. Harvey" certain goods, "for which we agree to pay," etc., sufficiently designates the payee. Maze *v.* Heinze, 53 Ill. App. 503.

Order at bottom of statement of account.— If an order for payment, naming no payee, is written at the bottom of a statement of account, this is a bill of exchange, the creditor being payee. Hoyt *v.* Lynch, 2 Sandf. (N. Y.) 328.

Insufficient designation.— An order by the payee indorsed on a note and addressed to the cashier of the bank where it is payable, but naming no payee, is not a bill of exchange (Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637), and a promise to pay "thirty-five dollars on a judgment in the hands of Lewis Murphy, Esq., against Mark A. Sanders, in favor of John Chenoweth," is not negotiable (Mayo *v.* Chenoweth, 1 Ill. 200).

35. *Connecticut.*— Sherman *v.* Globe, 4 Conn. 246.

Kentucky.— Stevens *v.* Gregg, 89 Ky. 461, 11 Ky. L. Rep. 686, 12 S. W. 775.

Maine.— Durgin *v.* Bartol, 64 Me. 473; Howard *v.* Palmer, 64 Me. 86.

Massachusetts.— Roby *v.* Phelon, 118 Mass. 541.

Pennsylvania.— Huling *v.* Hugg, 1 Watts & S. (Pa.) 418.

United States.— Garrettson *v.* North Atchison Bank, 47 Fed. 867.

England.— Smith *v.* McClure, 5 East 476, 2 Smith K. B. 43, 7 Rev. Rep. 750; Fisher *v.* Pomfret, 12 Mod. 125.

Necessity and effect of indorsement.— The payee may sue on such an instrument without indorsing it (Huling *v.* Hugg, 1 Watts & S. (Pa.) 418; Gould *v.* Mortimer, 4 Wkly. Notes Cas. (Pa.) 322), although a purchaser from him can sue on it only after indorsement by him (Durgin *v.* Bartol, 64 Me. 473; Smalley *v.* Wight, 44 Me. 442, 69 Am. Dec. 112). After indorsement and delivery it has the same force as any other note. Hall *v.* Burton, 29 Ill. 321, 81 Am. Dec. 310; Bloomingdale *v.* National Butchers', etc., Bank, 33 Misc. (N. Y.) 594, 68 N. Y. Suppl. 35.

36. *Alabama.*— Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57.

Arkansas.— The "Guardian of Martha E. Mims." Bingham *v.* Calvert, 13 Ark. 399; Hemphill *v.* Hamilton, 11 Ark. 425.

Connecticut.— Lockwood *v.* Jesup, 9 Conn. 272; Bacon *v.* Fitch, 1 Root (Conn.) 181.

Georgia.— Moody *v.* Threlkeld, 13 Ga. 55, the "administrator . . . of John H. Newland."

Illinois.— Adams *v.* King, 16 Ill. 169, 61 Am. Dec. 64, "the administrators of Abner Chase."

Indiana.— Moore *v.* Anderson, 8 Ind. 18, where the payee was described as "St. Bt. Juda and owners, or order."

Massachusetts.— Buck *v.* Merrick, 8 Allen (Mass.) 123, the treasurer of a parish "or his successor."

Michigan.— Knight *v.* Jones, 21 Mich. 161, "Mary Knight or heirs."

Missouri.— Caples *v.* Branham, 20 Mo. 244, 64 Am. Dec. 183, trustees, to be appointed by a Methodist convention.

New York.— Davis *v.* Garr, 6 N. Y. 124, 55 Am. Dec. 387, "Joseph M. White, . . . Trustees of the Apalachicola Land Company, or their successors in office, or order."

Tennessee.— Chitwood *v.* Cromwell, 12 Heisk. (Tenn.) 658, the "guardian of R. S. Sharp."

England.— Megginson *v.* Harper, 2 Cr. & M. 322, 3 L. J. Exch. 50, 4 Tyrw. 96 ("the trustees acting under the will of the late William Brigham"); Cowie *v.* Stirling, 6 E. & B. 333, 2 Jur. N. S. 663, 25 L. J. Q. B. 335, 4 Wkly. Rep. 543, 88 E. C. L. 333 [*affirming* Storm *v.* Stirling, 3 E. & B. 832, 77 E. C. L. 832]; Robertson *v.* Sheward, 1 M. & G. 511, 1 Scott N. R. 419, 39 E. C. L. 882 (the "manager of the National Provincial Bank of England").

Canada.— Patton *v.* Melville, 21 U. C. Q. B. 263, "John Patton, Esquire, treasurer of the

but a payee as a rule cannot be designated in the alternative — one of two or more persons named,[37] although such a note is evidence at least of a contract with the payees named on which it has been variously held that they may sue jointly,[38] severally,[39] or jointly or severally.[40] It may, however, be made payable to a person or his wife[41] or the alternative may designate a mere agent for the payee for convenience and not an alternative payee;[42] and it has been held that several

. . . St. John's Church, . . . or his successor."

Business or assumed name.— The real payee, S. P. Smith, may be described by his business name, as "S. P. Smith & Co." (Smith *v.* Hanie, 74 Ga. 324), or by an assumed name (Bonner *v.* Gordon, 63 Ill. 443), such as that of a fictitious corporation (Jones *v.* Home Furnishing Co., 9 N. Y. App. Div. 103, 41 N. Y. Suppl. 71). So if the corporation is intended as payee it may treat as fictitious the nominal payee. *In re* Pendleton Hardware, etc., Co., 24 Oreg. 330, 33 Pac. 544.

Estate of A, deceased.— It has been held sufficient to describe the payee as "the estate of Benjamin Thomas, deceased" (Tittle *v.* Thomas, 30 Miss. 122, 64 Am. Dec. 154; Lyon *v.* Marshall, 11 Barb. (N. Y.) 241), and such a note has been regarded as a mere statement of account (Bowles *v.* Lambert, 54 Ill. 237), or as a written contract and evidence of debt between the maker and executor of the estate (Hendricks *v.* Thornton, 45 Ala. 299; McKinney *v.* Harter, 7 Blackf. (Ind.) 385, 43 Am. Dec. 96). On the other hand such a note has been treated as equivalent to a note payable to a fictitious payee (Lewisohn *v.* Kent, etc., Co., 87 Hun (N. Y.) 257, 33 N. Y. Suppl. 826, 67 N. Y. St. 471; Scott *v.* Parker, 5 N. Y. Suppl. 753), and as a valid note payable to the legal representative (Shaw *v.* Smith, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348; Peltier *v.* Babillion, 45 Mich. 384, 8 N. W. 99).

"Heirs of A."— A note may be made to the "heirs of" a person named (Bacon *v.* Fitch, 1 Root (Conn.) 181; Cox *v.* Beltzhoover, 11 Mo. 142, 47 Am. Dec. 145), the heirs apparent being intended, if the person named be still alive (Lockwood *v.* Jesup, 9 Conn. 272).

Holder of office for time being.—A promise to pay "the secretary for the time being" of a designated company is "a promise to pay some person to be ascertained *ex post facto*," and is insufficient (Yates *v.* Nash, 8 C. B. N. S. 581, 6 Jur. N. S. 1343, 29 L. J. C. P. 306, 2 L. T. Rep. N. S. 430, 8 Wkly. Rep. 764, 98 E. C. L. 581; Storm *v.* Stirling, 3 E. & B. 832, 77 E. C. L. 832 [*affirmed* in Cowie *v.* Stirling, 6 E. & B. 333, 2 Jur. N. S. 663, 25 L. J. Q. B. 335, 4 Wkly. Rep. 543, 88 E. C. L. 333]. But see Rex *v.* Box, R. & R. 300, 6 Taunt. 325, 1 E. C. L. 635, holding that a note to the "stewardesses for the time being of the Provident Daughters' Society," naming them, will sustain an indictment for forgery, although the persons named were not legally stewardesses); but it has been held that where a premium note to a company is made payable to the company, "or the treasurer for the time being," the contract is with the company, since the alternative provision simply indicates the officer through whom the payment may be made (Gaytes *v.* Hibbard, 5 Biss. (U. S.) 99, 10 Fed. Cas. No. 5,287), and section 27 of the Negotiable Instruments Law allows a negotiable instrument to be payable to "the holder of an office for the time being."

"The person who shall thereafter indorse." — A note made payable to the order of the person who shall thereafter indorse it is negotiable and may be transferred by indorsement. Rich *v.* Starbuck, 51 Ind. 87; U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374.

37. *Illinois.*— Musselman *v.* Oakes, 19 Ill. 81, 68 Am. Dec. 583.

Maryland.— Bennington *v.* Dinsmore, 2 Gill (Md.) 348.

Massachusetts.— Carpenter *v.* Farnsworth, 106 Mass. 561, 8 Am. Rep. 360; Osgood *v.* Pearsons, 4 Gray (Mass.) 455.

New York.— Walrad *v.* Petrie, 4 Wend. (N. Y.) 575.

England.— Blanckenhagen *v.* Blundell, 2 B. & Ald. 417.

Canada.— Reed *v.* Reed, 11 U. C. Q. B. 26.

Contra, Fort *v.* Delee, 22 La. Ann. 180 (holding an instrument to be a promissory note, within the meaning of the statute of limitations, although payable to one of two persons named, or to the order of one of them); Knight *v.* Jones, 21 Mich. 161. See also Watson *v.* Evans, 1 H. & C. 662, 32 L. J. Exch. 137, holding that a note to "Joseph Watson, . . or to their order, or the major part of them" will support a joint action by all.

38. Willoughby *v.* Willoughby, 5 N. H. 244 (where it was held that in such a case the suit must be joint); Westgate *v.* Healy, 4 R. I. 523.

39. Ellis *v.* McLemoor, 1 Bailey (S. C.) 13; Record *v.* Chisum, 25 Tex. 348; Spaulding *v.* Evans, 2 McLean (U. S.) 139, 22 Fed. Cas. No. 13,216; Samuels *v.* Evans, 1 McLean (U. S.) 473, 21 Fed. Cas. No. 12,289.

40. Collyer *v.* Cook, 28 Ind. App. 272, 62 N. E. 655.

41. Being in effect made to the husband alone. Young *v.* Ward, 21 Ill. 223; Moodie *v.* Rowatt, 14 U. C. Q. B. 273. Or it may be treated as made to the husband and his wife, and after the former's death may be transferred by the wife alone. Prindle *v.* Caruthers, 15 N. Y. 425.

42. Noxon *v.* Smith, 127 Mass. 485 (holding that "the trustees of the Methodist Episcopal Church or their collector" designates an agent of the payee who may receive payment and is a valid note); Atlantic Mut. F. Ins. Co. *v.* Young, 38 N. H. 451, 75 Am. Dec.

payees may be named in succession — one to take if the other die before receiving payment.[43]

(III) *DRAWEE* — (A) *Who May Be* — (1) IN GENERAL — (a) DRAWER. A bill may be drawn upon the drawer himself, and is then in effect the promissory note[44] or the accepted bill[45] of the drawer, at the holder's election;[46] and this is true in general of a bill or draft drawn by a principal on his agent,[47] by an agent on his principal,[48] or, in the principal's business, by one agent on another,[49] and of a bill drawn by one partner on his firm.[50]

(b) FICTITIOUS PERSON. If a fictitious name is used for the drawee, the bill is in like manner in effect the note of the drawer.[51]

(c) PAYEE. Even the payee may be designated as drawee of the bill, in which case also the drawer is liable substantially as the maker of a note.[52]

200 (promise to pay to a corporation or its treasurer); Gaytes *v.* Hibbard, 5 Biss. (U. S.) 99, 10 Fed. Cas. No. 5,287; Holmes *v.* Jaques, L. R. 1 Q. B. 376, 12 Jur. N. S. 486, 35 L. J. Q. B. 130, 14 L. T. Rep. N. S. 252, 14 Wkly. Rep. 584.

43. Blanchard *v.* Sheldon, 43 Vt. 512.

44. *Alabama.*— Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657.

Florida.— Bailey *v.* South Western Railroad Bank, 11 Fla. 266.

Indiana.— Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163; Marion, etc., R. Co. *v.* Dillon, 7 Ind. 404.

Massachusetts. — Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Michigan.— Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193.

New York.— Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606.

North Dakota.— Drinkall *v.* Movius State Bank, (N. D. 1901) 88 N. W. 724.

South Carolina.— McCandlish *v.* Cruger, 2 Bay (S. C.) 377.

England.— Willans *v.* Ayers, 3 App. Cas. 133, 47 L. J. P. C. 1, 37 L. T. Rep. N. S. 732; Robinson *v.* Bland, 2 Burr. 1077; Starke *v.* Cheesman, Carth. 509; Miller *v.* Thomson, 1 Dowl. N. S. 199, 11 L. J. C. P. 21, 3 M. & G. 576, 4 Scott N. R. 204, 42 E. C. L. 303; Block *v.* Bell, 1 M. & Rob. 149; Dehers *v.* Harriot, 1 Show. 163.

See 7 Cent. Dig. tit. "Bills and Notes," § 15.

45. Randolph *v.* Parish, 9 Port. (Ala.) 76; Hazard *v.* Cole, 1 Ida. 276; Cunningham *v.* Wardwell, 12 Me. 466; Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193.

46. Randolph *v.* Parish, 9 Port. (Ala.) 76; Burnheisel *v.* Field, 17 Ind. 609; Planters' Bank *v.* Evans, 36 Tex. 592; Neg. Instr. L. § 214; Bills Exch. Act, § 5, subs. 2.

47. *Alabama.*— Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657.

Indiana.— Chicago, etc., R. Co. *v.* West, 37 Ind. 211; Indiana, etc., R. Co. *v.* Davis, 20 Ind. 6, 83 Am. Dec. 303; Burnheisel *v.* Field, 17 Ind. 609; Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163; St. James Church *v.* Moore, 1 Ind. 289.

Louisiana.— Poydras *v.* Delamare, 13 La. 98.

Massachusetts.— Tripp *v.* Swanzey Paper Co., 13 Pick. (Mass.) 291.

Mississippi.—Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432.

New York.— Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606; Mobley *v.* Clark, 28 Barb. (N. Y.) 390.

England.— Allen *v.* Sea, etc., Assur. Co., 9 C. B. 574, 67 E. C. L. 574.

48. Bailey *v.* South Western Railroad Bank, 11 Fla. 266; McCormick *v.* Hickey, 24 Mo. App. 362; Mobley *v.* Clark, 28 Barb. (N. Y.) 390; Drinkall *v.* Movius State Bank, (N. D. 1901) 88 N. W. 724. Or it may be regarded as the draft of the principal (Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537) drawn on himself (Raymond *v.* Mann, 45 Tex. 301).

49. *Idaho.*— Hazard *v.* Cole, 1 Ida. 276.

Indiana.— Maux Ferry Gravel Road Co. *v.* Branegan, 40 Ind. 361; Floyd County *v.* Day, 19 Ind. 450; Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163; Marion, etc., R. Co. *v.* Dillon, 7 Ind. 404.

Iowa.— Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Michigan.— Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193.

New York.— Bull *v.* Sims, 23 N. Y. 570; Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606; Read *v.* Buffalo, 67 Barb. (N. Y.) 526.

It is a note so far at least that demand and notice are unnecessary (Dennis *v.* Table Mountain Water Co., 10 Cal. 369; Fairchild *v.* Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606); but it is a bill as to recovery of statutory damages (Hazard *v.* Cole, 1 Ida. 276).

A draft by one public officer on another may be treated as an accepted bill. Baker *v.* Montgomery, 4 Mart. (La.) 90.

50. Dougal *v.* Cowles, 5 Day (Conn.) 511.

51. Smith *v.* Bellamy, 2 Stark. 223, 3 E. C. L. 386.

An actual drawee cannot be treated as fictitious because written over a half-erased bank name of which the words "Bank of Milwaukee" remained uncanceled. Cork *v.* Bacon, 45 Wis. 192, 30 Am. Rep. 712.

52. Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65; Wildes *v.* Savage, 1 Story (U. S.) 22, 29 Fed. Cas. No. 17,653, 3 Law Rep. 1; Holdsworth *v.* Hunter, 10 B. & C. 449, 8 L. J. K. B. O. S. 149, 5 M. & R. 393, 21 E. C. L. 193. So where it is payable to the

(2) Several Drawees. A bill may be addressed to several drawees jointly, but not in the alternative or in succession;[53] but the drawer may insert an alternative drawee, to whom the bill may be presented "in case of need" on the original drawee's failure or refusal to accept.[54]

(B) *How Designated.* The name of the person on whom a bill of exchange is drawn should appear on its face,[55] and the usual manner of effecting this is by the address at the top or bottom of the bill.[56] An acceptance will, however, supply the omission of such address,[57] and the drawee's name may be left blank and filled under the implied authority like any other blank.[58] It is sufficient too if the drawee be plainly designated rather than named.[59] The drawee may be named by his official or representative title and may accept the bill in that manner,[60] it may be addressed to him in one character and accepted in another,[61] or it may be addressed to a company and accepted by its agent;[62] but in general

order of the accepter. Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294.

53. Neg. Instr. L. § 216; Bills Exch. Act, § 6.

54. Neg. Instr. L. § 215; Bills Exch. Act, § 15.

55. McPherson *v.* Johnston, 3 Brit. Col. 465; Forward *v.* Thompson, 12 U. C. Q. B. 103.

The Negotiable Instruments Law, section 20, subsection 5, provides: "Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty." So Bills Exch. Act, § 6.

If no drawee is named the instrument may be treated as the drawer's own note or accepted bill (Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166; Petillon *v.* Lorden, 86 Ill. 361; Brooks *v.* Brady, 53 Ill. App. 155; Bunting *v.* Mick, 5 Ind. App. 289, 31 N. E. 378, 1055; Bradley *v.* Mason, 6 Bush (Ky.) 602; Almy *v.* Winslow, 126 Mass. 342) and recovery may be had on the common money counts (Ellis *v.* Wheeler, 3 Pick. (Mass.) 18). The holder must, however, prove the consideration as against the drawer in such case. Ball *v.* Allen, 15 Mass. 433; Watrous *v.* Halbrook, 39 Tex. 572.

56. Watrous *v.* Halbrook, 39 Tex. 572; Peto *v.* Reynolds, 11 Exch. 418 [*reversing* 2 C. L. R. 491, 9 Exch. 410, 18 Jur. 472, 23 L. J. Exch. 98, 2 Wkly. Rep. 196]; McPherson *v.* Johnston, 3 Brit. Col. 465.

It may be addressed "at" instead of "to" the drawee (Allan *v.* Mawson, 4 Campb. 115; Shuttleworth *v.* Stephens, 1 Campb. 407; Rex *v.* Hunter, R. & R. 380), e. g., by memorandum "Payable at No. 1, Wilmot Street" (Gray *v.* Milner, 3 Moore C. P. 90, 2 Stark. 336, 8 Taunt. 739, 21 Rev. Rep. 525, 4 E. C. L. 361).

It may be addressed to a certain house instead of to a person named. Atwood *v.* Griffin, 2 C. & P. 368, R. & M. 423, 31 Rev. Rep. 669, 12 E. C. L. 622.

57. Walton *v.* Williams, 44 Ala. 347; Wheeler *v.* Webster, 1 E. D. Smith (N. Y.) 1; Watrous *v.* Halbrook, 39 Tex. 572; Gray *v.* Milner, 3 Moore C. P. 90, 2 Stark. 336, 8 Taunt. 739, 21 Rev. Rep. 525, 4 E. C. L. 361.

May be treated as note.— It may in case of such acceptance be declared on and proved as a note. Bliss *v.* Burnes, McCahon (Kan.) 91.

58. See *infra*, I, C, 2, b, note 54.

But this does not authorize the holder to write an acceptance over a blank indorsement made by a third party when the note was delivered. Mahone *v.* Central Bank, 17 Ga. 111.

59. *Alabama.*— Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476, "Steamer C. W. Dorrance and owners."

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489, where the drawer was identified by the place named in the date, the drawee being named simply as the "First National Bank."

Massachusetts.— Taber *v.* Cannon, 8 Metc. (Mass.) 456, "the agent and owners" of a designated ship.

Nevada.— State *v.* Cleavland, 6 Nev. 181, "The agency of the bank of California" meaning the local Nevada agency.

Tennessee.— Rice *v.* Ragland, 10 Humphr. (Tenn.) 545, 53 Am. Dec. 737, "the building committee" of a certain hotel.

So a misnomer of the drawee is immaterial if he is clearly identified (Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151), especially where he has accepted the bill by his right name (Lloyd *v.* Ashby, 2 B. & Ad. 23, 9 L. J. K. B. O. S. 144, 22 E. C. L. 20). But see Grant *v.* Naylor, 4 Cranch (U. S.) 224, 2 L. ed. 603.

60. Shelton *v.* Darling, 2 Conn. 435 ("Noyes Darling, Esq., agent of the Commission Company"); Tassey *v.* Church, 4 Watts & S. (Pa.) 346 ("John Tassey, administrator").

61. Bruce *v.* Lord, 1 Hilt. (N. Y.) 247 (a bill drawn on John P. Lord and accepted by "John P. Lord, Treasurer Neuvitas M. Co."); Nicholas *v.* Diamond, 2 C. L. R. 305, 9 Exch. 153, 23 L. J. Exch. 1, 2 Wkly. Rep. 12 (a bill drawn on "Mr. James Diamond, Purser, West Downs Mining Company," and accepted by the person named individually).

62. Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476 (where the bill was drawn on "Steamer C. W. Dorrance and owners," and accepted by "St'r Dorrance, per G. M. McConico, agent"); May *v.* Hewitt, 33 Ala. 161; Okell *v.* Charles, 34 L. T. Rep. N. S. 822.

it must be accepted by the person on whom it is drawn and not by a third person.[63]

d. Order or Promise to Pay — (I) *Necessity For.* A bill or draft must contain an order for payment[64] and a promissory note must contain a promise to pay.[65]

(II) *Form of Order or Promise* — (A) *In General.* No particular form of words is necessary to constitute a bill of exchange or a negotiable promissory note,[66] and various expressions have been held to amount to such an order[67] or

The right way for one accepting for another to give notice of the fact is to use such words as "accepted for" or "per proc." Herald *v.* Connah, 34 L. T. Rep. N. S. 885. But see Lindus *v.* Bradwell, 5 C. B. 583, 12 Jur. 230, 17 L. J. C. P. 121, 57 E. C. L. 583, where a bill drawn on a husband and accepted by his wife in her own name was held to bind the husband. So where a bill is directed to "John A. Welles, Cashier Farmers & Mechanics' Bank of Michigan," and accepted by writing across the face thereof, "Accepted, John A. Welles, Cashier," it is drawn upon and accepted by the bank, and not by Welles in his individual capacity. Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457. And where it appeared in a draft in the printed heading and margin that the drawer was the agent of the drawee corporation, it was held not to bind the drawer personally, although the signature had no words indicating agency. Chipman *v.* Foster, 119 Mass. 189.

63. Davis *v.* Clarke, 6 Q. B. 16, 1 C. & K. 177, 8 Jur. 688, 13 L. J. Q. B. 305, 47 E. C. L. 177; Jackson *v.* Hudson, 2 Campb. 447; Mare *v.* Charles, 5 E. & B. 978, 2 Jur. N. S. 234, 25 L. J. Q. B. 119, 4 Wkly. Rep. 267, 85 E. C. L. 978, in which last case the acceptance of a bill drawn on one personally for supplies to the company and "accepted for the company" by him was held to be his personal acceptance.

Liability for accepting without authority. In general one who accepts a bill for another without his authority will be liable to the payee and subsequent holders, but not as accepter of the bill. Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59.

64. **A mere request** is not enough. Gillilan *v.* Myers, 31 Ill. 525; Knowlton *v.* Cooley, 102 Mass. 233; Little *v.* Slackford, 1 M. & M. 171.

65. Smith *v.* Bridges, 1 Ill. 18; Forward *v.* Thompson, 12 U. C. Q. B. 103.

"**An actual promise is not necessary,** if there are words in the instruments from which a promise to pay can be collected." Parke, B., in Taylor *v.* Steele, 11 Jur. 806, 16 L. J. Exch. 177, 16 M. & W. 665. But "at my death I request to be paid to Mary A. Chase one thousand dollars" is not a promissory note. Hatch *v.* Gillette, 8 N. Y. App. Div. 605, 40 N. Y. Suppl. 1016.

A promise to make a note is not a note. Coté *v.* Lemieux, 9 L. C. Rep. 221.

66. *Illinois.*— Smith *v.* Bridges, 1 Ill. 18.

South Carolina.— Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585; Stagg *v.* Pepoon, 1 Nott & M. (S. C.) 102.

Vermont.— Partridge *v.* Davis, 20 Vt. 499; Hitchcock *v.* Cloutier, 7 Vt. 22.

England.— Peto *v.* Reynolds, 11 Exch. 418 [*reversing* 2 C. L. R. 491, 9 Exch. 410, 18 Jur. 472, 23 L. J. Exch. 98, 2 Wkly. Rep. 196]; Brooks *v.* Elkins, 2 Gale 200, 6 L. J. Exch. 6, 2 M. & W. 74; Morris *v.* Lee, 2 Ld. Raym. 1396, 1 Str. 629.

Canada.— Hall *v.* Bradbury, 1 Rev. Lég. 180.

A note may be in the form of a bill of exchange (Lloyd *v.* Oliver, 18 Q. B. 471, 16 Jur. 833, 21 L. J. Q. B. 307; Edwards *v.* Dick, 4 B. & Ald. 212, 23 Rev. Rep. 255, 6 E. C. L. 455; Edis *v.* Bury, 6 B. & C. 433, 2 C. & P. 559, 9 D. & R. 492, 5 L. J. K. B. O. S. 179, 30 Rev. Rep. 389, 13 E. C. L. 200; Allan *v.* Mawson, 4 Campb. 115) payable to the drawer's order (St. James Church *v.* Moore, 1 Ind. 289), or of a bond without seal (State Bank *v.* Williams, 21 La. Ann. 121; Woodward *v.* Genet, 2 Hilt. (N. Y.) 526; Hitchcock *v.* Cloutier, 7 Vt. 22; Burleigh *v.* Rochester, 5 Fed. 667), or of a direction to the maker's executors "to pay . . . one thousand nine hundred and seventy-six dollars and ninety cents, being the balance due him" (Hegeman *v.* Moon, 131 N. Y. 462, 467, 30 N. E. 487 [*affirming* 60 Hun (N. Y.) 412, 15 N. Y. Suppl. 596], where Peckham, J., said: "The direction is, however, in the nature of a promise and expresses a time of payment and, therefore, excludes the presumption that it is payable immediately, which would otherwise arise from the use of the word due."

An order indorsed on a promissory note is a valid bill of exchange. Leonard *v.* Mason, 1 Wend. (N. Y.) 522. *Contra*, Hoyt *v.* Lynch, 2 Sandf. (N. Y.) 328; Platzer *v.* Norris, 38 Tex. 1 (for want of a designated payee). So an order referring to a note given for the amount is a bill of exchange. Cook *v.* Satterlee, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432.

67. Such are the expressions, "credit Mrs. Ann Allen, or order" (Allen *v.* Sea, etc., Assur. Co., 9 C. B. 574, 67 E. C. L. 574; Ellison *v.* Collingridge, 9 C. B. 570, 573, 67 E. C. L. 570, in which latter case Wilde, C. J., said: "As I understand the words 'credit in cash,' this is an order by one person on another, to hold to the use, or at the command, of a third party, a certain sum. That means pay the money to him"); "let the bearer have" (Biesenthall *v.* Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629); or "Mr. Nelson will much oblige Mr. Webb by paying

promise.[68] Neither the distinction between the expressions "I promise" and "we promise,"[69] the chance employment of a past for a present tense,[70] nor the

to J. Ruff" (Ruff *v.* Webb, 1 Esp. 129, 5 Rev. Rep. 723).

There is not a sufficient order where the words indicate not a demand of right but a request for a favor (Woolley *v.* Sergeant, 8 N. J. L. 262, 14 Am. Dec. 419 ["credit John Woolley, or bearer, thirty dollars, and I will pay you"]; Little *v.* Slackford, M. & M. 171, 31 Rev. Rep. 726, 22 E. C. L. 498 ["let the bearer have 7*l.*, and place it to my account"]) or a mere permission (Hamilton *v.* Spottiswoode, 4 Exch. 200, 18 L. J. Exch. 393 ["we hereby authorize you to pay"]; Russell *v.* Powell, 14 L. J. Exch. 269, 14 M. & W. 418 ["we do hereby authorize and require you to pay"]). An instrument in form a promissory note, but containing no promise by the maker, and with the word "accepted" written across the face, and the accepters' names signed to it is not in itself either a bill of exchange, promissory note, or writing obligatory, and does not of itself impose a liability on the accepters, but it may by proper allegation in the petition and proof on the trial be made to operate as a promissory note. Bliss *v.* Burnes, McCahon (Kan.) 91.

68. Sufficient promise.— "To he accountable for." Miller *v.* Austen, 13 How. (U. S.) 218, 14 L. ed. 119; Morris *v.* Lee, 2 Ld. Raym. 1396, 1 Str. 629. "For value received, five thousand dollars to pay Amanda Messmore or order." Messmore *v.* Morrison, 172 Pa. St. 300, 37 Wkly. Notes Cas. (Pa.) 431, 34 Atl. 45. "This is to certify that I am to pay." Meyer *v.* Weil, 37 La. Ann. 160. "On demand . . please pay" and no drawee. Almy *v.* Winslow, 126 Mass. 342. "Holden" for. Bean *v.* Arnold, 16 Me. 251. "To pay or cause to be paid." Lovell *v.* Hill, 6 C. & P. 238, 25 E. C. L. 412. "Borrowed of Woodfolk." Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585. "I have borrowed." Harrow *v.* Dugan, 6 Dana (Ky.) 341. "Borrowed of . . . in promise of payment of which I am truly thankful." Ellis *v.* Mason, 7 Dowl. P. C. 598, 3 Jur. 406, 8 L. J. Q. B. 196, 2 W. W. & H. 70. *Contra*, Hyne *v.* Dewdney, 21 L. J. Q. B. 278. "I guaranty to pay." Bruce *v.* Westcott, 3 Barb. (N. Y.) 374; Ketchell *v.* Burns, 24 Wend. (N. Y.) 456; Luqueer *v.* Prosser, 1 Hill (N. Y.) 256; Partridge *v.* Davis, 20 Vt. 499. "Sixty days after date, I guarantee the payment of three hundred and fifty-six dollars, sixty cents, ($356.60,) due by J. M. Verdier, . . . to Benjamin Mordecai," signed by the former, indorsed by the latter, and subscribed, after the word "Accepted," by a third person, was held to be made by such third person, and equivalent to a note of hand from him to the indorser. Mordecai *v.* Gadsden, 2 Speers (S. C.) 566. The indorsement on a bill of items "I hereby accept this bill . . . payable." Cowan *v.* Hallack, 9 Colo. 572, 13 Pac. 700. "Good to Robert Cochran, or order, for thirty dollars, borrowed money." Franklin *v.* March, 6 N. H. 364, 25 Am. Dec. 462. "Good to barer." Hussey *v.* Winslow, 59 Me. 170. "Good for" so much, without naming a payee. Weston *v.* Myers, 33 Ill. 424. *Contra*, in the absence of proof of title. Brown *v.* Gilman, 13 Mass. 158.

Insufficient promises.— A letter promising to accept an order is not a note, but an agreement of a distinctly different character. Allen *v.* Leavens, 26 Oreg. 164, 37 Pac. 488, 46 Am. St. Rep. 613, 26 L. R. A. 620. So a promise to pay one thousand dollars "at my death, . . . which she claims of my estate. She has been . . . a faithful servant, and it is my will to her" (Caviness *v.* Rushton, 101 Ind. 500, 51 Am. Rep. 759) or "I allow to give" (Harmon *v.* James, 7 Ind. 263) is not a promissory note.

69. *Connecticut.*— Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

Georgia.— Dickerson *v.* Burke, 25 Ga. 225.

Illinois.— Pogue *v.* Clark, 25 Ill. 333; Holmes *v.* Sinclair, 19 Ill. 71; Harris *v.* Coleman, etc., White Lead Co., 58 Ill. App. 366.

Indiana.— Maiden *v.* Webster, 30 Ind. 317; Groves *v.* Stephenson, 5 Blackf. (Ind.) 584; Lambert *v.* Lagow, 1 Blackf. (Ind.) 388.

Kentucky.— Harrow *v.* Dugan, 6 Dana (Ky.) 341.

Louisiana.— Monget *v.* Penny, 7 La. Ann. 134; State Bank *v.* Sterling, 2 La. 60.

Maine.— Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767.

Massachusetts.— Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257; Rice *v.* Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27.

Michigan.— Dederick *v.* Barber, 44 Mich. 19, 5 N. W. 1064.

New Hampshire.— Ladd *v.* Baker, 26 N. H. 76, 57 Am. Dec. 355; Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499.

New York.— Ely *v.* Clute, 19 Hun (N. Y.) 35; Hopkins *v.* Lane, 4 Thomps. & C. (N. Y.) 311; Lane *v.* Salter, 4 Rob. (N. Y.) 239; Luqueer *v.* Prosser, 1 Hill (N. Y.) 256.

Ohio.— Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48.

Pennsylvania.— Knisely *v.* Shenberger, 7 Watts (Pa.) 193; Higerty *v.* Higerty, 1 Phila. (Pa.) 232, 8 Leg. Int. (Pa.) 131.

South Carolina.— Karck *v.* Avinger, 3 Hill (S. C.) 215; Barnet *v.* Skinner, 2 Bailey (S. C.) 88.

Virginia.— Holman *v.* Gilliam, 6 Rand. (Va.) 39.

West Virginia.— Keller *v.* McHuffman, 15 W. Va. 64.

Wisconsin.— Dill *v.* White, 52 Wis. 456, 9 N. W. 404.

The personal pronoun may even be omitted altogether. Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 18 N. E. 56.

70. Lowe *v.* Murphy, 9 Ga. 338 (a certificate that "I did promise to pay . . . I hereby acknowledge to be unpaid, and yet due");

accidental insertion of a word negativing the promise[71] is to be marked with undue carefulness.

(B) *Mere Acknowledgment of Debt.* In some jurisdictions a mere acknowledgment of debt such as a due-bill or I O U is a sufficient promise,[72] and in some it is now made so by statute;[73] but in others an acknowledgment constitutes a mere due-bill and is not a promissory note,[74] and this is the rule in England.[75] An

Bland *v.* People, 4 Ill. 364; Perkins *v.* Com., 7 Gratt. (Va.) 651, 56 Am. Dec. 123.

71. Anonymous, 2 Atk. 52, "never to pay."

72. *Alabama.*— Fleming *v.* Burge, 6 Ala. 373; Johnson *v.* Johnson, Minor (Ala.) 263.

Arkansas.— Anderson *v.* Pearce, 36 Ark. 293, 38 Am. Rep. 39.

Florida.— Smith *v.* Westcott, 34 Fla. 430, 16 So. 332.

Georgia.— Patillo *v.* Mayer, 70 Ga. 715; Hart *v.* Conner, 21 Ga. 384; Brewer *v.* Brewer, 6 Ga. 587.

Kansas.— Blood *v.* Northup, 1 Kan. 28.

Kentucky.—See Carson *v.* Lucas, 13 B. Mon. (Ky.) 213 (where, however, the instrument did not import a promise on the part of the signer to pay, but was merely a certificate of a captain that the owners of the boat were indebted); Kalfus *v.* Watts, Litt. Sel. Cas. (Ky.) 197.

Louisiana.— Where it contains an unconditional promise to pay (Spearing *v.* Zacharie, 26 La. Ann. 496; Wardwell *v.* Sterne, 22 La. Ann. 28), but not where the promise is only implied (Garland *v.* Scott, 15 La. Ann. 143. See also New Orleans *v.* Strauss, 25 La. Ann. 50). A pasteboard ticket bearing simply the name of a plantation, an amount in figures, and the signature of a clerk on the plantation, issued to plantation laborers in payment for labor, is not an order or promissory note, or a written evidence of indebtedness, and is not binding on the alleged debtor without competent proof of the planter's indebtedness. Dalcour *v.* McCan, 37 La. Ann. 7.

Missouri.— Brady *v.* Chandler, 31 Mo. 28; McGowen *v.* West, 7 Mo. 569, 38 Am. Dec. 468; Finney *v.* Shirley, 7 Mo. 42.

New York.— Sheldon *v.* Heaton, 88 Hun (N. Y.) 535, 34 N. Y. Suppl. 856, 68 N. Y. St. 825; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Luqueer *v.* Prosser, 1 Hill (N. Y.) 256. But an instrument given for an account expressly stating that it is not to be negotiated and that no suit is to be brought upon it is not. Mackay *v.* Kahn, 17 N. Y. Suppl. 503; Russell *v.* Whipple, 2 Cow. (N. Y.) 536.

Tennessee.— Cummings *v.* Freeman, 2 Humphr. (Tenn.) 143 [*overruling* Read *v.* Wheeler, 2 Yerg. (Tenn.) 50].

Vermont.— Pindar *v.* Barlow, 31 Vt. 529.

Wisconsin.— Bacon *v.* Bicknell, 17 Wis. 523.

Canada.— Beaudry *v.* Laflamme, 6 L. C. Jur. 307; Désy *v.* Daly, 12 Quebec Super. Ct. 183. *Compare* Whishaw *v.* Gilmour, 6 L. C. Jur. 319, 13 L. C. Rep. 94; Dasylva *v.* Dufour, 16 L. C. Rep. 294; Palmer *v.* McLennan, 22 U. C. C. P. 565 [*affirming* 22 U. C. C. P. 258].

See 7 Cent. Dig. tit. "Bills and Notes," §§ 61, 381.

73. *Arkansas.*— Huyck *v.* Meador, 24 Ark. 191.

Colorado.— Before the adoption of the Negotiable Instruments Law. Lee *v.* Wilson, 9 Colo. 222, 11 Pac. 77; Lee *v.* Balcom, 9 Colo. 216, 11 Pac. 74.

Illinois.— Jacquin *v.* Warren, 40 Ill. 459; Weston *v.* Myers, 33 Ill. 424; Bilderback *v.* Burlingame, 27 Ill. 338. But this is not true if the intention is to give a mere statement of debt (Bowles *v.* Lambert, 54 Ill. 237), and an instrument in form as follows: "Cartage Ticket, 50 cents, Hibbard, Spencer & Co." is not a negotiable promissory note (Hibbard *v.* Holloway, 13 Ill. App. 101). Nor is a certificate that a contractor is entitled to payment of a certain sum "by the terms of the contract" (Olson *v.* Peterson, 50 Ill. App. 327) or an acknowledgment by the "secretary of the board of trustees of the Wesleyan University . . . that there is due to A B, a certain sum" (Sears *v.* Trustees Illinois Wesleyan University, 28 Ill. 183) a negotiable instrument.

Indiana.— Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515; McDonald *v.* Yeager, 42 Ind. 388; Bowers *v.* Headen, 4 Ind. 318.

South Dakota.— Schmitz *v.* Hawkeye Gold Min. Co., 8 S. D. 544, 67 N. W. 618.

United States.— Griffin *v.* Nokes, Hempst. (U. S.) 72, 11 Fed. Cas. No. 5,817*a*, construing Arkansas statute.

74. Currier *v.* Lockwood, 40 Conn. 349, 16 Am. Rep. 40; Gay *v.* Rooke, 151 Mass. 115, 23 N. E. 835, 21 Am. St. Rep. 434, 7 L. R. A. 392; Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 264; Merlin *v.* Manning, 2 Tex. 351. So a signed and attested indorsement on a note acknowledging it to be due has been held not to be a promissory note within the meaning of a statute concerning attested promissory notes (Gray *v.* Bowden, 23 Pick. (Mass.) 282), but a memorandum on the back of a note stating that "I hereby renew the within note," signed and attested, is a promissory note within the same statute (Daggett *v.* Daggett, 124 Mass. 149). A writing as follows: "There is a balance due the bearer, four hundred and seventy-five dollars," imports a debt from the maker to that amount, and the law implies a promise to pay; but if addressed to a third person it is a mere memorandum or statement of facts and not a contract for the payment of money. Hopson *v.* Brumwankel, 24 Tex. 607, 76 Am. Dec. 124.

75. Israel *v.* Israel, 1 Campb. 499; Gould *v.* Coombs, 1 C. B. 543, 9 Jur. 494, 14 L. J. C. P. 175, 50 E. C. L. 543; Beeching *v.* Westbrook, 1 Dowl. N. S. 18, 10 L. J. Exch. 464, 8 M. & W. 412; Childers *v.* Boulnois, D. & R. N. P. 8; Fisher *v.* Leslie, 1 Esp. 426; Smith *v.* Smith, 1 F. & F. 539; Melanotte *v.* Teas-

acknowledgment, however, may become a promise by the addition of words from which a promise of payment is naturally implied,[76] and this is equally true of a mere receipt with such words superadded.[77]

(c) *Must Be Unconditional*—(1) Rule Stated. Except where provided to the contrary by statute,[78] a bill or note is negotiable paper only where it is made payable at all events and unconditionally.[79] Under the Negotiable Instruments

dale, 13 L. J. Exch. 358, 13 M. & W. 216; Fesenmayer *v.* Adcock, 16 M. & W. 449.

76. A promise is implied from such words as "due . . . on demand" (Carver *v.* Hayes, 47 Me. 257); "paid . . . when called for" (Bilderback *v.* Burlingame, 27 Ill. 338; Kraft *v.* Thomas, 123 Ind. 513, 24 N. E. 346, 18 Am. St. Rep. 345); "payable" (Bowie *v.* Foster, Minor (Ala.) 264); "payable" on a given day (Cowan *v.* Hallack, 9 Colo. 572, 13 Pac. 700; Kendall *v.* Lewis, 10 Ky. L. Rep. 362; Potts *v.* Feeder Dam Coal Co., 6 Phila. (Pa.) 249, 24 Leg. Int. (Pa.) 261); "pay on demand" (Smith *v.* Allen, 5 Day (Conn.) 337; Corbett *v.* State, 24 Ga. 287; Mitchell *v.* Rome R. Co., 17 Ga. 574; Ubsdell *v.* Cunningham, 22 Mo. 124; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Stagg *v.* Pepoon, 1 Nott & M. (S. C.) 102; Richmond, etc., R. Co. *v.* Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670); "to be paid" (Brooks *v.* Elkins, 2 Gale 200, 6 L. J. Exch. 6, 2 M. & W. 74; Casborne *v.* Dutton, Selw. N. P. 381); "which I promise to pay" (Chadwick *v.* Allen, 1 Str. 706); or "without grace . . . will be due" (Central Trust Co. *v.* New York Equipment Co., 74 Hun (N. Y.) 405, 26 N. Y. Suppl. 850, 56 N. Y. St. 648). So the indorsement "For value received, I hereby acknowledge this note to be due, and promise to pay the same on demand," written on a note by the maker, and signed by him, is itself a promissory note (Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21), and it is a valid acknowledgment of indebtedness to write in a memorandum book, in the following form, namely: "I. O. you the sum of one hundred and sixty dollars, which I shall pay on demand to you" (Kinney *v.* Flynn, 2 R. I. 319).

77. This is true of the following: "For value received of Cummings & Manning, or order, thirty dollars and eighty three cents on demand." Cummings *v.* Gassett, 19 Vt. 308. "On deposit." Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87. "To be returned when called for." Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585. "Which I promise to pay." Green *v.* Davies, 4 B. & C. 235, 1 C. & P. 451, 6 D. & R. 306, 3 L. J. K. B. O. S. 185, 28 Rev. Rep. 230, 10 E. C. L. 557; Ashby *v.* Ashby, 3 M. & P. 186. "Payable to his order, on return of this certificate." Blood *v.* Northup, 1 Kan. 28. Of a receipt for goods "for which we agree to pay" a sum named. Maze *v.* Heinze, 53 Ill. App. 503. But not of a receipt for money, "which I hold subject to his order" (Roman *v.* Serna, 40 Tex. 306) or "which I have borrowed of you, and I have to be accountable for" (Horne *v.* Redfearn, 4 Bing. N. Cas. 433, 2 Jur. 376, 7 L. J. C. P. 214, 6 Scott 260, 33 E. C. L. 790), which is intended as a mere memorandum of account (Tomkins *v.* Ashby, 6 B. & C. 541, 9 D. & R. 543, 5 L. J. K. B. O. S. 246, 13 E. C. L. 247), or which is to "become a draft" when approved (Sioux Nat. Bank *v.* Cudahy Packing Co., 63 Fed. 805 [*affirmed* in 75 Fed. 473, 40 U. S. App. 142, 21 C. C. A. 428]).

78. Under the territorial statute of Iowa of 1839, which is no longer in force, all notes and bonds for the payment of money or other property were negotiable whether conditional or not. Jefferson County *v.* Fox, Morr. (Iowa) 48.

79. *Arkansas.*— Henry *v.* Hazen, 5 Ark. 401.

Colorado.— Carnahan *v.* Pell, 4 Colo. 190; Eldred *v.* Malloy, 2 Colo. 320, 20 Am. Rep. 752.

Georgia.— Hodges *v.* Hall, 5 Ga. 163.

Illinois.— Baird *v.* Underwood, 74 Ill. 176; Kingsbury *v.* Wall, 68 Ill. 311; Smalley *v.* Edey, 15 Ill. 324; Kelley *v.* Hemmingway, 13 Ill. 604.

Indiana.— McComas *v.* Haas, 107 Ind. 512, 8 N. E. 579.

Iowa.— Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82.

Kentucky.—Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168; Nichols *v.* Davis, 1 Bibb (Ky.) 490.

Maine.— Legro *v.* Staples, 16 Me. 252.

Maryland.— Tradesmen's Nat. Bank *v.* Green, 57 Md. 602.

Massachusetts.— Grant *v.* Wood, 12 Gray (Mass.) 220; Coolidge *v.* Ruggles, 15 Mass. 387.

Minnesota.— Mast *v.* Matthews, 30 Minn. 441, 16 N. W. 155; Edwards *v.* Ramsey, 30 Minn. 91, 14 N. W. 272; Stevens *v.* Johnson, 28 Minn. 172, 9 N. W. 677; Syracuse Third Nat. Bank *v.* Armstrong, 25 Minn. 530; Cooper *v.* Brewster, 1 Minn. 94.

Missouri.— Borum *v.* Reed, 73 Mo. 461.

Nebraska.— Grimison *v.* Russell, 14 Nebr. 521, 16 N. W. 819, 45 Am. Rep. 126.

New Hampshire.— Fletcher *v.* Thompson, 55 N. H. 308.

New Jersey.— Conover *v.* Stillwell, 34 N. J. L. 54.

New York.— Skillen *v.* Richmond, 48 Barb. (N. Y.) 428; Hosstatter *v.* Wilson, 36 Barb. (N. Y.) 307; Arnold *v.* Rock River Valley Union R. Co., 5 Duer (N. Y.) 207; Cook *v.* Satterlee, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432.

Pennsylvania.— Iron City Nat. Bank *v.* McCord, 139 Pa. St. 52, 21 Atl. 143, 23 Am. St. Rep. 166, 11 L. R. A. 559; Citizens' Nat. Bank *v.* Piollet, 126 Pa. St. 194, 17 Atl. 603, 12 Am. St. Rep. 860, 4 L. R. A. 190; Woods *v.* North, 84 Pa. St. 407, 24 Am. Rep. 201;

Law in the United States as well as under the Bills of Exchange Act in England this is expressly required.[80]

(2) WHAT IS CONDITIONAL — (a) IN GENERAL. To render the instrument non-negotiable by reason of its conditional character the condition must appear on its face.[81] In most cases conditional paper is distinctly conditional in form.[82] On

Overton *v.* Tyler, 3 Pa. St. 346, 45 Am. Dec. 645.

Tennessee.— Shelton *v.* Bruce, 9 Yerg. (Tenn.) 24.

Texas.— Martin *v.* Shumatte, 62 Tex. 188.

Vermont.— Smilie *v.* Stevens, 39 Vt. 315.

Wisconsin.— Stillwater First Nat. Bank *v.* Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365; Kirk *v.* Dodge County Mut. Ins. Co., 39 Wis. 138, 15 Am. Rep. 36; Van Steenwyck *v.* Sackett, 17 Wis. 645; Blaikie *v.* Griswold, 10 Wis. 293; Dilley *v.* Van Wie, 6 Wis. 209.

England.— Worley *v.* Harrison, 3 A. & E. 669, 1 Hurl. & W. 426, 5 L. J. K. B. 17, 5 N. & M. 173, 30 E. C. L. 309; Carlos *v.* Fancourt, 5 T. R. 482, 2 Rev. Rep. 647.

Canada.— McRobbie *v.* Torrance, 5 Manitoba 114; Prescott *v.* Garland, 34 N. Brunsw. 291; Sutherland *v.* Patterson, 4 Ont. 565; Angers *v.* Dillon, 15 Quebec 435; Hall *v.* Merrick, 40 U. C. Q. B. 566; Perth County *v.* McGregor, 21 U. C. Q. B. 459.

See 7 Cent. Dig. tit. "Bills and Notes," § 411.

80. Neg. Instr. L. §§ 20, 23; Bills Exch. Act, § 3.

81. Swank *v.* Nichols, 24 Ind. 199; Holt *v.* Knowlton, 86 Me. 456, 29 Atl. 1113; Monaghan *v.* Longfellow, 82 Me. 419, 19 Atl. 857; Hill *v.* Nutter, 82 Me. 199, 19 Atl. 170; Cunningham *v.* Trevitt, 82 Me. 145, 19 Atl. 110; Goddard *v.* Cutts, 11 Me. 440; Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479 (holding that it is not enough to say "this note is given upon condition"); Richards *v.* Richards, 2 B. & Ad. 447, 9 L. J. K. B. O. S. 319, 22 E. C. L. 447.

The condition in a collateral agreement will not extend to the note (Slipher *v.* Earhart, 83 Ind. 173; Titlow *v.* Hubbard, 63 Ind. 6; Holt *v.* Knowlton, 86 Me. 456, 29 Atl. 1113; Albright *v.* Russell, 5 Nebr. 207; Bruce *v.* Carter, 72 N. Y. 616), but will be deemed to be waived if not mentioned in the note (Evansville, etc., R. Co. *v.* Dunn, 17 Ind. 603; Goodenow *v.* Curtis, 33 Mich. 505).

Pleading on instrument of conditional character see *infra*, XIV, D [8 Cyc.].

The words "secured by mortgage" written in the margin of a promissory note form no part of the note; nor are they sufficient to notify third parties of the contents of the mortgage or that it contained some clause inconsistent with the note, or to put them on inquiry. It it be the intent to limit the effect of the note by the terms or conditions of the mortgage securing its payment, language appropriate to express it must be employed. Howry *v.* Eppinger, 34 Mich. 29. And conversely as to the effect of reference in the mortgage to the note see Grinnell *v.* Baxter, 17 Pick. (Mass.) 386.

An express condition will not be extended so as to make conditions of other provisions recited in the note but not made conditions by any expression to that effect. Johnson *v.* Georgia, etc., R. Co., 81 Ga. 725, 8 S. E. 531. Nor will it attach to a renewal without condition. Four Mile Valley R. Co. *v.* Bailey, 18 Ohio St. 208; Rogers *v.* Broadnax, 27 Tex. 238.

82. *Alabama.*— Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57, a note payable when the railroad is finished to a place named.

Colorado.— Carnahan *v.* Pell, 4 Colo. 190 (a warehouse receipt for goods to be held "unless taken from me by law"); Eldred *v.* Malloy, 2 Colo. 320, 20 Am. Rep. 752 (a note payable when the railroad is completed to a place named).

Illinois.— Chicago Trust, etc., Bank *v.* Chicago Title, etc., Co., 190 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138, on "the completion . . . according to . . . agreement" of certain works.

Indiana.— Freeman *v.* Matlock, 67 Ind. 99, a note payable when the railroad is completed to a place named.

Massachusetts.— Grant *v.* Wood, 12 Gray (Mass.) 220 (after the arrival and discharge of a named ship); Coolidge *v.* Ruggles, 15 Mass. 387 (provided the ship arrives free from capture and condemnation); Tucker *v.* Maxwell, 11 Mass. 143 (on a named person's return from a voyage).

Michigan.— Jordan *v.* Newton, 116 Mich. 674, 75 N. W. 130, providing that the railroad be built within a certain time.

Mississippi.— Hart *v.* Taylor, 70 Miss. 655, 12 So. 553 (on selection of the site for a college); Shackelford *v.* Hooker, 54 Miss. 716 ("after my advances are paid").

New York.— Shaver *v.* Western Union Tel. Co., 57 N. Y. 459 (if not revoked and A continue in my employ); James *v.* Hagar, 1 Daly (N. Y.) 517 (provided A proceeds to sea); Loftus *v.* Clark, 1 Hilt. (N. Y.) 310 ("provided he [Scotsmer] proceeds to sea").

North Carolina.— McNinch *v.* Ramsay, 66 N. C. 229, a note payable "after the ratification of . . . peace."

England.— Palmer *v.* Pratt, 2 Bing. 185, 3 L. J. C. P. O. S. 250, 9 Moore 358, 27 Rev. Rep. 583, 9 E. C. L. 538 (on arrival of the ship A); Morgan *v.* Jones, 1 Cr. & J. 162, 9 L. J. Exch. O. S. 41, 4 Tyrw. 21 ("provided one David Morgan should not return to England, or his death be duly certified" before the maturity of the note); Alves *v.* Hodgson, 2 Esp. 528, 7 T. R. 241, 4 Rev. Rep. 433 ("if he does his duty as an able seaman"); Beardsley *v.* Baldwin, 7 Mod. 417, 2 Str. 1151 (a note payable after the maker shall marry).

Act to be performed by another.— "Subject to" a certain contract. Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293; American Exch.

the other hand, although conditions are sometimes implied from the language of

Bank *v.* Blanchard, 7 Allen (Mass.) 333; Post *v.* Kinzua Hemlock R. Co., 171 Pa. St. 615, 33 Atl. 362; Parker *v.* American Exch. Bank, (Tex. Civ. App. 1894) 27 S. W. 1071. "Provided the terms mentioned [in my letter] are complied with." Kingston *v.* Long, Bayley Bills Exch. 13, 4 Dougl. 9, 26 E. C. L. 308. Provided that a certain mortgage be paid and canceled. Hays *v.* Gwin, 19 Ind. 19. On condition that payee deliver a deed (Kingsbury *v.* Wall, 68 Ill. 311), surrender a stock certificate (Van Zandt *v.* Hopkins, 151 Ill. 248, 37 N. E. 845 [*affirming* 40 Ill. App. 635]), or pay another note of the maker (Henry *v.* Colman, 5 Vt. 402). "When Mr. Dakin retires the notes of Dakin & Co." Dakin *v.* Graves, 48 N. H. 45. If another note of A is not paid. Grimison *v.* Russell, 14 Nebr. 521, 16 N. W. 819, 45 Am. Rep. 126. If this note "is not provided for as agreed by J. Updike." Baird *v.* Underwood, 74 Ill. 176. If the maker's receipt for the money be produced (Mason *v.* Metcalf, 4 Baxt. (Tenn.) 440) or the note surrendered as soon as the amount of it is received by the payee (Hubbard *v.* Mosely, 11 Gray (Mass.) 170, 71 Am. Dec. 698). On production of the bank pass-book with the draft. White *v.* Cushing, 88 Me. 339, 34 Atl. 164, 51 Am. St. Rep. 402, 32 L. R. A. 590; Iron City Nat. Bank *v.* McCord, 139 Pa. St. 52, 27 Wkly. Notes Cas. (Pa.) 151, 21 Atl. 143, 23 Am. St. Rep. 166, 11 L. R. A. 559. "On the return of this certificate and my guarantee" of another note. Smilie *v.* Stevens, 39 Vt. 315.

Maker's ability.— A note payable at A's death "provided he leaves either of us sufficient to pay the said sum or if we shall be otherwise able." Roberts *v.* Peake, 1 Burr. 323. "If in funds." Kemble *v.* Lull, 3 McLean (U. S.) 272, 14 Fed. Cas. No. 7,683. "When in funds." Edeline *v.* Homestead Assoc., 4 Wkly. Notes Cas. (Pa.) 509. Collateral agreement for no demand "as long as the interest is paid." Seacord *v.* Burling, 5 Den. (N. Y.) 444. A note for interest only unless the principal should be required for the payee's support. Shufeldt *v.* Gillilan, 124 Ill. 460, 16 N. E. 879; Light *v.* Scott, 88 Ill. 239. "Due to Sophia Gordon, widow, ten thousand dollars, to be paid as wanted for her support. If no part is wanted, it is not to be paid." Gordon *v.* Rundlett, 28 N. H. 435; Scammon *v.* Scammon, 28 N. H. 419. A four-year note with interest "not to be paid annually" unless it be convenient. Humphrey *v.* Beckwith, 48 Mich. 151, 12 N. W. 28. "Not to be paid unless I have the use of" certain land. Jennings *v.* Colorado Springs First Nat. Bank, 13 Colo. 417, 22 Pac. 777, 16 Am. Rep. 210. A note "for the rent of five rooms," the payee "to build a barnyard fence" and the maker to have all of the land back of the house. Fletcher *v.* Thompson, 55 N. H. 308. "When . . realized from sales . . . otherwise to be null and void." Martin *v.* Shumatte, 62 Tex. 188. Only if the amount is realized out of sales before the maturity of the note. Campbell *v.* Nebeker, 48 Ind. 464; Cornell *v.* Nebeker, 48 Ind. 463; Cochran *v.* Nebeker, 48 Ind. 459. No payment to be asked "until his, Coleman's, old mill is sold" (Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53), or the maker released from a certain suretyship (Moore *v.* Edwards, 167 Mass. 74, 44 N. E. 1070).

Option reserved to maker.— Reserving option to return goods purchased in lieu of payment (Webster First Nat. Bank *v.* Alton, 60 Conn. 402, 22 Atl. 1010; Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170), or reciting a warranty in the sale of goods and that payee is to make them good at his own expense (Hodges *v.* Hall, 5 Ga. 163). Provided a person named shall not be surrendered to prison before a certain day. Smith *v.* Boheme, Gilb. Cas. 93. Reserving an option to pay or lose the amount already paid. Draper *v.* Fletcher, 26 Mich. 154. A note containing a provision for its surrender, if the maker pays certain moneys to A. Chapman *v.* Wight, 79 Me. 595, 12 Atl. 546. But *contra*, where the alternative was to procure the discharge of the payee from a certain indorsement on a note made by a third person. Pool *v.* McCrary, 1 Ga. 319, 44 Am. Dec. 655. A note providing for a reduction of amount, if T "fails to deliver" goods (Faull *v.* Tinsman, 36 Pa. St. 108), or to procure a bond for the payee in a given time (Pearce *v.* Bacon, Wright (Ohio) 627). A note providing that a reduced amount if "paid on the first day of January, . . . shall cancel this note" (Fralick *v.* Norton, 2 Mich. 130, 55 Am. Dec. 56), for a reduction "for payment on or before maturity" (Edwards *v.* Ramsey, 30 Minn. 91, 14 N. W. 272), or that the payer may pay a reduced amount and sell a certain amount of goods as the payee's agent within a certain time (State *v.* Stratton, 27 Iowa 420, 1 Am. Rep. 282). A two-year note without interest, if paid in one year. Lamb *v.* Story, 45 Mich. 488, 8 N. W. 87. Providing that maker may settle with A and shall pay note in thirty days if the payee is obliged to pay A. Smalley *v.* Edey, 15 Ill. 324. On the other hand an option reserved to the maker to pay in United States bonds has been held not to render the note conditional. Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534.

Reference to consideration or fund.— Order for payment according to a certain "donation . . . in accordance with a resolution of the police jury." Jenkins *v.* Caddo Parish, 7 La. Ann. 559. "As a set-off for that sum left me in my father's will." Clarke *v.* Percival, 2 B. & Ad. 660, 9 L. J. K. B. O. S. 296, 22 E. C. L. 276. "To go as a set-off" for the balance of a debt named. Davies *v.* Wilkinson, 10 A. & E. 98, 3 Jur. 405, 8 L. J. Q. B. 228, 2 P. & D. 256, 37 E. C. L. 75. A note payable in instalments as the building is finished. Miller *v.* Excelsior Stone Co., 1 Ill. App. 273. A note for £50 for a cart for the use of a person named. Ellis *v.* Ellis,

the paper, the negotiability of the instrument is favored by the courts, and it is held to be unconditional where the disputed clause is merely a reference to the consideration or its application or to a fund for payment.[83] So if the condition is itself repugnant to the instrument, it will be rejected as such and the instrument will be construed to be unconditional.[84] It has been held, however, that

Gow 216. See also *infra*, I, C, 1, d, (II), (C), (2), (b); I, C, 1, d, (II), (C), (2), (c).

Collateral security.— Provided A shall not pay by a certain time. Baird *v.* Underwood, 74 Ill. 176; Smalley *v.* Edey, 15 Ill. 324; Appleby *v.* Biddolph [*cited* in Morice *v.* Lee, 3 Mod. 362, 363, 4 Vin. Abr. 240]. "For security of all such balances . . . but this note to be in force for six months." Leeds *v.* Lancashire, 2 Camph. 205. A note reciting that it is given as collateral for a certain debt. American Nat. Bank *v.* Sprague, 14 R. I. 410. "Given as collateral security with agreement." Costelo *v.* Crowell, 127 Mass. 293, 34 Am. Rep. 367. "As collateral security for any moneys now owing to them by Mr. J. Malachy which they may be unable to recover." Robins *v.* May, 11 A. & E. 213, 214, 3 Jur. 1188, 9 L. J. Q. B. 22, 3 P. & D. 147, 39 E. C. L. 134.

83. *Alabama.*— Savannah, etc., R. Co. *v.* Lancaster, 62 Ala. 555 (provision for registry of bonds and transfer of registered bonds only on the registry of the company); Goodwin *v.* McCoy, 13 Ala. 271 (a provision in the receipt taken for a collateral acceptance that it should be given upon payment of the note which it secured).

Illinois.— Merchants' Nat. Bank *v.* Ritzinger, 118 Ill. 484, 8 N. E. 834 ("second unpaid" on a check drawn in two parts); Coffman *v.* Campbell, 87 Ill. 98 (acceptance of A's draft "for stock"); Houghton *v.* Francis, 29 Ill. 244 (with ten per cent interest if not paid when due).

Iowa.— Jewett *v.* Lyon, 3 Greene (Iowa) 577, providing for a reduction in amount if the quantity does not hold out.

Kansas.— Pemberton *v.* Hoosier, 1 Kan. 108, "provided said sum is not in the meantime collected from the assets of Pemberton & Co."

Maine.— Treat *v.* Cooper, 22 Me. 203, "the contents of this note are to be appropriated to the payment of R. N. M. Smyth's mortgage to William & Jeremiah Coburn."

Massachusetts.— Strauss *v.* United Tel. Co., 164 Mass. 130, 41 N. E. 57, provision for registry of bonds and transfer of registered bonds only on the registry of the company.

Michigan.— Choate *v.* Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277 (title to goods reserved until note for purchase-mone paid); Cate *v.* Patterson, 25 Mich. 19 ("with interest if left three months"); Littlefield *v.* Hodge, 6 Mich. 326 (as per agreement).

Mississippi.— Hart *v.* Taylor, 70 Miss. 655, 12 So. 553 (a note for subscription for a college, if located in a certain place); Craig *v.* Vicksburg, 31 Miss. 216.

Missouri.— Ewing *v.* Clarke, 8 Mo. App 570.

New York.— Bruce *v.* Carter, 72 N. Y. 616, providing for discontinuance of suit on payment of costs. See also Gunther *v.* Darmstadt, 14 Daly (N. Y.) 368, 13 N. Y. St. 145.

Ohio.— Ring *v.* Foster, 6 Ohio 279, provided the payee deliver the crop with an allowance by weight for what is yet undelivered.

Oregon.— Hawley *v.* Bingham, 6 Oreg. 76, recital of agreement by payee to sell a machine to the maker on payment of the note.

United States.— Pendleton *v.* Knickerbocker L. Ins. Co., 7 Fed. 169, 27 Int. Rev. Rec. 295 (draft providing that insurance policy be void if draft not paid); Sherman Bank *v.* Apperson, 4 Fed. 25 ("for . . . payment on the Goree plantation, as per agreement").

England.— Jury *v.* Barker, E. B. & E. 459, 4 Jur. N. S. 587, 27 L. J. Q. B. 255, 6 Wkly. Rep. 660, 96 E. C. L. 459, and note (as per agreement); Brill *v.* Crick, 1 Gale 441, 5 L. J. Exch. 143, 1 M. & W. 232 (indorsement, for mere identification, that the note was upon the condition mentioned in a certain agreement); Evans *v.* Underwood, 1 Wils. C. P. 262 (on receiving his wages and prize-money).

Reference to fund for reimbursement see *infra*, I, C, 1, d, (II), (C), (2), (b), bb.

Recital of consideration see *infra*, I, C, 1, d, (II), (C), (2), (c).

84. Thus an agreement that a note shall not be considered to be a note (San Jose Sav. Bank *v.* Stone, 59 Cal. 183) or that the note shall be void if it was not paid (Lane *v.* Manning, 8 Yerg. (Tenn.) 435, 29 Am. Dec. 125. *Contra*, as between the immediate parties to such agreement. Lattimer *v.* Hill, 8 Hun (N. Y.) 171. And for construction limiting a provision that the note be void on the payee's death to the provision for a specified payment of income and not extending it to the principal see Leigh *v.* Coleman, 26 Ill. App. 53). So a provision in a note that the payee shall take live stock from the maker in payment if they can agree upon the price is not enforceable because of indefiniteness (Buford *v.* Ward, 108 Ala. 307, 19 So. 357), and if a note is payable in six months with an agreement by the maker to accept it in settlement of a pending suit, if he should win it, the agreement will be limited in its construction to the time during which the note is running (Da Costa *v.* O'Rourke, 12 Phila. (Pa.) 223, 34 Leg. Int. (Pa.) 338).

The condition is void if it is against public policy, such as a waiver of exemption (Harper *v.* Leal, 10 How. Pr. (N. Y.) 276) or appraisement laws (Levicks *v.* Walker, 15 La. Ann. 245, 77 Am. Dec. 187), or a waiver of protest and notice of dishonor with leave to the holder to extend the note indefinitely without notice, and without prejudice to his

the subsequent happening of the condition will not render the instrument negotiable.[85]

(b) Direction For Payment Out of Particular Fund — aa. *In General.* If a bill or note is made payable out of a particular fund it becomes conditional and is no longer a negotiable instrument.[86] Such instrument is generally made payable

rights against any party (Richmond Second Nat. Bank *v.* Wheeler, 75 Mich. 546, 42 N. W. 963); but the note is void if the payment is conditioned on the maker's election to a public office (Specht *v.* Beindorf, 56 Nebr. 553, 76 N. W. 1059, 42 L. R. A. 429). However, a stipulation that if the note is not paid within two months after it becomes due it shall bear interest from date is good and not against public policy. Bowler *v.* Houston, 1 Ohio Dec. (Reprint) 389. And the provision is valid in a premium note that if it is not paid at maturity the policy shall be void and the whole premium earned. New Zealand Ins. Co. *v.* Maaz, 13 Colo. App. 493, 59 Pac. 213.

85. White *v.* Smith, 77 Ill. 351, 20 Am. Rep. 251; Miller *v.* Excelsior Stone Co., 1 Ill. App. 273; Hill *v.* Halford, 2 B. & P. 413, 5 Rev. Rep. 632. Although the liability becomes absolute on the happening of the condition. Halstead *v.* Ryan, (Kan. App. 1899) 57 Pac. 852; Stevens *v.* Androscoggin Water Power Co., 62 Me. 498; Stout *v.* Watson, 45 Minn. 454, 48 N. W. 195; Neg. Instr. L. § 23. But see Walker *v.* Woollen, 54 Ind. 164, 23 Am. Rep. 639, where a note payable in six months or sooner if made out of sales was held to be unconditional after the six months had expired.

86. *Alabama.*— Gliddon *v.* McKinstry, 28 Ala. 408; West *v.* Foreman, 21 Ala. 400; Waters *v.* Carleton, 4 Port. (Ala.) 205. A promissory note of a corporation is not good which provides that the note shall not be enforceable against certain stock-holders. Heflin Gold Min. Co. *v.* Hilton, 124 Ala. 365, 27 So. 301.

Arkansas.— Raigauel *v.* Ayliff, 16 Ark. 594; Owen *v.* Lavine, 14 Ark. 389; Wilamouicz *v.* Adams, 13 Ark. 12; Blevins *v.* Blevins, 4 Ark. 441; Hamilton *v.* Myrick, 3 Ark. 541.

California.— Stewart *v.* Street, 10 Cal. 372.

Connecticut.— National Sav. Bank *v.* Cable, 73 Conn. 568, 48 Atl. 428.

Illinois.— Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144; Wickersham *v.* Beers, 20 Ill. App. 243.

Indiana.— Sheffield School Tp. *v.* Andress, 56 Ind. 157; Mills *v.* Kuykendall, 2 Blackf. (Ind.) 47.

Iowa.— Miller *v.* Poage, 56 Iowa 96, 8 N. W. 799, 41 Am. Rep. 82.

Kentucky.—Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168; Carlisle *v.* Dubree, 3 J. J. Marsh. (Ky.) 542; Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170; Mershon *v.* Withers, 1 Bibb (Ky.) 503; Nichols *v.* Davis, 1 Bibb (Ky.) 490.

Louisiana.— Agnel *v.* Ellis, McGloin (La.) 57.

Maryland.— Tradesmen's Nat. Bank *v.* Green, 57 Md. 602.

Massachusetts. — Cota *v.* Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464; Jackman *v.* Bowker, 4 Metc. (Mass.) 235.

Michigan. — Lansing Second Nat. Bank *v.* Lansing, 1 Mich. N. P. 181.

Minnesota.— Conroy *v.* Ferree, 68 Minn. 325, 71 N. W. 383; Kelly *v.* Bronson, 26 Minn. 359, 4 N. W. 607.

Mississippi.— Van Vacter *v.* Flack, 1 Sm. & M. (Miss.) 393, 40 Am. Dec. 100.

Missouri.— McGee *v.* Larramore, 50 Mo. 425.

Nebraska.— Hoagland *v.* Erck, 11 Nebr. 580, 10 N. W. 498.

New Hampshire.— Harriman *v.* Sanborn, 43 N. H. 128. *Compare* Chickering *v.* Greenleaf, 6 N. H. 51, holding that the phrase "out of any property I may possess," was intended to indicate the remedy and not to qualify the promise.

New Jersey.— Rice *v.* Porter, 16 N. J. L. 440; Herbert *v.* Tuthill, 1 N. J. Eq. 141; Smith *v.* Wood, 1 N. J. Eq. 74.

New York.— Duffield *v.* Johnson, 96 N. Y. 369 [*affirming* 10 Daly (N. Y.) 360]; Read *v.* Buffalo, 67 Barb. (N. Y.) 526; Van Wagner *v.* Terrett, 27 Barb. (N. Y.) 181; Ellison *v.* McCahill, 10 Daly (N. Y.) 367; Cole *v.* Dalton, 6 Daly (N. Y.) 484; Kenny *v.* Hinds, 44 How. Pr. (N. Y.) 7; Worden *v.* Dodge, 4 Den. (N. Y.) 159, 47 Am. Dec. 247; De Forrest *v.* Frary, 6 Cow. (N. Y.) 151; Cook *v.* Satterlee, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691, 707.

Ohio.— Smurr *v.* Forman, 1 Ohio 272. But see Ives *v.* Strickland, 6 Ohio Dec. (Reprint) 810, 8 Am. L. Rec. 309, to the effect that an accepted order to pay money from a specified fund is an unconditional order for the payment of money.

Pennsylvania.— Dyer *v.* Covington Tp., 19 Pa. St. 200; Reeside *v.* Knox, 2 Whart. (Pa.) 233, 30 Am. Dec. 247.

South Carolina.—Wiggins *v.* Vaught, Cheves (S. C.) 91.

Texas.— Andrews *v.* Harvey, 39 Tex. 123; Kinney *v.* Lee, 10 Tex. 155; Street *v.* Robertson, (Tex. Civ. App. 1902) 66 S. W. 1120.

Virginia. — Averett *v.* Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203; Jolliffe *v.* Higgins, 6 Munf. (Va.) 3. *Contra*, as to an order for payment out of moneys "lodged in the hands of the said Waite," and referred to as the "property of" the payee. Jolliffe *v.* Higgins, 6 Munf. (Va.) 3.

Wisconsin.— Woodward *v.* Smith, 104 Wis. 365, 80 N. W. 440.

Wyoming.— Thompson *v.* Wheatland Mercantile Co., (Wyo. 1901) 66 Pac. 595.

United States. — Virginia *v.* Turner, 1 Cranch C. C. (U. S.) 261, 28 Fed. Cas. No. 16,970. Notes payable from a particular fund, issued by a school township, endowed

"out of" the fund in so many words,[87] but the same effect will be given to the words "on account of," reference being to moneys due on some contract,[88] and even the words "and charge to" an account or fund referred to have been held to limit the promise or order to that fund,[89] although this seems to be against the weight of authority.[90] So an order for a certain sum "and deduct the same from my share" of certain designated profits,[91] a note payable "as soon as I am in possession of funds . . . from the estate of" a person named,[92] and an order for

only with restricted powers for special and purely local purposes of a non-commercial character are not negotiable by the law merchant. Stanton *v.* Shipley, 27 Fed. 498.

England. — Stevens *v.* Hill, 5 Esp. 247; Haydock *v.* Lynch, 2 Ld. Raym. 1563; Jenney *v.* Herle, 2 Ld. Raym. 1361, 8 Mod. 266, 1 Str. 591; Carlos *v.* Fancourt, 5 T. R. 482, 2 Rev. Rep. 647; Yeates *v.* Groves, 1 Ves. Jr. 280; Dawkes *v.* Deloraine, 2 W. Bl. 782, 3 Wils. C. P. 207.

Canada. — Angers *v.* Dillon, 15 Quebec Super. Ct. 435; Ockerman *v.* Blacklock, 12 U. C. C. P. 362.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 22, 52, 388.

An order negotiable in form, if drawn for the whole of a particular fund but not for a specific sum, and accepted by the drawee, to be paid when in funds, is not negotiable (Legro *v.* Staples, 16 Me. 252), especially where the drawer divests himself of all control over the fund (Georgia M. & F. Ins. Bank *v.* Jauncey, 3 Sandf. (N. Y.) 257 [*overruling* 1 Barb. (N. Y.) 486]).

Reference to a fund merely to fix the time of payment is not fatal to negotiability. Smith *v.* Ellis, 29 Me. 422.

87. *Alabama.* — West *v.* Foreman, 21 Ala. 400.

Arkansas. — Raigauel *v.* Ayliff, 16 Ark. 594; Owen *v.* Lavine, 14 Ark. 389; Wilamouicz *v.* Adams, 13 Ark. 12.

Indiana. — Mills *v.* Kuykendall, 2 Blackf. (Ind.) 47.

Kentucky. — Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170.

Massachusetts. — Jackman *v.* Bowker, 4 Metc. (Mass.) 235.

Mississippi. — Wadlington *v.* Covert, 51 Miss. 631.

Missouri. — Crowell *v.* Plant, 53 Mo. 145.

New Jersey. — Herbert *v.* Smith, 1 N. J. Eq. 141.

New York. — Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346; Kenny *v.* Hinds, 44 How. Pr. (N. Y.) 7; Worden *v.* Dodge, 4 Den. (N. Y.) 159, 47 Am. Dec. 247; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

Virginia. — Averett *v.* Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

Wisconsin. — Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42; Corbett *v.* Clark, 45 Wis. 403, 30 Am. Rep. 763.

Wyoming. — Stebbins *v.* Union Pac. R. Co., 2 Wyo. 71.

United States. — Virginia *v.* Turner, 1 Cranch C. C. (U. S.) 261, 28 Fed. Cas. No. 16,970.

Of this nature is a draft on an attorney to be paid out of moneys to be collected by him (Gliddon *v.* McKinstry, 28 Ala. 408; Waters *v.* Carleton, 4 Port. (Ala.) 205; Blevins *v.* Blevins, 4 Ark. 441; Hamilton *v.* Myrick, 3 Ark. 541; Nichol *v.* Davis, 1 Bibb (Ky.) 490; Shields *v.* Taylor, 25 Miss. 13; Van Vacter *v.* Flack, 1 Sm. & M. (Miss.) 393, 43 Am. Dec. 100; Crawford *v.* Cully, Wright (Ohio) 453), but a note to be paid "as soon and as fast as it may or can be collected on the contract, and if not so collected, to be paid in four years" is not out of a particular fund (Smith *v.* Ellis, 29 Me. 422).

88. Rice *v.* Porter, 16 N. J. L. 440; Pitman *v.* Breckenridge, 3 Gratt. (Va.) 127; Banbury *v.* Lisset, 2 Str. 1211. So a promise to pay money on another note. Bunker *v.* Athearn, 35 Me. 364. But in Pierson *v.* Dunlop, Cowp. 571, an order from the freighter on account of freight to be earned was held a good bill as admitting money due. And an order payable out of moneys due when a contract is completed has been held to be in effect a bill. *Ex p.* Shellard, L. R. 17 Eq. 109, 43 L. J. Bankr. 3, 29 L. T. Rep. N. S. 621, 22 Wkly. Rep. 152.

89. Ehrichs *v.* De Mill, 75 N. Y. 370; Reeside *v.* Knox, 2 Whart. (Pa.) 233, 30 Am. Dec. 247; Shinn *v.* Board of Education, 39 W. Va. 497, 20 S. E. 604.

90. *California.* — Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522.

Connecticut. — Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Illinois. — Petillon *v.* Lorden, 86 Ill. 361.

Massachusetts. — Whitney *v.* Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316.

Texas. — Planters' Bank *v.* Evans, 36 Tex. 592.

Vermont. — Arnold *v.* Sprague, 34 Vt. 402.

Wisconsin. — Mehlberg *v.* Tisher, 24 Wis. 607.

England. — *In re* Boyse, 33 Ch. D. 612, 56 L. J. Ch. 135, 55 L. T. Rep. N. S. 391, 35 Wkly. Rep. 247.

See also *infra*, I, C, 1, d, (II), (c), (2), (b), bb, note 99.

91. Sears *v.* Wright, 24 Me. 278 (a note payable "from the avails of the logs bought of Martin Mower"); Heckler *v.* Frankenbush, 76 Miss. 780, 25 So. 670 (under the Mississippi statute enabling an assignee to sue a note payable out of partnership profits); Munger *v.* Shannon, 61 N. Y. 251; Gates *v.* Eno, 4 Hun (N. Y.) 96, 6 Thomps. & C. (N. Y.) 384. But in Matthews *v.* Crosby, 56 N. H. 21, parol evidence to show reference to a contingency in a promise to pay "forty dollars profits" was rejected, and the note held negotiable.

92. Wiggins *v.* Vaught, Cheves (S. C.) 91. See also Henry *v.* Hazen, 5 Ark. 401 (where

the payment of certain rents,[93] or money due the drawer,[94] or of a certain sum "being the amount that came to you for me" from a person named[95] is conditional; but this is not so where the reference is to the funds or property of the maker or drawer generally,[96] or where the draft is general in its terms although drawn in fact against a particular fund.[97]

bb. *Reference For Reimbursement.* Where the reference is to a particular fund for reimbursement of the drawee it does not render the paper non-negotiable.[98] In such case the words generally used are a request to "charge to" such fund or account;[99] or in a note a promise to "credit" the account.[1]

(c) Recital of Consideration. A recital of the consideration of a bill or note, although needlessly full, will not affect its negotiability,[2] unless it is in reality an

an order to one to pay another a certain sum as soon as the former should receive the amount of the drawer's account of the government was held not to be a bill of exchange); Miller *v.* Poage, 56 Iowa 96, 8 N. W. 799, 41 Am. Rep. 82 (where by implication ["if this agent does not sell enough in one year, one more is granted"] it was evidently payable out of the proceeds of the agent's sales); Jackson *v.* Tilghman, 1 Miles (Pa.) 31 ("when in funds, the net amount of sales" of certain goods).

93. Morton *v.* Naylor, 1 Hill (N. Y.) 583.

94. For salary. Smurr *v.* Forman, 1 Ohio 272.

95. Harriman *v.* Sanborn, 43 N. H. 128, the paper being clearly a receipt, "value received" not being expressed.

96. *Iowa.*— Herriman *v.* McKee, 49 Iowa 185, after a certain insurance policy "becomes due."

Maine.— Smith *v.* Ellis, 29 Me. 422, "as soon and as fast as it [the money] may or can be collected."

Massachusetts.— Strauss *v.* United Telegram, 164 Mass. 130, 41 N. E. 57, as soon as earned.

New Hampshire.— Chickering *v.* Greenleaf, 6 N. H. 51, "out of any property I may possess."

New York.— Skillen *v.* Richmond, 48 Barb. (N. Y.) 428, "out of and from separate property."

Texas.— Bush *v.* Wilson, 23 Tex. 148, "out of any funds, not otherwise appropriated, so soon as collected."

United States.— U. S. *v.* Smith, 2 Cranch C. C. (U. S.) 111, 27 Fed. Cas. No. 16,326.

The instrument has been held negotiable where payable "out of any funds . . . not before specially appropriated." Bull *v.* Sims, 23 N. Y. 570. *Contra,* Matthis *v.* Cameron, 62 Mo. 504. And in Josselyn *v.* Lacier, 10 Mod. 294, an instrument payable out of one's growing subsistence was held non-negotiable. See also Russell *v.* Powell, 14 L. J. Exch. 269, 14 M. & W. 418.

97. Manchester *v.* Braedner, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829; U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 11 L. ed. 439.

98. *Arkansas.*— Defee *v.* Smith, 43 Ark. 221.

Kentucky.— Early *v.* McCart, 2 Dana (Ky.) 414; State Bank *v.* Sanders, 3 A. K. Marsh. (Ky.) 184, 13 Am. Dec. 149.

Maine.— Smith *v.* Ellis, 29 Me. 422; Sears *v.* Wright, 24 Me. 278.

Massachusetts.— Shepard *v.* Abbott, 179 Mass. 300, 60 N. E. 782.

New Hampshire.— Matthews *v.* Crosby, 56 N. H. 21.

New York.— Hollister *v.* Hopkins, 13 Hun (N. Y.) 210; Kelley *v.* Brooklyn, 4 Hill (N. Y.) 263.

Pennsylvania.— Coursin *v.* Ledlie, 31 Pa. St. 506.

Wisconsin.— Corbett *v.* Clark, 45 Wis. 403, 30 Am. Rep. 763.

England.— Macleed *v.* Snee, 2 Str. 762.

The Negotiable Instruments Law, section 22, provides that "an order or promise[s] to pay out of a particular fund is not unconditional" but that "an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount," or "a statement of the transaction which gives rise to the instrument," will not render it conditional.

99. *Maine.*— Redman *v.* Adams, 51 Me. 429.

New York.— Schmittler *v.* Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Shaver *v.* Western Union Tel. Co., 57 N. Y. 459; Hollister *v.* Hopkins, 13 Hun (N. Y.) 210; Hoyt *v.* Lynch, 2 Sandf. (N. Y.) 328; Cowperthwaite *v.* Sheffield, 1 Sandf. (N. Y.) 416 [*affirmed* in 3 N. Y. 243]; Lake *v.* Williamsburgh, 4 Den. (N. Y.) 520; Kelley *v.* Brooklyn, 4 Hill (N. Y.) 263. So an order drawn "on account of . . . cotton shipped to you as per bill of lading." Lowery *v.* Steward, 3 Bosw. (N. Y.) 505 [*affirmed* in 25 N. Y. 239, 82 Am. Dec. 346].

Ohio.— Carran *v.* Little, 40 Ohio St. 397.

Texas.— Texas Land, etc., Co. *v.* Carroll, 63 Tex. 48.

England.— Macleed *v.* Snee, 2 Str. 762.

But an order on the state treasurer with the request, "charge the same to account of my salary as Judge," has been held non-negotiable. Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168.

See also *supra*, I, C, 1, d, (II), (C), (2), (b), aa, note 90.

1. Adams *v.* Boyd, 33 Ark. 33; Early *v.* McCart, 2 Dana (Ky.) 414.

2. *Alabama.*— Bowie *v.* Foster, Minor (Ala.) 264, with an added proviso that a designated person's receipt will be good against the note.

Georgia.— Lewis *v.* Harper, 73 Ga. 564.

agreement for the payment or performance of a consideration which is still executory,[3] or qualifies the promise;[4] and a provision that the property for the purchase of which the note was given shall remain the property of the seller until paid for has been held not to destroy the negotiability of the note,[5] although this would seem to be against the weight of authority.[6]

Indiana.— Clanin *v.* Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; Griffin *v.* Kemp, 46 Ind. 172 ("as per deposit" in a check).

Maine.— Union Ins. Co. *v.* Greenleaf, 64 Me. 123; Collins *v.* Bradbury, 64 Me. 37.

Massachusetts.—Taylor *v.* Curry, 109 Mass. 36, 12 Am. Rep. 661; Barker *v.* Valentine, 10 Gray (Mass.) 341; Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750.

Michigan.— Wright *v.* Traver, 73 Mich. 493, 41 N. W. 517, 3 L. R. A. 50; Wright *v.* Irwin, 33 Mich. 32; Preston *v.* Whitney, 23 Mich. 260.

Minnesota.— Hillstrom *v.* Anderson, 46 Minn. 382, 49 N. W. 187.

New Hampshire.— Matthews *v.* Crosby, 56 N. H. 21, where a note for forty dollars "profits" was held to refer to a past transaction.

New York.— Chase *v.* Behrman, 10 Daly (N. Y.) 344; Chase *v.* Senn, 13 N. Y. Suppl. 266; Sanders *v.* Bacon, 8 Johns. (N. Y.) 485. *Contra*, Chase *v.* Kellogg, 59 Hun (N. Y.) 623, 13 N. Y. Suppl. 351, 36 N. Y. St. 832.

North Carolina.— Bresee *v.* Crumpton, 121 N. C. 122, 28 S. E. 351 ("No. of Policy, 654,971"); Salisbury First Nat. Bank *v.* Michael, 96 N. C. 53, 1 S. E. 855.

South Carolina.— Wallace *v.* Dyson, 1 Speers (S. C.) 127 [*followed* in Barnes *v.* Gorman, 9 Rich. (S. C.) 297].

Tennessee.— Rice *v.* Ragland, 10 Humphr. (Tenn.) 545, 53 Am. Dec. 737.

Texas.— Hubert *v.* Grady, 59 Tex. 502; Ellett *v.* Britton, 6 Tex. 229 ("which when paid will be in full of a judgment," etc.).

Wisconsin.— Kirk *v.* Dodge County Mut. Ins. Co., 39 Wis. 138, 15 Am. Rep. 36.

United States.— Sherman Bank *v.* Apperson, 4 Fed. 25. See also Pendleton *v.* Knickerbocker L. Ins. Co., 7 Fed. 169.

England.— Shenton *v.* James, 5 Q. B. 199, 1 C. & K. 136, D. & M. 331, 7 Jur. 1130, 13 L. J. Q. B. 94, 47 E. C. L. 136; Griffin *v.* Weatherby, L. R. 3 Q. B. 753, 9 B. & S. 726, 37 L. J. Q. B. 280, 18 L. T. Rep. N. S. 881, 17 Wkly. Rep. 8; *In re* Boyse, 33 Ch. D. 612, 56 L. J. Ch. 135, 55 L. T. Rep. N. S. 391, 35 Wkly. Rep. 247.

Canada.— Wood *v.* Shaw, 3 L. C. Jur. 169; Hall *v.* Prittie, 17 Ont. App. 306; Anderson *v.* Poirier, 13 Quebec Super. Ct. 283.

See also Neg. Instr. L. § 22; Bills Exch. Act, § 3; and *infra*, I, C, 1, i, (I), (B), note 84.

3. Hodges *v.* Hall, 5 Ga. 163 (an agreement to buy and pay for property); Considerant *v.* Brisbane, 6 Duer (N. Y.) 686 ("for which I am to receive stock"); Jarvis *v.* Wilkins, 5 Jur. 9, 10 L. J. Exch. 104, 7 M. & W. 410 (an agreement to pay for property bought by another person). But an order for property with a promise to pay a certain amount at a certain time is a note under the Maine statute. Morris *v.* Lynde, 73 Me. 88. And so of a provision for applying the proceeds of the note to a particular object which is otherwise satisfied before its maturity. Treat *v.* Cooper, 22 Me. 203.

A draft drawn on a shipment and sold with the bill of lading appended to it is not strictly a bill of exchange. It wants the essential requisite of being negotiable and payable at all events, independently of its consideration. Lanfear *v.* Blossman, 1 La. Ann. 148, 45 Am. Dec. 76.

4. Siegel *v.* Chicago Trust, etc., Bank, 131 Ill. 569, 23 N. E. 417, 19 Am. St. Rep. 51, 7 L. R. A. 537; McComas *v.* Haas, 107 Ind. 512, 8 N. E. 579; Doherty *v.* Perry, 38 Ind. 15; American Exch. Bank *v.* Blanchard, 7 Allen (Mass.) 333 (holding that a written contract in this form: "Twelve months after date, we promise to pay to ourselves or order three hundred and twenty-one $\frac{25}{100}$ dollars, for value received, payable in Boston, and subject to the policy," is not a negotiable note.

5. *Alabama.*—Montgomery First Nat. Bank *v.* Slaughter, 98 Ala. 602, 14 So. 545, 39 Am. St. Rep. 88.

Georgia.— Howard *v.* Simpkins, 70 Ga. 322, 69 Ga. 773, under Georgia code.

Mississippi.— Burnley *v.* Tufts, 66 Miss. 48, 5 So. 627, 14 Am. St. Rep. 540.

Nebraska.—Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811, with a power to take possession and sell and to accelerate the maturity of the note.

New York.— Buffalo Third Nat. Bank *v.* Bowman-Spring, 50 N. Y. App. Div. 66, 63 N. Y. Suppl. 410 (and with waiver of protest and provisions as to credits and extension); Mott *v.* Havana Nat. Bank, 22 Hun (N. Y.) 354.

Ohio.— Mansfield Sav. Bank *v.* Miller, 2 Ohio Cir. Ct. 96, 1 Ohio Cir. Dec. 383.

United States.— Chicago R. Equipment Co. *v.* Merchants' Bank, 136 U. S. 268, 10 S. Ct. 999, 34 L. ed. 349 [*affirming* 25 Fed. 809, in which case there was also a provision for accelerating the maturity of an entire series of notes on default of any one], under Illinois statute.

Canada.— Anderson *v.* Poirier, 13 Quebec Super. Ct. 283.

See 7 Cent. Dig. tit. "Bills and Notes," § 420.

6. *Connecticut.*— Webster First Nat. Bank *v.* Alton, 60 Conn. 402, 22 Atl. 1010.

Kansas.— South Bend Iron-Works *v.* Paddock, 37 Kan. 510, 15 Pac. 574, power to retake and sell on default.

Massachusetts.— Sloan *v.* McCarty, 134 Mass. 245.

Michigan.— Wright *v.* Traver, 73 Mich. 493,

(d) Return of Certificate. It seems now to be established that a certificate of deposit does not lose its negotiable character by being made payable "on return of this certificate."[7]

(d) "*Without Defalcation or Discount.*" The words "without defalcation or discount" were formerly required in some states to constitute a negotiable note.[8]

e. **For Payment of Money** — (i) *In General* — (a) *Rule Stated.* The law merchant gave negotiable character to instruments for the payment of money only and to no others,[9] and by the rules of the law merchant a negotiable bill of exchange or promissory note[10] cannot be paid in goods, wares, merchandise[11]

41 N. W. 517, 3 L. R. A. 50; Bannister *v.* Rouse, 44 Mich. 428, 6 N. W. 870.

Minnesota.— With attorney's fees and with power to enter and sell at any time for insecurity (Edwards *v.* Ramsey, 30 Minn. 91, 14 N. W. 272; Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350; Stevens *v.* Johnson, 28 Minn. 172, 9 N. W. 677; Syracuse Third Nat. Bank *v.* Armstrong, 25 Minn. 530) or with attorney's fees only (Johnston Harvester Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252).

New York.— Buffalo Third Nat. Bank *v.* Spring, 18 Misc. (N. Y.) 9, 59 N. Y. Suppl. 794.

Pennsylvania.— Post *v.* Kinzua Hemlock R. Co., 171 Pa. St. 615, 37 Wkly. Notes Cas. (Pa.) 305, 33 Atl. 362; Gazlay *v.* Riegel, 16 Pa. Super. Ct. 501.

Wisconsin.— W. W. Kimball Co. *v.* Mellon, 80 Wis. 133, 48 N. W. 1100, with power of entry and sale for insecurity, acceleration of maturity of note, and agreement to pay deficiency.

Canada.— Hamilton Bank *v.* Gillies, 12 Manitoba 495; Merchants' Bank *v.* Dunlop, 9 Manitoba 623; Prescott *v.* Garland, 34 N. Brunsw. 291; Dominion Bank *v.* Wiggins, 21 Ont. App. 275.

Effect of reservation.— The reservation of title in the payee will support an action for breach of warranty. Fleetwood *v.* Dorsey Mach. Co., 95 Ind. 491. Such provision is in effect a chattel mortgage (Carroll Bank *v.* Taylor, 67 Iowa 572, 25 N. W. 810; Chicago R. Equipment Co. *v.* Merchants' Bank, 136 U. S. 268, 10 S. Ct. 999, 34 L. ed. 349) and in Maine at least must be recorded as such (Holt *v.* Knowlton, 86 Me. 456, 29 Atl. 1113; Monaghan *v.* Longfellow, 82 Me. 419, 19 Atl. 857; Hill *v.* Nutter, 82 Me. 199, 19 Atl. 170; Cunningham *v.* Trevitt, 82 Me. 145, 19 Atl. 110; Nichols *v.* Ruggles, 76 Me. 25).

7. *Georgia.*— Lynch *v.* Goldsmith, 64 Ga. 42; Carey *v.* McDougald, 7 Ga. 84.

Illinois.— Telford *v.* Patton, 144 Ill. 611, 33 N. E. 1119; Hunt *v.* Divine, 37 Ill. 137.

Indiana.— National State Bank *v.* Ringel, 51 Ind. 393; Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358.

Iowa.— Bean *v.* Briggs, 1 Iowa 488, 63 Am. Dec. 464.

Kansas.— Blood *v.* Northup, 1 Kan. 28.

Maine.— Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.

Maryland.— Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

Michigan.—Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173; Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Cate *v.* Patterson, 25 Mich. 191.

Nebraska.— Kirkwood *v.* Exchange Nat. Bank, 40 Nebr. 497, 58 N. W. 1135; Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

New York.— Frank *v.* Wessels, 64 N. Y. 155.

Ohio.— Citizens' Nat. Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526.

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377; Smilie *v.* Stevens, 39 Vt. 315.

United States.— Miller *v.* Austen, 13 How. (U. S.) 218, 14 L. ed. 119 [*affirming* 5 McLean (U. S.) 153, 2 Fed. Cas. No. 661], construing Ohio statute.

Contra, White *v.* Cushing, 88 Me. 339, 34 Atl. 164, 51 Am. St. Rep. 402, 32 L. R. A. 590; Dempsey *v.* Harm, (Pa. 1887) 12 Atl. 27; Lebanon Bank *v.* Mangan, 28 Pa. St. 452; Patterson *v.* Poindexter, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554; O'Neill *v.* Bradford, 1 Pinn. (Wis.) 390, 42 Am. Dec. 574.

See 7 Cent. Dig. tit. "Bills and Notes," § 412.

8. See Woodruff *v.* Webb, 32 Ark. 612; Macy *v.* Kendall, 33 Mo. 164.

9. *Indiana.*— Johnston *v.* Griest, 85 Ind. 503, where the promise was to make a gift.

Kansas.— South Bend Iron-Works *v.* Paddock, 37 Kan. 510, 15 Pac. 574; Killam *v.* Schoeps, 26 Kan. 310, 40 Am. Rep. 313.

Missouri.— Chandler *v.* Calvert, 87 Mo. App. 368.

New York.— Hosstatter *v.* Wilson, 36 Barb. (N. Y.) 307; Austin *v.* Burns, 16 Barb. (N. Y.) 643; Morton *v.* Naylor, 1 Hill (N. Y.) 583.

North Carolina.—Hodges *v.* Clinton, 3 N. C. 79.

United States.— Fry *v.* Rousseau, 3 McLean (U. S.) 106, 9 Fed. Cas. No. 5,141.

England.— Martin *v.* Chauntry, 2 Str. 1271.

10. But a scrip certificate for stock is held to be negotiable by banker's usage. Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194, 46 L. J. Q. B. 346, 36 L. T. Rep. N. S. 240, 25 Wkly. Rep. 366.

11. *Alabama.*— Auerbach *v.* Prichett, 58 Ala. 451.

Arkansas.— Gwinn *v.* Roberts, 3 Ark. 72.

Colorado.— Scudder *v.* Clarke, 1 Colo. 192.

Georgia.— Smith *v.* Barnes, 24 Ga. 442.

or in labor.[12] This is generally provided in foreign statutes and in many statutes in the United States,[13] but some states have extended this character to instruments for the payment of property.[14]

(B) *Effect of Additional Provisions* — (1) In General. On the other hand

Illinois.— Walters *v.* Short, 10 Ill. 252; Bradley *v.* Morris, 4 Ill. 182. *Overruled* under the statute in Bilderback *v.* Burlingame, 27 Ill. 338. See *infra*, note 14.

Iowa.— Markley *v.* Rhodes, 59 Iowa 57, 12 N. W. 775 (in corporate stock); McCartney *v.* Smalley, 11 Iowa 85; Peddicord *v.* Whittam, 9 Iowa 471; Riggs *v.* Price, 3 Greene (Iowa) 334.

Kentucky.— May *v.* Lansdown, 6 J. J. Marsh. (Ky.) 165; Coyle *v.* Satterwhite, 4 T. B. Mon. (Ky.) 124.

Louisiana.— Pepper *v.* Peytavin, 12 Mart. (La.) 671.

Maine.— Farnum *v.* Virgin, 52 Me. 576; Matthews *v.* Houghton, 11 Me. 377.

Massachusetts.— Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478; Eastern R. Co. *v.* Benedict, 15 Gray (Mass.) 289 (in corporate stock); Sears *v.* Lawrence, 15 Gray (Mass.) 267; Gushee *v.* Eddy, 11 Gray (Mass.) 502, 71 Am. Dec. 728; Clark *v.* King, 2 Mass. 524.

Mississippi.—Minor *v.* Michie, Walk. (Miss.) 24.

Missouri.— Jeffries *v.* Hager, 18 Mo. 272.

New Hampshire.— Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Carleton *v.* Brooks, 14 N. H. 149; Bailey *v.* Simonds, 6 N. H. 159, 25 Am. Dec. 454.

New York.— Brown *v.* Richardson, 20 N. Y. 472; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691; Thomas *v.* Rossa, 7 Johns. (N. Y.) 461; Jerome *v.* Whitney, 7 Johns. (N. Y.) 321. Neither is an order for certain drafts a negotiable bill. Weedsport Bank *v.* Park Bank, 4 Abb. Dec. (N. Y.) 545, 2 Keyes (N. Y.) 561; Burch *v.* Newberry, 1 Barb. (N. Y.) 648.

North Carolina.— Alexander *v.* Oaks, 19 N. C. 513.

Ohio.— Rhodes *v.* Lindly, 3 Ohio 51; Niswanger *v.* Staley, 1 Ohio Dec. (Reprint) 382.

Oregon.— Hyland *v.* Blodgett, 9 Oreg. 166, 42 Am. Rep. 799.

Pennsylvania.— Gould *v.* Richardson, 11 Phila. (Pa.) 202, 33 Leg. Int. (Pa.) 158.

South Carolina.— Wingo *v.* McDowell, 8 Rich. (S. C.) 446; Peay *v.* Pickett, 1 Nott & M. (S. C.) 254.

Tennessee.— Lawrence *v.* Dougherty, 5 Yerg. (Tenn.) 435; Looney *v.* Pinckston, 1 Overt. (Tenn.) 384.

Texas.— Griffeth *v.* Hanks, 46 Tex. 217; Pridgen *v.* Cox, 9 Tex. 367 (holding that an order for a certain amount payable in the drawee's store is not a bill of exchange).

Vermont.— Roberts *v.* Smith, 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567 ("one ounce of gold"); Perry *v.* Smith, 22 Vt. 301; Wainwright *v.* Straw, 15 Vt. 215, 40 Am. Dec. 675 ("in cattle, or in grain").

Wisconsin.— Horton *v.* Arnold, 17 Wis. 139; Corbitt *v.* Stonemetz, 15 Wis. 170 ("in such articles as the said Catharine [the payee] may need for her support").

England.—Williamson *v.* Bennett, 2 Campb. 417. So an order for goods and a payment of money is not a bill. Martin *v.* Chauntry, 2 Str. 1271.

Canada.—Gillin *v.* Cutler, 1 L. C. Jur. 277; Boulton *v.* Jones. 19 U. C. Q. B. 517.

See 7 Cent. Dig. tit. "Bills and Notes," § 397.

12. *Illinois.*— Ransom *v.* Jones, 2 Ill. 291.

Indiana.— McClellan *v.* Coffin, 93 Ind. 456.

Kentucky.—Henry *v.* Hughes, 1 J. J. Marsh. (Ky.) 453; Halbert *v.* Deering, 4 Litt. (Ky.) 9.

Missouri.— Bothick *v.* Purdy, 3 Mo. 82. So a note "to be paid in cut-stone work" is not assignable and cannot avail in the hands of the assignee as a set-off in his favor in another claim. Prather *v.* McEvoy, 8 Mo. 661.

Pennsylvania.— Reynolds *v.* Richards, 14 Pa. St. 205.

Tennessee.— Quinby *v.* Merritt, 11 Humphr. (Tenn.) 439.

Wisconsin. — Leonard *v.* Carter, 16 Wis. 607, where the whole instrument was void for uncertainty.

Canada.— Downs *v.* McNamara, 3 U. C. Q. B. 276.

See 7 Cent. Dig. tit. "Bills and Notes," § 398.

13. See Neg. Instr. L. § 20; Bills Exch. Act, § 3.

14. Such notes have been held to be negotiable in Archer *v.* Claflin, 31 Ill. 306; Stewart *v.* Smith, 28 Ill. 397; Bilderback *v.* Burlingame, 27 Ill. 338 ("in lumber"); Borah *v.* Curry, 12 Ill. 66; Spurgin *v.* McPheeters, 42 Ind. 527; Fink *v.* Maples, 15 Ind. 297; Spears *v.* Bond, 79 Mo. 467; Smith *v.* Giegrich, 36 Mo. 369; Draher *v.* Schreiber, 15 Mo. 602. But before the Missouri act of 1879 an accepted order, payable in articles to be afterward manufactured by the accepter, did not import a consideration, and no action could be maintained on it as on an inland bill of exchange or promissory note. Jeffries *v.* Hager, 18 Mo. 272. See also Burnham *v.* Watts, 4 N. Brunsw. 377.

In Iowa the statute (Iowa Rev. Stat. § 1797) makes instruments payable in anything besides money negotiable "whenever it is manifest from their terms that such was the intent of the makers; but the use of the technical words 'order' or 'bearer' alone will not manifest such intent." Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244; Peddicord *v.* Whittam, 9 Iowa 471. Nor will the words "one thousand dollars in lumber at the market value." McCartney *v.* Smalley, 11 Iowa 85. But it is otherwise with the words "without defalcation." Council Bluffs Iron Works *v.* Cuppey, 41 Iowa 104.

negotiability is unaffected by additional words which constitute no additional agreement and in no way qualify or render doubtful the preceding absolute promise to pay money,[15] or by adding an agreement implied by law,[16] and some additional provisions are expressly allowed by statute.[17]

(2) AGREEMENT AS TO CREDITING AMOUNT. The negotiability of the instrument will not be affected by a statement that the amount will be credited in a particular way.[18]

(3) PROVISION FOR ATTORNEY'S FEES AND COSTS OF COLLECTION — (a) IN GENERAL. A very common addition in the United States is a stipulation providing for attorney's fees in case of suit. There is a variance among the states as to the validity of such provisions, but generally they are held to be valid, unless they come into conflict with the laws against usury.[19] In some states, however, such

In Mississippi a note payable in cotton at a fixed price is a promissory note, and may be declared on as such, but it is non-negotiable and subject to defense. Rankin *v.* Sanders, 6 How. (Miss.) 52, 38 Am. Dec. 431.

15. Charleston First Nat. Bank *v.* Gary, 18 S. C. 282 [*followed* in Dowie *v.* Joyner, 25 S. C. 123]. So a note is negotiable which is payable to order, on a day certain, without a contingency, and purports to be according to the condition of a mortgage, the terms of the mortgage corresponding with those of the note (Littlefield *v.* Hodge, 6 Mich. 326), and a warranty of the goods sold and a provision for set-off of damages for breach of it has been held not to affect negotiability (Mitchell *v.* McCabe, 10 Ohio 405).

16. Baxter *v.* Stewart, 4 Sneed (Tenn.) 213. See also Gaines *v.* Shelton, 47 Ala. 413, where there was the further provision to return the negro at the end of the term and it was held that the instrument could be declared on as a note. But in Winston *v.* Metcalf, 7 Ala. 837, it was held that such an agreement was not assignable with the note.

17. **The Negotiable Instruments Law,** section 24, provides that "the negotiable character of an instrument otherwise negotiable is not affected by a provision which: 1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or 2. Authorizes a confession of judgment if the instrument be not paid at maturity; or 3. Waives the benefit of any law intended for the advantage or protection of the obligor; or 4. Gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal."

As to provision under Bills of Exchange Act see Kirkwood *v.* Smith, [1896] 1 Q. B. 582, 65 L. J. Q. B. 408, 74 L. T. Rep. N. S. 423, 44 Wkly. Rep. 480.

18. Early *v.* McCart, 2 Dana (Ky.) 414; Chesney *v.* St. John, 4 Ont. App. 150; Munro *v.* Cox, 30 U. C. Q. B. 363. *Contra*, the addition of an agreement that the drawer "will apply the amount, first, to the satisfaction of judgment of E. Percival . . . and the balance to mortgage of Harvey H. Peterson to" him. Coursin *v.* Ledlie, 31 Pa. St. 506. So it is not negotiable if there is a statement on the margin or face of the note that it is "given as collateral security with agreement" (Costelo *v.* Crowell, 127 Mass. 293, 34 Am. Rep. 367), "to be held as collateral security for" certain debts of a third person (Haskell *v.* Lambert, 16 Gray (Mass.) 592), or for the maker's draft accepted by a third person (American Nat. Bank *v.* Sprague, 14 R. I. 410).

A provision by separate agreement not known to the indorsee for the application of the proceeds to a certain debt does not affect negotiability. Gilmore *v.* Hirst, 56 Kan. 626, 44 Pac. 603.

19. *Illinois.*— Barton *v.* Farmers', etc., Nat. Bank, 122 Ill. 352, 13 N. E. 503, the consideration of the note being sufficient to support the stipulation also.

Indiana.— Harvey *v.* Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222; Maynard *v.* Mier, 85 Ind. 317; Tuley *v.* McClung, 67 Ind. 10; Garver *v.* Pontious, 66 Ind. 191 (where a statute making conditional stipulations void was held not to apply to unconditional agreements); Smock *v.* Ripley, 62 Ind. 81; Sinker *v.* Fletcher, 61 Ind. 276; Brown *v.* Barber, 59 Ind. 533; Churchman *v.* Martin, 54 Ind. 380; Smiley *v.* Meir, 47 Ind. 559; Mathews *v.* Norman, 42 Ind. 176.

Iowa.— Ft. Dodge First Nat. Bank *v.* Breese, 39 Iowa 640; McGill *v.* Griffin, 32 Iowa 445 (if "enforced by legal proceedings"). But no recovery can be had on such stipulation in a usurious note. Miller *v.* Gardner, 49 Iowa 234.

Maryland.— Bowie *v.* Hall, 69 Md. 433, 16 Atl. 64, 9 Am. St. Rep. 433, 1 L. R. A. 546.

Minnesota.— Harris Mfg. Co. *v.* Anfinson, 31 Minn. 182, 17 N. W. 274; Johnston Harvester Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252. But the right to them does not accrue until the payee incurs the liability and then only to the extent of the reasonable value of the attorney's services actually performed or to be performed, which must be proved. Campbell *v.* Worman, 58 Minn. 561, 60 N. W. 668.

Mississippi.— Duggan *v.* Champlin, 75 Miss. 441, 23 So. 179; Brahan *v.* Clarksville First Nat. Bank, 72 Miss. 266, 16 So. 203; Meacham *v.* Pinson, 60 Miss. 217.

Montana.— Bank of Commerce *v.* Fuqua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588.

stipulations are by statute void and without any effect;[20] and they have been held void as evasions of usury laws,[21] as against public policy,[22] and as not authorized by law[23] and providing without consideration for a penalty or forfeiture.[24] So it has been a much-debated question whether such a promise is fatal to negotiability and the courts are pretty evenly divided upon the subject. In many jurisdictions such stipulation has been held not to affect the negotiability,[25] although fees or

Oregon.— Peyser *v.* Cole, 11 Oreg. 39, 4 Pac. 520, 50 Am. Rep. 481.

Texas.— Miner *v.* Paris Exch. Bank, 53 Tex. 559.

Wisconsin.— Pirie *v.* Stern, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103; Vipond *v.* Townsend, 88 Wis. 285, 60 N. W. 430; Stillwater First Nat. Bank *v.* Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365.

Agreement not conditional.—Such an agreement dependent only on collection is not conditional (Harvey *v.* Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222; Tuley *v.* McClung, 67 Ind. 10), and the Indiana statute making conditions void in such instruments applies only to express conditions (Garver *v.* Pontious, 66 Ind. 191; Smock *v.* Ripley, 62 Ind. 81; Brown *v.* Barber, 59 Ind. 533; Churchman *v.* Martin, 54 Ind. 380 [*followed* in Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 6 U. S. App. 312, 3 C. C. A. 1, 17 L. R. A. 595] and the stipulation is valid although it be conditional on collection by legal process (Stingley *v.* Lafayette Second Nat. Bank, 42 Ind. 580; McGill *v.* Griffin, 32 Iowa 445. *Contra*, Churchman *v.* Martin, 54 Ind. 380, under the statute of 1875).

By and against whom recoverable.— Such fees may be recovered by the holder of the note, although not the original payee (Johnson *v.* Crossland, 34 Ind. 334; Bank of British North America *v.* Ellis, 2 Fed. 44, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204) and against an indorser (Hubbard *v.* Harrison, 38 Ind. 323; Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204) or surety (Moore *v.* Staser, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 665); and where stipulated for in a bill of exchange they are assumed by the accepter (Smith *v.* Muncie Nat. Bank, 29 Ind. 158).

Effect of void stipulation.— A promissory note is not void because it contains a void stipulation for attorney's fees. Maynard *v.* Mier, 85 Ind. 317.

20. Hartford Security Co. *v.* Eyer, 36 Nebr. 507, 54 N. W. 838, 38 Am. St. Rep. 735; National Bank of Commerce *v.* Feeney, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732. So in Georgia since 1891. Exchange Bank *v.* Apalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813.

21. *Arkansas.* — Boozer *v.* Anderson, 42 Ark. 167.

Michigan.— Myer *v.* Hart, 40 Mich. 517, 29 Am. Rep. 553.

North Carolina.— Tinsley *v.* Hoskins, 111 N. C. 340, 16 S. E. 325, 32 Am. St. Rep. 801.

Ohio.— State *v.* Taylor, 10 Ohio 378.

United States.— Merchants' Nat. Bank *v.* Sevier, 14 Fed. 662.

Not itself usury.— But this stipulation is not in itself usury (Martinsville First Nat. Bank *v.* Canatsey, 34 Ind. 149; Smith *v.* Silvers, 32 Ind. 321; Billingsley *v.* Dean, 11 Ind. 331; Meacham *v.* Pinson, 60 Miss. 217) and it is not affected by the fact that it was inserted for the sole benefit of the payee, and not with any purpose of paying the amount to an attorney (Sturgis Nat. Bank *v.* Smith, 9 Tex. Civ. App. 540, 30 S. W. 678).

22. Witherspoon *v.* Musselman, 14 Bush (Ky.) 214, 29 Am. Rep. 404; Myer *v.* Hart, 40 Mich. 517, 29 Am. Rep. 553; Exchange Bank *v.* Apalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813; Tinsley *v.* Hoskins, 111 N. C. 340, 16 S. E. 325, 32 Am. St. Rep. 801; Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517; Balfour *v.* Davis, 14 Oreg. 47, 12 Pac. 89. *Contra*, Barton *v.* Farmers', etc., Nat. Bank, 122 Ill. 352, 13 N. E. 503; Meacham *v.* Pinson, 60 Miss. 217.

23. Dow *v.* Updike, 11 Nebr. 95, 7 N. W. 857.

24. *Arkansas.* — Boozer *v.* Anderson, 42 Ark. 167.

Kentucky.— Witherspoon *v.* Musselman, 14 Bush (Ky.) 214, 29 Am. Rep. 404.

Michigan.— Bullock *v.* Taylor, 39 Mich. 137, 33 Am. Rep. 356, where the agreement was for a gross sum for attorney's fees and express charges.

North Carolina.— Williams *v.* Rich, 117 N. C. 235, 23 S. E. 257, "in the nature of forfeiture and readily used to cover usurious agreements."

Virginia.— Rixey *v.* Pearre, 89 Va. 113, 15 S. E. 498.

United States.— Merchants' Nat. Bank *v.* Sevier, 14 Fed. 662.

Contra, Salem Farmers' Nat. Bank *v.* Rasmussen, 1 Dak. 60, 46 N. W. 574; Barton *v.* Farmers', etc., Nat. Bank, 122 Ill. 352, 13 N. E. 503.

25. *Alabama.* — Montgomery First Nat. Bank *v.* Slaughter, 98 Ala. 602, 14 So. 545, 39 Am. St. Rep. 88; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

Arkansas.— Trader *v.* Chidester, 41 Ark. 242, 48 Am. Rep. 38; Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9.

Colorado.— Cowing *v.* Cloud, (Colo. App. 1901) 65 Pac. 417 [*citing* Frost *v.* Fisher, 13 Colo. App. 322, 58 Pac. 872].

Georgia.— Jones *v.* Crawford, 107 Ga. 318, 33 S. E. 51, 45 L. R. A. 105 (the addition being declared void by Ga. Civ. Code, § 3667); Stapleton *v.* Louisville Banking Co., 95 Ga. 802, 803, 23 S. E. 81 (where Simmons, C. J.,

costs are to be added only in case of suit.[26] In others, however, it has been held to destroy negotiability.[27]

said: "The stipulation as to costs and attorney's fees is not a part of the main engagement, but relates to the remedy in case of failure to comply with the contract, and is intended to compensate for the expense resulting from its breach. It does not become effective unless there is a failure to pay at the time specified; and it cannot then affect its negotiability, for negotiability in the full commercial sense ceases at maturity. . . . So far from tending to check the circulation of the paper, such a provision adds to its value and thus renders it more available for commercial purposes").

Illinois.— Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617; Dorsey *v.* Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428 [*affirming* 38 Ill. App. 305]; Nickerson *v.* Sheldon, 33 Ill. 372, 85 Am. Dec. 280; Lauferty *v.* Johnson, 17 Ill. App. 549.

Indiana.— Witty *v.* Michigan Mut. L. Ins. Co., 123 Ind. 411, 24 N. E. 141, 18 Am. St. Rep. 327, 8 L. R. A. 365 (and waiver of demand); Maynard *v.* Mier, 85 Ind. 317; Proctor *v.* Baldwin, 82 Ind. 370; Hubbard *v.* Harrison, 38 Ind. 323; Stoneman *v.* Pyle, 35 Ind. 103, 9 Am. Rep. 637; Smith *v.* Silvers, 32 Ind. 321; Smith *v.* Muncie Nat. Bank, 29 Ind. 158; Nicely *v.* Winnebago Nat. Bank, 18 Ind. App. 30, 47 N. E. 476.

Iowa.— Shenandoah Nat. Bank *v.* Marsh, 89 Iowa 273, 56 N. W. 458, 48 Am. St. Rep. 381; Sperry *v.* Horr, 32 Iowa 184, 185 (where Beck, J., said: "The agreement for the payment of attorney fees in no sense increased the amount of money which was payable when the notes fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued, to enforce its collection than to the sum which the maker is bound to pay"). See also Chandler *v.* Kennedy, 8 S. D. 56, 65 N. W. 439, an Iowa note.

Kansas.— Gilmore *v.* Hirst, 56 Kan. 626, 44 Pac. 603; Seaton *v.* Scovill, 18 Kan. 433, 21 Am. Rep. 212 note, 26 Am. Rep. 779.

Kentucky.— Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209.

Louisiana.— Dietrich *v.* Bayhi, 23 La. Ann. 767.

Michigan.— Altman *v.* Fowler, 70 Mich. 57, 37 N. W. 708; Altman *v.* Rittershofer, 68 Mich. 287, 36 N. W. 74, 13 Am. St. Rep. 341; Cayuga County Nat. Bank *v.* Purdy, 56 Mich. 6, 22 N. W. 93.

Mississippi.— Clifton *v.* Bank of Aberdeen, 75 Miss. 929, 23 So. 394.

Nebraska.— Stark *v.* Olsen, 44 Nebr. 646, 63 N. W. 37; Roberts *v.* Snow, 27 Nebr. 425, 43 N. W. 241; Aultman *v.* Stout, 15 Nebr. 586, 19 N. W. 464; Kemp *v.* Klaus, 8 Nebr. 24; Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811.

Oregon.— Benn *v.* Kutzschan, 24 Oreg. 28, 32 Pac. 763 (if reasonable in amount); Peyser *v.* Cole, 11 Oreg. 39, 4 Pac. 520, 50 Am. Rep. 451.

Tennessee.— Oppenheimer *v.* Farmers', etc., Bank, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, 33 L. R. A. 767.

Texas.— Hamilton Gin, etc., Co. *v.* Sinker, 74 Tex. 51, 11 S. W. 1056; Wright *v.* Morgan, (Tex. Civ. App. 1896) 37 S. W. 627.

Washington.— Colfax Second Nat. Bank *v.* Anglin, 6 Wash. 403, 33 Pac. 1056.

United States.— Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 6 U. S. App. 312, 17 L. R. A. 595 (under Indiana statute); Schlesinger *v.* Arline, 31 Fed. 648 (Georgia note); Howenstein *v.* Barnes, 5 Dill. (U. S.) 482, 12 Fed. Cas. No. 6,786, 20 Alb. L. J. 318, 8 Am. L. Rec. 163, 9 Centr. L. J. 48, 8 Reporter 326, 1 Wkly Jur. 249; Wilson Sewing Mach. Co. *v.* Moreno, 6 Sawy. (U. S.) 35, 7 Fed. 806 (Oregon paper); Adams *v.* Addington, 4 Woods (U. S.) 389, 16 Fed. 89 (under the law merchant).

Neg. Instr. L. § 21.

See 7 Cent. Dig. tit. "Bills and Notes," § 403.

What law governs.— The fact that a stipulation for attorney's fee in a note, valid where made, is declared against public policy of the forum and void there does not destroy the negotiability of the note (Chandler *v.* Kennedy, 8 S. D. 56, 65 N. W. 439), but the provision being void the negotiability of the note is unimpaired (National Bank of Commerce *v.* Feeney, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732).

26. *Illinois.*— Nickerson *v.* Sheldon, 33 Ill. 372, 85 Am. Dec. 280.

Indiana.— Stoneman *v.* Pyle, 35 Ind. 103, 9 Am. Rep. 637.

Kentucky.—Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209; Handley *v.* Tebbetts, 13 Ky. L. Rep. 280, 16 S. W. 131, 17 S. W. 166.

Oregon.— Peyser *v.* Cole, 11 Oreg. 39, 4 Pac. 520, 50 Am. Rep. 451.

United States.— Howenstein *v.* Barnes, 5 Dill. (U. S.) 482, 12 Fed. Cas. No. 6,786, 20 Alb. L. J. 318, 8 Am. L. Rec. 163, 9 Centr. L. J. 48, 8 Reporter 326, 1 Wkly. Jur. 249.

27. *California.*— Findley *v.* Pott, 131 Cal. 385, 63 Pac. 694; Kendall *v.* Parker, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117; Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035; San Diego First Nat. Bank *v.* Falkenhan, 94 Cal. 141, 29 Pac. 866; San Diego First Nat. Bank *v.* Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; Adams *v.* Seaman, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 833; Chase *v.* Whitmore, 68 Cal. 545, 9 Pac. 942.

Dakota.— Garretson *v.* Purdy, 3 Dak. 178, 14 N. W. 100.

(b) How Amount Fixed. Where such a stipulation may be inserted it may be for a reasonable fee,[28] for a specified percentage,[29] or for a fixed sum.[30]

(4) Reference to Collateral. A negotiable bill or note may also contain a recital of collateral securing it,[31] and provide for its surrender when the

Maryland.— Maryland Fertilizing, etc., Co. *v.* Newman, 60 Md. 584, 45 Am. Rep. 750.

Minnesota.— Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350; Jones *v.* Radatz, 27 Minn. 240, 6 N. W. 800.

Missouri.— McCoy *v.* Green, 83 Mo. 626; Carthage First Nat. Bank *v.* Jacobs, 73 Mo. 35; Trenton First Nat. Bank *v.* Gay, 71 Mo. 627; Storr *v.* Wakefield, 71 Mo. 622; Carthage First Nat. Bank *v.* Marlow, 71 Mo. 618; Samstag *v.* Conley, 64 Mo. 476; Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430 ("if collected by attorney"); Creasy *v.* Gray, 88 Mo. App. 454; Clark *v.* Barnes, 58 Mo. App. 667.

Montana.— Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582. *Contra,* before the adoption of the civil code in 1895. Bank of Commerce *v.* Fuqua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588.

North Carolina.— New Windsor First Nat. Bank *v.* Bynum, 84 N. C. 24, 37 Am. Rep. 604, where there was also a right to declare note due for insecurity.

North Dakota.— Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Pennsylvania.— Johnston *v.* Speer, 92 Pa. St. 227, 37 Am. Rep. 675 (where the percentage for attorney's fees was left blank); Woods *v.* North, 84 Pa. St. 407, 24 Am. Rep. 201 ("if not paid when due").

South Carolina.— Sylvester, etc., Co. *v.* Alewine, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86, for an "undefined sum."

South Dakota.— Johnson *v.* Schar, 9 S. D. 536, 70 N. W. 838.

Utah.— Lippincott *v.* Rich, 22 Utah 196, 61 Pac. 526, under Utah Rev. Stat. (1898), §§ 1553, 1559. *Contra,* Salisbury *v.* Stewart, 15 Utah 308, 49 Pac. 777, 62 Am. St. Rep. 934.

Wisconsin.— Peterson *v.* Stoughton State Bank, 78 Wis. 113, 47 N. W. 368; Stillwater First Nat. Bank *v.* Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365; Morgan *v.* Edwards, 53 Wis. 599, 11 N. W. 21, 40 Am. Rep. 781 (where there was also a waiver of appraisement and exemption).

United States.— Aurora Second Nat. Bank *v.* Basuier, 65 Fed. 58, 27 U. S. App. 541, 12 C. C. A. 517 (under Dakota statute); Hardin *v.* Olson, 4 McCrary (U. S.) 643, 14 Fed. 705 (Minnesota paper).

See 7 Cent. Dig. tit. "Bills and Notes," § 403.

A provision for attorney's fees in the mortgage securing a note does not affect its negotiability. Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47. *Contra,* under Cal. Civ. Code, §§ 3088, 3093. Meyer *v.* Weber, 133 Cal. 681, 65 Pac. 1110.

28. Mathews *v.* Norman, 42 Ind. 176; Moore *v.* Staser, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 665 (for a "reasonable sum" to be fixed by the court); Ft. Dodge First Nat. Bank *v.* Breese, 39 Iowa 640; Peyser *v.* Cole, 11 Oreg. 39, 4 Pac. 520, 50 Am. Rep. 451.

An agreement to pay all costs of collection will be construed to mean a reasonable attorney's fee. Reeves *v.* Estes, 124 Ala. 303, 26 So. 935; Williams *v.* Flowers, 90 Ala. 136, 7 So. 439, 24 Am. St. Rep. 772; Wilson Sewing Mach. Co. *v.* Moreno, 6 Sawy. (U. S.) 35, 7 Fed. 806.

29. Wood *v.* Winship Mach. Co., 83 Ala. 424, 3 So. 757, 3 Am. St. Rep. 754; Dorsey *v.* Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428; Smiley *v.* Meir, 47 Ind. 559; Brahan *v.* Clarksville First Nat. Bank, 72 Miss. 266, 16 So. 203.

30. Farmers' Nat. Bank *v.* Rasmussen, 1 Dak. 60, 46 N. W. 574.

Amount fixed unreasonable.— But if it is an unreasonable fixed sum the court will not enforce the payment of it, and being unauthorized to make a new contract for the parties will make no allowance therefor. Levens *v.* Briggs, 21 Oreg. 333, 28 Pac. 15, 14 L. R. A. 188; Kimball *v.* Moir, 15 Oreg. 427, 15 Pac. 669; Balfour *v.* Davis, 14 Oreg. 47, 12 Pac. 89.

31. *Illinois.*— Biegler *v.* Merchants' L. & T. Co., 62 Ill. App. 560; Mumford *v.* Tolman, 54 Ill. App. 471. The statute in Illinois requires that if a note is secured by chattel mortgage it shall be so stated in the note. Sellers *v.* Thomas, 185 Ill. 384, 57 N. E. 10.

Iowa.— Knipper *v.* Chase, 7 Iowa 145.

Kentucky.— Duncan *v.* Louisville, 13 Bush (Ky.) 378, 26 Am. Rep. 201.

Maine.— Collins *v.* Bradbury, 64 Me. 37.

Massachusetts.— Towne *v.* Rice, 122 Mass. 67; Branning *v.* Markham, 12 Allen (Mass.) 454.

Minnesota.— Guilford *v.* Minneapolis, etc., R. Co., 48 Minn. 560, 51 N. W. 658, 31 Am. St. Rep. 694.

Missouri.— Ewing *v.* Clark, 76 Mo. 545.

Nebraska.— Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811.

New York.— New York Security, etc., Co. *v.* Storm, 81 Hun (N. Y.) 33, 30 N. Y. Suppl. 605, 62 N. Y. St. 539; Arnold *v.* Rock River Valley Union R. Co., 5 Duer (N. Y.) 207.

Pennsylvania.— Valley Nat. Bank *v.* Crowell, 148 Pa. St. 284, 23 Atl. 1068, 33 Am. St. Rep. 824.

South Carolina.— Rathburn *v.* Jones, 47 S. C. 206, 25 S. E. 214.

United States.— De Hass *v.* Dibert, 70 Fed. 227, 28 U. S. App. 559, 17 C. C. A. 79, 30 L. R. A. 189; De Hass *v.* Roberts, 59 Fed. 853.

England.— Fancourt *v.* Thorne, 9 Q. B. 312, 10 Jur. 639, 15 L. J. Q. B. 344, 58 E. C. L. 312; Wise *v.* Charlton, 4 A. & E.

note,[32] or when a part of a series of notes,[33] is paid. To such recital may be added a a power of sale on non-payment[34] and an agreement to pay deficiency.[35]

(5) Waiver of Exemption or Diligence. In the absence of a prohibitory statute a negotiable note may even contain a waiver of exemption[36] or of due diligence on the holder's part.[37]

786, 2 Hurl. & W. 49, 6 L. J. K. B. 80, 6 N. & M. 364, 31 E. C. L. 346.

See 7 Cent. Dig. tit. "Bills and Notes," § 418.

This is provided by statute in some jurisdictions. Cal. Civ. Code, § 3092; Mont. Civ. Code, § 3996; Neg. Instr. L. § 24; Bills Exch. Act, § 83.

Proviso not to waive vendor's lien.— The negotiability of a note is not destroyed by a proviso that the payee shall not waive his vendor's lien by receiving the note. Phelps, etc., Windmill Co. *v.* Honeywell, 7 Kan. App. 645, 53 Pac. 488.

Louisiana — Paraph by notary.— *Ne varietur*, stamped by a notary for identification with a mortgage, which is frequently found in Louisiana notes, does not affect negotiability. Kentucky Bank *v.* Goodale, 20 La. Ann. 50; Nott *v.* Watson, 11 La. Ann. 664; Maskell *v.* Haifleigh, 8 La. Ann. 457; Chalaron *v.* Vance, 7 La. 571; Abat *v.* Gormley, 3 La. 238; Canfield *v.* Gibson, 1 Mart. N. S. (La.) 143; Fusilier *v.* Bonin, 12 Mart. (La.) 235; Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

The recital of the collateral must not incorporate provisions of the collateral which render uncertain the amount to be paid (Brooke *v.* Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536, by adding taxes on the mortgaged land) or the time for payment (Continental Nat. Bank *v.* McGeoch, 73 Wis. 332, 41 N. W. 409, maturity accelerated as to deficiency after sale of collateral).

32. Goss *v.* Emerson, 23 N. H. 38.

33. Ilsley *v.* Smedes, 15 Daly (N. Y.) 488, 8 N. Y. Suppl. 470, 29 N. Y. St. 417.

34. *Alabama.*— Commercial Bank *v.* Crenshaw, 103 Ala. 497, 15 So. 741.

Iowa.— Carroll Bank *v.* Taylor, 67 Iowa 572, 25 N. W. 810 [*distinguishing* Smith *v.* Marland, 59 Iowa 645, 13 N. W. 852, where the power of entry and sale for insecurity before maturity was held to render the note non-negotiable]; Knipper *v.* Chase, 7 Iowa 145.

Louisiana.— Haynes *v.* Beckman, 6 La. Ann. 224.

Massachusetts.— Towne *v.* Rice, 122 Mass. 67.

Missouri.— Ewing *v.* Clark, 76 Mo. 545.

New York.— Arnold *v.* Rock River Valley Union R. Co., 5 Duer (N. Y.) 207.

Pennsylvania.— Valley Nat. Bank *v.* Crowell, 148 Pa. St. 284, 23 Atl. 1068, 33 Am. St. Rep. 824.

South Carolina.— Charleston First Nat. Bank *v.* Gary, 18 S. C. 282.

See 7 Cent. Dig. tit. "Bills and Notes," § 418.

But the notes will be rendered non-negotiable by a provision that the collateral may be sold for insecurity before the note matures, unless further security is furnished (Commercial Nat. Bank *v.* Consumers' Brewing Co., 17 App. Cas. (D. C.) 100 [*following* 16 App. Cas. (D. C.) 186]; Lincoln Nat. Bank *v.* Perry, 66 Fed. 887, 32 U. S. App. 15, 14 C. C. A. 273), especially where it is coupled with a provision for attorney's fees (Benny *v.* Dunn, 2 Lack. Leg. N. 135, 26 Pittsb. Leg. J. N. S. (Pa.) 382), and that the deficiency after sale shall mature forthwith (Continental Nat. Bank *v.* Wells, 73 Wis. 332, 41 N. W. 409).

35. Mumford *v.* Tolman, 54 Ill. App. 471; Arnold *v.* Rock River Valley Union R. Co., 5 Duer (N. Y.) 207; Charleston First Nat. Bank *v.* Gary, 18 S. C. 282.

36. Lyon *v.* Martin, 31 Kan. 411, 2 Pac. 790; Zimmerman *v.* Anderson, 67 Pa. St. 421, 5 Am. Rep. 447 (where it was held that the words, "waiving the right of appeal and all valuation, appraisement, stay and exemption laws," do not contain any condition or contingency; but after the note falls due and is unpaid and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability they add to it and give additional value to the note); Hughitt *v.* Johnson, 28 Fed. 865. See also Neg. Instr. L. § 24. *Contra*, a stipulation for attorney's fees with waiver (Samstag *v.* Conley, 64 Mo. 476) and a warrant for judgment with release of errors and waiver of exemption and stay laws (Overton *v.* Tyler, 3 Pa. St. 346, 45 Am. Dec. 645).

37. Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 S. E. 109 (holding that a provision in a note that "the endorsers hereon contract as makers hereof, . . . and agree, as to the holder hereof, to be held liable as original makers of this note" does not alter the negotiable character of the note); Witty *v.* Michigan Mut. L. Ins. Co., 123 Ind. 411, 24 N. E. 141, 18 Am. St. Rep. 327, 8 L. R. A. 327 (a waiver of demand and exemption with provisions for renewal and for attorney's fees); Denegre *v.* Milne, 10 La. Ann. 324 (holding that "acceptance waived" leaves the negotiability of a bill undisturbed); Buffalo Third Nat. Bank *v.* Bowman-Spring, 50 N. Y. App. Div. 66, 63 N. Y. Suppl. 410 (a waiver of protest with reservation of title to property in the payee until payment of note and agreement as to credits and against extension by payee's agent).

Waiver of diligence in suit and of notice of protest renders the note non-negotiable. Hegeler *v.* Comstock, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393, decided under the statutory prohibition.

Waiver of presentment and notice coupled with authority to extend the time of payment without notice makes the paper non-negoti-

(6) WARRANT TO CONFESS JUDGMENT. A warrant to confess judgment has been held not to destroy the negotiability of the note,[38] but in some states a different rule prevails.[39]

(c) *Effect of Option For Alternative Payment.* A negotiable note or bill must not be for the payment of money or the performance of some other thing in the alternative;[40] but where there is a condition in a note that it may be discharged in a specific work or property within a certain time it has been held that the time is of the essence of the contract, and that it becomes an absolute contract for the payment of money at the expiration of the time fixed[41] or at maturity of the note, if no other time is designated,[42] if before maturity the maker does not give notice of his intention to pay in such manner,[43] and negotiability is not prejudiced by the reservation of a right to the holder to elect some act in lieu of payment.[44]

(II) *HOW MONEY DESIGNATED.* The money may be designated in various ways, and by any word or phrase which indicates money and not mere securities or obligations.[45] Among the more usual of the phrases which are employed to

able. Richmond Second Nat. Bank *v.* Wheeler, 75 Mich. 546, 42 N. W. 963.

38. *Iowa.*— Tolman *v.* Janson, 106 Iowa 455, 76 N. W. 732.

Kansas.— Gilmore *v.* Hirst, 56 Kan. 626, 44 Pac. 603.

Louisiana.— Fort *v.* Delee, 22 La. Ann. 180, power to issue execution in case of non-payment.

Nebraska.— Kemp *v.* Klaus, 8 Nebr. 24.

Ohio.— Cushman *v.* Welsh, 19 Ohio St. 536. The negotiability does not, however, extend to the warrant (Osborn *v.* Hawley, 19 Ohio 130), unless expressly conferred to confess a judgment in favor of "the legal holder" or "holder" and is invalidated by a transfer of the note (Ream *v.* Merchants' Nat. Bank, 2 Ohio Cir. Ct. 43).

39. Richards *v.* Barlow, 140 Mass. 218, 6 N. E. 68 ("at any time hereafter," the note being payable in ninety days); Conrad Seipp Brewing Co. *v.* McKittrick, 86 Mich. 191, 48 N. W. 1086; Carthage First Nat. Bank *v.* Marlow, 71 Mo. 618 (with attorney's fees); Overton *v.* Tyler, 3 Pa. St. 346, 45 Am. Dec. 645 [*followed* in Sweeney *v.* Thickstun, 77 Pa. St. 131]; Draper *v.* Sharp, 1 Pittsb. (Pa.) 478. But see McIntyre *v.* Steel, 1 Wkly. Notes Cas. (Pa.) 494, where it was held that Overton *v.* Tyler, 3 Pa. St. 346, 45 Am. Dec. 645, had been overruled in principle by Zimmerman *v.* Anderson, 67 Pa. St. 421, 5 Am. Rep. 447.

40. Dennett *v.* Goodwin, 32 Me. 44; Matthews *v.* Houghton, 11 Me. 377; Alexander *v.* Oaks, 19 N. C. 513; Thompson *v.* Gaylard, 3 N. C. 326; Lawrence *v.* Dougherty, 5 Yerg. (Tenn.) 435; Looney *v.* Pinckston, 1 Overt. (Tenn.) 384; Going *v.* Barwick, 16 U. C. Q. B. 45. See also Newhorn *v.* Lawrence, 5 U. C. Q. B. 359. But see Pool *v.* McCrary, 1 Ga. 319, 44 Am. Dec. 655 (under statute); Knight *v.* Connecticut River Petroleum Co., 44 Vt. 472 (holding a contract of sale of personal property, reserving to the vendor the right to pay a certain sum of money in lieu of the delivery of the property sold to be a promissory note, payable either in money or in the goods specified).

41. *Alabama.*— Weaver *v.* Lapsley, 42 Ala. 601, 94 Am. Dec. 671; Schuessler *v.* Watson, 37 Ala. 98, 76 Am. Dec. 348; Nesbitt *v.* Pearson, 33 Ala. 668.

Connecticut.—Hun *v.* Higby, 2 Root (Conn.) 190; Lockwood *v.* Smith, 1 Root (Conn.) 497.

Illinois.— Jones *v.* Hubbard, 17 Ill. App. 564.

Pennsylvania.— Church *v.* Feterow, 2 Penr. & W. (Pa.) 301.

Texas.— Woods *v.* Parker, 36 Tex. 131; Baker *v.* Todd, 6 Tex. 273, 55 Am. Dec. 775.

42. Schnier *v.* Fay, 12 Kan. 184; Dunklee *v.* Goodnough, 68 Vt. 113, 34 Atl. 427.

43. Plowman *v.* Riddle, 7 Ala. 775.

44. Louisville Banking Co. *v.* Gray, 123 Ala. 251, 26 So. 205 (with leave to the payee — a bank — to apply on the note at any time any money which the maker may have in the bank on deposit or otherwise); Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582 (under Mont. Civ. Code (1895), §§ 3994, 3996); Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Hodges *v.* Shuler, 22 N. Y. 114 [*affirming* 24 Barb. (N. Y.) 68]; Hosstatter *v.* Wilson, 36 Barb. (N. Y.) 307; Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645; Neg. Instr. L. § 324. See also McDonell *v.* Holgate, 2 Rev. Lég. 29.

45. The instrument was held negotiable when payable in: Arkansas money. Wilburn *v.* Greer, 6 Ark. 255 [*distinguishing* Hawkins *v.* Watkins, 5 Ark. 481, where the term "Arkansas money" was limited, qualified, and defined by the words "of the Fayetteville Branch"]. Cash notes. Goading *v.* Britain, 1 Stew. & P. (Ala.) 282. Current money. Bainbridge *v.* Owen, 2 J. J. Marsh. (Ky.) 463. Current money of the state. Carter *v.* Penn, 4 Ala. 140; McChord *v.* Ford, 3 T. B. Mon. (Ky.) 166 [*distinguishing* Chambers *v.* George, 5 Litt. (Ky.) 335, on the ground that through a typographical error in that case the word "currency" appears as "money"]; Cockrill *v.* Kirkpatrick, 9 Mo. 697. Exchange. Bradley *v.* Litt, 4 Biss. (U. S.) 473, 3 Fed. Cas. No. 1,783 [*overruling* Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742]. But see Hogue *v.*

designate money in commercial paper are such expressions as "currency" [46] and

Edwards, 9 Ill. App. 148, 263, which held that no action against a bank can be maintained upon a check payable in exchange. Good current money of this state. Graham *v.* Adams, 5 Ark. 261. Lawful current money of Pennsylvania. Wharton *v.* Morris, 1 Dall. (Pa.) 124, 1 L. ed. 65. Lawful money. Dorrance *v.* Stewart, 1 Yeates (Pa.) 349. Legal tender notes. Kelly *v.* Ferguson, 46 How. Pr. (N. Y.) 411. Like funds to those deposited. Swift *v.* Whitney, 20 Ill. 144; Laughlin *v.* Marshall, 19 Ill. 390; Peru Bank *v.* Farnsworth, 18 Ill. 563. Mississippi certificates of indebtedness. Deason *v.* Taylor, 53 Miss. 697. York state bills or specie. Keith *v.* Jones, 9 Johns. (N. Y.) 120.

The instrument was held non-negotiable when payable in: Bank stock or lawful money of the United States. Alexander *v.* Oaks, 19 N. C. 513. Brandon money. Gordon *v.* Parker, 2 Sm. & M. (Miss.) 485. Checks. Farmersville First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334. Confederate bonds. Prigeon *v.* Smith, 31 Tex. 171. County scrip. Jones *v.* State, 40 Ark. 344. Current Mississippi bank money. Hopson *v.* Fountain, 5 Humphr. (Tenn.) 140. Current notes of the state of North Carolina. Warren *v.* Brown, 64 N. C. 381. East India bonds. Applebye *v.* Biddulph, Bull. N. P. 272. Foreign bills. Jones *v.* Fales, 4 Mass. 245. *Compare* Sanger *v.* Stimpson, 8 Mass. 260. Good solvent cash notes. Ward *v.* Lattimer, 2 Tex. 245. But this becomes an absolute promise to pay money if payment be not made in the alternative commodity on the day appointed. Grant *v.* Burleson, 38 Tex. 214; Smith *v.* Falwell, 21 Tex. 466; Hopkins *v.* Seymour, 10 Tex. 202; Baker *v.* Todd, 6 Tex. 273, 55 Am. Dec. 775. Government scrip. Wilamouicz *v.* Adams, 13 Ark. 12. Land-office money of the state of Illinois. Scott *v.* Com., 5 J. J. Marsh. (Ky.) 643. New York funds or their equivalent. Hasbrook *v.* Palmer, 2 McLean (U. S.) 10, 11 Fed. Cas. No. 6,188. New York or Chicago exchange. Brooklyn First Nat. Bank *v.* Slette, 67 Minn. 425, 69 N. W. 1148, 64 Am. St. Rep. 429; Chandler *v.* Calvert, 87 Mo. App. 368. Paper medium. Lange *v.* Kohne, 1 McCord (S. C.) 115. Sight check. Hamburg Bank *v.* Johnson, 3 Rich. (S. C.) 42. Solvent notes and accounts of other men. Williams *v.* Sims, 22 Ala. 512. State paper. Madison County *v.* Bartlett, 2 Ill. 67. Tennessee money. Taylor *v.* Neblett, 4 Heisk. (Tenn.) 491 [*overruling* Searcy *v.* Vance, Mart. & Y. (Tenn.) 225]. Tennessee or Alabama money or its equivalent. Chevallier *v.* Buford, 1 Tex. 503. United States bonds. Blouin *v.* Hart, 30 La. Ann. 714; Easton *v.* Hyde, 13 Minn. 90. So of a New York note payable "in Canada money" (Thompson *v.* Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546), of a Canadian note payable "in Canada bills" (Gray *v.* Worden, 29 U. C. Q. B. 535), of an order to pay A's note (Noyes *v.* Gilman, 65 Me. 589), or of a promise to pay A's bill of exchange (Bradt *v.* Krank, 164 N. Y. 515, 58 N. E. 657); but a promise to pay two hundred dollars "borrowed money, in State Bank of Tennessee and Kentucky," describes the funds borrowed and not those to be paid (Womack *v.* Walling, 1 Baxt. (Tenn.) 425).

46. *Arkansas.*— Burton *v.* Brooks, 25 Ark. 215, "greenback currency." *Contra*, "common currency in Arkansas," where, at the time of suit, the terms unquestionably meant bank-notes or paper issues. Dillard *v.* Evans, 4 Ark. 175.

Georgia.— Echols *v.* Grattan, 42 Ga. 547, "whatever good currency may be used at the time the note falls due."

Illinois.— Northern Bank *v.* Zepp, 28 Ill. 180; Trowbridge *v.* Seaman, 21 Ill. 101; Swift *v.* Whitney, 20 Ill. 144. "In Illinois currency," being currency of the place and by implication of the place of payment. Chicago Mar. Bank *v.* Rushmore, 28 Ill. 463; Chicago Mar. Bank *v.* Birney, 28 Ill. 90; Chicago F. & M. Ins. Co. *v.* Keiron, 27 Ill. 501.

Indiana.— Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358.

Kentucky.— "Kentucky currency." Lampton *v.* Haggard, 3 T. B. Mon. (Ky.) 149 [*explaining* Chambers *v.* George, 5 Litt. (Ky.) 335, where a note payable "in the currency of this state" was held non-negotiable, on the ground that the expression "currency of this state" had then a different popular meaning].

Louisiana.— Fry *v.* Dudley, 20 La. Ann. 368.

Michigan.— Phelps *v.* Town, 14 Mich. 374. "In Canada currency," where it was payable in Canada. Black *v.* Ward, 27 Mich. 191, 15 Am. Rep. 162.

Minnesota.— Butler *v.* Paine, 8 Minn. 324.

Mississippi.— Mitchell *v.* Hewitt, 5 Sm. & M. (Miss.) 361, "currency of the state of Mississippi."

New York.— Frank *v.* Wessels, 64 N. Y. 155 ("paper currency"); Ehle *v.* Chittenango Bank, 24 N. Y. 548 ("New York State currency"). *Contra*, where "payable in Pennsylvania or New York paper currency to be current in the state of Pennsylvania, or the state of New York." Leiber *v.* Goodrich, 5 Cow. (N. Y.) 186.

North Carolina.— Johnson *v.* Miller, 76 N. C. 439 ("the common currency of the country"); Blackburn *v.* Brooks, 65 N. C. 413 ("undepreciated currency," meaning "ordinary business currency").

Ohio.— Citizens' Nat. Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Howe *v.* Hartness, 11 Ohio St. 449, 78 Am. Dec. 312. "Currency of Zanesville." Dugan *v.* Campbell, 1 Ohio 115.

Virginia.— Caldwell *v.* Craig, 22 Gratt. (Va.) 340, "currency at its specie value."

Wisconsin.—Klauber *v.* Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773, 9 Centr. L. J. 488 [*explaining* and *criticizing* Ford *v.* Mitchell, 15 Wis. 304].

United States.— Trebilcock *v.* Wilson, 12 Wall. (U. S.) 687, 20 L. ed. 460; Paup *v.* Drew, 10 How. (U. S.) 218, 13 L. ed. 394.

Canada.— Wallace *v.* Souther, 16 Can. Su-

"current funds," [47] and to make it payable "in gold" [48] is to make it payable in money, not bullion; [49] but negotiable paper cannot be made payable in bank-notes.[50]

preme Ct. 717; St. Stephen Branch R. Co. *v.* Black, 13 N. Brunsw. 139; Chicago Third Nat. Bank *v.* Cosby, 43 U. C. Q. B. 58, 41 U. C. Q. B. 402.

Contra.—*Alabama.*—Mobile Bank *v.* Brown, 42 Ala. 108; Carlisle *v.* Davis, 7 Ala. 42 ("common currency of Alabama," meaning bank-notes).

Iowa.— Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244; Rindskoff *v.* Barrett, 11 Iowa 172.

Missouri.— Farwell *v.* Kennett, 7 Mo. 595. But see Cockrill *v.* Kirkpatrick, 9 Mo. 697, where the note was payable in "currency of this state."

Pennsylvania.— Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390.

Tennessee.— Coffin *v.* Hill, 1 Heisk. (Tenn.) 385, "currency of the country, but not in Confederate notes."

47. *Alabama.*— Lacy *v.* Holbrook, 4 Ala. 88, "funds current in the city of New York."

Illinois.— Wood *v.* Price, 46 Ill. 435; Marc *v.* Kupfer, 34 Ill. 286, 28 Ill. 388; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.

Kansas.— Blood *v.* Northup, 1 Kan. 28.

Maine.— Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.

Maryland.— Laird *v.* State, 61 Md. 309.

Nebraska.— Kirkwood *v.* Exchange Nat. Bank, 40 Nebr. 497, 58 N. W. 1135; Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

Ohio.— Citizens' Nat. Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; White *v.* Richmond, 16 Ohio 5 ("current funds of the State of Ohio").

United States.— Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97.

Contra.—*Indiana.*— National State Bank *v.* Ringel, 51 Ind. 393; Conwell *v.* Pumphrey, 9 Ind. 135, 68 Am. Dec. 611.

Iowa.— Haddock *v.* Woods, 46 Iowa 433. But it may be shown to be negotiable by proof that, under customs prevailing at the time and place of its execution, the term was understood to mean money and that such funds circulated as money. American Emigrant Co. *v.* Clark, 47 Iowa 671.

North Carolina.— Johnson *v.* Henderson, 76 N. C. 227.

Pennsylvania.— Wright *v.* Hart, 44 Pa. St. 454, "current funds at Pittsburgh."

Texas.— Texas Land, etc., Co. *v.* Carroll, 63 Tex. 48, 52. But see Williams *v.* Arnis, 30 Tex. 37.

Vermont.— Collins *v.* Lincoln, 11 Vt. 268.

Wisconsin.— Lindsey *v.* McClelland, 18 Wis. 481, 86 Am. Dec. 786; Platt *v.* Sauk County Bank, 17 Wis. 222. But these cases are explained and criticized in Klauber *v.* Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773.

Canada.— Bettis *v.* Weller, 30 U. C. Q. B. 23. See also Stephens *v.* Berry, 15 U. C. C. P. 548.

See also BANKS AND BANKING, 5 Cyc. 521, note 81; and 7 Cent. Dig. tit. "Bills and Notes," § 396.

48. **"In specie or its equivalent"** is good. Rhyne *v.* Wacaser, 63 N. C. 36. But *contra*, as to a note made payable "in lawful funds of the United States or its equivalent." Ogden *v.* Slade, 1 Tex. 13.

Mexican silver dollars.— A note for "one thousand Mexican silver dollars" is good. Hogue *v.* Williamson, 85 Tex. 553, 22 S. W. 580, 34 Am. St. Rep. 823, 20 L. R. A. 481.

49. Strickland *v.* Holbrooke, 75 Cal. 268, 17 Pac. 204 ("United States gold coin"); Wood *v.* Bullens, 6 Allen (Mass.) 516 ("gold dollars"); Chrysler *v.* Renois, 43 N. Y. 209 ("gold dollars").

50. *Massachusetts.*—Jones *v.* Fales, 4 Mass. 245.

North Carolina.— State *v.* Corpening, 32 N. C. 58.

Pennsylvania.— Gray *v.* Donahoe, 4 Watts (Pa.) 400.

Tennessee.— Taylor *v.* Neblett, 4 Heisk. (Tenn.) 491; Hopson *v.* Fountain, 5 Humphr. (Tenn.) 140; Childress *v.* Stuart, Peck (Tenn.) 276.

Vermont.— Collins *v.* Lincoln, 11 Vt. 268, "current bills."

United States.— Irvine *v.* Lowry, 14 Pet. (U. S.) 293, 10 L. ed. 462, "office notes of the Lumberman's Bank."

England.— *Ex p.* Imeson, 2 Rose 225, "Cash or Bank of England Notes."

See 7 Cent. Dig. tit. "Bills and Notes," § 396.

"Current bank notes."—*Alabama.*— Young *v.* Scott, 5 Ala. 475; Jackson *v.* Waddill, 1 Stew. (Ala.) 579.

Mississippi.— Bonnell *v.* Covington, 7 How. (Miss.) 322, of designated banks.

New York.— Little *v.* Phenix Bank, 2 Hill (N. Y.) 425 [*affirmed* in 7 Hill (N. Y.) 359]. But in Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176, it was held that "current bank-notes" are "notes or bills used in general circulation as money, and constituted the general currency of the country recognized by law at the time and place where payment was to be made and demanded." And to the effect that a promissory note payable "in bank-notes current in the city of New York" is a negotiable note, within the New York statute see Judah *v.* Harris, 19 Johns. (N. Y.) 144.

North Carolina.— Lackey *v.* Miller, 61 N. C. 26.

Ohio.— Shamokin Bank *v.* Street, 16 Ohio St. 1, of designated banks. *Contra*, where payable "in current Ohio bank notes." Swetland *v.* Creigh, 15 Ohio 118; Morris *v.* Edwards, 1 Ohio 189.

Pennsylvania.— Gray *v.* Donahoe, 4 Watts (Pa.) 400.

The words "dollars" [51] and "sterling" [52] mean "dollars" and "sterling" where the paper is to be paid.

(III) *AMOUNT* — (A) *Must Be Certain* — (1) IN GENERAL. To constitute a negotiable instrument it must be for the payment of a certain amount,[53] and this is in some states especially provided by statute,[54] but it is sufficient if the amount can be certainly ascertained by the terms of the note or bill.[55] If, however, the

Tennessee.—Wolfe *v.* Tyler, 1 Heisk. (Tenn.) 313; McDowell *v.* Keller, 4 Coldw. (Tenn.) 258; Simpson *v.* Moulden, 3 Coldw. (Tenn.) 429; Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303 (of designated bank); Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158; Gamble *v.* Hatton, Peck (Tenn.) 130.

United States.— Fry *v.* Rousseau, 3 McLean (U. S.) 106, 9 Fed. Cas. No. 5,141, "current bank notes, receivable at the counter of said bank."

Notes of certain designated banks.—*Arkansas.*— Mitchell *v.* Walker, 4 Ark. 145.

Kentucky.— Breckinridge *v.* Ralls, 4 T. B. Mon. (Ky.) 533; January *v.* Henry, 3 T. B. Mon. (Ky.) 8; Stucker *v.* Miller, 5 Litt. (Ky.) 235; Campbell *v.* Weister, 1 Litt. (Ky.) 30.

North Carolina.— Patton *v.* Hunt, 64 N. C. 163.

Pennsylvania.— McCormick *v.* Trotter, 10 Serg. & R. (Pa.) 94.

Tennessee.— Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158 [*overruling* Deberry *v.* Darnell, 5 Yerg. (Tenn.) 451].

Virginia.— Beirne *v.* Dunlap, 8 Leigh (Va.) 514.

Contra, where the note is payable in notes of designated banks "payable and negotiable in any bank in the state." Besancon *v.* Shirley, 9 Sm. & M. (Miss.) 457.

51. Womack *v.* Walling, 1 Baxt. (Tenn.) 425; Donley *v.* Tindall, 32 Tex. 43, 5 Am. Rep. 234; Atlantic, etc., R. Co. *v.* Carolina Nat. Bank, 19 Wall. (U. S.) 548, 22 L. ed. 196; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361. See also BANKS AND BANKING, 5 Cyc. 529, note 54. *Compare* Cook *v.* Lillo, 103 U. S. 792, 26 L. ed. 460; New York *v.* New York County, 7 Wall. (U. S.) 26, 19 L. ed. 60.

52. Kearney *v.* King, 2 B. & Ald. 301; Lansdowne *v.* Lansdowne, 2 Bligh 60, 4 Eng. Reprint 250; Taylor *v.* Booth, 1 C. & P. 286, 12 E. C. L. 172.

A note for £500 sterling is payable in a certain sum of "money" and therefore negotiable. King *v.* Hamilton, 8 Sawy. (U. S.) 167, 12 Fed. 478.

53. *District of Columbia.*— Russell *v.* Russell, 1 MacArthur (D. C.) 263.

Iowa.— Smith *v.* Marland, 59 Iowa 645, 13 N. W. 852.

Kentucky.— Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209.

Louisiana.— Agnel *v.* Ellis, McGloin (La.) 57.

Maine.— Legro *v.* Staples, 16 Me. 252; Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Massachusetts.— Fiske *v.* Witt, 22 Pick. (Mass.) 83; Cushman *v.* Haynes, 20 Pick. (Mass.) 132.

Michigan.— Port Huron First Nat. Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589.

Mississippi.— Mattbews *v.* Redwine, 23 Miss. 233.

Missouri.— Stillwell *v.* Craig, 58 Mo. 24.

Rhode Island.— American Nat. Bank *v.* Sprague, 14 R. I. 410.

United States.— Hasbrook *v.* Palmer, 2 McLean (U. S.) 10, 11 Fed. Cas. No. 6,188.

England.— Bolton *v.* Dugdale, 4 B. & Ad. 619, 2 L. J. K. B. 104, 1 N. & M. 412, 24 E. C. L. 273; Jones *v.* Simpson, 2 B. & C. 318, 3 D. & R. 545, 2 L. J. K. B. O. S. 22, 26 Rev. Rep. 371, 9 E. C. L. 145; Ayrey *v.* Fearnsides, 4 M. & W. 168; Smith *v.* Nightingale, 2 Stark. 375, 20 Rev. Rep. 694, 3 E. C. L. 452.

See 7 Cent. Dig. tit. "Bills and Notes," § 399.

54. **Negotiable Instruments Law**, section 21, provides as follows: "The sum payable is a sum certain within the meaning of this act, although it is to be paid: 1. With interest; or 2. By stated instalments; or 3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or 4. With exchange, whether at a fixed rate or at the current rate; or 5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity." Section 36 provides that "where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply: 1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount; 2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof."

The Bills of Exchange Act, section 9, is substantially the same as the above sections 21 and 36, except the provision for fees and costs of collection.

55. *Illinois.*— Bowes *v.* Industrial Bank, 58 Ill. App. 498, holding that the sum may be adopted from the face of the instrument as in case of an order indorsed on an architect's certificate of builders' work done.

Indiana.—McWhorter *v.* Norris, 9 Ind. App. 490, 34 N. E. 854, 37 N. E. 21, a promise to pay an annual sum during the life of the payee.

amount is to be determined by future sales or collections,[56] or if it contemplates future and uncertain increase or diminution[57] it is uncertain and the paper is not negotiable; but uncertainty is not to be imputed by reason of an obvious omission[58] or misspelling.[59]

(2) Effect of Executing in Blank. The leaving of a blank for the amount

Maine.— Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.

Michigan.— Knight *v.* Jones, 21 Mich. 161, a note for "the sum making four hundred and fifty dollars, on the first day of January, eighteen hundred and sixty-eight."

New York.— Ballard *v.* Burnside, 49 Barb. (N. Y.) 102, a joint note to pay "the sums set opposite our names."

South Carolina.— Bay *v.* Freazer, 1 Bay (S. C.) 66, "pay the within contents," etc., indorsed on a bond.

Texas.— Smith *v.* Clopton, 4 Tex. 109, for one dollar and fifty cents "for each and every acre of land which . . . said Waldrop has this day sold to me," afterward indorsed by maker: "Since the within was written, the land has been surveyed and found to be sixty-five acres, which will make the within call for $97.50."

Utah.— McBride *v.* Collins, 4 Utah 181, 7 Pac. 647, an order for payment on a contract where the amount is ascertainable by measurement stated and calculation.

Credits indorsed on the note after execution and before delivery, while reducing the amount, do not render it uncertain. Smith *v.* Shippey, 182 Pa. St. 24, 37 Atl. 844, 38 L. R. A. 823.

56. *Maine.*— Legro *v.* Staples, 16 Me. 252.

Massachusetts.— Fiske *v.* Witt, 22 Pick. (Mass.) 83.

Mississippi.— Matthews *v.* Redwine, 23 Miss. 233, contingent on receipt on an execution.

Pennsylvania.— Jackson *v.* Tilghman, 1 Miles (Pa.) 31.

England.— Jones *v.* Simpson, 2 B. & C. 318, 3 D. & R. 545, 3 L. J. K. B. O. S. 22, 26 Rev. Rep. 371, 9 E. C. L. 145.

57. The amount is uncertain where it contemplates the addition of future premiums (Lime Rock F. & M. Ins. Co. *v.* Hewett, 60 Me. 407; Marrett *v.* Equitable Ins. Co., 54 Me. 537; Dodge *v.* Emerson, 34 Me. 96; Palmer *v.* Ward, 6 Gray (Mass.) 340), of taxes that may be levied upon it or upon a collateral mortgage (Carmody *v.* Crane, 110 Mich. 508, 68 N. W. 268; Farquhar *v.* Fidelity Ins., etc., Co., 13 Phila. (Pa.) 473, 35 Leg. Int. (Pa.) 404), or of other sums that may be due (Bolton *v.* Dugdale, 4 B. & Ad. 619, 2 L. J. K. B. 104, 1 N. & M. 412, 24 E. C. L. 273; Smith *v.* Nightingale, 2 Stark. 375, 20 Rev. Rep. 694, 3 E. C. L. 452); or the deduction of advances and expenses (Cushman *v.* Haynes, 20 Pick. (Mass.) 132), of overcharges to be shown in bills rendered for material (Green *v.* Austin, 7 Iowa 521), of errors in a settlement (Frink *v.* Ryan, 4 Ill. 322), of fees and costs (Agnel *v.* Ellis, McGloin (La.) 57), of other amounts that may be owing (Leeds *v.* Lancashire, 2 Campb. 205; Barlow *v.* Broadhurst, 4 Moore C. P. 471, 16 E. C. L. 381), or by reference to a market price at time of maturity (Lent *v.* Hodgman, 15 Barb. (N. Y.) 274). So of an order to pay whatever sum might be due the drawers on settlement (Bacon *v.* Bates, 53 Vt. 30); of an instrument which provides that a less amount paid at maturity shall cancel the instrument (Fralick *v.* Norton, 2 Mich. 130, 55 Am. Dec. 56; Mansfield Sav. Bank *v.* Miller, 2 Ohio Cir. Ct. 96; National Bank of Commerce *v.* Feeney, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L. R. A. 732); or of one which adds to such provision a reservation of title in the property for which the note was given with a power to take possession and sell on default (Edwards *v.* Ramsey, 30 Minn. 91, 14 N. W. 272 [*following* Syracuse Third Nat. Bank *v.* Armstrong, 25 Minn. 530]).

58. *Connecticut.*—Booth *v.* Wallace, 2 Root (Conn.) 247, a note given for "thirty-two, twelve shillings, and five pence."

Illinois.— Beardsley *v.* Hill, 61 Ill. 354 (a note for "one hundred and ninety-one, fifty cents"); Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286 (a note in figures and words, "$500 . . . five hundred").

Indiana.— Ohm *v.* Yung, 63 Ind. 432.

Maine.— Coolhroth *v.* Purinton, 29 Me. 469.

Massachusetts.— Sweetser *v.* French, 13 Metc. (Mass.) 262, where the word "dollars" was supplied by marginal figures.

Missouri.— Murrill *v.* Handy, 17 Mo. 406 (a note for "fifty-two 25–100"); Grant *v.* Brotherton, 7 Mo. 458.

Nebraska.— State *v.* Western Bank, 34 Nebr. 175, 51 N. W. 749, a draft which "stated the amount in figures as '$500,' and in writing 'five and no 100 dollars.'"

Ohio.— McCoy *v.* Gilmore, 7 Ohio 268, "eight hundred and sixty-eight . . . $868."

Tennessee.— Williamson *v.* Smith, 1 Coldw. (Tenn.) 1, 78 Am. Dec. 478, with words and figures but no "dollars" or dollar mark.

Texas.— Garrett *v.* Interstate Bank, 79 Tex. 133, 15 S. W. 224; Petty *v.* Fleishel, 31 Tex. 169, 98 Am. Dec. 524 (where the marginal figures supplied the word "dollars").

Vermont.— Northrop *v.* Sanborn, 22 Vt. 433, 54 Am. Dec. 83, an order for "37,89," without any mark ($) expressing dollars. *Contra*, Brown *v.* Behee, 1 D. Chipm. (Vt.) 227, 6 Am. Dec. 728, where there were no marginal figures.

Virginia.— Harman *v.* Howe, 27 Gratt. (Va.) 676.

England.— Phipps *v.* Tanner, 5 C. & P. 488, 24 E. C. L. 669; Elliot's Case, 2 East P. C. 951.

59. Ohm *v.* Yung, 63 Ind. 432; Burnham *v.* Allen, 1 Gray (Mass.) 496.

authorizes the holder to fill it with any amount [60] and he cannot set up as against a *bona fide* holder for value [61] that the actual authority given by him has been exceeded.[62] The amount for which a blank may be filled is, however, often restricted by the marginal figures,[63] and it has been held to constitute a material alteration to tear the figures off the paper and raise the amount,[64] or to write, in

60. *Alabama.*— Roberts *v.* Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291.

Kentucky.— Hall *v.* Commonwealth Bank, 5 Dana (Ky.) 258, 30 Am. Dec. 685; Commonwealth Bank *v.* Curry, 2 Dana (Ky.) 142; Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25.

Mississippi.— Hemphill *v.* State Bank, 6 Sm. & M. (Miss.) 44; Johnson *v.* Blasdale, 1 Sm. & M. (Miss.) 17, 40 Am. Dec. 85.

New York.— Griggs *v.* Howe, 31 Barb. (N. Y.) 100; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336.

North Carolina.— Humphreys *v.* Finch, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293; McArthur *v.* McLeod, 51 N. C. 475.

Ohio.— Fullerton *v.* Sturges, 4 Ohio St. 529.

South Carolina.— Diercks *v.* Roberts, 13 S. C. 338; Carson *v.* Hill, 1 McMull. (S. C.) 76 (where one filled in the amount designated by marginal figures after making advances beyond that sum).

Tennessee.— Frazier *v.* Gaines, 2 Baxt. (Tenn.) 92.

Vermont.— Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

Virginia.— Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377.

But not so where the amount to be paid on a corporation bond depends on the place of payment to be indorsed on the bond (Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457) or where there is a blank for attorney's commissions, leaving the amount payable uncertain (Johnston *v.* Speer, 92 Pa. St. 227, 37 Am. Rep. 675).

If an excessive amount is written in a blank for attorney's fees it may be reduced to a reasonable amount. White *v.* Alward, 35 Ill. App. 195.

61. Where the payee had notice that the authority was limited to a specific sum it was held that it would not suffice for a larger sum on the payment of a further consideration. Clower *v.* Wynn, 59 Ga. 246.

62. *Alabama.*— Decatur Bank *v.* Spence, 9 Ala. 800; Huntington *v.* Mobile Branch Bank, 3 Ala. 186; Herbert *v.* Huie, 1 Ala. 18, 34 Am. Dec. 755.

Illinois.— Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246; Young *v.* Ward, 21 Ill. 223.

Indiana.— Wilson *v.* Kinsey, 49 Ind. 35; Johns *v.* Harrison, 20 Ind. 317. This is true also of a surety. Gothrupt *v.* Williamson, 61 Ind. 599. If, however, blanks are left merely for payee's name and the amount, adding "from maturity" to a complete interest clause is a material alteration and discharges the maker. Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15.

Kansas.— Joseph *v.* Eldorado First Nat. Bank, 17 Kan. 256.

Kentucky.— Smith *v.* Lockridge, 8 Bush (Ky.) 423; Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58; Hall *v.* Bank, 5 Dana (Ky.) 258; Commonwealth Bank *v.* Curry, 2 Dana (Ky.) 142; Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25.

Maine.— Abbott *v.* Rose, 62 Me. 194, 16 Am. Rep. 427.

Massachusetts.— Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206.

New York.— Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Van Duzer *v.* Howe, 21 N. Y. 531.

North Carolina.— McArthur *v.* McLeod, 51 N. C. 475.

South Carolina.— This is true also of an indorser before delivery. Diercks *v.* Roberts, 13 S. C. 338.

Tennessee.— Frazier *v.* Gains, 2 Baxt. (Tenn.) 92; Waldron *v.* Young, 9 Heisk. (Tenn.) 777; Nichol *v.* Bate, 10 Yerg. (Tenn.) 429.

England.— Molloy *v.* Delves, 7 Bing. 428, 20 E. C. L. 194, 4 C. & P. 492, 19 E. C. L. 617, 9 L. J. C. P. O. S. 171, 5 M. & P. 275; Barker *v.* Sterne, 2 C. L. R. 1020, 9 Exch. 684, 23 L. J. Exch. 201, 2 Wkly. Rep. 418; Russel *v.* Langstaffe, 2 Dougl. 514; Collis *v.* Emmett, 1 H. Bl. 313; Leslie *v.* Hastings, 1 M. & Rob. 119; Snaith *v.* Mingay, 1 M. & S. 82.

See 7 Cent. Dig. tit. "Bills and Notes," § 89.

If the agreement is for the amount that may be due, what is found to be due may be inserted, although a smaller sum was contemplated by the surety who signed in blank (Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127) and a note is valid, although the amount was left blank with an agreement that it be filled by arbitrators (Page *v.* Pendergast, 2 N. H. 233).

It is a forgery for one to whom a blank acceptance is intrusted to fill up the blank by inserting a sum greater than he is authorized to insert. Van Duzer *v.* Howe, 21 N. Y. 531.

63. See *infra*, I, C, 1, e, (III), (B), note 83.

In such case a bona fide holder has authority to fill with any sum not exceeding the limitation in the margin, which the transaction between him and the person from whom he received the paper will warrant. Norwich Bank *v.* Hyde, 13 Conn. 279; Clute *v.* Small, 17 Wend. (N. Y.) 238; Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93; Carson *v.* Hill, 1 McMull. (S. C.) 76. *Contra*, Saunderson *v.* Piper, 2 Arn. 58, 5 Bing. N. Cas. 425, 3 Jur. 773, 8 L. J. C. P. 227, 7 Scott 408, 35 E. C. L. 231.

64. Hall *v.* Commonwealth Bank, 5 Dana (Ky.) 258, 30 Am. Dec. 685.

words, in the blank a larger sum and alter the figures to correspond.[65] So the amount may be restricted in England, where stamped paper is used, by the size of the stamp.[66]

(3) Provision For Interest or Exchange. A provision for interest does not in general deprive the paper of its negotiable character.[67] It may reserve interest after maturity,[68] or a higher rate after maturity,[69] and may even bear interest from date in case of non-payment at maturity;[70] but a note which makes the interest or rate of interest contingent is not negotiable.[71] In like manner the instrument may be made payable with exchange,[72] and while there is some dissent from this proposition[73] the authorities are practically agreed that where the

65. Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67; Henderson *v.* Bondurant, 39 Mo. 369, 93 Am. Dec. 281. *Contra,* Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; Garrard *v.* Lewis, 10 Q. B. D. 30, 47 L. T. Rep. N. S. 408, 31 Wkly. Rep. 475. See also Schryver *v.* Hawkes, 22 Ohio St. 308, holding that where the agent to whom a note has been given for negotiation fills it up and negotiates it for a larger amount than was indicated by figures in the margin it is not a forgery and does not vitiate the note, although he also alter the figures. *Compare* Woolfolk *v.* Bank of America, 10 Bush (Ky.) 504, where the alteration was made possible by the owner's negligence.

66. Russell *v.* Langstaffe, 2 Dougl. 496; Pasmore *v.* North, 13 East 517, 12 Rev. Rep. 420; Collis *v.* Emmett, 1 H. Bl. 313; Crutchly *v.* Mann, 2 Marsh. 29, 5 Taunt. 529, 1 E. C. L. 272; Crutchley *v.* Clarence, 2 M. & S. 90, 14 Rev. Rep. 596; Snaith *v.* Mingay, 1 M. & S. 82. See also *infra,* II, D, 1, c.

67. Warrington *v.* Early, 2 C. L. R. 398, 2 E. & B. 763, 18 Jur. 42, 23 L. J. Q. B. 47, 2 Wkly. Rep. 78, 75 E. C. L. 763. So by Neg. Instr. L. § 21.

Interest not computed.— It may be "with interest" not computed. Roffey *v.* Greenwell, 10 A. & E. 222, 8 L. J. Q. B. 336, 2 P. & D. 365, 37 E. C. L. 137; Richards *v.* Richards, 2 B. & Ad. 447, 9 L. J. K. B. O. S. 319, 22 E. C. L. 190.

Interest for specified period.— It may even bear interest if left six months, but no interest after six months. Kirkwood *v.* Exchange Nat. Bank, 40 Nebr. 497, 58 N. W. 1135; Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

68. Houghton *v.* Francis, 29 Ill. 244; Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 6 U. S. App. 312, 3 C. C. A. 1, 17 L. R. A. 595.

69. Towne *v.* Rice, 122 Mass. 67; Hollinshead *v.* Stuart, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659; Merrill *v.* Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859 [*distinguishing* Hegeler *v.* Comstock, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393, where the note, which was held non-negotiable, was "with interest from date until paid at the rate of ten per cent per annum, eight per cent if paid when due"]. *Contra,* Cayuga County Nat. Bank *v.* Purdy, 56 Mich. 6, 22 N. W. 93.

Compound interest after maturity may be provided for, and a note otherwise negotiable is not rendered non-negotiable by stipulations for the payment of interest on interest. Gilmore *v.* Hirst, 56 Kan. 626, 44 Pac. 603.

70. Crump *v.* Berdan, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345; Hope *v.* Barker, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387 [*affirming* 43 Mo. App. 632]; Christian County Bank *v.* Goode, 44 Mo. App. 129.

71. "With interest the same as savings banks pay" (Whitwell *v.* Winslow, 134 Mass. 343), or in two years with interest, or without interest if paid within one year (Story *v.* Lamb, 52 Mich. 525, 18 N. W. 248; Lamb *v.* Story, 45 Mich. 488, 8 N. W. 87). But an increased rate of interest reserved as a penalty, if the note is not paid at maturity, may be rejected and leave the note to draw the original rate of interest without losing its negotiable character. Smith *v.* Crane, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20.

72. *Illinois.*— Hoyt *v.* Jaffray, 29 Ill. 104. *Contra,* Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742 [*disapproved* in Bradley *v.* Lill, 4 Biss. (U. S.) 473, 3 Fed. Cas. No. 1,783].

Kansas.— Clark *v.* Skeen, 61 Kan. 526, 60 Pac. 327, 78 Am. St. Rep. 337, 49 L. R. A. 190.

Michigan.— Johnson *v.* Frisbie, 15 Mich. 286; Smith *v.* Kendall, 9 Mich. 241, 80 Am. Dec. 83. But *compare* Cayuga County Nat. Bank *v.* Purdy, 56 Mich. 6, 22 N. W. 93.

Minnesota.— Hastings *v.* Thompson, 54 Minn. 184, 55 N. W. 968, 40 Am. St. Rep. 315, 21 L. R. A. 178.

New Mexico.— Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181 *semble.*

Texas.—Whittle *v.* Fond du Lac Nat. Bank, (Tex. Civ. App. 1894) 26 S. W. 1106.

Wisconsin.— Leggett *v.* Jones, 10 Wis. 34.

United States.— Bradley *v.* Lill, 4 Biss. (U. S.) 473, 3 Fed. Cas. No. 1,783; Price *v.* Teal, 4 McLean (U. S.) 201, 19 Fed. Cas. No. 11,417; Grutacap *v.* Woulluise, 2 McLean (U. S.) 581, 11 Fed. Cas. No. 5,854.

Neg. Instr. L. § 21.

See 7 Cent. Dig. tit. "Bills and Notes," § 402.

73. *District of Columbia.*— Russell *v.* Russell, 1 MacArthur (D. C.) 263.

Indiana.— John Church Co. *v.* Spurrier, 20 Ind. App. 39, 50 N. E. 93; Nicely *v.* Winnebago Nat. Bank, 18 Ind. App. 30, 47 N. E. 476; Nicely *v.* Commercial Bank, 15 Ind. App. 563, 44 N. E. 572, 57 Am. St. Rep. 245.

instrument is payable in the place where drawn such provision may be rejected as surplusage.[74]

(4) Provision For Payment of Taxes. An agreement to pay taxes that may be levied on a note renders it uncertain as to the amount to be paid and non-negotiable.[75]

(B) *How Expressed.* The amount may be expressed either in figures or words or both,[76] and it is usual to express it in words in the body of the instrument and in figures in the margin. The latter may help to clear an obscurity,[77] to indicate[78] or supply[79] an omission, or to restrict the power implied by leaving the amount blank;[80] but they are not part of the instrument[81] or necessary to its completeness,[82] and if the words and figures disagree the words will control.[83]

Iowa.— Culbertson *v.* Nelson, 93 Iowa 187, 61 N. W. 854, 57 Am. St. Rep. 266, 27 L. R. A. 222.

Missouri.— Fitzharris *v.* Leggatt, 10 Mo. App. 527.

North Dakota.— Flagg *v.* Barnes County School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363.

Pennsylvania.— Philadelphia Bank *v.* Newkirk, 2 Miles (Pa.) 442.

South Carolina.—Carroll County Sav. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313; Read *v.* McNulty, 12 Rich. (S. C.) 445, 78 Am. Dec. 467.

United States.— Aurora Second Nat. Bank *v.* Basuier, 65 Fed. 58, 27 U. S. App. 541, 12 C. C. A. 517 (decided under a statute of South Dakota); Windsor Sav. Bank *v.* McMahon, 38 Fed. 283, 3 L. R. A. 192; Hughitt *v.* Johnson, 28 Fed. 865; Lane *v.* Gobbold, 14 Fed. Cas. No. 8,051, 39 Hunt. Mer. Mag. 332 (with exchange and collection fees).

Canada.— Cozet *v.* Kirk, 9 N. Brunsw. 543; Nash *v.* Gibbon, 9 N. Brunsw. 479; Saxton *v.* Stevenson, 23 U. C. C. P. 503; Palmer *v.* Fahnestock, 9 U. C. C. P. 172.

See 7 Cent. Dig. tit. "Bills and Notes," § 402.

74. Clauser *v.* Stone, 29 Ill. 114, 81 Am. Dec. 299; Hill *v.* Todd, 29 Ill. 101; Bullock *v.* Taylor, 39 Mich. 137, 33 Am. Rep. 356; Christian County Bank *v.* Goode, 44 Mo. App. 129. *Contra*, Russell *v.* Russell, 1 MacArthur (D. C.) 263; Aurora Second Nat. Bank *v.* Basuier, 65 Fed. 58, 27 U. S. App. 541, 12 C. C. A. 517 (under South Dakota statute).

75. Walker *v.* Thompson, 108 Mich. 686, 66 N. W. 584; New Windsor First Nat. Bank *v.* Bynum, 84 N. C. 24, 37 Am. Rep. 604; Howell *v.* Todd, 12 Fed. Cas. No. 6,783; Farquhar *v.* Fidelity Ins., etc., Co., 8 Fed. Cas. No. 4,676, 18 Alb. L. J. 330, 7 Centr. L. J. 334, 11 Chic. Leg. N. 49, 24 Int. Rev. Rec. 334, 13 Phila. (Pa.) 473, 35 Leg. Int. (Pa.) 404, 26 Pittsb. Leg. J. (Pa.) 43, 6 Reporter 676.

Such provisions in a collateral mortgage will not render the note secured by it non-negotiable. Frost *v.* Fisher, 13 Colo. App. 322, 58 Pac. 872; Northern Counties Invest. Trust *v.* Edgar, (Nebr. 1902) 91 N. W. 402; Garnett *v.* Myers, (Nebr. 1902) 91 N. W. 400; Consterdine *v.* Moore, (Nebr. 1902) 91 N. W. 399; Bradbury *v.* Kinney, 63 Nebr. 754, 89 N. W. 257.

76. Strickland *v.* Holbrooke, 75 Cal. 268, 17 Pac. 204; Hubert *v.* Grady, 59 Tex. 502.

In Iowa no recovery can be had on an instrument in the form of a promissory note, stating no sum payable in the body of the note, although it contains figures in the margin; for such figures constitute a mere memorandum and are no part of the instrument. Hollen *v.* Davis, 59 Iowa 444, 13 N. W. 413, 44 Am. Rep. 688.

In Louisiana figures alone were formerly sufficient (Nugent *v.* Roland, 12 Mart. (La.) 659, 13 Am. Dec. 381), but now under the Louisiana act of March 14, 1823, which provides that a note shall not be obligatory or admissible in evidence unless the amount be expressed in words at full length, a note in which the number of dollars is expressed in words, but the number of cents in figures is insufficient (Pilie *v.* Mollere, 2 Mart. N. S. (La.) 666). In such case, however, the note is not void but the fractions will be considered not written. White *v.* Noland, 3 Mart. N. S. (La.) 636.

77. Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286.

78. Clute *v.* Small, 17 Wend. (N. Y.) 238, where the marginal figures were $334, and the body "three hundred —— dollars."

79. Witty *v.* Michigan Mut. L. Ins. Co., 123 Ind. 411, 24 N. E. 141, 18 Am. St. Rep. 327, 8 L. R. A. 365, where the body of the note was for "—— dollars."

80. See *supra*, I, C, 1, e, (III), (A), (2).

81. Norwich Bank *v.* Hyde, 13 Conn. 279; Riley *v.* Dickens, 19 Ill. 29; Hollen *v.* Davis, 59 Iowa 444, 13 N. W. 413, 44 Am. Rep. 688; Smith *v.* Smith, 1 R. I. 398, 53 Am. Dec. 652 (on question of alteration). But see Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286.

82. Sweetser *v.* French, 13 Metc. (Mass.) 262; Elliott's Case, 2 East P. C. 951.

83. *California.*—Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451.

Indiana.— Rockville Nat. Bank *v.* Lafayette Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236 (although they may specify a different medium of payment); Mears *v.* Graham, 8 Blackf. (Ind.) 144.

Missouri.— Payne *v.* Clark, 19 Mo. 152, 59 Am. Dec. 333.

Texas.— Garrett *v.* Interstate Bank, 79 Tex. 133, 15 S. W. 224; Petty *v.* Fleishel, 31 Tex. 169, 98 Am. Dec. 524.

England.— Saunderson *v.* Piper, 2 Arn. 58, 5 Bing. N. Cas. 425, 3 Jur. 773, 8 L. J. C. P. 227, 7 Scott 408, 35 E. C. L. 231.

But see Riley *v.* Dickens, 19 Ill. 29.

The amount intended may be designated in any ascertainable or known denomination.[84]

f. Time of Payment — (I) *Must Be Certain* — (A) *Rule Stated.* A negotiable bill or note must be payable at a time certain,[85] and by the Negotiable Instruments Law it "must be payable on demand or at a fixed or determinable future time."[86] Where the event or condition on which the maturity of the note and the maker's liability to pay depends is one over which the holder *pro hac vice* will have entire control, then there is no such uncertainty regarding it as affects the character of the instrument or its negotiability.[87] So it may be made payable after notice[88] or on call.[89]

(B) *Effect of Making Payable on Happening of Contingency.* If the time for payment is contingent or conditional the paper will be non-negotiable;[90] but

Evidence as to amount for which negotiated.— In such case it has been held that evidence is not admissible to show that the bill was negotiated for the value expressed by the marginal figures and not for the value expressed in the body of the hill. Smith *v.* Smith, 1 R. I. 398, 53 Am. Dec. 652.

84. Hogue *v.* Williamson, 85 Tex. 553, 22 S. W. 580, 34 Am. St. Rep. 823, 20 L. R. A. 481 ("one thousand Mexican silver dollars"); King *v.* Hamilton, 8 Sawy. (U. S.) 167, 12 Fed. 478 ("pounds sterling . . . of Great Britain").

85. Harrell *v.* Marston, 7 Rob. (La.) 34; Mahoney *v.* Fitzpatrick, 133 Mass. 151, 43 Am. Rep. 502 (holding that a promissory note payable "on demand or in three years from this date," with interest "during said term or for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable); New Windsor First Nat. Bank *v.* Bynum, 84 N. C. 24, 37 Am. Rep. 604.

86. Neg. Instr. L. § 20. So also by Bills Exch. Act, §§ 3, 83.

"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: 1. At a fixed period after date or sight; or 2. On or before a fixed or determinable future time specified therein; or 3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening he uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." Neg. Instr. L. § 23. So also Bills Exch. Act, § 11.

87. Protection Ins. Co. *v.* Bill, 31 Conn. 534.

88. Clayton *v.* Gosling, 5 B. & C. 360, 8 D. & R. 110, 4 L. J. K. B. O. S. 176, 11 E. C. L. 497.

In such case it may be called at any time, although it is not to draw interest unless it remains a specified time. Richer *v.* Voyer, L. R. 5 P. C. 461, 30 L. T. Rep. N. S. 506, 22 Wkly. Rep. 849.

89. *Connecticut.*— Protection Ins. Co. *v.* Bill, 31 Conn. 534.

Illinois.— White *v.* Smith, 77 Ill. 351, 20 Am. Rep. 251.

Missouri.— Stillwell *v.* Craig, 58 Mo. 24.

New York.— Howland *v.* Edmonds, 24 N. Y. 307; Savage *v.* Medbury, 19 N. Y. 32; White *v.* Haight, 16 N. Y. 310; Colgate *v.* Buckingham, 39 Barb. (N. Y.) 177; Dutchess Cotton Mfg. Co. *v.* Jarvis, 14 Johns. (N. Y.) 244: Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273.

Vermont.— Washington County Mut. Ins. Co. *v.* Miller, 26 Vt. 77.

United States.— Gaytes *v.* Hibbard, 5 Biss. (U. S.) 99, 10 Fed. Cas. No. 5,287.

90. *Illinois.*— Chicago Trust, etc., Bank *v.* Chicago Title, etc., Co., 190 Ill. 404, 60 N. E. 586.

Maryland.— Tradesmen's Nat. Bank *v.* Green, 57 Md. 602.

Michigan.— Brooks *v.* Hargreaves, 21 Mich. 254, when a dividend is declared.

Mississippi.— Effinger *v.* Richards, 35 Miss. 540.

New Hampshire.— Gordon *v.* Rundlett, 28 N. H. 435, "to be paid as wanted for her support."

New Jersey.— Smith *v.* Wood, 1 N. J. Eq. 74.

New York.— Sackett *v.* Palmer, 25 Barb. (N. Y.) 179.

Tennessee.— Shelton *v.* Bruce, 9 Yerg. (Tenn.) 24, when a suit is determined in the maker's favor.

Vermont.— Downer *v.* Tucker, 31 Vt. 204, when a lease is surrendered.

Wisconsin.— Corbitt *v.* Stonemetz, 15 Wis. 170, at such time as payee might need for support.

Canada.— Russell *v.* Wells, 5 U. C. Q. B. O. S. 725.

Compare Glancy *v.* Elliott, 14 Ill. 456.

"When able," "when convenient," or equivalent expressions have been held to destroy negotiability (Humphrey *v.* Beckwith, 48 Mich. 151, 12 N. W. 28 ["not to be paid . . . unless . . . can make it convenient"]; Rowlett *v.* Lane, 43 Tex. 274 ["at the earliest possible moment"]; Salinas *v.* Wright, 11 Tex. 572 ["so soon as circumstances will permit me"]; *Ex p.* Tootell, 4 Vcs. Jr. 372 ["at such a period of time that my circumstances will admit"]) and, under an indorsement by the payee of a promise not to compel payment but to receive the amount when convenient for the maker to pay it, it has been held that the payee could never maintain an action (Barnard *v.* Cushing, 4 Metc. (Mass.) 230, 38 Am. Dec. 362); but "when able" has been held to mean "on demand if able" (Veasey *v.* Reeves,

instruments that seem to be conditional are often construed to be payable on demand or within a reasonable time,[91] and paper may be made payable on the happening of any event which must happen, however remote or uncertain the time. Thus it may be payable on a designated person's death,[92] but not on his

6 Ind. 406), a note for money "which I promise to pay as soon as I possibly can" has been held to be due at once (Kincaid *v.* Higgins, 1 Bibb (Ky.) 396), and it has been held that the meaning of a note "payable at my convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment," is not that the money shall become due only at the pleasure of the maker, without regard to lapse of time or the rights of the payee, but that the maker is to have a reasonable time, to be determined by himself, in which to pay the note (Smithers *v.* Junker, 41 Fed. 101, 7 L. R. A. 264. So too Works *v.* Hershey, 35 Iowa 340; Jones *v.* Eisler, 3 Kan. 134; Lewis *v.* Tipton, 10 Ohio St. 88, 75 Am. Dec. 498).

"When realized"— generally with reference to the fund or sale which the maker looks to — renders the instrument contingent and non-negotiable.

Arkansas.— Henry *v.* Hazen, 5 Ark. 401.

Georgia.—Corbett *v.* State, 24 Ga. 287. But *compare* Vaughan *v.* Dean, 32 Ga. 502; Woolbright *v.* Sneed, 5 Ga. 167.

Louisiana.— Agnel *v.* Ellis, McGloin (La.) 57, an acceptance "to be paid as soon as funds are received."

Michigan.— Although a precise time is named for payment at all events. Port Huron First Nat. Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589.

New York.— De Forrest *v.* Frary, 6 Cow. (N. Y.) 151.

Pennsylvania.— Gillespie *v.* Mather, 10 Pa. St. 28; Jackson *v.* Tilghman, 1 Miles (Pa.) 31.

South Carolina.— Wiggins *v.* Vaught, Cheves (S. C.) 91.

Texas.— Martin *v.* Shumatte, 62 Tex. 188; Walker *v.* Phillips, 35 Tex. 784.

Wisconsin.—Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53; State *v.* La Crosse County Ct. Judge, 11 Wis. 50.

United States.— Nunez *v.* Dautel, 19 Wall. (U. S.) 560, 22 L. ed. 161.

England.— Alexander *v.* Thomas, 16 Q. B. 333, 15 Jur. 173, 20 L. J. Q. B. 207, 71 E. C. L. 333; Hill *v.* Halford, 2 B. & P. 413, 5 Rev. Rep. 632.

Contra, Crooker *v.* Holmes, 65 Me. 195, 20 Am. Rep. 687; Sears *v.* Wright, 24 Me. 278; Ubsdell *v.* Cunningham, 22 Mo. 124; Capron *v.* Capron, 44 Vt. 410 ("if not enough realized . . . in one year to have more time"). See also Shields *v.* Taylor, 25 Miss. 13 (holding such a note assignable by indorsement, under the statute); Mense *v.* Osbern, 5 Mo. 544.

At date named or sooner on receipt of funds.— On the other hand many cases hold such paper to be negotiable, if there is a definite time for payment which can only be accelerated by the sale or receipt of funds referred to.

Colorado.— Kiskadden *v.* Allen, 7 Colo. 206, 3 Pac. 221.

Illinois.— Cisne *v.* Chidester, 85 Ill. 523; McCarty *v.* Howell, 24 Ill. 341.

Indiana.— Noll *v.* Smith, 64 Ind. 511, 31 Am. Rep. 131; Woollen *v.* Ulrich, 64 Ind. 120; Walker *v.* Woollen, 54 Ind. 164, 23 Am. Rep. 639; Hoover *v.* Johnson, 6 Blackf. (Ind.) 473.

Iowa.— Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808.

Kansas.— Palmer *v.* Hummer, 10 Kan. 464, 15 Am. Rep. 352.

Massachusetts.— Cota *v.* Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464.

Nebraska.— Dobbins *v.* Oberman, 17 Nebr. 163, 22 N. W. 356.

Pennsylvania.— Ernst *v.* Steckman, 74 Pa. St. 13, 15 Am. Rep. 542.

Tennessee.— Gardner *v.* Barger, 4 Heisk. (Tenn.) 668.

Washington.— Joergenson *v.* Joergenson, (Wash. 1902) 68 Pac. 913.

91. Jones *v.* Eisler, 3 Kan. 134 ("when I receive it from government, for losses sustained in August, 1856, or as soon as otherwise convenient"); Hicks *v.* Shouse, 17 B. Mon. (Ky.) 483 ("so soon as I sell my house and lot in the city of Lexington, and until said sale is made, I promise to pay eight per cent. interest"); Dobbins *v.* Oberman, 17 Nebr. 163, 22 N. W. 356 ("immediately upon Anna M. Wilson delivering possession to me of" certain land); Scull *v.* Roane, Hempst. (U. S.) 103, 21 Fed. Cas. No. 12,570c (where a note was made payable on the settlement of accounts between the maker and a third party).

92. *Alabama.*— Conn *v.* Thornton, 46 Ala. 587.

Connecticut.—Bristol *v.* Warner, 19 Conn. 7.

Illinois.— Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608 [*affirming* 61 Ill. App. 62]. So a note payable at the maker's death "unless I see proper to pay the same sooner." Forbes *v.* Williams, 13 Ill. App. 280.

Indiana.— Price *v.* Jones, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; Hathaway *v.* Roll, 81 Ind. 567; Garrigus *v.* Home Frontier, etc., Missionary Soc., 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262; Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

Missouri.—Maze *v.* Baird, 89 Mo. App. 348.

New Hampshire.— Martin *v.* Stone, 67 N. H. 367, 29 Atl. 845.

New York.— Hegeman *v.* Moon, 131 N. Y. 462, 30 N. E. 487 [*affirming* 60 Hun (N. Y.) 412, 15 N. Y. Suppl. 596, 39 N. Y. St. 787]; Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845 [*affirming* 57 Hun (N. Y.) 518, 11 N. Y. Suppl. 278, 33 N. Y. St. 98]; Root *v.* Strang,

coming of age[93] or on his marriage,[94] since these events may never happen. The completion of a railroad or building,[95] the arrival of a public ship,[96] or the declaration of peace,[97] has seemed to the courts sufficiently certain to render an instrument payable on that event negotiable, and if the instrument is made payable "on the return of this certificate" it is still unconditional and negotiable.[98] But the contrary has been held as to the settlement of a private estate[99] or business,[1] the arrival or departure of a private ship,[2] or the time when the legislature shall have validated certain bonds,[3] and a bill or note made payable after the election of a certain president is said to be a wager contract and void.[4]

(c) *Effect of Provisions For Accelerating Maturity.* Paper is negotiable which is payable in instalments and provides that the whole shall be due on default in any instalment or in the payment of interest.[5] It may also be made payable before the time named for maturity, at the option of the holder on the

77 Hun (N. Y.) 14, 28 N. Y. Suppl. 273, 59 N. Y. St. 258.

United States.— Crider *v.* Shelby, 95 Fed. 212.

England.— Roffey *v.* Greenwell, 10 A. & E. 222, 8 L. J. Q. B. 336, 2 P. & D. 365, 37 E. C. L. 137; Cooke *v.* Colehan, 2 Str. 1217.

See 7 Cent. Dig. tit. "Bills and Notes," § 53.

Making a note payable "out of my estate" is in effect to make it payable at the maker's death (Kelsey *v.* Chamberlain, 47 Mich. 241, 10 N. W. 355), but it will not be a negotiable note if the amount is thereby rendered uncertain (Worley *v.* Harrison, 3 A. & E. 669, 1 Hurl. & W. 426, 5 L. J. K. B. 17, 5 N. & M. 173, 30 E. C. L. 309).

93. Kelley *v.* Hemmingway, 13 Ill. 604, 606 (where Treat, C. J., said: "The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*"); Rice *v.* Rice, 43 N. Y. App. Div. 458, 60 N. Y. Suppl. 97.

But if the day is named a note payable on that day is negotiable. Goss *v.* Nelson, 1 Burr. 226, 1 Ld. Ken. 498.

94. Beardsley *v.* Baldwin, 7 Mod. 417, 2 Str. 1151; Pearson *v.* Garrett, 4 Mod. 242.

95. *Connecticut.*— Bristol *v.* Warner, 19 Conn. 7.

Indiana.— Vannoy *v.* Duprez, 72 Ind. 26.

Iowa.— Levally *v.* Harmon, 20 Iowa 533.

Massachusetts.— Stevens *v.* Blunt, 7 Mass. 240.

Missouri.— Crawford *v.* Johnson, 87 Mo. App. 478.

North Carolina.— Goodloe *v.* Taylor, 10 N. C. 458.

Texas.— Rose *v.* San Antonio, etc., R. Co., 31 Tex. 49.

Contra, Miller *v.* Excelsior Stone Co., 1 Ill. App. 273; Chandler *v.* Carey, 64 Mich. 237, 31 N. W. 309, 8 Am. St. Rep. 814; Weidler *v.* Kauffman, 14 Ohio 425; Thomas *v.* Huggins, 23 Ont. App. 191.

96. Dixon *v.* Nuttall, 1 C. M. & R. 307, 6 C. & P. 320, 3 L. J. Exch. 290, 4 Tyrw. 1013, 25 E. C. L. 453; Andrews *v.* Franklin, 1 Str. 24; Haussoullier *v.* Hartsinck, 7 T. R. 733, 4 Rev. Rep. 561; Evans *v.* Underwood, 1 Wils. C. P. 262.

97. *Alabama.*— Nelson *v.* Manning, 53 Ala. 549.

Louisiana.— Mortee *v.* Edwards, 20 La. Ann. 236; Gaines *v.* Dorsett, 18 La. Ann. 563.

North Carolina.— Chapman *v.* Wacaser, 64 N. C. 532 [*distinguished* in McNinch *v.* Ramsay, 66 N. C. 229, where it was held that no action could be sustained upon a note payable after the ratification of a treaty of peace between the United States and the Confederate states].

South Carolina.— Brewster *v.* Williams, 2 S. C. 455.

Texas.— Atcheson *v.* Scott, 51 Tex. 213 [*overruling* Thompson *v.* Houston, 31 Tex. 610]; Knight *v.* McReynolds, 37 Tex. 204; Shaw *v.* Trunsler, 30 Tex. 390.

See 7 Cent. Dig. tit. "Bills and Notes," § 321.

98. See *supra,* I, C, 1, d, (II), (C), (2), (D), note 7.

99. Husband *v.* Epling, 81 Ill. 172, 25 Am. Rep. 273.

1. Henry *v.* Hazen, 5 Ark. 401; Sackett *v.* Palmer, 25 Barb. (N. Y.) 179. So when a suit is settled (Burgess *v.* Fairbanks, 83 Cal. 215, 23 Pac. 292, 17 Am. St. Rep. 230; Shelton *v.* Bruce, 9 Yerg. (Tenn.) 24) or a dividend declared (Brooks *v.* Hargreaves, 21 Mich. 254).

2. Grant *v.* Wood, 12 Gray (Mass.) 220; Tucker *v.* Maxwell, 11 Mass. 143; The Lykus, 36 Fed. 919; Palmer *v.* Pratt, 2 Bing. 185; Duchaine *v.* Maguire, 8 Quebec 295; Dooley *v.* Ryarson, 1 Quebec 219.

3. Leak *v.* Bear, 80 N. C. 271.

4. Gregory *v.* King, 58 Ill. 169; Guyman *v.* Burlingame, 36 Ill. 201; Gordon *v.* Casey, 23 Ill. 70; Lockhart *v.* Hullinger, 2 Ill. App. 465; Cooper *v.* Brewster, 1 Minn. 94; Specht *v.* Beindorf, 56 Nebr. 553, 76 N. W. 1059, 42 L. R. A. 429; Danforth *v.* Evans, 16 Vt. 538. *Contra,* Rapp *v.* Wilkerson, 1 Ohio Dec. (Reprint) 177, 3 West L. J. 220.

5. *Alabama.*— Chambers *v.* Marks, 93 Ala. 412, 9 So. 74.

Colorado.— Campbell *v.* Equitable Securities Co., (Colo. App. 1902) 68 Pac. 788.

Georgia.— Griffin *v.* Macon City Bank, 58 Ga. 584.

Indiana.— German Mut. F. Ins. Co. *v.* Franck, 22 Ind. 364.

maker's default,[6] on the holder's exercising an option to take payment in stock,[7] or at the maker's option.[8]

(D) *Effect of Provisions For Extension or Renewal.* A negotiable note may provide for a definite extension or renewal at the maker's request,[9] but it cannot contain a provision that the payee or holder may extend the time of payment indefinitely.[10]

Nebraska.— Roberts *v.* Snow, 27 Nebr. 425, 43 N. W. 241.

North Dakota.— Hollinshead *v.* Stuart, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659.

United States.—De Hass *v.* Roberts, 59 Fed. 853.

England.— Carlon *v.* Kenealy, 1 D. & L. 331, 13 L. J. Exch. 64, 12 M. & W. 139; Miller *v.* Biddle, 11 Jur. N. S. 980, 13 L. T. Rep. N. S. 334, 14 Wkly. Rep. 110; Cooke *v.* Horn, 29 L. T. Rep. N. S. 369. *Compare* Kirkwood *v.* Smith, [1896] 1 Q. B. 582, 65 L. J. Q. B. 408, 74 L. T. Rep. N. S. 423, 44 Wkly. Rep. 480.

See also Neg. Instr. L. § 21; Bills Exch. Act, § 9.

6. *Colorado.*—Cowing *v.* Cloud, (Colo. App. 1901) 65 Pac. 417.

Illinois.— Hunter *v.* Clarke, (Ill. 1900) 56 N. E. 297; Sea *v.* Glover, 1 Ill. App. 335.

Kansas.— Clark *v.* Skeen, 61 Kan. 526, 60 Pac. 327, 78 Am. St. Rep. 337, 49 L. R. A. 190. *Contra,* Warren *v.* Gruwell, 5 Kan. App. 523, 48 Pac. 205. And the paper is non-negotiable where the option to accelerate the principal is made dependent on the breach of conditions in a collateral mortgage. Wright *v.* Shimek, 8 Kan. App. 350, 55 Pac. 464; Chapman *v.* Steiner, 5 Kan. App. 326, 48 Pac. 607.

Michigan.— Wilson *v.* Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Markey *v.* Corey, 108 Mich. 184, 66 N. W. 493, 62 Am. St. Rep. 698, 36 L. R. A. 117. *Contra,* where the note contained a clause that in case of sale or removal of goods the notes should become due at once. Port Huron First Nat. Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589.

Minnesota.— Phelps *v.* Sargent, 69 Minn. 118, 71 N. W. 927.

Nebraska.— Stark *v.* Olsen, 44 Nebr. 646, 63 N. W. 37; Roberts *v.* Snow, 27 Nebr. 425, 43 N. W. 241. So where it reserves to the holder full power to declare the note due, and take possession of a certain machine at any time he may deem himself insecure, "even before the maturity of the note." Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811.

North Dakota.— Hollinshead *v.* Stuart, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659.

Rhode Island.— American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103.

South Dakota.— Merrill *v.* Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

Texas.— Wright *v.* Morgan, (Tex. Civ. App. 1896) 37 S. W. 627.

United States.— Chicago R. Equipment Co. *v.* Merchants' Bank, 136 U. S. 268, 10 S. Ct. 999, 34 L. ed. 349; De Hass *v.* Roberts, 59 Fed. 853.

Contra, New Windsor First Nat. Bank *v.* Bynum, 84 N. C. 24, 37 Am. Rep. 604; Carroll County Sav. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313; Continental Nat. Bank *v.* McGeoch, 73 Wis. 332, 41 N. W. 409.

Contemporary agreement.— As to effect on maturity of a like provision in a contemporaneous agreement see National Shoe, etc., Bank *v.* New York L. Ins., etc., Co., 53 N. Y. Suppl. 360.

7. Hodges *v.* Shuler, 22 N. Y. 114; Keeffe *v.* Bannin, 57 N. Y. App. Div. 361, 68 N. Y. Suppl. 352.

8. Cowing *v.* Cloud, (Colo. App. 1901) 65 Pac. 417; Crocker *v.* Green, 54 Ga. 494 (holding that provision for allowance of interest on such advance payments of principal is in effect an agreement for such payments); Leader *v.* Plante, 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415; Riker *v.* A. & W. Sprague Mfg. Co., 14 R. I. 402, 51 Am. Rep. 413. *Contra,* Richards *v.* Barlow, 140 Mass. 218, 6 N. E. 68; Stults *v.* Silva, 119 Mass. 137; Way *v.* Smith, 111 Mass. 523; Hubbard *v.* Mosely, 11 Gray (Mass.) 170, 71 Am. Dec. 698; Ezell *v.* Edwards, 2 Tex. App. Civ. Cas. § 767.

The payee's right to demand the balance due at the end of the term is not affected by the option reserved to the maker of a note "redeemable at the pleasure of the town after ten years from date." Chadwick *v.* Portland, 46 Me. 44.

9. Anniston L. & T. Co. *v.* Stickney, 108 Ala. 146, 19 So. 63, 31 L. R. A. 234. And this has been held to be true of a note payable in one year "and if there is not enough realized by good management in one year to have more time to pay." Capron *v.* Capron, 44 Vt. 410. But see Citizens' Nat. Bank *v.* Piollet, 126 Pa. St. 194, 24 Wkly. Notes Cas. (Pa.) 83, 17 Atl. 603, 12 Am. St. Rep. 860, 4 L. R. A. 190, holding that words written across the face of a note to the effect that it will be renewed at maturity render the note uncertain and destroy its negotiability.

As long as maker lives.— A stipulation for extension as long as the maker lives is valid. Maupin *v.* McCormick, 2 Bush (Ky.) 206.

10. *Indiana.*— Mitchell *v.* St. Mary, 148 Ind. 111, 47 N. E. 224 (but not commercial paper under statute as to pleading); Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Dec. 316; Rosenthal *v.* Rambo, 28 Ind. App. 265, 62 N. E. 637; Merchants', etc., Sav. Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341; Oyler *v.* McMurray, 7 Ind. App. 645, 34 N. E. 1004. See also Matchett *v.* Anderson Foundry, etc., Works,

(II) *At Fixed Time.* Where the instrument fixes the day of payment it is not necessary to do so by making it payable "on" that day.[11] If it is made payable a given time after date[12] the time will run from the date expressed, even though the paper is antedated or postdated; but if no date is expressed the time will run from the day of the delivery of the instrument.[13] If the time named for payment is ambiguous[14] or uncertain it may in general be explained by parol evidence.[15] If the time of payment is left blank it may afterward be filled by any *bona fide* holder of the paper.[16]

(III) *On Demand,*[17] *At Sight, or After Sight.* In England and the United States where no time is expressed, as in checks and frequently in drafts and notes, the instrument is generally payable on demand, as though it were so written.[18] Bills of exchange are generally drawn payable "at sight" or so many days "after sight," i. e., after presentment and acceptance or protest for non-

(Ind. App. 1902) 64 N. E. 229; Rosenthal *v.* Rambo, 28 Ind. App. 265, 62 N. E. 637.

Iowa.— Woodbury *v.* Roberts, 59 Iowa 348, 13 N. W. 312, 44 Am. Rep. 685.

Michigan.— Richmond Second Nat. Bank *v.* Wheeler, 75 Mich. 546, 42 N. W. 963; Smith *v.* Van Blarcom, 45 Mich. 371, 8 N. W. 90.

Wisconsin.— Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817, unless the agreement for extension is so indefinite as to be wholly without effect.

United States.— Coffin *v.* Spencer, 39 Fed. 262.

11. It is due on the day named, where payable "by" that day (Preston *v.* Dunham, 52 Ala. 217), "on or after" it (Brookshire *v.* Allen, (Tex. Civ. App. 1895) 32 S. W. 164), "on or before" it (Helmer *v.* Krolick, 36 Mich. 371; Mattison *v.* Marks, 31 Mich. 421, 18 Am. Rep. 197; Springfield First Nat. Bank *v.* Skeen, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748 [*affirming* 29 Mo. App. 115]; Jordan *v.* Tate, 19 Ohio St. 586; Bates *v.* Leclair, 49 Vt. 229), although concluding with request to remit as soon as sold (Ward *v.* Perrigo, 33 Wis. 143), or "on or by" it (Massie *v.* Belford, 68 Ill. 290).

If payable "within one year" it is due one year after date (Leader *v.* Plante, 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415) and an instalment payable "in each year" means at the end of each year (Rideout *v.* Woods, 30 N. H. 375).

A note payable "on or before" a given day has been held to be negotiable in some cases (Springfield First Nat. Bank *v.* Skeen, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748 [*affirming* 29 Mo. App. 115]; Curtis *v.* Horn, 58 N. H. 504; Gill *v.* First Nat. Bank, (Tex. Civ. App. 1898) 47 S. W. 751) and non-negotiable in others where it was coupled with a contingent provision as to interest, if paid "before" (Story *v.* Lamb, 52 Mich. 525, 18 N. W. 248; Lamb *v.* Story, 45 Mich. 488, 8 N. W. 87), or with a contingent stipulation for annual interest "if convenient" (Humphrey *v.* Beckwith, 48 Mich. 151, 12 N. W. 28); but "on or before" leaves the maker free to pay but the holder not free to call in the note (Pagal *v.* Nickel, 107 Wis. 471, 83 N. W. 767).

12. Length of time after date immaterial. — Its negotiability is not impaired by its being payable two years after date. Duncan *v.* Louisville, 13 Bush (Ky.) 378, 26 Am. Rep. 201.

13. See *infra*, VII, A, 3, d.

14. The ambiguity may be merely apparent and require construction merely, as in the case of a note payable "in good notes, . . . to be due in eighteen months" (Wade *v.* Darrow, 15 Ind. 212), a note dated July 20 and payable "one year August 15 after date" (Washington County Bank *v.* Jerome, 8 Mich. 490), or a bill drawn and dated in New York and reading "On the 31st of October . . pay . . . payable in Paris the 31st of December" (Henschel *v.* Mahler, 3 Den. (N. Y.) 428 [*affirming* 3 Hill (N. Y.) 132]).

15. *Alabama.*— Wallace *v.* Hill, Minor (Ala.) 70.

Georgia.— Neal *v.* Reams, 88 Ga. 298, 14 S. E. 617; McCrary *v.* Caskey, 27 Ga. 54.

Ohio.— Kelsey *v.* Hibbs, 13 Ohio St. 340, "on the 6–9 January."

Wisconsin.— Lamon *v.* French, 25 Wis. 37.

Canada.— Drapeau *v.* Pominville, 11 Quebec Super. Ct. 326.

The time cannot be changed by a conflicting memorandum. Fisk *v.* McNeal, 23 Nebr. 726, 37 N. W. 616, 8 Am. St. Rep. 162. And as to the need of equitable relief against ambiguity in the time of payment see Wood *v.* Goodrich, 9 Yerg. (Tenn.) 266.

16. Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408; Pearson *v.* Stoddard, 9 Gray (Mass.) 199; Hunt *v.* Adams, 6 Mass. 519; Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59; Deshon *v.* Leffler, 7 Mo. App. 595. And see *infra*, I, C, 2, b, note 57.

17. By statute "an instrument is payable on demand: 1. Where it is expressed to be payable on demand, or at sight, or on presentation; or 2. In which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand." Neg. Instr. L. § 26. So by Bills Exch. Act, § 10, of "bills" except as to bills "issued" in last sentence. And see Cal. Civ. Code, § 3099.

18. See *infra*, VII, A, 7, a, (III).

It is not a material alteration to add "on

acceptance,[19] but a note payable "at sight" is payable on demand, since notes are not presented for acceptance.[20] A bill or note may, however, be made payable "on demand" by the use of those words or of other equivalent expression,[21] but such expression may be modified by other provisions[22] or controlled by a memorandum[23] or contemporaneous writing.[24]

(IV) *In Instalments.* A bill or note may be payable in instalments,[25] but it is not negotiable unless the time for paying the instalments is expressed.[26]

g. Place of Payment — (I) *Necessity of Naming* — (A) *Rule Stated.* Although it is in many cases usual and desirable it is not necessary at common law to name an express place of payment in a negotiable bill or note,[27] and this is provided by statute in many of the United States[28] and in England.[29] Under some statutes,[30] however, only those notes are governed by the law merchant[31] which are made payable at a bank.[32]

demand" to a note payable generally. Aldous *v.* Cornwell, L. R. 3 Q. B. 573, 9 B. & S. 607, 27 L. J. Q. B. 201, 16 Wkly. Rep. 1045.

19. Mitchell *v.* Degrand, 1 Mason (U. S.) 176, 17 Fed. Cas. No. 9,661.

20. See *infra*, VII, A, 8.

21. See *infra*, VII, A, 7, a, (I).

22. Thus an agreement in writing by which the subscriber to it promised to pay another a sum of money on demand, with interest, and added: "But no demand is to be made as long as the interest is paid," is not a promissory note. Seacord *v.* Burling, 5 Den. (N. Y.) 444.

23. McCalla *v.* McCalla, 48 Ga. 502 ("to be paid when C. McCalla collects" another note); Franklin Sav. Inst. *v.* Reed, 125 Mass. 365; Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518 ("one half to be paid in 12 months, the balance in 24 months"); Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817 ("to be extended, if desired").

As to memoranda generally see *infra*, I, C, 4.

24. Round *v.* Donnel, 5 Kan. 54; Brownlee *v.* Arnold, 60 Mo. 79 (collateral mortgage).

25. *Illinois.*— Van Buskirk *v.* Day, 32 Ill. 260.

Massachusetts.— Ewer *v.* Myrick, 1 Cush. (Mass.) 16, holding that the whole may be payable in ten years with instalments of less than one tenth each to be paid annually.

Michigan.— Wright *v.* Irwin, 33 Mich. 32.

New Hampshire.— Rideout *v.* Woods, 30 N. H. 375.

New York.— Chase *v.* Kellogg, 59 Hun (N. Y.) 623, 13 N. Y. Suppl. 351, 36 N. Y. St. 832; Chase *v.* Behrman, 10 Daly (N. Y.) 344; Chase *v.* Senn, 13 N. Y. Suppl. 266, 36 N. Y. St. 36.

26. Moffat *v.* Edwards, C. & M. 16, 41 E. C. L. 15. Thus a corporate debenture providing for annual drawings and payment on call is not negotiable. Crouch *v.* Crédit Foncier Co., L. R. 8 Q. B. 374, 42 L. J. Q. B. 183, 29 L. T. Rep. N. S. 259, 21 Wkly. Rep. 946.

27. *Arkansas.*— Craig *v.* Price, 23 Ark. 633.

Maine.— Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Missouri.— Even a promise "to pay . . . the sum of 20,000 feet of good salable lumber" is not impaired by the fact that no place of delivery is named. Spears *v.* Bond, 79 Mo. 467.

New York.— Holtz *v.* Boppe, 37 N. Y. 634; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239 [*reversing* 18 Johns. (N. Y.) 315]; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396.

Vermont.— Newbury Bank *v.* Richards, 35 Vt. 281; Blodgett *v.* Durgin, 32 Vt. 361.

England.— Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381.

As to place of presentment see *infra*, X, C.

As to parol evidence of place intended for payment see *infra*, XIV, E [8 Cyc.].

28. Neg. Instr. L. § 25.

29. Bills Exch. Act, § 3.

30. The courts of one state will enforce the statute of another state in this respect where it is applicable to the note in suit. Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281; Stix *v.* Matthews, 75 Mo. 96.

31. By usage in some states grace is not allowed on notes which are not payable in bank. Dalton City Co. *v.* Haddock, 54 Ga. 584; Isham *v.* Fox, 7 Ohio St. 317; Sharp *v.* Ward, 7 Ohio 223.

32. In Alabama negotiable notes, to which alone this statute has been held to apply (Gwathmay *v.* Clisby, 24 Blatchf. (U. S.) 398, 31 Fed. 220), must be payable at a bank or private banking house or some other designated place (Montgomery First Nat. Bank *v.* Slaughter, 98 Ala. 602, 14 So. 545, 39 Am. St. Rep. 88; Carmelich *v.* Mims, 88 Ala. 335, 6 So. 913; Cook *v.* Citizens Mut. Ins. Co., 53 Ala. 37 [holding that the statute did not affect notes made and indorsed prior to its passage]; Bradley *v.* Patton, 51 Ala. 108; Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580). It is not sufficient to designate a town or village generally. Haden *v.* Lehman, 83 Ala. 243, 3 So. 528. But the local date is sufficient designation of the place where the bank is situated. Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314 [*distinguishing* Renfro *v.* Merchants', etc., Bank, 83 Ala. 425, 3 So. 776, where it was held that a banker's certificate of deposit, payable on

(B) *Place Left Blank.* If in a bill of exchange or promissory note the place

its return properly indorsed, with the banker's name and address at its heading, contained no sufficient designation of a place of payment to render it commercial paper].

In Indiana negotiability is confined to such notes as are drawn payable at a bank in this state having an actual existence at the time the note is executed (Melton *v.* Gibson, 97 Ind. 158; Scotten *v.* Randolph, 96 Ind. 581; Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498; Hardy *v.* Brier, 91 Ind. 91; Foreman *v.* Beckwith, 73 Ind. 515; Woollen *v.* Wise, 73 Ind. 212; Woollen *v.* Whitacre, 73 Ind. 198; Ruddell *v.* Fhalor, 72 Ind. 533, 37 Am. Rep. 177; Zook *v.* Simonson, 72 Ind. 83; Crossan *v.* May, 68 Ind. 242; Maxwell *v.* Morehart, 66 Ind. 301; Bremmerman *v.* Jennings, 60 Ind. 175; King *v.* Vance, 46 Ind. 246; Holloway *v.* Porter, 46 Ind. 62; Parkinson *v.* Finch, 45 Ind. 122 (holding that the maker may show the bank named to be fictitious); Porter *v.* Daugherty, 43 Ind. 37; Porter *v.* Holloway, 43 Ind. 35; Musselman *v.* McElhenny, 23 Ind. 4, 85 Am. Dec. 445; Woodward *v.* Mathews, 15 Ind. 339; Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79; Mix *v.* State Bank, 13 Ind. 521; Potter *v.* Sheets, 5 Ind. App. 506, 32 N. E. 811); but the bank need not be a chartered or incorporated one (Reed *v.* Trentman, 53 Ind. 438; Snyder *v.* Oatman, 16 Ind. 265; Davis *v.* McAlpine, 10 Ind. 137) as under the statute in force up to 1843 (Blount *v.* Riley, 3 Ind. 471; McNitt *v.* Hatch, 4 Blackf. (Ind.) 531), and negotiability is not affected by making the bank named as place of payment the payee of the note (De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46) or by making the note payable to bearer (Melton *v.* Gibson, 97 Ind. 158). If the location of the bank named be not mentioned it is presumed to be a bank in the state (Henderson *v.* Ackelmire, 59 Ind. 540; Burroughs *v.* Wilson, 59 Ind. 536; Roach *v.* Hill, 54 Ind. 245; Walker *v.* Woollen, 54 Ind. 164, 23 Am. Rep. 639; Indianapolis Piano Mfg. Co. *v.* Caven, 53 Ind. 258) and the courts of Indiana will take notice that an Indiana bank referred to as place of payment is an incorporated bank (Gordon *v.* Montgomery, 19 Ind. 110), but not that the office of a firm in another state is a bank (Crossan *v.* May, 68 Ind. 242). The place of payment is not, however, sufficiently described as "at the Indiana Banking Company of Indianapolis" (Rominger *v.* Keyes, 73 Ind. 375) or "at the bank at Goshen" (Butterfield *v.* Davenport, 84 Ind. 590), although there is only one bank there (Hardy *v.* Brier, 91 Ind. 91. The fact of there being other banks there is matter of defense. Coffing *v.* Hardy, 86 Ind. 369). Negotiable notes like other commercial paper are not subject to defense (Scotten *v.* Randolph, 96 Ind. 581); but a note which is not made payable at a designated bank is subject to defense (Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498; Reagan *v.* Burton, 67 Ind. 347; Woodward *v.* Mathews, 15 Ind. 339), and even notes which are negotiable under the statute become subject to defense if transferred by delivery only (Foreman *v.* Beckwith, 73 Ind. 515). Non-negotiable notes are not *prima facie* payment of prior indebtedness (Lindeman *v.* Rosenfield, 67 Ind. 246, 33 Am. Rep. 79; Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283), but they are assignable, although non-negotiable under the statute (King *v.* Vance, 46 Ind. 246; Parkinson *v.* Finch, 45 Ind. 122).

In Kentucky a promissory note is only negotiable when it is made payable and negotiable at an incorporated bank or national bank in Kentucky and is actually negotiated by such a bank in that state. M. V. Monarch Co. *v.* Terre Haute First Nat. Bank, 105 Ky. 336, 20 Ky. L. Rep. 1223, 49 S. W. 32; Graham *v.* Louisville City Nat. Bank, 103 Ky. 641, 20 Ky. L. Rep. 295, 45 S. W. 870; Payne *v.* Bowling Green Bank, 10 Bush (Ky.) 176; Campbell *v.* Farmers' Bank, 10 Bush (Ky.) 152; Gaines *v.* Frankfort Deposit Bank, 19 Ky. L. Rep. 171, 39 S. W. 438; Newman *v.* Evans, 5 Ky. L. Rep. 603. It must be indorsed to the bank as well as discounted by it, and not on its face made to the bank as payee. Louisville Banking Co. *v.* Buchanan, 107 Ky. 125, 21 Ky. L. Rep. 756, 52 S. W. 967; Nickell *v.* Citizens' Bank, 22 Ky. L. Rep. 1552, 60 S. W. 925; Toll *v.* Farmers' Nat. Bank, 13 Ky. L. Rep. 682. It is not negotiable if it is drawn negotiable and payable at the bank, and the payee having refused to discount it it is discounted by plaintiff (Rogge *v.* Cassidy, 12 Ky. L. Rep. 54, 13 S. W. 716) or by a chartered bank in another state (Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 871). The bank named will be presumed to be in Kentucky. Graham *v.* Louisville City Nat. Bank, 103 Ky. 641, 20 Ky. L. Rep. 295, 45 S. W. 870. This statute applies also to coupon bonds payable to bearer (Cunningham *v.* Porter, 23 Ky. L. Rep. 847, 64 S. W. 493; Louisville Banking Co. *v.* Ogden, 22 Ky. L. Rep. 1591, 61 S. W. 289; Ritchie *v.* Cralle, 22 Ky. L. Rep. 160, 56 S. W. 963), and its principle is adhered to in the construction of special charters, where the requirement is in different language. Thus under the provision in the charter of the bank of Kentucky that a note when discounted at the bank shall be considered a bill of exchange, a note merely payable, but not discounted, at the bank cannot be so considered (Jones *v.* Wood, 3 A. K. Marsh. (Ky.) 162; Stapp *v.* Bacon, 1 A. K. Marsh. (Ky.) 535); and a provision in the charter of a bank that "all promissory notes and inland bills of exchange which may be discounted and owned by said bank shall be and are hereby put upon the footing of foreign bills of exchange" was construed to apply only to notes and bills made negotiable and payable in banks (Payne *v.* Bowling Green Bank, 10 Bush (Ky.) 176).

In Montana a note payable and negotiable at a particular bank does not lose its negotiability by being discounted elsewhere. Stad-

of payment be left blank[33] the holder generally has implied authority to fill the blank with any convenient place,[34] unless the instrument in terms requires the blank to be filled as a condition of its completeness.[35]

(II) *MAY BE PAYABLE WHERE.* The idea of a foreign bill of exchange presupposes a place of payment different from the place of drawing,[36] but this rule was never applied to inland bills, checks, or promissory notes.[37] It is, how-

ler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

In Virginia and West Virginia, before 1898, the statutes of both states required negotiable notes and checks to be made payable in the state at a particular bank, office for discount and deposit, or place of business of savings bank or licensed broker. This act was repealed in Virginia in 1898, and the Negotiable Instruments Law was then enacted in that state. Under these statutes a note must be made payable at bank to be negotiable (Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636) and the bank must be in existence at the time the note is first discounted (Brown *v.* Hull, 33 Gratt. (Va.) 23) and must be a chartered bank (Caton *v.* Lenox, 5 Rand. (Va.) 31; Huntington Bank *v.* Hysell, 22 W. Va. 142); but a promissory note, made and indorsed in Virginia, although made payable at the northwest bank of Virginia, by whose charter notes "made negotiable" at that bank are put upon the footing of bills of exchange is not mercantile negotiable paper (Bradley *v.* Knox, 5 Cranch C. C. (U. S.) 297, 3 Fed. Cas. No. 1,782). It is not sufficient to make it payable at either of the banking houses in Wheeling, Va. (Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126), and a bank in another state is not sufficient (Marietta Bank *v.* Pindall, 2 Rand. (Va.) 465). The statute applies, however, to a note made in another state payable in Virginia (Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126), but not to a note made and payable in New York but discounted in Virginia (Corbin *v.* Planter's Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673). See also Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281, applying West Virginia law.

The incorporation of the bank will not be presumed when that is a statutory requirement. Salmons *v.* Hoyt, 53 Ga. 493.

33. Where no blank is left there can be no implied authority to insert a place of payment. Simpson *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554; Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

34. *Illinois.*— Canon *v.* Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769.

Indiana.— Marshall *v.* Drescher, 68 Ind. 359; Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334. The holder may fill a bank name in a note payable "at the —— bank" and so bring the note within the statutory requirement for negotiability (Gillaspie *v.* Kelley, 41 Ind. 158, 13 Am. Rep. 318), but to fill the space after the printed words "payable at" with the name of a bank is an alteration, as its effect is to change the character of the note and make it negotiable (Cronkhite *v.* Nebeker, 81 Ind. 319, 42 Am. Rep. 127; Young *v.* Baker, (Ind. App. 1902) 64 N. E. 54).

Iowa.— Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143. But if the note is payable at "—— National Bank" it is an alteration to erase "national" and insert the name of a state bank. Adair *v.* England, 58 Iowa 314, 12 N. W. 277.

Kentucky.— Cason *v.* Grant County Deposit Bank, 97 Ky. 487, 31 S. W. 40, 53 Am. St. Rep. 418; Rogers *v.* Poston, 1 Metc. (Ky.) 643.

New York.— McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372; Redlich *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573; Waggoner *v.* Millington, 8 Hun (N. Y.) 142; Kitchen *v.* Place, 41 Barb. (N. Y.) 465.

Ohio.— Dater *v.* Simon, 5 Ohio Dec. (Reprint) 377, 5 Am. L. Rec. 257.

Oregon.— Cox *v.* Alexander, 30 Oreg. 438, 46 Pac. 794.

Pennsylvania.— Wessell *v.* Glenn, 108 Pa. St. 104.

See 7 Cent. Dig. tit. "Bills and Notes," § 90.

If a blank is intended it cannot be filled with the name of a bank in violation of an express agreement between the parties. Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334; Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808.

Acceptance qualified.— Where the holder fills a blank acceptance by making it at a particular place this will not discharge an accommodation indorser. Todd *v.* State Bank, 3 Bush (Ky.) 626. Before the present English statute, however, if such words were added without the accepter's authority he was held to be discharged, as the words constituted a material alteration of his contract. Cowie *v.* Halsall, 4 B. & Ald. 197, 3 Stark. 36, 6 E. C. L. 449; Desbrow *v.* Weatherley, 6 C. & P. 758, 1 M. & Rob. 438, 25 E. C. L. 675; Taylor *v.* Mosely, 6 C. & P. 273, 25 E. C. L. 429; Burchfield *v.* Moore, 25 Eng. L. & Eq. 123; Macintosh *v.* Haydon, R. & M. 362, 21 E. C. L. 767.

35. Thus a railroad bond referring to a memorandum on its back with blank for place of payment is not negotiable till such blank is filled. Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457.

36. See *supra*, I, B, 2, a, (III), (B).

37. Southern Bank *v.* Brashears, 1 Disn. (Ohio) 207, 12 Ohio Dec. (Reprint) 578, holding that a bill of exchange is not deprived of the character of a bill by the fact of its being payable at the place where drawn. It is the form of the instrument which gives it character, and not the intention to transmit funds from one place to another.

ever, permissible to make even the bond of a municipal corporation payable in another place or even in another state.[38]

(III) *MAY BE DESIGNATED IN MEMORANDUM.* The place of payment may be designated by a memorandum, and this is part of the instrument if so intended.[39] The alteration of it is in such case a material alteration,[40] but if it is a mere memorandum for the holder it will not be treated as part of the bill.[41]

(IV) *EFFECT OF MISTAKE IN DESIGNATION.* A mistake in the name of the designated place of payment may be corrected.[42]

(V) *WHAT IS PLACE OF PAYMENT*—(A) *Where Place Not Expressed.* In the case of a note[43] with no place of payment expressed, the place of payment is the maker's residence or place of business.[44] Where no place of payment is designated in a bill of exchange it is payable at the place named in the drawee's address[45] or at his residence;[46] or, as against the drawer, at the place where the bill was drawn;[47] and, as against an indorser, at the indorser's residence.[48] The

38. Municipal bonds in Illinois may be made payable at another state. Cairo *v.* Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673; Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523 (notwithstanding the prohibition of the Illinois statute). But a statute providing for such bonds in California has been held to be unconstitutional. Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580. See, generally, MUNICIPAL CORPORATIONS.

39. Thus where the maker of a promissory note which was in printed form by mistake signed his name above the printed line stating the bank at which the note was payable, it was held that the printed line below the signature was part of the note, and that the note was therefore negotiable, especially where it had coupons of interest attached and was indorsed in that form; these circumstances precluding all doubt of the fact that the designation of the place of payment was on the note when it was executed. Turnbull *v.* Thomas, 1 Hughes (U. S.) 172, 24 Fed. Cas. No. 14,243.

40. Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239 [*reversing* 18 Johns. (N. Y.) 315].

The insertion of place of payment in a blank not intentionally left is an alteration. McCoy *v.* Lockwood, 71 Ind. 319; Marshall *v.* Drescher, 68 Ind. 359; Simpson *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554; Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

41. American Nat. Bank *v.* Bangs, 42 Mo. 450, 97 Am. Dec. 329.

Separation from the body of the note by a period followed by the words "At A. B.'s" does not prevent the memorandum being regarded as part of the instrument. Vander Donckt *v.* Thellusson, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812.

42. Stix *v.* Mathews, 63 Mo. 371; State Bank *v.* Vaughan, 36 Mo. 90.

So as to abbreviation of name of bank. Miller *v.* Powers, 16 Ind. 410; Lane *v.* Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613.

As to misnomer ("Citz. Bank" for "Citizens Bank") see Locke *v.* Merchants' Nat. Bank, 66 Ind. 353.

43. A banker's certificate of deposit, payable at a specified date "on the return of the certificate," is payable at the place where the bank is located. Sanbourn *v.* Smith, 44 Iowa 152.

44. Hartford Bank *v.* Green, 11 Iowa 476; Bullard *v.* Thompson, 35 Tex. 313 (where the note would be void for usury by the law of the place of execution, and where it was dated at the maker's place of residence); Campbell *v.* Clark, Hempst. (U. S.) 67, 4 Fed. Cas. No. 2,355*a*. But if the post-office address of the maker was stated to be in one county and the note was executed in another county the court may find that the maker resided in either county. Adair *v.* Egland, 58 Iowa 314, 12 N. W. 277.

Partnership notes are payable at the place of business of the firm, other notes made at the same time and in the same transaction having been made expressly payable there. Greenboum's Estate, 173 Pa. St. 507, 38 Wkly. Notes Cas. (Pa.) 7, 33 Atl. 224, 51 Am. St. Rep. 774.

Under the statute of Utah it is payable "at the residence or place of business of the maker, or wherever he may be found." As to the necessity for tender there see McCauley *v.* Leavitt, 10 Utah 91, 37 Pac. 164.

45. *Illinois.*— Abt *v.* American Trust, etc., Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175.

Maryland.— Lizardi *v.* Cohen, 3 Gill (Md.) 430.

Massachusetts.— Worcester Bank *v.* Wells, 8 Metc. (Mass.) 107.

New Jersey.—Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239.

United States.— Cox *v.* New York Nat. Bank, 100 U. S. 704, 25 L. ed. 739.

See 7 Cent. Dig. tit. "Bills and Notes," § 293.

46. Collins *v.* Sabatier, 19 La. Ann. 299; Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381.

47. Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239. But it has been held that the bill is presumably accommodation paper if payable at the drawer's residence. Sharp *v.* Bailey, 9 B. & C. 44, 4 M. & R. 4, 17 E. C. L. 29.

48. Prentiss *v.* Savage, 13 Mass. 20; Powers *v.* Lynch, 3 Mass. 77; Hicks *v.* Brown, 12

parties may even by their parol agreement fix upon a place of payment,[49] but the place of payment cannot be assumed to be the place where a note is dated[50] or where it is made negotiable.[51]

(B) *For Accepter.* An acceptance in blank is an agreement to pay at the place named in the bill;[52] or if no place is named to pay generally.[53] This agreement may be restricted to a particular place by definite words to that effect;[54] and in England the statute[55] required such acceptance to be for payment there "only and not elsewhere."[56]

(C) *Where Several Places Named.* Where several places are named in the instrument the choice of place remains with the maker, unless otherwise provided.[57]

h. Negotiable Words. The usual form of negotiable paper is a provision for payment to "order" or "bearer." These or similar words[58] are in gen-

Johns. (N. Y.) 142; Potter *v.* Brown, 5 East 124, 1 Smith K. B. 351, 7 Rev. Rep. 663.

49. Meyer *v.* Hibsher, 47 N. Y. 265; Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65.

50. *Maine.*— Pierce *v.* Whitney, 22 Me. 113, 29 Me. 188.

New York.— Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Bank of America *v.* Woodworth, 18 Johns. (N. Y.) 315; Anderson *v.* Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442.

Pennsylvania.— Lightner *v.* Will, 2 Watts & S. (Pa.) 140.

South Carolina.—Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

Vermont.— Blodgett *v.* Durgin, 32 Vt. 361.

United States.— Burrows *v.* Hannegan, 1 McLean (U. S.) 309, 4 Fed. Cas. No. 2,205.

But it is sometimes inferred from the circumstances that payment at such place was intended.

Alabama.—Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314 (where "J. L. Holmes' office" was designated by the date). On the other hand a note is not made payable in California because it is payable "after my [the maker's] arrival in San Francisco." Schuessler *v.* Watson, 37 Ala. 98, 76 Am. Dec. 348.

Illinois.— Lewis *v.* Headley, 36 Ill. 433, 87 Am. Dec. 227.

Maryland.— Ricketts *v.* Pendleton, 14 Md. 320.

New Hampshire.—Orcutt *v.* Hough, 54 N. H. 472.

New York.—Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222.

Rhode Island.— Hazard *v.* Spencer, 17 R. I. 561, 23 Atl. 729, where it was dated "Providence, R. I." and payable "at bank."

South Dakota.— So where it is secured by a mortgage in that state and contains the stipulation, "It is agreed that this note is executed and is to be construed under the laws" of such state. Jones *v.* Fidelity L. & T. Co., 7 S. D. 122, 63 N. W. 553.

Texas.— Bullard *v.* Thompson, 35 Tex. 313.

Where there is not proof of the place where made it will be presumed to have been made, and to be payable, within the state (Cook *v.* Crawford, 4 Tex. 420) and that the place where it is dated is in the state (Smith *v.* Robinson, 11 Ala. 270; Equitable L. Ins. Co. *v.* Gleason, 56 Iowa 47, 8 N. W. 790).

51. Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65.

A note is negotiable elsewhere, although drawn "negotiable and payable at Shea & Brown's bank." Schoharie County Nat. Bank *v.* Bevard, 51 Iowa 257, 1 N. W. 524; McArthur *v.* McLeod, 51 N. C. 475 (holding that where a note is given for a real business transaction, although it may be expressed to be payable at a bank, it is nevertheless negotiable in the market generally, and that it is only restricted when it appears on the paper to be negotiable at a bank and nowhere else). On the other hand it is said that a note payable to plaintiff "negotiable and payable at" a designated bank is *prima facie* a note to be offered for discount at bank, and not elsewhere, and is made payable to plaintiff in order that he may become the first indorser. Hoffman *v.* Coombs, 9 Gill (Md.) 284. And to like effect see Raymond *v.* Middleton, 29 Pa. St. 529.

52. See *infra*, V, A, 1.

53. See *infra*, V, A, 1.

54. See *infra*, V, B, 1, note 23.

55. 1 & 2 Geo. IV, c. 78.

56. Fayle *v.* Bird, 6 B. & C. 531, 13 E. C. L. 243, 2 C. & P. 303, 12 E. C. L. 584, 9 D. & R. 639, 5 L. J. K. B. O. S. 217; Turner *v.* Hayden, 4 B. & C. 1, 6 D. & R. 5, R. & M. 215, 10 E. C. L. 455; Selby *v.* Eden, 3 Bing. 611, 4 L. J. C. P. O. S. 198, 11 Moore C. P. 511, 11 E. C. L. 298.

This applies only in actions against the accepter. Gibb *v.* Mather, 8 Bing. 214, 2 Cr. & J. 254, 1 L. J. Exch. 87, 1 M. & Scott 387, 21 E. C. L. 512; Boydell *v.* Harkness, 3 C. B. 168, 4 D. & L. 179, 15 L. J. C. P. 233, 54 E. C. L. 168; Walter *v.* Cubley, 2 Cr. & M. 151, 3 L. J. Exch. 2, 4 Tyrw. 87; Parkes *v.* Edge, 1 Cr. & M. 429, 1 Dowl. P. C. 643, 2 L. J. Exch. 94, 3 Tyrw. 364; Harris *v.* Packer, 3 Tyrw. 370 note.

For place of presentment see *infra*, X, C.

For restrictive acceptances see *infra*, V, B.

57. Wornack *v.* Jenkins, 17 Ind. 137; Wilcox *v.* Williams, 5 Nev. 206; Pollard *v.* Herries, 3 B. & P. 335.

Where it is simply payable "at bank" in a given place the holder may select the bank and notify the maker. Hazard *v.* Spencer, 17 R. I. 561, 23 Atl. 729.

58. If the intention is clear no particular words are necessary. U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374 (holding that a

eral [59] necessary to its negotiability,[60] and are often required by statute,[61] but a note

promissory note may be made payable to the order of the person who should thereafter indorse the same); Raymond *v.* Middleton, 29 Pa. St. 529.

A note payable simply "to order" without naming any payee is in effect payable to bearer. Davega *v.* Moore, 3 McCord (S. C.) 482. But an indorsement "pay the amount to order for my use" destroys the negotiability. Brown *v.* Jackson, 1 Wash. (U. S.) 512, 4 Fed. Cas. No. 2,015.

"Assigns" or "assignees."—The words "assigns" and "assignees" have been held sufficient. Dutchess County Ins. Co. *v.* Hachfield, 1 Hun (N. Y.) 675 (as to a coupon bond payable to a blank payee "his executors, administrators, or assignees"); Murphy *v.* Arkansas, etc., Land, etc., Co., 97 Fed. 723; Porter *v.* Janesville, 3 Fed. 617. But in Virginia a county bond in the form of a sealed bill to A or his assigns is not a negotiable instrument (Cronin *v.* Patrick County, 89 Fed. 79) and a corporation bond payable "to A. T. Blakely and J. Dent, their executors, administrators, or assigns, or to the bearer hereof" has been held assignable clear of prior equities in equity only (*Ex p.* New Zealand Banking Corp., L. R. 3 Ch. 154, 37 L. J. Ch. 418, 18 L. T. Rep. N. S. 132, 16 Wkly. Rep. 533).

"Holder."— A note to "Mancil Owens or holder" has been held negotiable. Putnam *v.* Crymes, 1 McMull. (S. C.) 9, 36 Am. Dec. 250. So a bond payable to a company named "or holder . . . is transferred by the signature of the president." Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488.

The words "payable and negotiable at" a bank named will not supply the place of negotiable words. Hosford *v.* Stone, 6 Nebr. 378; Carruth *v.* Middleton, 2 Phila. (Pa.) 45, 13 Leg. Int. (Pa.) 28; Carruth *v.* Walker, 8 Wis. 252, 76 Am. Dec. 235.

59. In a bill or note held by the government words of negotiability are unnecessary. U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374; U. S. *v.* Buford, 3 Pet. (U. S.) 12, 7 L. ed. 585.

60. *California.*— Graves *v.* Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.

Connecticut.— Curtiss *v.* Hazen, 56 Conn. 146, 14 Atl. 771; Backus *v.* Danforth, 10 Conn. 297; Lyon *v.* Summers, 7 Conn. 399; Huntington *v.* Harvey, 4 Conn. 124.

Delaware.— Hollis *v.* Vandergrift, 5 Houst. (Del.) 521; Fernon *v.* Farmer, 1 Harr. (Del.) 32.

Georgia.— Hamilton *v.* Grangers L., etc., Ins. Co., 65 Ga. 750; Reed *v.* Murphy, 1 Ga. 236. *Contra,* so far as regards the indorsee's right to sue in his own name. Columbus Nat. Bank *v.* Leonard, 91 Ga. 805, 18 S. E. 32 [*following* Goodman *v.* Fleming, 57 Ga. 350]; Cohen *v.* Prater, 56 Ga. 203.

Indiana.— Sinclair *v.* Johnson, 85 Ind. 527; Albright *v.* Griffin, 78 Ind. 182.

Maryland.— Noland *v.* Ringgold, 3 Harr. & J. (Md.) 216, 5 Am. Dec. 435.

Nebraska.— Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468.

New York.— New York Security, etc., Co. *v.* Storm, 81 Hun (N. Y.) 33, 30 N. Y. Suppl. 605, 62 N. Y. St. 539; Maule *v.* Crawford, 14 Hun (N. Y.) 193; Roe *v.* Hallett, 20 N. Y. Wkly. Dig. 34.

Ohio.— Parker *v.* Riddle, 11 Ohio 102; Smurr *v.* Forman, 1 Ohio 272.

Pennsylvania.— Barriere *v.* Nairac, 2 Dall. (Pa.) 249, 1 L. ed. 368; Gerard *v.* La Coste, 1 Dall. (Pa.) 194, 1 L. ed. 96, 1 Am. Dec. 236; Lang *v.* Fegenbush, 2 Phila. (Pa.) 20, 13 Leg. Int. (Pa.) 4.

South Carolina.— Stagg *v.* Pepoon, 1 Nott & M. (S. C.) 102.

South Dakota.— Searles *v.* Seipp, 6 S. D. 472, 61 N. W. 804.

Tennessee.— Hackney *v.* Jones, 3 Humphr. (Tenn.) 612.

Texas.— Taylor *v.* Moore, (Tex. 1892) 20 S. W. 53; Ellis *v.* Hahn, (Tex. Civ. App. 1902) 68 S. W. 336.

England.— Hill *v.* Lewis, 1 Salk. 132. See also Henderson *v.* Comptoir d'Escompte, L. R. 5 P. C. 253, 2 Aspin. 98, 42 L. J. P. C. 60, 29 L. T. Rep. N. S. 192, 21 Wkly. Rep. 873, a bill of lading. And even a bond payable to "A. Coqui, or to his executors, administrators, or transferees, or to the holder for the time being" has been held non-negotiable. *In re* Natal Invest. Co., L. R. 3 Ch. 355, 37 L. J. Ch. 362, 18 L. T. Rep. N. S. 171, 16 Wkly. Rep. 637. But see as to the words "holder for the time being" *In re* Imperial Land Co., L. R. 11 Eq. 478, 40 L. J. Ch. 93, 24 L. T. Rep. N. S. 255, 19 Wkly. Rep. 223. *Contra,* Bills Exch. Act, § 8, subs. 4, unless words are used prohibiting transfer. Decroix *v.* Meyer, 25 Q. B. D. 343.

Contra.— *Colorado.*— Cowan *v.* Hallack, 9 Colo. 572, 13 Pac. 700; Thackaray *v.* Hanson, 1 Colo. 365.

Illinois.— Fawsett *v.* U. S. National L. Ins. Co., 97 Ill. 11, 37 Am. Rep. 95; Archer *v.* Claflin, 31 Ill. 306; Sappington *v.* Pulliam, 4 Ill. 385; Haines *v.* Nance, 52 Ill. App. 406.

Kentucky.—Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286.

Tennessee.— Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303.

United States.— Patent Title Co. *v.* Stratton, 89 Fed. 174 (construing Colorado statute); Sherman Bank *v.* Apperson, 4 Fed. 25 (construing Tennessee statute).

Canada.— Under Bills Exch. Act, § 8, subs. 4. Ward *v.* Quebec Bank, 3 Quebec 122; Désy *v.* Daly, 12 Quebec Super. Ct. 183, 3 Rev. de Jur. 492.

See 7 Cent. Dig. tit. "Bills and Notes," § 363.

The description of the payee, as "Robert A. Parrish, trustee, in order" does not affect the negotiability of the paper. Bush *v.* Peckard, 3 Harr. (Del.) 385.

61. See Davis *v.* Helm, 34 Mo. App. 332; Neg. Instr. L. § 20.

which is non-negotiable for want of such words is still a valid note[62] and may be declared on as such.[63] Bills payable to bearer were formerly held to be non-negotiable, as being without words of transfer;[64] but they are now recognized as negotiable and transferable by delivery.[65] Making the instrument payable "to the order of" a person named is the same as to such person "or order";[66] and in like manner to a person named "or bearer" is the same in effect as "to bearer."[67] Without words of negotiability purchasers take the bill or note subject to all defenses which were

62. *Indiana.*— Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245.

Maine.— Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Maryland.—Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299.

Massachusetts.— Sibley *v.* Phelps, 6 Cush. (Mass.) 172; Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750.

New York.— Paine *v.* Noelke, 53 How. Pr. (N. Y.) 273; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Downing *v.* Backenstoes, 3 Cai. (N. Y.) 137.

Pennsylvania.— Coursin *v.* Ledlie, 31 Pa. St. 506.

Wisconsin.— Corbett *v.* Clark, 45 Wis. 403, 30 Am. Rep. 763.

England.— Smith *v.* Kendall, 1 Esp. 231, 6 T. R. 123; Rex *v.* Box, 6 Taunt. 325, 1 E. C. L. 635.

It imports a consideration (Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245; Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845), is assignable at law and not in equity only (Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286; Halsey *v.* Dehart, 1 N. J. L. 93; Griffin *v.* Nokes, Hempst. (U. S.) 72, 11 Fed. Cas. No. 5,817*a*), and is entitled to grace like a negotiable note (Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299).

63. Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Downing *v.* Backenstoes, 3 Cai. (N. Y.) 137.

64. Bradley *v.* Trammel, Hempst. (U. S.) 164, 3 Fed. Cas. No. 1,788*a*; Nicholson *v.* Sedgwick, 1 Ld. Raym. 180; Horton *v.* Coggs, 3 Lev. 299; Hodges *v.* Steward, 1 Salk. 125; Walmsley *v.* Child, 1 Ves. 341.

65. *Alabama.*— White *v.* Joy, 4 Ala. 571; Sprowl *v.* Simpkins, 3 Ala. 515; Carroll *v.* Meeks, 3 Port. (Ala.) 226.

Arkansas.— Cowser *v.* Tatum, 24 Ark. 13; Edison *v.* Frazier, 9 Ark. 219.

Georgia.— Cox *v.* Adams, 2 Ga. 158.

Iowa.—Mainer *v.* Reynolds, 4 Greene (Iowa) 187; Hotchkiss *v.* Thompson, Morr. (Iowa) 156; Creighton *v.* Gordon, Morr. (Iowa) 41.

Maine.— Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767.

Massachusetts.— Truesdell *v.* Thompson, 12 Metc. (Mass.) 565; Wilbour *v.* Turner, 5 Pick. (Mass.) 526; Ellis *v.* Wheeler, 3 Pick. (Mass.) 18; Dole *v.* Weeks, 4 Mass. 451.

Mississippi.— Hathcock *v.* Owen, 44 Miss. 799; Cobb *v.* Duke, 36 Miss. 60, 72 Am. Dec. 157; Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520.

New Jersey.—Hutchings *v.* Low, 13 N. J. L. 246.

New York.— Pierce *v.* Crafts, 12 Johns. (N. Y.) 90.

Ohio.— Avery *v.* Latimer, 14 Ohio 542.

Pennsylvania.— Rankin *v.* Woodworth, 2 Watts (Pa.) 134.

South Carolina.— Allwood *v.* Haseldon, 2 Bailey (S. C.) 457.

Vermont.— Matthews *v.* Hall, 1 Vt. 316.

England.— Grant *v.* Vaughan, 3 Burr. 1516; Wayman *v.* Bend, 1 Campb. 175; Crawley *v.* Crowther, Freem. Ch. 257; Hinton's Case, 2 Show. 235; Shelden *v.* Hentley, 2 Show. 160.

This is also true of checks (Keene *v.* Beard, 8 C. B. N. S. 372, 6 Jur. N. S. 1248, 29 L. J. C. P. 287, 2 L. T. Rep. N. S. 240, 8 Wkly. Rep. 469, 98 E. C. L. 372), government bonds (Ringling *v.* Kohn, 4 Mo. App. 59; Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044), and interest coupons (Thompson *v.* Perrine, 106 U. S. 589, 1 S. Ct. 564, 568, 27 L. ed. 298; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526).

Alteration.— The addition of the word "bearer" is a material alteration. McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68; Bruce *v.* Westcott, 3 Barb. (N. Y.) 374.

66. Durgin *v.* Bartol, 64 Me. 473; Howard *v.* Palmer, 64 Me. 86; Huling *v.* Hugg, 1 Watts & S. (Pa.) 418; Carter *v.* Palmer, 12 Mod. 380; Buller *v.* Crips, 6 Mod. 29; Myers *v.* Wilkins, 6 U. C. Q. B. 421.

A bill drawn to the order of the drawer is payable to the drawer and he may sue upon the acceptance. Smith *v.* McClure, 5 East 476, 2 Smith K. B. 43, 7 Rev. Rep. 750; Frederick *v.* Cotton, 2 Show. 8.

67. *Indiana.*— Melton *v.* Gibson, 97 Ind. 158.

Iowa.—Shelton *v.* Sherfey, 3 Greene (Iowa) 108. But a note payable "to the bearer, M. C. Murdough," is payable to the person named only and is not negotiable. Warren *v.* Scott, 32 Iowa 22.

Mississippi.— Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520.

New Jersey.— Hutchings *v.* Low, 13 N. J. L. 246.

New York.—Dean *v.* Hall, 17 Wend. (N. Y.) 214.

Pennsylvania.— So a corporation bond payable to "John Thompson or bearer." Carr *v.* Le Fevre, 27 Pa. St. 413.

Texas.— Hopkins *v.* Seymour, 10 Tex. 202; Greneaux *v.* Wheeler, 6 Tex. 515.

Vermont.— Matthews *v.* Hall, 1 Vt. 316.

United States.— Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121.

England.—Grant *v.* Vaughan, 3 Burr. 1516; Waynam *v.* Bend, 1 Campb. 175.

available between the original parties;[68] and if it was originally non-negotiable,[69] as against the original parties,[70] it will not be rendered negotiable by subsequent transfer in negotiable form.[71] If the words "or order" have been omitted by mistake the omission may be corrected.[72] In some states a negotiable note is required to be payable and negotiable and actually negotiated at a bank in the state.[73] The effect of making a bill or note "negotiable at" a particular bank or office is to make it clear of set-off by maker or drawer,[74] but in the absence of any statutory requirement such words have no effect on the negotiability of the paper.[75]

i. Words Expressing Consideration — "Value Received" — (I) *NECESSITY OF* **— (A)** *In General.* The consideration is usually expressed in the words "value received," but unless required by statute they are not essential to its negotiability,[76]

68. Ryals *v.* Johnson County Sav. Bank, 106 Ga. 525, 32 S. E. 645; Dyer *v.* Homer, 22 Pick. (Mass.) 253; Wiggin *v.* Damrell, 4 N. H. 69; Sanborn *v.* Little, 3 N. H. 539.

The liability of the drawer or maker to payee and indorsees is the same in such case.

Connecticut.— Backus *v.* Danforth, 10 Conn. 297.

Delaware.— Fernon *v.* Farmer, 1 Harr. (Del.) 32.

Georgia.— Reed *v.* Murphy, 1 Ga. 236.

Iowa.— Warren *v.* Scott, 32 Iowa 22.

Maryland.— Noland *v.* Ringgold, 3 Harr. & J. (Md.) 216, 5 Am. Dec. 435.

Nebraska.— Hosford *v.* Stone, 6 Nebr. 378.

New York.— Maule *v.* Crawford, 14 Hun (N. Y.) 193.

Tennessee.— Hackney *v.* Jones, 3 Humphr. (Tenn.) 612.

England.— Hill *v.* Lewis, 1 Salk. 132.

69. Originally negotiable.— If a bill payable to order is indorsed to bearer its negotiability will be thereby enlarged (Shelton *v.* Sherfey, 3 Greene (Iowa) 108), but a negotiable bill will not be rendered non-negotiable by an indorsement to a particular person (Fawsett *v.* U. S. National L. Ins. Co., 97 Ill. 11, 37 Am. Rep. 95; Halbert *v.* Ellwood, 1 Kan. App. 95, 41 Pac. 67; Rice *v.* Stearns, 3 Mass. 225, 3 Am. Dec. 129; Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199]; Hodges *v.* Adams, 19 Vt. 74, 46 Am. Dec. 181). See also *supra*, I, A, 3, c, (II).

70. As against an indorsee or accepter.— An indorsement to order makes it negotiable as against the indorser. Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 264; Carruth *v.* Walker, 8 Wis. 252, 76 Am. Dec. 235. So as against the accepter if accepted payable to the payee's order. Crosby *v.* Heartt, 15 La. 304.

71. Gregg *v.* Johnson, 37 Tex. 558.

Rights of indorsee.— The indorsee cannot sue prior parties (Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637; Barriere *v.* Nairac, 2 Dall. (Pa.) 249, 1 L. ed. 368; Gerard *v.* La Coste, 1 Dall. (Pa.) 194, 1 L. ed. 96, 1 Am. Dec. 236; Pratt *v.* Thomas, 2 Hill (S. C.) 654), but he may sue his own indorser (Sweetser *v.* French, 13 Metc. (Mass.) 262; Smurr *v.* Forman, 1 Ohio 272; Hill *v.* Lewis, 1 Salk. 132) and may transfer such right of action to his indorsee (Codwise *v.* Gleason, 3 Day (Conn.) 12, 5 Fed. Cas. No. 2,939; Josselyn *v.* Ames, 3 Mass. 274; Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403).

72. Cole *v.* Parkin, 12 East 471; Knill *v.* Williams, 10 East 431, 10 Rev. Rep. 349; Kershaw *v.* Cox, 2 Esp. 246.

73. See *supra*, I, C, 1, g, (I), (A), note 32.

74. Mandeville *v.* Union Bank, 9 Cranch (U. S.) 9, 3 L. ed. 639.

75. In Pennsylvania a note "payable and negotiable without defalcation at the Kensington Bank" is negotiable only if negotiated at the bank. Raymond *v.* Middleton, 29 Pa. St. 529.

76. *Colorado.*— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369; Cowan *v.* Hallack, 9 Colo. 572, 13 Pac. 700.

Connecticut.—Bristol *v.* Warner, 19 Conn. 7.

Illinois.— Archer *v.* Claflin, 31 Ill. 306.

Maine.— Noyes *v.* Gilman, 65 Me. 589; Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Massachusetts.—Dean *v.* Carruth, 108 Mass. 242; Townsend *v.* Derby, 3 Metc. (Mass.) 363.

Montana.— Clarke *v.* Marlow, 20 Mont. 249, 50 Pac. 713.

New Hampshire.—Martin *v.* Stone, 67 N. H. 367, 29 Atl. 845. But their omission has been regarded as ground for suspicion. Harriman *v.* Sanborn, 43 N. H. 128.

New York.— Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845 [*affirming* 57 Hun (N. Y.) 518, 11 N. Y. Suppl. 278, 33 N. Y. St. 98]; Underhill *v.* Phillips, 10 Hun (N. Y.) 591; Kinsman *v.* Birdsall, 2 E. D. Smith (N. Y.) 395; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590.

Pennsylvania.— Coursin *v.* Ledlie, 31 Pa. St. 506.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775.

Vermont.—Leonard *v.* Walker, Brayt. (Vt.) 203.

United States.— Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743; Benjamin *v.* Tillman, 2 McLean (U. S.) 213, 3 Fed. Cas. No. 1,304.

England.— Creswell *v.* Crisp, 2 Cr. & M. 634, 2 Dowl. P. C. 653, 3 L. J. Exch. 184; White *v.* Lednich, 4 Dougl. 247; Mackleod *v.* Snee, 2 Ld. Raym. 1481; Grant *v.* Da Costa, 3 M. & S. 351; Claxton *v.* Swift, 2 Show. 494; Poplewell *v.* Wilson, 1 Str. 364. *Contra*,

and in general[77] there is no such statutory requirement.[78] Without such words the law implies a consideration for all commercial paper;[79] and this extends to the liability of maker to indorsee[80] and to a guaranty indorsed on the note at the time of its delivery,[81] but not to the signature of a new maker added after delivery of the note.[82]

Cramlington *v.* Evans, 1 Show. 4; Banbury *v.* Lisset, 2 Str. 1211; 2 Bl. Comm. 468.

Canada.— Duchesnay *v.* Evarts, 2 Rev. Lég. 31.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 6, 44.

They are not necessary to the validity of a promissory note (Mitchell *v.* Rome R. Co., 17 Ga. 574) or even of a sealed note (Crenshaw *v.* Bullitt, 1 Blackf. (Ind.) 41; Edelen *v.* Gough, 5 Gill (Md.) 103).

On the other hand their presence does not show an intent to make the bill negotiable. Culbertson *v.* Nelson, 93 Iowa 187, 61 N. W. 854, 57 Am. St. Rep. 266, 27 L. R. A. 222.

77. In Missouri these words are necessary to the negotiability of a note (Hart *v.* Harrison Wire Co., 91 Mo. 414, 4 S. W. 123; Stix *v.* Mathews, 63 Mo. 371; Bailey *v.* Smock, 61 Mo. 213; Macy *v.* Kendall, 33 Mo. 164; Thomson *v.* Roatcap, 27 Mo. 283; Austin *v.* Blue, 6 Mo. 265; Beatty *v.* Anderson, 5 Mo. 447; Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39; St. Charles First Nat. Bank *v.* Hunt, 25 Mo. App. 170; International Bank *v.* German Bank, 3 Mo. App. 362; Lowenstein *v.* Knopf, 2 Mo. App. 159; Savings Bank *v.* National Bank of Commerce, 38 Fed. 800); but the statute does not apply to checks (Famous Shoe, etc., Co. *v.* Crosswhite, 124 Mo. 34, 27 S. W. 397, 46 Am. St. Rep. 424, 26 L. R. A. 568; Burns *v.* Kahn, 47 Mo. App. 215).

In Pennsylvania negotiable notes "bearing date in the city or county of Philadelphia" must read "for value in account or for value received." Brightly Purd. Dig. Pa. (1894), p. 1731, § 1.

78. They are expressly dispensed with by Neg. Instr. L. § 25; Bills Exch. Act, § 3.

To recover statutory damages the words are sometimes necessary. Hallowell *v.* Page, 24 Mo. 590; Riggs *v.* St. Louis, 7 Mo. 438.

79. *Alabama.*— Hunley *v.* Lang, 5 Port. (Ala.) 154.

California.— People *v.* McDermott, 8 Cal. 288.

Georgia.— Mitchell *v.* Rome R. Co., 17 Ga. 574.

Illinois.— Stacker *v.* Hewitt, 2 Ill. 207.

Iowa.— All written contracts signed by the maker import a consideration. Jones *v.* Berryhill, 25 Iowa 289.

Kentucky.— Murray *v.* Clayborn, 2 Bibb (Ky.) 300.

Maine.— Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Massachusetts.—Dean *v.* Carruth, 108 Mass. 242; Townsend *v.* Derby, 3 Metc. (Mass.) 363. *Contra*, of an accepted order to bearer with no drawer named. Ball *v.* Allen, 15 Mass. 433.

Mississippi.— Matlock *v.* Livingston, 9 Sm. & M. (Miss.) 489.

Missouri.— Taylor *v.* Newman, 77 Mo. 257; Griffith *v.* Cotrell, 1 Mo. 480.

Montana.—Clarke *v.* Marlow, 20 Mont. 249, 50 Pac. 713.

New York.— Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845 [*affirming* 57 Hun (N. Y.) 518, 11 N. Y. Suppl. 278, 33 N. Y. St. 98]; Hook *v.* Pratt, 78 N. Y. 371, 34 Am. Rep. 539; Sprague *v.* Sprague, 80 Hun (N. Y.) 285, 30 N. Y. Suppl. 162, 61 N. Y. St. 862; Underhill *v.* Phillips, 10 Hun (N. Y.) 591; Kinsman *v.* Birdsall, 2 E. D. Smith (N. Y.) 395; McLeod *v.* Hunter, 29 Misc. (N. Y.) 558, 61 N. Y. Suppl. 73; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Hughes *v.* Wheeler, 8 Cow. (N. Y.) 77; Goshen, etc., Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273.

Oregon.— Wilson *v.* Wilson, 26 Oreg. 315, 38 Pac. 189, under Oreg. Code, §§ 3188, 3190.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775.

Virginia.— Peasley *v.* Boatwright, 2 Leigh (Va.) 195.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Cook *v.* Gray, Hempst. (U. S.) 84, 6 Fed. Cas. No. 3,156*a*; Benjamin *v.* Tillman, 2 McLean (U. S.) 213, 3 Fed. Cas. No. 1,304.

England.— Grant *v.* Da Costa, 3 M. & S. 351.

But see Camp *v.* Tompkins, 9 Conn. 545; Edgerton *v.* Edgerton, 8 Conn. 6; Sidle *v.* Anderson, 45 Pa. St. 464, the last case holding that no consideration is presumed in the case of a sealed order for money.

By the Negotiable Instruments Law, section 50, "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

80. Mason *v.* Buckmaster, 1 Ill. 27; Labadie *v.* Chouteau, 37 Mo. 413 (holding that a note payable to the order of the payee, although not expressed to be for value received, nor containing the words "negotiable and payable, without defalcation" imports a valuable consideration, both as between the maker and payee, and as between an indorsee and indorser, under Mo. Rev. Code (1855), p. 319.

81. Manrow *v.* Durham, 3 Hill (N. Y.) 584. If the guaranty is delivered contemporaneously with the note. Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743, construing Alabama statute.

As to expressing consideration for guaranty see *infra*, II, B, 4, b, (II), (B).

82. Courtney *v.* Doyle, 10 Allen (Mass.) 122; Green *v.* Shepherd, 5 Allen (Mass.) 589; Clopton *v.* Hall, 51 Miss. 482. Nor to a guaranty subsequently indorsed (Hall *v.* Farmer, 5 Den. (N. Y.) 484) or the accommodation in-

(B) *Particular Statement of Consideration.* In some cases the statute requires a particular statement of the consideration,[83] and in the absence of such a statute a full statement will not affect the negotiability of the paper.[84]

dorsement after delivery by a third party (Hood *v.* Robbins, 98 Ala. 484, 13 So. 574; Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341).

83. **Instruments given for patent right** — *In general.*— In New York section 330 of the Negotiable Instruments Law provides: "A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words 'given for a patent right' prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase-price or the use of a patented article." Subject to such defenses, however, it is a valid instrument in his hands. Herdic *v.* Roessler, 109 N. Y. 127, 16 N. E. 198. Earlier statutes containing a similar requirement have been enacted in a number of other states.

Constitutionality of statutes.— These statutes have been held to be constitutional under the constitutions of the United States (Brechhill *v.* Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695; Herdic *v.* Roessler, 109 N. Y. 127, 16 N. E. 198), Ohio (Tod *v.* Wick, 36 Ohio St. 370), and Pennsylvania (Haskell *v.* Jones, 86 Pa. St. 173), but not of Indiana (Helm *v.* Huntington First Nat. Bank, 43 Ind. 167, 13 Am. Rep. 395).

These statutes have been held not to apply to a non-negotiable note (State *v.* Brower, 30 Ohio St. 101), a note given for a patented machine (State *v.* Peck, 25 Ohio St. 26), or a note given for the privilege of selling a patented article (People's State Bank *v.* Jones, 26 Ind. App. 583, 58 N. E. 852, 84 Am. St. Rep. 310).

Effect of omitting words.— Most of the earlier statutes have been held not to affect the right of recovery, in the absence of such words, by a *bona fide* holder for value (Smith *v.* Wood, 111 Ga. 221, 36 S. E. 649; New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Pape *v.* Hartwig, 23 Ind. App. 333, 55 N. E. 271; Moses *v.* Comstock, 4 Nebr. 516; Hunter *v.* Henninger, 93 Pa. St. 373; Haskell *v.* Jones, 86 Pa. St. 173; Harmon *v.* Hagerty, 88 Tenn. 705, 13 S. W. 690; Streit *v.* Waugh, 48 Vt. 298; Pendar *v.* Kelley, 48 Vt. 27), but a holder taking with notice of such omission takes the note subject to any defense growing out of the invalidity or worthlessness of the patent (Tod *v.* Wick, 36 Ohio St. 370; Hunter *v.* Henninger, 93 Pa. St. 373), and in Arkansas, where the statute makes such notes void, the defense is available even against a *bona fide* holder (Wyatt *v.* Wallace, 67 Ark. 575, 55 S. W. 1105). See also Craig *v.* Samuel, 24 Can. Supreme Ct. 278; Girvin *v.* Burke, 19 Ont. 204.

Effect of words of consideration or want thereof on bona fides of holder see *infra*, IX, A, 3, b, (II).

Instruments for speculative consideration. — In New York section 331 of the Negotiable Instruments Law provides: "If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words 'given for a speculative consideration,' or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder."

Peddler's notes.— In Kentucky the statute (Ky. Stat. § 4223) requires such notes to be marked as such, and this act has been held to be constitutional. Rumbley *v.* Hall, 21 Ky. L. Rep. 1071, 54 S. W. 4.

84. *Illinois.*— Siegel *v.* Chicago Trust, etc., Bank, 131 Ill. 569, 23 N. E. 417, 19 Am. St. Rep. 51, 7 L. R. A. 537.

Indiana.— American Ins. Co. *v.* Gallahan, 75 Ind. 168; Doherty *v.* Perry, 38 Ind. 15; Hereth *v.* Meyer, 33 Ind. 511.

Kentucky.— Warner *v.* Broddus, 2 J. J. Marsh. (Ky.) 264.

Louisiana.— Canal Bank *v.* Holland, 5 La. Ann. 363; Maurin *v.* Chambers, 16 La. 207.

Michigan.— Beardslee *v.* Horton, 3 Mich. 560.

Nebraska.— Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 4 N. W. 995.

North Carolina.— Burney *v.* Galloway, 33 N. C. 53.

North Dakota.— National German American Bank *v.* Lang, 2 N. D. 66, 49 N. W. 414.

Tennessee.— Ryland *v.* Brown, 2 Head (Tenn.) 270.

Texas.— Buchanan *v.* Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077.

Vermont.— Plumb *v.* Niles, 34 Vt. 230.

Canada.— Merchants' Bank *v.* Dunlop, 9 Manitoba 623.

See 7 Cent. Dig. tit. "Bills and Notes," § 391; and *supra*, I, C, 1, d, (II), (C), (2), (c), note 2.

Sufficient consideration.— An agreement to pay a certain sum "for each share of stock," set opposite the subscribers' names, sufficiently

(II) *Import of Words.* The words "value received" [85] import a valid consideration.[86] In a bill of exchange they mean consideration received by the drawer from the payee [87] or by the accepter from the drawer.[88] In a note they mean consideration received by the maker from the payee.[89]

j. Signature — (I) *Necessity of.* Every negotiable instrument requires the signature of the party who is to be bound by it.[90] Signature by sureties will not dispense with signature by the principal;[91] and delivery by one maker to the payee with a condition that the note should not take effect until signed by others is a good defense.[92] Signature by an indorser of a note with the maker's name

expresses a consideration to make the instrument a promissory note. Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459. So a due-bill "for keeping stage horses" (Fleming *v.* Burge, 6 Ala. 373) or for "money borrowed" (Johnson *v.* Johnson, Minor (Ala.) 263), or a receipt for advancements with a promise of repayment (Hammett *v.* Brown, 44 S. C. 397, 22 S. E. 482).

85. **Words of equivalent import** such as "for value" (Rowland *v.* Harris, 55 Ga. 141), "agreeably to my father's last will" (Horn *v.* Fuller, 6 N. H. 511), or for services "to make the amount the same as Chas. W. Cornell" (Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428) also import a valid consideration.

86. *Alabama.*— Thompson *v.* Armstrong, 5 Ala. 383.

Colorado.— Martin *v.* Hazzard Powder Co., 2 Colo. 596.

Connecticut.— Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170.

Illinois.— Hoyt *v.* Jaffray, 29 Ill. 104; Hill *v.* Todd, 29 Ill. 101.

Kentucky.— Cotton *v.* Graham, 84 Ky. 672, 8 Ky. L. Rep. 658, 2 S. W. 647.

Maine.— Bourne *v.* Ward, 51 Me. 191 (in a non-negotiable note); Sawyer *v.* Vaughan, 25 Me. 337; Stevens *v.* McIntire, 14 Me. 14.

Massachusetts.— Delano *v.* Bartlett, 6 Cush. (Mass.) 364; Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61.

Michigan.— Conrad Seipp Brewing Co. *v.* McKittrick, 86 Mich. 191, 48 N. W. 1086, a non-negotiable note.

North Carolina.— Stronach *v.* Bledsoe, 85 N. C. 473; Cox *v.* Slade, 13 N. C. 8.

Ohio.— Dugan *v.* Campbell, 1 Ohio 115.

Pennsylvania.— Messmore *v.* Morrison, 172 Pa. St. 300, 34 Atl. 45, in a due-bill.

West Virginia.— Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917, and of a consideration valid as against the maker, i. e., to a married woman's separate estate.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

England.— Holliday *v.* Atkinson, 5 B. & C. 501, 8 D. & R. 168, 29 Rev. Rep. 299, 11 E. C. L. 558. But the words do not necessarily import a cash consideration, at least in a non-negotiable note. Morgan *v.* Jones, 1 Cr. & J. 162, 9 L. J. Exch. O. S. 41, 4 Tyrw. 21.

In an **indorsement** the words "value received" indicate a consideration equal to the face of the note. Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226.

In a contract of **guaranty** their presence raises a presumption of valid consideration (Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9; Citizens' Sav. Bank, etc., Co. *v.* Babbitt, 71 Vt. 182, 44 Atl. 71) and satisfies the requirements of the statute of frauds (Miller *v.* Cook, 23 N. Y. 495; Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; Douglass *v.* Howland, 24 Wend. (N. Y.) 35; Watson *v.* McLaren, 19 Wend. (N. Y.) 557), but under the New York statute the words must be in the guaranty itself and it is not enough that they should be in the body of the note, although the guaranty is written on the same paper (Brewster *v.* Silence, 8 N. Y. 207). But this is not conclusive against the guarantor where there was no actual consideration. Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547.

87. "To shew that it is not an accommodation bill, but made on a valuable consideration given for it by the payee" (Bayley, J.), and to "inform the drawee of a fact which he does not know, than of one of which he must be well aware" (Ellenborough, C. J.) in Grant *v.* Da Costa, 3 M. & S. 351.

88. This is necessarily so in a bill payable to the order of the drawer. Highmore *v.* Primrose, 5 M. & S. 65.

89. Clayton *v.* Gosling, 5 B. & C. 360, 8 D. & R. 110, 4 L. J. K. B. O. S. 176, 11 E. C. L. 497.

90. May *v.* Miller, 27 Ala. 515; Tevis *v.* Young, 1 Metc. (Ky.) 197, 71 Am. Dec. 474; Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497; Vyse *v.* Clarke, 5 C. & P. 403, 24 E. C. L. 626. See also Neg. Instr. L. § 37, which provides that "no person is liable on the instrument whose signature does not appear thereon."

The **Bills of Exchange Act** defines a bill of exchange as "signed by the person giving it" (section 3) and a promissory note as "signed by the maker" (section 83).

But a **mortgage securing a note** which it recites is valid, although the note is not signed, and the note may be read in evidence as part of the mortgage. McFadden *v.* Dykins, 82 Ind. 558.

91. Knight *v.* Hurlbut, 74 Ill. 133; Stricklin *v.* Cunningham, 58 Ill. 293.

92. As against payee (Miller *v.* Gambie, 4 Barb. (N. Y.) 146), but not as against a *bona fide* holder (Smith *v.* Moberly, 10 B. Mon. (Ky.) 266, 52 Am. Dec. 543).

left blank is, however, an authority to fill such blank with the name of any maker,[93] and signature by a drawee as accepter with the drawer's name left blank implies like authority.[94] Many statutes in the United States require that a negotiable instrument be "signed by the maker or drawer." [95]

(II) *Form of.* The signer's full name is not needed to constitute a sufficient signature. His initials may suffice for a valid signature,[96] or he may use an abbreviation,[97] and it is immaterial that the name is misspelled;[98] and he may adopt for his signature an arbitrary number or word or a fictitious name.[99] Signature may also be by mark, where the signer is unable to write his name,[1] or the signer may use a hand stamp where the statute does not prescribe otherwise.[2] Lithographed or printed signatures have been held to be sufficient in case of coupons or coupon notes and they are of frequent occurrence.[3] The same reason of convenience or quasi-necessity is not, however, present in the execution of

As to conditional delivery generally see *infra*, II, D, 2, b.

93. Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257. *A fortiori* if there is an express authority to that effect. Haven *v.* Hobbs, 1 Vt. 238, 18 Am. Dec. 678. But see, as to an earlier rule to the contrary, McCall *v.* Taylor, 19 C. B. N. S. 301, 11 Jur. N. S. 529, 34 L. J. C. P. 365, 12 L. T. Rep. N. S. 461, 13 Wkly. Rep. 840, 115 E. C. L. 301; Goldsmid *v.* Hampton, 5 C. B. N. S. 94, 94 E. C. L. 94; Stoessiger *v.* South Eastern R. Co., 2 C. L. R. 1595, 2 E. & B. 549, 18 Jur. 605, 23 L. J. Q. B. 293, 2 Wkly. Rep. 375, 77 E. C. L. 549. So in Kentucky assumpsit would not lie against the accepter or indorser on an instrument having all the forms of a bill of exchange except the drawer's name. Tevis *v.* Young, 1 Metc. (Ky.) 197, 71 Am. Dec. 474.

94. Harvey *v.* Cane, 34 L. T. N. S. 64, 24 Wkly. Rep. 400.

But the forgery of such an acceptance has been held in England not to constitute the forging of a bill of exchange. Reg. *v.* Harper, 15 Am. L. Rev. 553.

95. See Neg. Instr. L. § 20.

A note is signed by the maker where his name is written by another in his presence and by his direction, either with or without the maker's mark. Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322; *In re* Embree, 18 Lanc. L. Rev. 57. See also Bowman *v.* Rector, (Tenn. Ch. 1900) 59 S. W. 389.

Signature by agent see *supra*, I, C, 1, c, (I), (E), (2), (d).

96. Weston *v.* Myers, 33 Ill. 424; Palmer *v.* Stephens, 1 Den. (N. Y.) 471; Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443.

97. Kemp *v.* McCormick, 1 Mont. 420, "Jno." for "John."

98. Lassen County Bank *v.* Sherer, 108 Cal. 513, 41 Pac. 415, by omitting one letter leaving identity clear, "Joiah" for "Josiah."

99. So held as to a signature "1. 2. 8." with evidence as to intention, on authority of the English cases in Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 775 [*citing* Baker *v.* Dening, 8 A. & E. 94, 2 Jur. 775, 7 L. J. Q. B. 137, 3 N. & P. 228, 1 W. W. & H. 148, 35 E. C. L. 497; Geary *v.* Physic, 5 B. & C. 234, 7 D. & R. 653, 4 L. J. K. B. O. S. 147, 29 Rev. Rep. 225, 11 E. C. L. 442; George *v.* Surrey, M. & M. 516, 31 Rev. Rep. 755, 22 E. C. L. 576; Addy *v.* Grix, 8 Ves. Jr. 504; Harrison *v.* Harrison, 8 Ves. Jr. 185], where Nelson, C. J., said: "These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself."

1. *California.*— Hilborn *v.* Alford, 22 Cal. 482.

Illinois.— Handyside *v.* Cameron, 21 Ill. 588, 74 Am. Dec. 119.

Indiana.— Shank *v.* Butsch, 28 Ind. 19. If a person executing a note is unable to write it is not necessary that he touch the pen while the person authorized to do so signs his name. Kennedy *v.* Graham, 9 Ind. App. 624, 35 N. E. 925, 37 N. E. 25.

Kentucky.— Hinkle *v.* Dodge, 7 Ky. L. Rep. 526.

New Hampshire.— Willoughby *v.* Moulton, 47 N. H. 205.

South Carolina.—Shiver *v.* Johnson, 2 Brev. (S. C.) 397; Paisley *v.* Snipes, 2 Brev. (S. C.) 200; Gervais *v.* Baird, 2 Brev. (S. C.) 37.

England.— George *v.* Surrey, M. & M. 516, 31 Rev. Rep. 755, 22 E. C. L. 517.

Canada.— If in the presence of a witness. Blackburn *v.* Decelles, 15 L. C. Jur. 260; Collins *v.* Bradshaw, 10 L. C. Rep. 366; Anderson *v.* Park, 6 L. C. Rep. 479. See also Patterson *v.* Pain, 1 L. C. Rep. 19, 2 R. J. R. Q. 467; Straas *v.* Gilbert, 15 Quebec L. R. 59.

See 7 Cent. Dig. tit. "Bills and Notes," § 73.

2. Cadillac State Bank *v.* Cadillac Stave, etc., Co., (Mich. 1901) 88 N. W. 67; Bennett *v.* Brumfitt, L. R. 3 C. P. 28, Hop. & Ph. 407, 37 L. J. C. P. 25, 17 L. T. Rep. N. S. 213, 16 Wkly. Rep. 131.

3. Pennington *v.* Baehr, 48 Cal. 565; Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291; McKee *v.* Vernon County, 3 Dill. (U. S.) 210, 16 Fed. Cas. No. 8,851.

So a due-bill with printed signature adopted by maker's initials in writing. Weston *v.* Myers, 33 Ill. 424.

ordinary bills and notes, and it is believed that such a signature has not been recognized by American or English courts as sufficient.[4]

(III) *Position of.* The position of the signature is not fixed by any law, but all departure from usual place of signature is liable to misconstruction and should be avoided. Thus the signature of the maker or drawer is usually at the lower right-hand corner of the paper. It may, however, be placed on any part of the paper if so placed as a signature.[5] One may even sign as maker upon the back of the note,[6] and the signature of an indorser may in like manner be made upon the face of the note.[7] Any party may sign upon another paper — an "allonge," — attached by pins or otherwise to the bill itself.[8]

k. Seal — (I) *Necessity and Effect of* — (A) *In General.* The law merchant did not cover sealed instruments, and originally a seal was held to destroy the negotiability of a bill or note,[9] and although such instruments still remained

4. Story Bills, § 53; Chitty Bills 187*n*.

5. *Alabama.*— Lampkin *v.* State, 105 Ala. 1, 16 So. 575 (at the bottom "and charge it to John Driver"); May *v.* Miller, 27 Ala. 515.

Connecticut. — Palmer *v.* Grant, 4 Conn. 389.

Georgia.— Patillo *v.* Mayer, 70 Ga. 715 (across its face); Quin *v.* Sterne, 26 Ga. 223, 71 Am. Dec. 204.

Illinois.— Lincoln *v.* Hinzey, 51 Ill. 435.

Kansas.—Bliss *v.* Burnes, McCahon (Kan.) 91, across its face.

Massachusetts.— Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68.

New York. — Clason *v.* Bailey, 14 Johns. (N. Y.) 484.

United States.— Turnbull *v.* Thomas, 1 Hughes (U. S.) 172, 24 Fed. Cas. No. 14,243.

England.— Welford *v.* Beazley, 3 Atk. 503; Saunderson *v.* Jackson, 2 B. & P. 238, 3 Esp. 180, 5 Rev. Rep. 382; Taylor *v.* Dobbins, 1 Str. 399 (in the body of the note, at the top, "I, J. S., promise," etc.).

A second signature to the left of the first maker with the word "witness" is *prima facie* not that of an additional maker (Hopkins *v.* Lane, 4 Thomps. & C. (N. Y.) 311; Steininger *v.* Hoch, 39 Pa. St. 263, 80 Am. Dec. 521), although a different conclusion was reached where the word to the left was not "witness" but "security" (Keller *v.* McHuffman, 15 W. Va. 64).

Place commonly used for attestation.— If a person writes his name to a note at the place commonly used for attestation, although without using any words of attestation, the presumption is that he writes it, not as a maker of the note but as a subscribing witness. Farnsworth *v.* Rowe, 33 Me. 263. And see, as to the effect of signatures, one in the right corner with seal, the other in the left corner without seal, Steininger *v.* Hoch, 39 Pa. St. 263, 80 Am. Dec. 521.

"Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign he is to be deemed an indorser." Neg. Instr. L. § 36.

6. *Alabama.*— Eudora Min., etc., Co. *v.* Barclay, 122 Ala. 506, 26 So. 113.

Connecticut. — Palmer *v.* Grant, 4 Conn. 389.

Georgia.— Quin *v.* Sterne, 26 Ga. 223, 71 Am. Dec. 204.

Massachusetts. — Rodocanachi *v.* Buttrick, 125 Mass. 134; National Pemberton Bank *v.* Lougee, 108 Mass. 371, 11 Am. Rep. 367.

Michigan.—Dow Law Bank *v.* Godfrey, 126 Mich. 521, 85 N. W. 1075, 86 Am. St. Rep. 559.

Missouri.— Schmidt *v.* Schmaelter, 45 Mo. 502.

New Jersey.— It being in such case wholly a question of intention. Watkins *v.* Kirkpatrick, 26 N. J. L. 84; Crozer *v.* Chambers, 20 N. J. L. 256.

7. *California.*— Shain *v.* Sullivan, 106 Cal. 208, 39 Pac. 606.

Georgia.— Perry *v.* Bray, 68 Ga. 293.

Illinois.— Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296.

Kentucky.—Cason *v.* Wallace, 4 Bush (Ky.) 388.

Massachusetts.— See Com. *v.* Butterick, 100 Mass. 12, an indictment for forgery.

New Jersey.— Haines *v.* Dubois, 30 N. J. L. 259.

England.— *Ex p.* Yates, 2 De G. & J. 191, 4 Jur. N. S. 649, 27 L. J. Bankr. 9, 6 Wkly. Rep. 178, 59 Eng. Ch. 191; Young *v.* Glover, 3 Jur. N. S. 637.

A second signature below that of the first maker will not be reduced to an indorsement by the signer's letter written by him to the maker, stating that he had "indorsed and returned" the notes. Tacoma Mill Co. *v.* Sherwood, 11 Wash. 492, 39 Pac. 977.

8. Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17; French *v.* Turner, 15 Ind. 59; Folger *v.* Chase, 18 Pick. (Mass.) 63; Heister *v.* Gilmore, 5 Phila. (Pa.) 62, 19 Leg. Int. (Pa.) 260.

9. *Alabama.*— Sayre *v.* Lucas, 2 Stew. (Ala.) 259, 20 Am. Dec. 33.

Delaware.— Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 288, 89 Am. Dec. 230; Hall *v.* Hickman, 2 Del. Ch. 318.

Indiana.— Lewis *v.* Wilson, 5 Blackf. (Ind.) 370.

Maryland.— Talbott *v.* Suit, 68 Md. 443, 13 Atl. 356.

Michigan.— Rawson *v.* Davidson, 49 Mich. 607, 14 N. W. 565.

Minnesota.— Brown *v.* Jordhal, 32 Minn.

transferable at common law[10] their transfer was neither in form nor effect the transfer of a negotiable bill.[11] The civil law, however, made no such distinction,[12] and it has been abrogated by statute in many of the United States.[13] Perhaps

135, 19 N. W. 650, 50 Am. Rep. 560; Helfer *v.* Alden, 3 Minn. 332.

Mississippi. — Murrell *v.* Jones, 40 Miss. 565.

Missouri. — Brown *v.* Lockhart, 1 Mo. 409.

New York. — Merritt *v.* Cole, 9 Hun (N. Y.) 98, 14 Hun (N. Y.) 324; Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256.

North Carolina. — Barden *v.* Southerland, 70 N. C. 528.

Ohio. — Osborn *v.* Kistler, 35 Ohio St. 99.

Oregon. — Osborne *v.* Hubbard, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833.

Pennsylvania. — Sidle *v.* Anderson, 45 Pa. St. 464; Frevall *v.* Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; Folwell *v.* Beaver, 13 Serg. & R. (Pa.) 311; January *v.* Goodman, 1 Dall. (Pa.) 208, 1 L. ed. 103.

South Carolina. — Tucker *v.* English, 2 Speers (S. C.) 673; Foster *v.* Floyd, 4 McCord (S. C.) 159; Parks *v.* Duke, 2 McCord (S. C.) 380; Parker *v.* Kennedy, 1 Bay (S. C.) 398; Cunningham *v.* Smith, Harp. Eq. (S. C.) 90.

Vermont. — Read *v.* Young, 1 D. Chipm. (Vt.) 244.

West Virginia. — Laidley *v.* Bright, 17 W. Va. 779.

Wisconsin. — Parkison *v.* McKim, 1 Pinn. (Wis.) 214.

United States. — U. S. Bank *v.* Donnally, 8 Pet. (U. S.) 361, 8 L. ed. 974.

England. — Glyn *v.* Baker, 13 East 509, 12 Rev. Rep. 414.

Canada. — See Wilson *v.* Gates, 16 U. C. Q. B. 278.

But see Porter *v.* McCollum, 15 Ga. 528, holding that a note payable to bearer is, under the usage and custom of merchants, negotiable by a delivery, although it is under seal.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 63, 376.

Sealed instruments have been held to be non-negotiable and as such not subject to days of grace (Skidmore *v.* Little, 4 Tex. 301) and not within statutes permitting an action by the indorsee (Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 288, 89 Am. Dec. 230), providing generally that "bills of exchange, and promissory notes payable in money at a bank . . . are governed by the commercial law" (Muse *v.* Dantzler, 85 Ala. 359, 5 So. 178), permitting joinder of action against the several parties (Mann *v.* Sutton, 4 Rand. (Va.) 253), regulating the jurisdiction of the federal courts in actions brought by the assignee (Coe *v.* Cayuga Lake R. Co., 19 Blatchf. (U. S.) 522, 8 Fed. 534), or discharging the drawer for want of due diligence in the holder (Force *v.* Craig, 7 N. J. L. 272).

Note both sealed and unsealed. — A note might, however, be the sealed note of one maker and the unsealed note of the other. Hanger *v.* Dodge, 24 Ark. 205. See also McLaughlin *v.* Braddy, 63 S. C. 433, 41 S. E. 523.

10. Except as between immediate parties, however (Helfer *v.* Alden, 3 Minn. 332), such transfer was subject to equities.

Alabama. — Muse *v.* Dantzler, 85 Ala. 359, 5 So. 178.

Delaware. — Hall *v.* Hickman, 2 Del. Ch. 318.

Mississippi. — Smith *v.* Clopton, 48 Miss. 66; Lamkin *v.* Nye, 43 Miss. 241; Murrell *v.* Jones, 40 Miss. 565.

New Jersey. — Barrow *v.* Bispham, 11 N. J. L. 110; Shannon *v.* Marselis, 1 N. J. Eq. 413.

New York. — Clute *v.* Robinson, 2 Johns. (N. Y.) 595.

Ohio. — Osborn *v.* Kistler, 35 Ohio St. 99.

Pennsylvania. — Hopkins *v.* Cumberland Valley R. Co., 3 Watts & S. (Pa.) 410; Wheeler *v.* Hughes, 1 Dall. (Pa.) 23, 1 L. ed. 20.

England. — Turton *v.* Benson, 10 Mod. 455, Prec. Ch. 522, 1 P. Wms. 497, 1 Str. 240, 2 Vern. 764; Coles *v.* Jones, 2 Vern. 692; Hill *v.* Caillovel, 1 Ves. 122; Matthews *v.* Wallwyn, 4 Ves. Jr. 118.

11. Indorsement where payable to bearer. — In some states the statute formerly required indorsement for the transfer of a sealed bill payable to bearer. Sayre *v.* Lucas, 2 Stew. (Ala.) 259, 20 Am. Dec. 33. It could not be transferred by blank indorsement (Speer *v.* Post, 3 N. J. L. 1032) and the blank indorsement was subject to explanation by parol evidence (Gist *v.* Drakely, 2 Gill (Md.) 330, 41 Am. Dec. 426).

An express contract was necessary to render the assignor liable to remote holders or even to his immediate assignee. Helfer *v.* Alden, 3 Minn. 332; Dilts *v.* Trimmer, 3 N. J. L. 951; Boylan *v.* Dickerson, 3 N. J. L. 430; Garretsie *v.* Van Ness, 2 N. J. L. 20, 2 Am. Dec. 333; Frevall *v.* Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; Tucker *v.* English, 2 Speers (S. C.) 673; Pratt *v.* Thomas, 2 Hill (S. C.) 654; Parks *v.* Duke, 2 McCord (S. C.) 380; Parker *v.* Kennedy, 1 Bay (S. C.) 398.

12. Story Prom. N. § 55.

13. *Kentucky.* — Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286; Norton *v.* Allen, 3 A. K. Marsh. (Ky.) 284.

Michigan. — McKinney *v.* Miller, 19 Mich. 142.

Minnesota. — Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285.

New York. — New York Security, etc., Co. *v.* Storm, 81 Hun (N. Y.) 33, 30 N. Y. Suppl. 605, 62 N. Y. St. 539.

North Carolina. — Salisbury First Nat. Bank *v.* Michael, 96 N. C. 53, 1 S. E. 855; Pate *v.* Brown, 85 N. C. 166.

Ohio. — Bain *v.* Wilson, 10 Ohio St. 14; St. Clairsville Bank *v.* Smith, 5 Ohio 222. But such an instrument, although payable

the chief difference between sealed and unsealed notes consists now in the longer limitation of actions provided by statute for the former. If the instrument is sealed by consent of parties, even after it has been barred as a simple contract, its life will be extended as a sealed bill.[14] With this effect in view it is therefore at common law a material alteration to add a seal without consent of parties.[15]

(B) *In Corporate Paper.* A corporation seal was once considered an essential to any written contract of the corporation — a form of corporate signature which left the contract a simple contract,[16] but this is no longer the rule in the United States,[17] although still followed in many English cases.[18] Hence the bill or note of a corporation is generally under the law merchant held to be commercial paper, although executed with the corporate seal,[19] where there is no intention indicated by recitals or otherwise to make it a specialty;[20] but where a seal is intended a corporation may use a common seal or adopt any other convenient seal.[21]

to bearer, can be transferred only by indorsement. Osborn *v.* Kistler, 35 Ohio St. 99; Cushman *v.* Welsh, 19 Ohio St. 536; Avery *v.* Latimer, 14 Ohio 542; Putnam *v.* Stewart, 1 Ohio Dec. (Reprint) 573, 10 West. L. J. 410.

Texas.— Courand *v.* Vollmer, 31 Tex. 397.

14. Hanger *v.* Dodge, 24 Ark. 205.

15. Vaughan *v.* Fowler, 14 S. C. 355, 37 Am. Rep. 731; United States *v.* Linn, 1 How. (U. S.) 104, 11 L. ed. 64; Davidson *v.* Cooper, 12 L. J. Exch. 467, 11 M. & W. 778 [*affirmed* in 13 M. & W. 343].

16. St. Joseph's Polish Catholic Beneficial Soc. *v.* St. Hedwig's Church, (Del. 1901) 50 Atl. 535; Aggs *v.* Nicholson, 1 H. & N. 165, 25 L. J. Exch. 348, 4 Wkly. Rep. 776.

A common seal might be so used by the corporation. Mill Dam Foundery *v.* Hovey, 21 Pick. (Mass.) 417; Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

A formal corporation seal served to show the intention to make it the contract of the corporation and not that of the officer who signed it. Dutton *v.* Marsh, L. R. 6 Q. B. 301, 40 L. J. Q. B. 175, 24 L. T. Rep. N. S. 470, 19 Wkly. Rep. 754.

17. *District of Columbia.*— Creswell *v.* Holden, 3 MacArthur (D. C.) 579.

Kentucky.— Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171.

Maryland.— Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324.

New York.— Danforth *v.* Schoharie, etc., Turnpike Road, 12 Johns. (N. Y.) 227; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188.

Pennsylvania.— Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339.

Virginia. — Legrand *v.* Hampden Sidney College, 5 Munf. (Va.) 324.

United States.— Mechanics Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351; Burleigh *v.* Rochester, 5 Fed. 667.

Its agent may indorse for it without seal. Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

18. Copper Miners Co. *v.* Fox, 16 Q. B. 229, 15 Jur. 703, 20 L. J. Q. B. 174, 71 E. C. L. 229; Church *v.* Imperial Gas Light, etc., Co., 6 A. & E. 846, 7 L. J. Q. B. 118, 3 N. & P. 35, 1 W. W. & H. 137, 33 E. C. L. 443; East London Water Works Co. *v.* Bailey, 4 Bing. 283, 5 L. J. C. P. O. S. 175, 12 Moore C. P. 533, 13 E. C. L. 505; Ludlow *v.* Charlton, 9 C. & P. 242, 4 Jur. 657, 10 L. J. Exch. 75, 6 M. & W. 815, 38 E. C. L. 151; Arnold *v.* Poole, 2 Dowl. N. S. 574, 7 Jur. 653, 12 L. J. C. P. 97, 4 M. & G. 860, 5 Scott N. R. 741, 43 E. C. L. 444; Diggle *v.* London, etc., R. Co., 5 Exch. 442, 14 Jur. 937, 19 L. J. Exch. 308, 6 R. & Can. Cas. 590; Lamprell *v.* Guardians of Poor, 3 Exch. 283, 18 L. J. Exch. 282; Slark *v.* Highgate Archway Co., 5 Taunt. 792, 1 E. C. L. 405.

19. Benoist *v.* Carondelet, 8 Mo. 250; Chase Nat. Bank *v.* Faurot, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605 [*affirming* 72 Hun (N. Y.) 373, 25 N. Y. Suppl. 447, 55 N. Y. St. 179]; Central Nat. Bank *v.* Charlotte, etc., R. Co., 5 S. C. 156, 22 Am. Rep. 12; *Ex p.* City Bank, L. R. 3 Ch. 758, 18 L. T. Rep. N. S. 894, 16 Wkly. Rep. 919; *In re* Imperial Land Co., L. R. 11 Eq. 478, 40 L. J. Ch. 93, 23 L. T. Rep. N. S. 515, 19 Wkly. Rep. 223. *Contra,* Hopkins *v.* Cumberland Valley R. Co., 3 Watts & S. (Pa.) 410.

United States Treasury notes under the treasury seal are in like manner negotiable. Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534.

20. Weeks *v.* Esler, 143 N. Y. 374, 38 N. E. 377 [*affirming* 68 Hun (N. Y.) 518, 23 N. Y. Suppl. 54, 52 N. Y. St. 758]. Especially where the so-called seal was part of the printed blank and intended as a copy of the corporate seal only as a mark of genuineness. Muth *v.* Dolfield, 43 Md. 466; Jackson *v.* Myers, 43 Md. 452. See also Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881 [*following* Jones *v.* Horner, 60 Pa. St. 214], holding that the negotiability of a note made by a corporation is not affected by a paper seal pasted upon it, which is not the seal of the corporation, and that the seal may be disregarded as surplusage where the note itself does not purport to be under seal, and the corporation had not authorized the making of a note under seal.

21. Blood *v.* La Serena Land, etc., Co., 113

(II) *What Is a Seal.*[22] A scroll is now by statute[23] a sufficient seal in many of the United States,[24] but a scroll is not a sufficient seal at common law,[25] although referred to as such in the instrument.[26] So a printed impression has been held not to be a sufficient corporate seal[27] unless the instrument recites that it is so sealed,[28] and an unsealed note is not converted into a sealed instrument by an indorsement under seal[29] or by the fact that it is secured by, and recited in, a sealed mortgage.[30] It constitutes, however, a sufficient seal to stamp an impres-

Cal. 221, 41 Pac. 1017, 45 Pac. 252. So even a municipal corporation. Jefferson County *v.* Lewis, 20 Fla. 980.

22. See, generally, SEALS.

23. As to the effect of these and similar statutes see also the following cases:

Arkansas.— Anderson *v.* Wilburn, 8 Ark. 155.

California.— Hastings *v.* Vaughn, 5 Cal. 315.

Mississippi.— Commercial Bank *v.* Ullman, 10 Sm. & M. (Miss.) 411.

Missouri.— Underwood *v.* Dollins, 47 Mo. 259.

Ohio.— Osborn *v.* Kistler, 35 Ohio St. 99; Michenor *v.* Kinney, Wright (Ohio) 459.

Pennsylvania.— Long *v.* Ramsay, 1 Serg. & R. (Pa.) 72.

Tennessee.— Scruggs *v.* Brackin, 4 Yerg. (Tenn.) 528.

Virginia.— Peasley *v.* Boatwright, 2 Leigh (Va.) 195.

Wisconsin.— Williams *v.* Starr, 5 Wis. 534.

24. In Alabama, by statute, if the writings "import on their face to be made under seal" they are sealed (Carter *v.* Penn, 4 Ala. 140); but a promissory note containing only the word "seal," surrounded by a scroll appended to the signature of the maker, does not so import and is not a sealed instrument (Blackwell *v.* Hamilton, 47 Ala. 470).

In Colorado a promissory note written upon a blank containing a printed seal will not be deemed a sealed instrument, it appearing that no intention to adopt the seal existed. Buckingham *v.* Orr, 6 Colo. 587.

In Georgia the expression of an intention to seal with a scroll seal (Milledge *v.* Gardner, 29 Ga. 700) or the words "signed and sealed" with signature and scroll (Humphries *v.* Nix, 77 Ga. 98) are sufficient, but not the mere printed words "witness my hand and seal" without scroll or seal (Willhelms *v.* Partoine, 72 Ga. 898; Brooks *v.* Kiser, 69 Ga. 762), the words "signed, sealed, and delivered" written below the maker's signature and seal (Echols *v.* Phillips, 112 Ga. 700, 37 S. E. 977), or an actual seal without any words of recital (Chambers *v.* Kingsberry, 68 Ga. 828).

In Illinois the recital of a seal when no seal is affixed does not make the note a sealed instrument, but it is still a promissory note. Vance *v.* Funk, 3 Ill. 263.

In Mississippi it must appear that the scroll was intended for a seal (Hudson *v.* Poindexter, 42 Miss. 304; McRaven *v.* McGuire, 9 Sm. & M. (Miss.) 34; Whittington *v.* Clarke, 8 Sm. & M. (Miss.) 480), but the words "witness my hand and seal" are sufficient, even without a scroll (McCarley *v.* Tippah County, 58 Miss. 483, 38 Am. Rep. 338).

Declaring purpose to seal.— In some jurisdictions an instrument is not under seal unless the purpose to seal it is declared in the body (Breitling *v.* Marx, 123 Ala. 222, 26 So. 203; Echols *v.* Phillips, 112 Ga. 700, 37 S. E. 977; Chambers *v.* Kingsberry, 68 Ga. 828; Gover *v.* Chamberlain, 83 Va. 286, 5 S. E. 174), but this is unnecessary in others (Brown *v.* Jordhal, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560; Osborne *v.* Hubbard, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833; Giles *v.* Mauldin, 7 Rich. (S. C.) 11; Conner *v.* Autrey, 18 Tex. 427). *A fortiori* a note concluding "witness my hand and seal," with the word "seal" written inside of an ink scroll, is "a note in writing under seal" within the terms of the statute. Clopton *v.* Pridgen, 8 Tex. 308.

As to effect of engraved scroll half hidden in the engraved border of a note see Bancroft *v.* Haines, 2 Pa. Dist. 373, 13 Pa. Co. Ct. 116, 31 Wkly. Notes Cas. (Pa.) 248.

25. *Alabama.*— Blackwell *v.* Hamilton, 47 Ala. 470.

Indiana.— Deming *v.* Bullitt, 1 Blackf. (Ind.) 241.

Massachusetts.— Tasker *v.* Bartlett, 5 Cush. (Mass.) 359; Bradford *v.* Randall, 5 Pick. (Mass.) 496; Com. *v.* Griffith, 2 Pick. (Mass.) 11.

New Hampshire.— Douglas *v.* Oldham, 6 N. H. 150.

New York.— Coit *v.* Millikin, 1 Den. (N. Y.) 376; Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508; Warren *v.* Lynch, 5 Johns. (N. Y.) 239.

Vermont.— Beardsley *v.* Knight, 4 Vt. 471.

Virginia.— Clegg *v.* Lemessurier, 15 Gratt. (Va.) 108.

26. Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502; Irwin *v.* Brown, 2 Cranch C. C. (U. S.) 314, 13 Fed. Cas. No. 7,080.

27. Bates *v.* Boston, etc., R. Co., 10 Allen (Mass.) 251; Farmers', etc., Bank *v.* Haight, 3 Hill (N. Y.) 493.

28. Woodman *v.* York, etc., R. Co., 50 Me. 549; Royal Bank *v.* Grand Junction R., etc., Co., 100 Mass. 444, 97 Am. Dec. 115.

29. Rand *v.* Dovey, 83 Pa. St. 280 (under a corporate seal); Ege *v.* Kyle, 2 Watts (Pa.) 222.

30. Seymour *v.* Street, 5 Nebr. 85; Crouse *v.* McKee, 14 N. Y. St. 158; Jackson *v.* Sackett, 7 Wend. (N. Y.) 94; Clarke *v.* Figes, 2 Stark. 234, 3 E. C. L. 391.

Purchaser cannot assume contra.— But the purchaser under a mortgage which recites the notes secured without execution of a seal cannot assume that they are without seal and

sion into the paper[31] or to stick a paper seal to the instrument and stamp an impression on it.[32]

1. Attestation. Bills and notes do not require the signature of an attesting witness, and it is not customary, or in general desirable, to have them witnessed. Even if a note is signed with a mark a witness is unnecessary unless required by statute,[33] but by statute in some jurisdictions notes so executed are required to be witnessed;[34] and where this is so the mere presentation of a note with a mark only is not evidence of its validity,[35] although a failure to have it attested by a subscribing witness does not render it void, but merely requires actual proof of its execution.[36] In some of the states a distinction is made by statute between attested promissory notes and others, in that attested notes are actionable for a longer period than those which are not attested.[37] An attesting witness under such a statute must be one who at the time of the attestation would be competent to testify in court to the matter to which he attested.[38] Under such a statute a

therefore barred. Foster *v.* Jett, 74 Fed. 678, 40 U. S. App. 86, 20 C. C. A. 670.

31. *California.*— Connolly *v.* Goodwin, 5 Cal. 220.

Maine.— Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529.

Massachusetts.— Hendee *v.* Pinkerton, 14 Allen (Mass.) 381.

New Hampshire.— Allen *v.* Sullivan R. Co., 32 N. H. 446.

New Jersey.—Corrigan *v.* Trenton Delaware Falls Co., 5 N. J. Eq. 52.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9; Ross *v.* Bedell, 5 Duer (N. Y.) 462.

United States.— Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228.

But a note signed with the name of a limited partnership by its treasurer is not rendered non-negotiable by the fact that a stamped device, purporting to be the seal of the company, had been affixed to the left-hand side of the note, over the body of the writing. Stevens *v.* Philadelphia Ball Club, 142 Pa. St. 52, 21 Atl. 797, 11 L. R. A. 860.

32. Van Bokkelen *v.* Taylor, 62 N. Y. 105; Gillespie *v.* Brooks, 2 Redf. Surr. (N. Y.) 349.

33. Shank *v.* Butsch, 28 Ind. 19.

34. Flowers *v.* Bitting, 45 Ala. 448; Chadwell *v.* Chadwell, 98 Ky. 643, 17 Ky. L. Rep. 1207, 33 S. W. 1118; Vanover *v.* Murphy, 12 Ky. L. Rep. 733, 15 S. W. 61.

The signature of a witness attests the execution of a note, although signed by the maker's mark only. It is very different from the formal attestation of a will, where all the requisitions of the statute of wills must be contained in the certificate of attestation or proved otherwise. McDermott *v.* McCormick, 4 Harr. (Del.) 543.

35. Chadwell *v.* Chadwell, 98 Ky. 643, 17 Ky. L. Rep. 1207, 33 S. W. 1118; Vanover *v.* Murphy, 12 Ky. L. Rep. 733, 15 S. W. 61; Banque Nationale *v.* Charette, 10 Montreal Leg. N. 85; Fiset *v.* Pilon, 9 Montreal Leg. N. 380; Remillard *v.* Moisaw, 15 Quebec Super. Ct. 622.

36. Vanover *v.* Murphy, 12 Ky. L. Rep. 733, 15 S. W. 61.

37. Smith *v.* Dunham, 8 Pick. (Mass.) 246. See also Daggett *v.* Daggett, 124 Mass. 149 (holding that the following memorandum written upon the back of a promissory note and signed in the presence of an attesting witness, "I hereby renew the within note," is a witnessed promissory note within the statute of limitations); Gray *v.* Bowden, 23 Pick. (Mass.) 282 (holding that an indorsement on a promissory note acknowledging it to be due, signed by the promisor and attested by a witness, is not an attested promissory note within the meaning of the statute extending the limitation of actions upon such notes to twenty years).

Signing after attestation.— Where a witness attests the signature of one maker of a promissory note and another maker afterward signs it, it seems that it is not an attested note as to the latter within the provision of the statute of limitations. Walker *v.* Warfield, 6 Metc. (Mass.) 466. And in Solon Ministerial, etc., Fund *v.* Rowell, 49 Me. 330, it was expressly held that defendant was not estopped from availing himself of the statute of limitations where he signed the note which then had upon it the attestation of a subscribing witness to the signatures of the other makers of the note, the witness not being present when he signed it.

Unattested indorsement.— An unattested indorsement is neither within the language nor the spirit of the statute which excepts attested promissory notes from the general limitation of six years as applicable to personal contracts. Seavey *v.* Coffin, 64 Me. 224.

What is sufficient attestation.— The name of a person subscribed to a promissory note, with intent to attest the signing thereof by the maker, is a sufficient witnessing within the statute of limitations, although there are no words over the name indicating the intent of his subscription. Faulkner *v.* Jones, 16 Mass. 290. The signature of an attesting witness, placed below the body of a note and above the date thereof, may apply to the whole note, if shown to have been made for that purpose after the note is completed. Warren *v.* Chapman, 115 Mass. 584.

38. Jenkins *v.* Dawes, 115 Mass. 599. But if a promissory note be attested by the wife of the payee as a witness, with the knowledge and consent of the maker, he cannot afterward object that the same is not a witnessed note within the statute of limitations, al-

note with an attestation is in fact a different legal contract from what it would be without it,[39] and the attestation of a note not before witnessed, by a person who was not present at the signing, is a material alteration of the contract and destroys its validity.[40] The attestation of a note must be made with the knowledge of the promisor, and as a part of the same transaction with the making of the note, and whether it is so made is a question of fact for the jury, as to which the burden of proof is on the payee.[41] The agent of the payee, in receiving a note, may properly witness it at his own suggestion and without request, and if the signature is in the proper place for the attestation he need not write on the note for what purpose he affixed it.[42] But it is doubtful if the attestation upon the face of a note will apply to a signature upon the back of it, unless the attestation clause expressly so states.[43]

2. Blanks — a. Implied Power to Fill — (I) *In General* — (A) *Rule Stated.* In general every blank left in a bill or note duly delivered implies a power in the holder to fill it in accordance with the general purport of the paper;[44] and the

though the witness would not be competent to testify on behalf of her husband in court. Alexander *v.* Hanley, 64 Vt. 361, 24 Atl. 242.

Different makers with separate witnesses. — It does not affect the validity of a note that it was executed by one of the payers in the presence of one witness, and by the other in the presence of another witness, although it purports to be executed by both in the presence of two subscribing witnesses. Ogle *v.* Graham, 2 Penr. & W. (Pa.) 132.

39. Smith *v.* Dunham, 8 Pick. (Mass.) 246.

40. Brackett *v.* Mountfort, 11 Me. 115; Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164. But if the promissory note is attested before delivery by a person not a party to it, and without the procurement or knowledge of either party, and the note is accepted by the payee without any knowledge that it has been attested, and without relying upon the attestation as a part of the contract, the attestation is not such a material alteration as will make the note void, but may be stricken out and an action may then be maintained upon it. Church *v.* Fowle, 142 Mass. 12, 6 N. E. 764. And where a joint and several promissory note was signed by the principal and two sureties at different times, and was placed in the hands of the principal to be delivered, and he afterward acknowledged his signature to a witness, who subscribed his name in the presence of the principal and of the payee without stating that he witnessed only the signature of the principal, it was held, in an action against the three makers, that this was not necessarily such an alteration of the instrument as would discharge the sureties. Beary *v.* Haines, 4 Whart. (Pa.) 17.

Question for jury whether signed in presence of witness.— When the maker of a note, four years after the time at which he signed it, in pursuance of an agreement made at that time, acknowledged to a person who did not see him sign the note that the signature was his, and requested such person to sign it as a witness in order to prevent the operation of the statute of limitations, it was held that the question whether the note was signed in the presence of an attesting witness was for the jury. Swazey *v.* Allen, 115 Mass. 594.

41. Drury *v.* Vannevar, 1 Cush. (Mass.) 276.

42. Farnsworth *v.* Rowe, 33 Me. 263.

43. Black *v.* Rogers, 68 Me. 574.

44. *Alabama.*— Decatur Bank *v.* Spence, 9 Ala. 800.

Illinois.—Young *v.* Ward, 21 Ill. 223; White *v.* Alward, 35 Ill. App. 195.

Indiana.— Gothrupt *v.* Williamson, 61 Ind. 599; Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665; Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15; Gillaspie *v.* Kelley, 41 Ind. 158, 13 Am. Rep. 318.

Iowa.— Iowa College *v.* Hill, 12 Iowa 462.

Kansas.— Lowden *v.* Schoharie County Nat. Bank, 38 Kan. 533, 16 Pac. 748.

Kentucky.— Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58; Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528; State Bank *v.* Garey, 6 B. Mon. (Ky.) 626; Commonwealth Bank *v.* McChord, 4 Dana (Ky.) 191, 29 Am. Dec. 398; Commonwealth Bank *v.* Curry, 2 Dana (Ky.) 142; Sowders *v.* Citizens' Nat. Bank, 12 Ky. L. Rep. 356.

Maine.— Market, etc., Nat. Bank *v.* Sargent, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376; Abbott *v.* Rose, 62 Me. 194, 16 Am. Rep. 427.

Massachusetts.— Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236; Androscoggin Bank *v.* Kimball, 10 Cush. (Mass.) 373.

Mississippi.— Davis *v.* Lee, 26 Miss. 505, 59 Am. Dec. 267. See also Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716, holding that a note delivered, signed, with a blank to be filled up by the holder, is valid when so completed.

Missouri.— Mackey *v.* Basil, 50 Mo. App. 190; Green *v.* Kennedy, 6 Mo. App. 577.

New York.— Redlich *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573; Van Duzer *v.* Howe, 21 N. Y. 531; Hardy *v.* Norton, 66 Barb. (N. Y.) 527; Griggs *v.* Howe, 31 Barb. (N. Y.) 100; Harris *v.* Berger, 15 N. Y. St. 389; Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336.

North Carolina.— McArthur *v.* McLeod, 51 N. C. 475.

Ohio.— St. Clairsville Bank *v.* Smith, 5 Ohio 222.

statute law in some jurisdictions has in effect reënacted the rule of the law merchant.[45]

(B) *Depends Upon Voluntary Delivery.* This authority depends wholly upon the voluntary delivery of the instrument by the party to be bound by it, and does not extend to paper that has been found or stolen,[46] even for the protection of a subsequent *bona fide* holder of such paper.[47] This is true also of a paper which has been signed for another purpose and carried off and used fraudulently,[48] but the negligence of one who signs a note in blank by mistake for another sort of paper does not amount to a want of delivery and constitutes no defense against a *bona fide* holder.[49]

(II) *Sealed Instruments.* At common law a blank left in a sealed instrument could not be filled after its delivery under such implied authority,[50] but whatever distinction may remain between sealed contracts and simple contracts in the United States, the rule has not been applied to coupon bonds, and they are put on the footing of commercial paper as to the filling of blanks left in them.[51]

b. What Blanks May Be Filled. The implied power to fill blanks extends to

South Carolina.—Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294; Aiken *v.* Cathcart, 3 Rich. (S. C.) 133, 45 Am. Dec. 764.

Texas.— Jones *v.* Primm, 6 Tex. 170.

Virginia.— Jordan *v.* Neilson, 2 Wash. (Va.) 164.

United States.—Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377; Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; National Exch. Bank *v.* White, 30 Fed. 412.

England.— Collis *v.* Emmett, 1 H. Bl. 313.

Canada.— Gnaedinger *v.* Bertrand, 24 L. C. Jur. 8.

See 7 Cent. Dig. tit. "Bills and Notes," § 86.

The power extends to blanks in a partnership note executed by one partner. Chemung Canal Bank *v.* Bradner, 44 N. Y. 680.

45. **The California Civil Code**, section 3125, provides that "one who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterward, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form."

The Negotiable Instruments Law, section 33, reads as follows: "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." See also Bills Exch. Act, § 20.

46. Ledwich *v.* McKim, 53 N. Y. 307; Daniels *v.* Empire State Sav. Bank, 92 Hun (N. Y.) 450, 38 N. Y. Suppl. 580, 74 N. Y. St. 207.

47. Ledwich *v.* McKim, 53 N. Y. 307; Baxendale *v.* Bennett, 3 Q. B. D. 525, 47 L. J. Q. B. 624, 26 Wkly. Rep. 899.

48. Cline *v.* Guthrie, 42 Ind. 227, 13 Am. Rep. 357 (name written to show its spelling); Caulkins *v.* Whisler, 29 Iowa 495, 4 Am. Rep. 236 (name written to identify a signature); Lenheim *v.* Wilmarding, 55 Pa. St. 73.

So where signature is procured by fraudulent representation as to the paper itself without negligence on the signer's part. Whitney *v.* Snyder, 2 Lans. (N. Y.) 477; Walker *v.* Ebert, 29 Wis. 194, 9 Am. Rep. 548; Foster *v.* Mackinnon, L. R. 4 C. P. 704, 38 L. J. C. P. 310, 20 L. T. Rep. N. S. 887, 17 Wkly. Rep. 1105.

So where delivery was conditioned procuring another signature and the condition was disregarded by the agent. Awde *v.* Dixon, 6 Exch. 869, 20 L. J. Exch. 295.

49. Breckenridge *v.* Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353 (where he signs his name on a blank paper to enable an agent to withdraw money from a bank, and a note is fraudulently written over the signature and negotiated to a *bona fide* holder); Ross *v.* Doland, 29 Ohio St. 473; Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323 (where one signs blank bills in duplicate "second of exchange, first unpaid," and all are filled up and negotiated as distinct bills for different amounts to *bona fide* holders).

50. 1 Daniel Neg. Instr. § 148. See also Alterations of Instruments, 2 Cyc. 165.

51. *Massachusetts.*— Chapin *v.* Vermont, etc., R. Co., 8 Gray (Mass.) 575.

New Jersey.— Boyd *v.* Kennedy, 38 N. J. L. 146, 20 Am. Rep. 376, where the reasons for the exception are set forth by Depue, J.

New York.— Brainerd *v.* New York, etc., R. Co., 25 N. Y. 496; Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51 (a municipal bond); Dutchess County Ins. Co. *v.* Hachfield,

all parts of the paper. It extends to the promise itself;[52] to the signature;[53] to the name of the drawee,[54] payee,[55] or indorsee;[56] to the date;[57] to the time[58]

1 Hun (N. Y.) 675; Hubbard *v.* New York, etc., R. Co., 36 Barb. (N. Y.) 286.

Pennsylvania.— Stahl *v.* Berger, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666.

South Carolina.— Gourdin *v.* Commander, 6 Rich. (S. C.) 497.

United States.— White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221.

52. A joint or joint and several promise may be made. Snyder *v.* Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739.

The pronoun "I" or "we" may be inserted according to the sense (Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668; Loomis *v.* Freer, 4 Ill. App. 547; Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 18 N. E. 56; Marshall *v.* Drescher, 68 Ind. 359) or may be omitted (Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273).

53. The maker's name, after blank indorsement of the designated payee (Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58; Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257), the maker's firm-name (Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140), or the name of an additional maker, where the note was signed in blank (Commonwealth Bank *v.* McChord, 4 Dana (Ky.) 191, 29 Am. Dec. 398) or where the promise was joint and several (Snyder *v.* Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739) may be added.

The drawer's signature may be added after a blank acceptance (Moiese *v.* Knapp, 30 Ga. 942; Montague *v.* Perkins, 17 Jur. 577, 22 L. J. C. P. 187, 1 Wkly. Rep. 437) or where the bill was made payable to the drawer's order and was negotiated by his indorsement, without signing as drawer (Hopps *v.* Savage, 69 Md. 513, 16 Atl. 133, 1 L. R. A. 648), and in such case a *bona fide* holder may insert his own name as drawer (Harvey *v.* Cane, 34 L. T. Rep. N. S. 64, 24 Wkly. Rep. 400). Such signature may be filled in even after the accepter's death (Carter *v.* White, 25 Ch. D. 666, 54 L. J. Ch. 138, 50 L. T. Rep. N. S. 670, 32 Wkly. Rep. 692 [*affirming* 20 Ch. D. 225]), but not after the holder has notice of want of authority from the accepter (Hogarth *v.* Latham, 3 Q. B. D. 643, 47 L. J. Q. B. 339, 39 L. T. Rep. N. S. 75, 26 Wkly. Rep. 388). Until it is so signed the paper is not properly a bill of exchange (McCall *v.* Taylor, 19 C. B. N. S. 301, 11 Jur. N. S. 529, 34 L. J. C. P. 365, 12 L. T. Rep. N. S. 461, 13 Wkly. Rep. 840, 115 E. C. L. 301) and cannot be declared on as such (Stoessiger *v.* South Eastern R. Co., 2 C. L. R. 1595, 3 E. & B. 549, 18 Jur. 605, 23 L. J. Q. B. 293, 2 Wkly. Rep. 375, 77 E. C. L. 549).

54. Wheeler *v.* Webster, 1 E. D. Smith (N. Y.) 1.

55. See *supra*, I, C, 1, c, (II), (A), (2), (b).

56. See *infra*, VI, C, 1, b, (III), (c).

57. *Arkansas.*— Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9. But see Inglish *v.* Breneman, 9 Ark. 122, 47 Am. Dec. 735.

Illinois.— Gill *v.* Hopkins, 19 Ill. App. 74. So a date may be added to a blank indorsement. Maxwell *v.* Vansant, 46 Ill. 58.

Louisiana.— Shultz *v.* Payne, 7 La. Ann. 222, holding that the authority is clear where the paper is payable a certain number of days after date.

Massachusetts.—Androscoggin Bank *v.* Kimball, 10 Cush. (Mass.) 373.

Michigan.— Breckenridge First State Sav. Bank *v.* Webster, 121 Mich. 149, 79 N. W. 1068.

New York.— Page *v.* Morrell, 3 Abb. Dec. (N. Y.) 433, 3 Keyes (N. Y.) 117, 33 How. Pr. (N. Y.) 244; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336.

Ohio.— Fullerton *v.* Sturges, 4 Ohio St. 529.

Pennsylvania.— Hepler *v.* Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813; Lennig *v.* Ralston, 23 Pa. St. 137; Barber *v.* Aregood, 1 Wkly. Notes Cas. (Pa.) 403.

South Carolina.—Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294.

Vermont.— Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

United States.— Michigan Ins. Bank *v.* Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934.

England.— Usher *v.* Dauncey, 4 Campb. 97, 15 Rev. Rep. 729.

See also *supra*, I, C, 1, f, (II), note 16; and 7 Cent. Dig. tit. "Bills and Notes," § 87.

Prima facie authority.— Since it may be that where no date is expressed none was intended, it has been held that a blank date is at most only *prima facie* evidence of authority to fill out. Inglish *v.* Breneman, 5 Ark. 377, 41 Am. Dec. 96, 9 Ark. 122, 47 Am. Dec. 735; Stout *v.* Cloud, 5 Litt. (Ky.) 205. See also Page *v.* Morrell, 3 Abb. Dec. (N. Y.) 433, 3 Keyes (N. Y.) 117, 33 How. Pr. (N. Y.) 244.

A partial omission may be supplied where no blank was intended. Evans *v.* Steel, 2 Ala. 114, where the year was written "one thousand forty," meaning 1840.

Power to antedate is not implied and a bill or note antedated by a holder is void in the hands of subsequent holders with notice (Inglish *v.* Breneman, 9 Ark. 122, 47 Am. Dec. 735, 5 Ark. 377, 41 Am. Dec. 96; Emmons *v.* Meeker, 55 Ind. 321; Miles *v.* Major, 2 J. J. Marsh. (Ky.) 153; Goodman *v.* Simonds, 19 Mo. 106), unless such antedating is by agreement between the parties (Mitchell *v.* Culver, 7 Cow. (N. Y.) 336); but a bill so antedated is valid in the hands of a *bona fide* holder for value without notice (Page *v.* Morrell, 3 Abb. Dec. (N. Y.) 433, 3 Keyes (N. Y.) 117, 33 How. Pr. (N. Y.) 244; Mechanics', etc., Bank *v.* Schuyler, 7 Cow. (N. Y.) 337 note; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336).

58. *Kansas.*— Lowden *v.* Schoharie County Nat. Bank, 38 Kan. 533, 16 Pac. 748.

or place[59] of payment; to the amount to be paid;[60] and to the rate of interest.[61]

c. Time For Filling. The blank should be filled by the holder within a reasonable time and what this is is a question for the jury.[62] It may be before or after signing,[63] after transfer,[64] after maturity of the paper,[65] after the drawer who left the blank has become insolvent[66] or *non compos*,[67] or after the dissolution of

Kentucky.—Rogers *v.* Poston, 1 Metc. (Ky.) 643, where a reasonable time of payment was supplied in the case of a blank acceptance.

Louisiana.— Shultz *v.* Payne, 7 La. Ann. 222.

Maine.— Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539.

Missouri.— Ivory *v.* Michael, 33 Mo. 398, as against an indorser before delivery.

New York.— McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372.

Ohio.— Fullerton *v.* Sturges, 4 Ohio St. 529.

South Carolina.—Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294.

Vermont.— Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

Virginia.— Douglas *v.* Scott, 8 Leigh (Va.) 43.

But see Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236, holding that the insertion of a specified time of payment in a note, if made without authority, will avoid the instrument.

See 7 Cent. Dig. tit. "Bills and Notes," § 90.

Although filled in a way not authorized by him the maker will be liable to an innocent holder. Elliott *v.* Levings, 54 Ill. 213; Johns *v.* Harrison, 20 Ind. 317; Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294; Waldron *v.* Young, 9 Heisk. (Tenn.) 777.

A mere omission by mistake will be supplied, such as the word "months" after date (Loomis *v.* Freer, 4 Ill. App. 547; Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539; Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59; McLean *v.* Nichlen, 3 Vict. L. Rep. 107), "days" (Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408; Weems *v.* Parker, 60 Ill. App. 167; Deshon *v.* Leffler, 7 Mo. App. 595), "year" (Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684; Hunt *v.* Adams, 6 Mass. 519), "date" (McPherson *v.* Biscoe, 3 Ark. 90; Pearson *v.* Stoddard, 9 Gray (Mass.) 199), or in designation of the year the word "hundred" (Massic *v.* Belford, 68 Ill. 290). But to the effect that parol evidence is inadmissible to explain a note payable "in one from the first of October following the date" see Wainwright *v.* Straw, 15 Vt. 215, 40 Am. Dec. 675.

59. See *supra*, I, C, 1, g, (I), (B).

60. See *supra*, I, C, 1, e, (III), (A), (2).

61. Visher *v.* Webster, 8 Cal. 109; Port Huron First Nat. Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589.

A mere omission or mistake will be supplied, as the word "per" (Williams *v.* Baker, 67 Ill. 238), "interest" (Thompson *v.* Hoagland, 65 Ill. 310), or "date" (Miller *v.* Cavanaugh, 18 Ky. L. Rep. 183, 35 S. W. 920), or completing an unfinished word (Gramer *v.* Joder, 65 Ill. 314).

A blank cannot be filled above the legal rate (Hoopes *v.* Collingwood, 10 Colo. 107, 13 Pac. 909, 3 Am. St. Rep. 565; Patton *v.* Shanklin, 14 B. Mon. (Ky.) 15; Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661), the statutory rate, in the absence of a rate expressed (Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468), or the rate agreed upon (Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534; Weyerhauser *v.* Dun, 100 N. Y. 150, 2 N. E. 274).

If an illegal rate is filled in by the payee the note is void as against the maker. Paris Nat. Bank *v.* Nickell, 34 Mo. App. 295. But while filling a blank by inserting an optional rate of interest does not bind the maker it does not destroy the right to recover the principal and legal interest. Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534.

62. Temple *v.* Pullen, 8 Exch. 389, 22 L. J. Exch. 151.

What is reasonable time.— Four years has been held to be unreasonable (Snyder *v.* Armstrong, 9 Phila. (Pa.) 146, 30 Leg. Int. (Pa.) 304), the drawer having married in the meantime and changed her name (Daniels *v.* Empire State Sav. Bank, 92 Hun (N. Y.) 450, 38 N. Y. Suppl. 580, 74 N. Y. St. 207), and twelve years has been held not unreasonable (Montague *v.* Perkins, 17 Jur. 577, 22 L. J. C. P. 187, 1 Wkly. Rep. 437).

When filled it is said to relate back to the time of the delivery of the instrument in blank. Barker *v.* Sterne, 2 C. L. R. 1020, 9 Exch. 684, 23 L. J. Exch. 201, 2 Wkly. Rep. 418; Snaith *v.* Mingay, 1 M. & S. 82. But *contra*, as to a blank acceptance, as distinguished from the drawing of a bill in blank. Abrahams *v.* Skinner, 12 A. & E. 763, 5 Jur. 97, 10 L. J. Q. B. 43, 4 P. & D. 358, 40 E. C. L. 378. And see Goldsmid *v.* Hampton, 5 C. B. N. S. 94, 94 E. C. L. 94.

63. Battalora *v.* Erath, 25 La. Ann. 318.

64. Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665; Carson *v.* Hill, 1 McMull. (S. C.) 76 (after transfer as collateral security by way of pledge).

It may be filled after the accommodation indorsement and delivery to the maker and before delivery by him. Burton *v.* Goffin, 5 Brit. Col. 454.

65. Farmers', etc., Bank *v.* Horsey, 2 Houst. (Del.) 385.

66. Fetters *v.* Muncie Nat. Bank, 34 Ind. 251, 7 Am. Rep. 225; Abrahams *v.* Skinner, 12 A. & E. 763, 5 Jur. 97, 10 L. J. Q. B. 43, 4 P. & D. 358, 40 E. C. L. 378; *Ex p.* Bartlett, 3 De G. & J. 378, 60 Eng. Ch. 295. But see Temple *v.* Pullen, 8 Exch. 389, 22 L. J. Exch. 151.

67. Bechtel's Estate, 133 Pa. St. 367, 19 Atl. 412.

the firm to be bound by it;[68] but not after the death of the party to be bound.[69] It may even be filled during the trial of the cause;[70] and in the case of a blank indorsement at least it is not essential that it should be filled at all before judgment,[71] although it has been held to be different with a blank left in the body of the paper for the payee's name.[72]

d. Extent of Power — (i) *In General.* The power to fill blanks includes power to supply mere verbal omissions;[73] but not to make additions[74] or erasures,[75] and even where an open space has been left by the maker's negligence

68. Chemung Canal Bank *v.* Bradner, 44 N. Y. 680.

69. Canal, etc., R. Co. *v.* Armstrong, 27 La. Ann. 433; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

The rule is different in the case of a blank acceptance coupled with an interest (Hatch *v.* Searles, 2 Smale & G. 147) or of an indorsement in blank (Barnes *v.* Reynolds, 4 How. (Miss.) 114), and the death of a partner does not prevent the filling of a blank date in a partnership note (Usher *v.* Dauncey, 4 Camph. 97, 15 Rev. Rep. 729).

70. Croskey *v.* Skinner, 44 Ill. 321; Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640; Mitchell *v.* Mitchell, 11 Gill. & J. (Md.) 388; Seay *v.* State Bank, 3 Sneed (Tenn.) 558, 67 Am. Dec. 579. Or it may be dispensed with at the trial. Weston *v.* Myers, 33 Ill. 424.

71. Rees *v.* Conococheaque Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755.

72. Greenhow *v.* Boyle, 7 Blackf. (Ind.) 56. *Contra,* Weston *v.* Myers, 33 Ill. 424; Wood *v.* Wellington, 30 N. Y. 218.

73. Of this character are "dollars" and the dollar mark ($), and mere misspelled or unfinished words.

Connecticut. — Booth *v.* Wallace, 2 Root (Conn.) 247.

Illinois.— Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286.

Indiana.— Glenn *v.* Porter, 72 Ind. 525; Ohm *v.* Yung, 63 Ind. 432.

Maine.— Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539.

Massachusetts.— Sweetser *v.* French, 13 Metc. (Mass.) 262; Hunt *v.* Adams, 6 Mass. 519.

Missouri.— Murrill *v.* Handy, 17 Mo. 406.

New York.— Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93.

Ohio.— McCoy *v.* Gilmore, 7 Ohio 268.

Tennessee.— Williamson *v.* Smith, 1 Coldw. (Tenn.) 1, 78 Am. Dec. 478.

Texas.—Garrett *v.* Interstate Bank, 79 Tex. 133, 15 S. W. 224.

Vermont.— Northrop *v.* Sanborn, 22 Vt. 433, 54 Am. Dec. 83. *Contra,* Brown *v.* Bebee, 1 D. Chipm. (Vt.) 227, 6 Am. Dec. 728.

74. Adding a seal where the seal is immaterial, the blank being properly filled, does not vitiate the instrument (Fullerton *v.* Sturges, 4 Ohio St. 529; Frazier *v.* Gains, 2 Baxt. (Tenn.) 92), but one who signs a blank paper as surety is not bound if the principal fills in a note, adding his own signature and seals for both signers (Smith *v.* Carder, 33 Ark. 709).

Attorney's fees.— The clause, "with —— per cent. attorney's commissions if collected," cannot be filled in without a special agreement. Johnston *v.* Speer, 92 Pa. St. 227, 37 Am. Rep. 675.

Interest clause added or enlarged.

Connecticut.— Mahaiwe Bank *v.* Douglass, 31 Conn. 170.

Indiana.— Franklin L. Ins. Co. *v.* Courtney, 60 Ind. 134; Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15 (where "after maturity" was added to the interest clause); Kountz *v.* Hart, 17 Ind. 329.

Iowa.— Conger *v.* Crabtree, 88 Iowa 536, 55 N. W. 335, 45 Am. St. Rep. 249. In Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143, however, an addition which was erased in a public manner was held not to avoid the note.

Maine.— Waterman *v.* Vose, 43 Me. 504, "with interest."

Michigan.— Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661, holding that the words "with interest at" in a printed form do not authorize the insertion of the rate.

Missouri. — Presbury *v.* Michael, 33 Mo. 542; Ivory *v.* Michael, 33 Mo. 398.

New York.—Weyerhauser *v.* Dun, 100 N. Y. 150, 2 N. E. 274; McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372; Farmers' Nat. Bank *v.* Thomas, 79 Hun (N. Y.) 595, 29 N. Y. Suppl. 837, 61 N. Y. St. 518.

West Virginia.— Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

Negotiable words.— Simmons *v.* Atkinson, etc., Co., 69 Miss. 862, 12 So. 263, 23 L. R. A. 599; Bruce *v.* Westcott, 3 Barb. (N. Y.) 374; Lawton *v.* Millidge, 4 N. Brunsw. 520. But as to the effect of the words in a recital of the note in a collateral mortgage see Elliott *v.* Deason, 64 Ga. 63.

Place of payment.— McCoy *v.* Lockwood, 71 Ind. 319; Simpson *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554; Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

Time of payment.— Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236 (the note reading "after date I promise"); Farmers' Nat. Bank *v.* Thomas, 79 Hun (N. Y.) 595, 29 N. Y. Suppl. 837, 61 N. Y. St. 518; Bland *v.* O'Hagan, 64 N. C. 471.

Waiver of appraisement.—Holland *v.* Hatch, 11 Ind. 497, 71 Am. Dec. 363. But see Holland *v.* Hatch, 15 Ohio St. 464, where the addition was treated as surplusage.

75. Fontaine *v.* Gunter, 31 Ala. 258; Mahaiwe Bank *v.* Douglass, 31 Conn. 170. See also Angle *v.* Northwestern L. Ins. Co., 92

there is no implied authority to fill it, and the maker is not estopped by his negligence as against a *bona fide* purchaser.[76]

(II) *WHERE SIGNATURE BLANK.* A note may be written over a blank signature delivered for that purpose[77] or on the reverse side of a blank indorsement, which has been so delivered,[78] and a bill may be drawn on a blank acceptance,

U. S. 330, 23 L. ed. 556, holding that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or alter its material terms by erasing what is written or printed as a part thereof, or to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument.

Indorsements, however, may be struck out by a *bona fide* holder (Moore *v.* Maple, 25 Ill. 341), but if he strike out an indorser's name and insert it in a blank acceptance this will discharge a co-indorser signing before the alteration (Mahone *v.* Central Bank, 17 Ga. 111).

76. The bill or note being complete in itself.

Iowa.— Conger *v.* Crabtree, 88 Iowa 536, 55 N. W. 335, 45 Am. St. Rep. 249; Grand Haven First Nat. Bank *v.* Hall, 83 Iowa 645, 50 N. W. 944; Knoxville Nat. Bank *v.* Clark, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129.

Massachusetts.— Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67; Wade *v.* Withington, 1 Allen (Mass.) 561.

Missouri.— Lammers *v.* White Sewing Mach. Co., 23 Mo. App. 471.

New Hampshire.— Goodman *v.* Eastman, 4 N. H. 455.

England.— So in the case of a bill written on a paper with a stamp for a much larger amount, and altered to that amount. Scholfield *v.* Londeshorough, [1896] A. C. 514, 65 L. J. Q. B. 593, 75 L. T. Rep. N. S. 254, 45 Wkly. Rep. 124 [*affirming* [1894] 2 Q. B. 660, [1895] 1 Q. B. 536, *reversing* the earlier cases, and *repudiating* Young *v.* Grote, 4 Bing. 253, 5 L. J. C. P. O. S. 165, 12 Moore C. P. 484, 29 Rev. Rep. 552, 13 E. C. L. 491, which the earlier cases followed]. So too Robarts *v.* Tucker, 16 Q. B. 560, 71 E. C. L. 560; Matter of North British Australasian Co., 7 C. B. N. S. 400, 97 E. C. L. 400; Orr *v.* Union Bank, 2 C. L. R. 1566, 1 Macq. 513; Arnold *v.* Cheque Bank, 1 C. P. 578, 45 L. J. C. P. 562, 34 L. T. Rep. N. S. 729, 24 Wkly. Rep. 759; Bank of Ireland *v.* Evans, 5 H. L. Cas. 389; British Linen Co. *v.* Caledonian Ins. Co., 7 Jur. N. S. 587, 4 L. T. Rep. N. S. 162, 4 Macq. 107, 9 Wkly. Rep. 581.

The contrary rule had been laid down in Young *v.* Grote, 4 Bing. 253, 5 L. J. C. P. O. S. 165, 12 Moore C. P. 484, 29 Rev. Rep. 552, 13 E. C. L. 491, and followed in some American cases (Holmes *v.* Ft. Gaines Bank, 120 Ala. 493, 24 So. 959; Winter *v.* Pool, 104 Ala. 580, 16 So. 543; Isnard *v.* Torres, 10 La. Ann. 103; Abbott *v.* Rose, 62 Me. 194, 16 Am. Rep. 427; Weidman *v.* Symes, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603 [*reversing* 116 Mich. 619, 74 N. W. 1008]; Garrard *v.* Haddan, 67 Pa. St. 82, 5 Am. Rep. 412 [*distinguishing* Worrall *v.* Gheen, 39 Pa. St. 388, where the alteration was perceptible on the instrument's face]) and as to checks by later English cases (Halifax Union *v.* Wheelwright, L. R. 10 Exch. 183, 44 L. J. Exch. 121, 32 L. T. Rep. N. S. 802, 23 Wkly. Rep. 704; Swan *v.* North British Australasian Co., 2 H. & C. 175). A distinction too has been made in some of the cases between the drawer or accepter of a bill and the drawer of a check. See Scholfield *v.* Londeshorough, [1896] A. C. 514, 65 L. J. Q. B. 593, 75 L. T. Rep. N. S. 254, 45 Wkly. Rep. 124; Halifax Union *v.* Wheelwright, L. R. 10 Exch. 183, 44 L. J. Exch. 121, 32 L. T. Rep. N. S. 802, 23 Wkly. Rep. 704; Swan *v.* North British Australasian Co., 2 H. & C. 175.

77. Manning *v.* Norwood, 1 Ala. 429 (but holding that there is no authority to make it a sealed bond); Roberts *v.* Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291; Geddes *v.* Blackmore, 132 Ind. 55, 32 N. E. 567; Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58 (holding that the party so signing is liable notwithstanding the omission of an additional signature which had been agreed on); Patton *v.* Shanklin, 14 B. Mon. (Ky.) 15 (holding that there is no authority to make the interest clause for more than legal interest).

Holder without authority.— If a man writes his name upon a blank piece of paper, and another person obtains possession of the same, and without authority to use it for any purpose writes a promissory note over the name and negotiates it, such note is not valid in the hands of an innocent holder against the person whose name is subscribed to it. Nance *v.* Lary, 5 Ala. 370. So where the paper was delivered to be filled up as a note it was held that the holder was without authority to write therein a sealed note. Smith *v.* Carder, 33 Ark. 709.

78. To the order of the indorser (Moody *v.* Threlkeld, 13 Ga. 55; Young *v.* Ward, 21 Ill. 223; Bradford Nat. Bank *v.* Taylor, 75 Hun (N. Y.) 297, 27 N. Y. Suppl. 96, 56 N. Y. St. 754; Ferguson *v.* Childress, 9 Humphr. (Tenn.) 382; Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61) or of the maker himself (Binney *v.* Globe Nat. Bank, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379), and in violation of the conditions on which it was delivered (Freeport First Nat. Bank *v.* Compo-Board Mfg. Co., 61 Minn. 274, 63 N. W. 731) and although the signer may have intended to become a surety only (Moody *v.* Threlkeld, 13 Ga. 55).

Said to be "a letter of credit."— A blank indorsement on a printed note blank is said to be "a letter of credit for an indefinite

which has been duly executed and stamped;[79] but the form itself cannot be changed and the blanks filled so as to make a different instrument.[80]

(III) *Effect of Exceeding Power.* Where the original power is exceeded it may be cured by a subsequent ratification;[81] but it is no defense against a *bona fide* holder that the power has been exceeded, where this is not apparent on the paper itself,[82] or that the holder has departed from the power conferred, as by inserting another name than that intended.[83] That the authority has been exceeded is of course available as a defense against holders with notice,[84] although

sum." Lord Mansfield in Russel *v.* Langstaffe, 2 Dougl. 514.

Either a negotiable or a non-negotiable note may be written on the blank paper. Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334; Orrick *v.* Colston, 7 Gratt. (Va.) 189; Douglass *v.* Scott, 8 Leigh (Va.) 43.

79. Montague *v.* Perkins, 17 Jur. 577, 22 L. J. C. P. 187, 1 Wkly. Rep. 437; Scard *v.* Jackson, 34 L. T. Rep. N. S. 65 note.

80. Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 385; Luellen *v.* Hare, 32 Ind. 211.

81. Bremner *v.* Fields, (Tex. Civ. App. 1896) 34 S. W. 447.

82. *Alabama.*—Robertson *v.* Smith, 18 Ala. 220.

Indiana.— Geddes *v.* Blackmore, 132 Ind. 551, 32 N. E. 567.

Missouri.— Farmers' Bank *v.* Garten, 34 Mo. 119.

Ohio.— Selser *v.* Brock, 3 Ohio St. 302.

Pennsylvania.— Simpson *v.* Bovard, 74 Pa. St. 351.

United States.— National Exch. Bank *v.* White, 30 Fed. 412.

Adding words of negotiability.— This is so where words are added to make the paper negotiable (Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334; Orrick *v.* Colston, 7 Gratt. (Va.) 189; Douglass *v.* Scott, 8 Leigh (Va.) 43), as by making it payable at a bank for that purpose (Gillaspie *v.* Kelley, 41 Ind. 158, 13 Am. Rep. 318), and such an addition is a material alteration (Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636).

Inserting larger sum than agreed.— This is true where a larger sum than that agreed upon is filled in the blank.

Alabama.— Decatur Bank *v.* Spence, 9 Ala. 800; Huntington *v.* Mobile Branch Bank, 3 Ala. 186; Herbert *v.* Huie, 1 Ala. 18, 34 Am. Dec. 755.

Illinois.— Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246; Yocum *v.* Smith, 63 Ill. 321, 14 Am. Rep. 120; Young *v.* Ward, 21 Ill. 223.

Indiana.— Gothrupt *v.* Williamson, 61 Ind. 599; Wilson *v.* Kinsey, 49 Ind. 35; Johns *v.* Harrison, 20 Ind. 317.

Kansas.— Joseph *v.* Eldorado First Nat. Bank, 17 Kan. 256.

Kentucky.— Woolfolk *v.* Bank of America, 10 Bush (Ky.) 504; Smith *v.* Lockridge, 8 Bush (Ky.) 423; Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58; Smith *v.* Moberly, 10 B. Mon. (Ky.) 266, 52 Am. Dec. 543; Hall *v.* Commonwealth Bank, 5 Dana (Ky.) 258, 30 Am. Dec. 685; Commonwealth Bank *v.* Curry, 2 Dana (Ky.) 142; Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25.

Maine.—Market, etc., Nat. Bank *v.* Sargent, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376; Abbott *v.* Rose, 62 Me. 194, 16 Am. Rep. 427.

Mississippi.— Fanning *v.* Farmers', etc., Bank, 8 Sm. & M. (Miss.) 139.

Missouri.— Tumilty *v.* State Bank, 13 Mo. 276.

New York.— Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Van Duzer *v.* Howe, 21 N. Y. 531; Griggs *v.* Howe, 31 Barb. (N. Y.) 100.

North Carolina.— McArthur *v.* McLeod, 51 N. C. 475.

Pennsylvania.— Gillespie *v.* Rogers, 184 Pa. St. 488, 39 Atl. 290.

South Carolina.— Diercks *v.* Roberts, 13 S. C. 338.

Tennessee.— Frazier *v.* Gains, 2 Baxt. (Tenn.) 92; Waldron *v.* Young, 9 Heisk. (Tenn.) 777; Nichol *v.* Bate, 10 Yerg. (Tenn.) 429.

Wisconsin.— Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

England.— Molloy *v.* Delves, 7 Bing. 428, 20 E. C. L. 194, 4 C. & P. 492, 19 E. C. L. 617, 9 L. J. C. P. O. S. 171, 5 M. & P. 75; Barker *v.* Sterne, 2 C. L. R. 1020, 9 Exch. 684, 23 L. J. Exch. 201, 2 Wkly. Rep. 418; Russel *v.* Langstaffe, 2 Dougl. 514; Collis *v.* Emmett, 1 H. Bl. 313; Leslie *v.* Hastings, 1 M. & Rob. 119; Snaith *v.* Mingay, 1 M. & S. 87.

Canada.— Nova Scotia Bank *v.* Lepage, 6 Montreal Super. Ct. 321. See also Dorwin *v.* Thomson, 13 L. C. Jur. 262.

See 7 Cent. Dig. tit. "Bills and Notes," § 89.

83. Name of maker.— Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257.

Name of cosurety.— Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58.

Name of accommodation indorser.— Diercks *v.* Roberts, 13 S. C. 338.

Name of payee.— Huntington *v.* Mobile Branch Bank, 3 Ala. 186; Gothrupt *v.* Williamson, 61 Ind. 599; Wilson *v.* Kinsey, 49 Ind. 35; Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294. And where an unintended name has been filled in as payee and he takes without notice, he will be treated as a *bona fide* holder for value, where the amount has been exceeded, although the defense is set up by a surety. Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63.

84. *Connecticut.*—Booth *v.* Wallace, 2 Root (Conn.) 247.

Georgia.— Clower *v.* Wynn, 59 Ga. 246.

Indiana.— Johns *v.* Harrison, 20 Ind. 317.

in some jurisdictions the amount actually authorized by the maker may be recovered by a holder who knew that the authorized limit had been exceeded, the note being void as to the excess only.[85]

3. CONTEMPORANEOUS AGREEMENTS. A bill or note is sometimes construed with a separate contemporaneous writing as one contract,[86] and this is a matter of common occurrence in the case of a note with collateral mortgage or agreement.[87]

Kentucky.— Smith *v.* Lockridge, 8 Bush (Ky.) 423.

Maine.— Coolbroth *v.* Purinton, 29 Me. 469.

Missouri.—Wagner *v.* Diedrich, 50 Mo. 484; Murrill *v.* Handy, 17 Mo. 406; Grant *v.* Brotherton, 7 Mo. 458; Mackey *v.* Basil, 50 Mo. App. 190 (original holder). *Contra,* Harris *v.* Enyart, 13 Mo. 108.

Ohio.— McCoy *v.* Gilmore, 7 Ohio 268.

United States.—Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377.

What constitutes notice.— Notice of limitation of authority must, to operate as a defense, be brought home to the holder. Snyder *v.* Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739. Knowledge that the instrument was executed in blank is not such notice as will subject him to defenses on the ground that the maker's authority was exceeded, of which fact he has no knowledge. Huntington *v.* Mobile Branch Bank, 3 Ala. 186; Joseph *v.* Eldorado First Nat. Bank, 17 Kan. 256; Snyder *v.* Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739. Nor even, it has been held, that he executed it in blank, with authority to fill it up in a particular manner, and that he filled it up in a different manner, without the further proof that the payee took the note with notice of the particular authority to fill up the blank. Torrey *v.* Fisk, 10 Sm. & M. (Miss.) 590. The mere discounting of a note with such a blank raises no presumption against the *bona fides* of the holder. Chemung Canal Bank *v.* Bradner, 44 N. Y. 680.

85. Clower *v.* Wynn, 59 Ga. 246; Goss *v.* Whitehead, 33 Miss. 213; Goad *v.* Hart, 8 Sm. & M. (Miss.) 787; Hemphill *v.* Alabama Bank, 6 Sm. & M. (Miss.) 44; Johnson *v.* Blasdale, 1 Sm. & M. (Miss.) 17, 40 Am. Dec. 85. But this is not the rule in New York (Ogden *v.* Pope, 18 N. Y. Suppl. 140, 44 N. Y. St. 646) or in Louisiana as to the party who knowingly fills it up for an excessive amount (Robertson *v.* Glasscock, 6 La. Ann. 124).

86. *Illinois.*— Davis *v.* McVickers, 11 Ill. 327.

Indiana.— Allen *v.* Nofsinger, 13 Ind. 494.

Kansas.— Weeks *v.* Medler, 20 Kan. 57.

Louisiana.— Davidson *v.* Bodley, 27 La. Ann. 149.

Michigan.— Singer Mfg. Co. *v.* Haines, 36 Mich. 385.

New Hampshire.— Hill *v.* Huntress, 43 N. H. 480.

New Jersey.— Babbitt *v.* Moore, 51 N. J. L. 229, 17 Atl. 99.

Ohio.— Berry *v.* Wisdom, 3 Ohio St. 241.

Wisconsin.— Elmore *v.* Hoffman, 6 Wis. 68.

United States.— Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204.

See 7 Cent. Dig. tit. "Bills and Notes," § 325.

This was so where the note contained an express reference to the agreement (Wood *v.* Ridgeville College, 114 Ind. 320, 16 N. E. 619 [where the note contained a condition regarding payment thereof on a certificate of tuition in a college, for which the note was given, all being made at the same time]; American Gas, etc., Co. *v.* Wood, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449 [where the note was to be surrendered on return of the consideration]; Post *v.* Kinzua Hemlock R. Co., 171 Pa. St. 615, 33 Atl. 362) and where the agreement related to a consideration yet to be earned (Montgomery *v.* Hunt, 99 Ga. 499, 27 S. E. 701; Montgomery *v.* Hunt, 93 Ga. 438, 21 S. E. 59; McNamara *v.* Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355; Sutton *v.* Beckwith, 68 Mich. 303, 36 N. W. 79, 13 Am. St. Rep. 344).

Instruments bearing different dates.— A note and a lease may be construed together, although they bear different dates. Murphy *v.* Farley, 124 Ala. 279, 27 So. 442. But a note and a deed of trust executed more than two months apart, both being about the same transaction, cannot be treated as parts of one transaction. Wooters *v.* Foster, 1 Tex. App. Civ. Cas. § 700.

87. *Alabama.*— Commercial Bank *v.* Crenshaw, 103 Ala. 497, 15 So. 741; Pritchard *v.* Miller, 86 Ala. 500, 5 So. 784 (where the body of a note made no reference to interest, but in the margin were figures representing both principal and interest from date to maturity and the mortgage recited that it was given to secure the payment of this note, "with interest from date to maturity").

Arkansas.— Richardson *v.* Thomas, 28 Ark. 387, where all other property of the maker of the note was exempted from liability in the mortgage.

Connecticut.— Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354, interest clause.

Georgia.— Elliott *v.* Deason, 64 Ga. 63, where a note made to "W. L. Prentice, or ——" was explained by the mortgage as payable to the person named or bearer.

Illinois.— Hunter *v.* Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; Holmes *v.* Parker, 125 Ill. 478, 17 N. E. 759 (a note to the person named and collateral power to enter judgment for "Holmes and Bro.").

Kansas.— Meyer *v.* Graeber, 19 Kan. 165 (where a note was payable in four years with interest, without specifying when the interest was to be paid, and the mortgage securing it provided for annual interest, and it was held that the interest on the note was payable annually); Sturgis First Nat. Bank *v.* Peck, 8 Kan. 660; Muzzy *v.* Knight, 8 Kan. 456;

Such agreement may render the note conditional,[88] otherwise modify its terms,[89]

Lockrow *v.* Cline, 4 Kan. App. 716, 46 Pac. 720 (where the negotiability of the bonds was determined by the construction of the mortgage securing them).

Kentucky.— Park *v.* Cooke, 3 Bush (Ky.) 168.

Massachusetts.—Hunt *v.* Livermore, 5 Pick. (Mass.) 395, where a receipt for an insurance premium provided for the surrender of the premium note on a certain contingency.

Michigan.— Lawrence *v.* Griswold, 30 Mich. 410, receipt and note for an insurance premium.

Missouri.— Noell *v.* Gaines, 68 Mo. 649; Brownlee *v.* Arnold, 60 Mo. 79 (a trust deed given to secure several notes maturing at different times and postponing the maturity of all till the last became due).

North Dakota.— St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867.

Texas.— Pfeuffer *v.* Wilderman, 1 Tex. App. Civ. Cas. § 1169, where the mortgage was conditioned that upon the happening of certain events the note should become due at once.

Utah.— Donaldson *v.* Grant, 15 Utah 231, 49 Pac. 779.

This is especially true where the mortgage refers to the note as payable according to its tenor (Dobbins *v.* Parker, 46 Iowa 357; Grinnell *v.* Baxter, 17 Pick. (Mass.) 386, the latter case holding that such mortgage might be sued on as a duplicate note after the note has been barred by the statute of limitations) and the form of remedy may be restricted to foreclosure of the mortgage by a proviso in the note that it is "secured by . . . mortgage . . . and governed by the conditions thereof" (Seieroe *v.* Kearney First Nat. Bank, 50 Nebr. 612, 70 N. W. 220).

Where several notes maturing at different times are secured by a trust deed which accelerates the maturity of all on default in any, it is held in some cases that the instruments ought to be construed together. Chambers *v.* Marks, 93 Ala. 412, 9 So. 74; Noell *v.* Gaines, 68 Mo. 649.

So where the mortgage contains a clause accelerating maturity of the principal on default in the interest. Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510; Park *v.* Cooke, 3 Bush (Ky.) 168; Consterdine *v.* Moore, (Nebr. 1902) 91 N. W. 399; Batchelder *v.* Council Grove Water Co., 131 N. Y. 42, 29 N. E. 801. See also Chambers *v.* Marks, 93 Ala. 412, 9 So. 74. *Contra*, as to acceleration on default in interest.

Iowa.— Trease *v.* Haggin, 107 Iowa 458, 78 N. W. 58.

Minnesota.— White *v.* Miller, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673, time for suit on note not accelerated by option in mortgage maturing it on default of interest.

Missouri.— Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154.

Ohio.— McClelland *v.* Bishop, 42 Ohio St. 113, time not accelerated for demand and notice against indorser.

Rhode Island.— American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103.

88. *Colorado.*— Munro *v.* King, 3 Colo. 238.

Indiana.— Wood *v.* Ridgeville College, 114 Ind. 320, 16 N. E. 619; Titlow *v.* Hubbard, 63 Ind. 6 (where the note was made "subject to certain conditions contained in a written agreement of this date"); Hickman *v.* Rayl, 55 Ind. 551; Woodward *v.* Mathews, 15 Ind. 339.

Kansas.— Lockrow *v.* Cline, 4 Kan. App. 716, 46 Pac. 720.

Kentucky.— Davis *v.* Logan, 5 J. J. Marsh. (Ky.) 298.

Minnesota.— Syracuse Third Nat. Bank *v.* Armstrong, 25 Minn. 530, title of property purchased not to pass till the note was paid.

Missouri.— Jennings *v.* Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373, where the agreement constituted a condition for the payment of the note.

Nebraska.— Seieroe *v.* Kearney First Nat. Bank, 50 Nebr. 612, 70 N. W. 220, where the note was to be "governed by the conditions" of the mortgage.

New York.— McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 6 Am. St. Rep. 397, 1 L. R. A. 299; Divine *v.* Divine, 58 Barb. (N. Y.) 264.

Pennsylvania.— Post *v.* Kinzua Hemlock R. Co., 171 Pa. St. 615, 33 Atl. 362 (a due-bill for rent under "lease and conditional sale 'of even date'"); Reed *v.* Cossatt, 153 Pa. St. 156, 25 Atl. 1074 (the note being "subject to agreement" to look to certain securities only and to no other property).

Texas.— Rogers *v.* Broadnax, 24 Tex. 538, 27 Tex. 238.

Utah.— Donaldson *v.* Grant, 15 Utah 231, 49 Pac. 779, where the mortgage contained an agreement as to payment of taxes.

United States.— Thomas *v.* Page, 3 McLean (U. S.) 167, 23 Fed. Cas. No. 13,906.

It may defeat the note (Crosman *v.* Fuller, 17 Pick. (Mass.) 171), and in such case the holder cannot repudiate even an illegal agreement and bring suit on the note (O'Brien *v.* McDonald, 144 N. Y. 716, 39 N. E. 858 [*affirming* 78 Hun (N. Y.) 420, 29 N. Y. Suppl. 191, 60 N. Y. St. 748]). But in Saunders *v.* Richardson, 2 Sm. & M. (Miss.) 90, it was held that an agreement in a deed to accept payment in bank paper for certain notes given for the consideration of the deed was a mere defeasance which would avoid the note only by strict compliance, and that it was no part of the note.

89. *California.*— Goodwin *v.* Nickerson, 51 Cal. 166, where there was a contemporaneous stipulation under seal for conditional payment out of the proceeds of a mine.

Illinois.— Bradley *v.* Marshall, 54 Ill. 173, allowing payment in rent.

Kansas.—Weeks *v.* Medler, 20 Kan. 57, payment of note in work. And it has been held that the contract embodied in a note may be modified by a mortgage given to secure the

or defeat recovery upon it by showing a failure of consideration,[90] but it cannot be used to contradict the note.[91] It must be between the same parties as the note itself,[92] and can only be used as a defense against the original parties or against subsequent parties with notice.[93]

4. MEMORANDA — a. When Part of Instrument. A memorandum on the back, margin, or face of the paper forms in general part of it, where it was made before the execution of the instrument,[94] unless placed upon it for identification

same, so as to render the maker liable in a representative capacity only. Cabbell *v.* Knote, 2 Kan. App. 68, 43 Pac. 309.

Kentucky.— Tranter *v.* Hibberd, 21 Ky. L. Rep. 1710, 56 S. W. 169.

Michigan.— Singer Mfg. Co. *v.* Haines, 36 Mich. 385, where the agreement provided for payment of the note in work.

Minnesota.— Bingham *v.* Stewart, 14 Minn. 214, to prove that a promissory note by the trustees of a school district was to be the note of such district and not of defendants.

Nebraska.— Polo Mfg. Co. *v.* Parr, 8 Nebr. 379, 1 N. W. 312, 30 Am. Rep. 830, an indorsement, "to be paid in wheat."

New Hampshire.— Hill *v.* Huntress, 43 N. H. 480, allowing payment in hides.

New York.— Treadwell *v.* Archer, 76 N. Y. 196 [*reversing* Sherwood *v.* Archer, 10 Hun (N. Y.) 73], a contemporaneous agreement by a married woman charging her separate estate.

The maturity of the note may be affected by such an agreement that it shall not be payable until a person named sells so many bushels of oats. Jacobs *v.* Mitchell, 46 Ohio St. 601, 22 N. E. 768. So where the parties agreed in writing that the payment covered by the note, but not mentioning the note, should not bear interest for the first six months or be due in fact until eighteen months after date (Terry *v.* Hammond, 53 Cal. 120), and where a note was drawn payable one day after date, and on the next day, pursuant to original agreement, an obligation was entered into by the payee whereby the maker was to have five years in which to pay and still later, pursuant to such agreement, a mortgage securing the note and such obligation was delivered (Round *v.* Donnel, 5 Kan. 54). On the other hand a collateral agreement not to demand payment until a certain time after the note matured, giving the maker the right to sue for a breach thereof, is no bar to a recovery on the note after its maturity (Dow *v.* Tuttle, 4 Mass. 414, 3 Am. Dec. 226), and the maker cannot set up a written agreement that if at the time of the maturity of the notes it should not be convenient for defendant to pay the same plaintiff should wait the convenience of defendant, in consideration of his paying interest (Atwood *v.* Lewis, 6 Mo. 392).

90. Talbott *v.* Heinze, 25 Mont. 4, 63 Pac. 624, where the note was given in consideration of an agreement made a few days earlier, which had not been performed.

91. *Indiana.*— McDonald *v.* Elfes, 61 Ind. 279, to show that a note payable to the administrator of a particular person was to be applied only in satisfaction of a debt of such person to the maker.

Iowa.— Levally *v.* Harmon, 20 Iowa 533, holding that a collateral agreement containing a misrecital of the terms of a promissory note, but no covenant that the note is to be paid only on the terms contained in such agreement, will not be construed as changing the condition named in the note itself.

New Hampshire.—Porter *v.* Pierce, 22 N. H. 275, 55 Am. Dec. 151, by showing that it was to be transferred to a third person on certain conditions.

Pennsylvania.— Geisinger's Estate, 2 Pa. Dist. 735, to be "null and void" after the maker's death. So in the absence of fraud or mistake it is not competent to show an agreement made contemporaneously with the giving of a note changing the time of payment, and stipulating that judgment should not be entered, although the note contained a confession. Philbin *v.* Davinger, 29 Leg. Int. (Pa.) 325.

Tennessee.— Lane *v.* Manning, 8 Yerg. (Tenn.) 435, 22 Am. Dec. 125, the maker not to be liable if he made default.

United States.— Gorrell *v.* New York Home L. Ins. Co., 63 Fed. 371, 24 U. S. App. 188, 11 C. C. A. 240, to make it payable only out of a certain fund mentioned in a letter accompanying the note.

See also *infra*, XIV, E [8 Cyc.].

But where a note was made between partners a contemporaneous agreement may show that it was given to secure the payee against loss of the partnership capital and to limit the recovery to that amount. Rogers *v.* Smith, 47 N. Y. 324.

92. Levally *v.* Harmon, 20 Iowa 533; McGregor *v.* Bugbee, 15 Vt. 734. Even when written on the same paper. Brewster *v.* Silence, 8 N. Y. 207. So the maker of the note cannot testify to the contents of a lost written memorandum, signed by himself and handed to plaintiff at the same time the note was executed and delivered, it not being shown that this memorandum constituted any part of the contract between the parties or was accepted by plaintiff as such. Bull *v.* Edward Thompson Co., 99 Ga. 134, 25 S. E. 31.

93. As to defenses generally see *infra*, XIV, B [8 Cyc.].

94. *Alabama.*— Seymour *v.* Farquhar, 93 Ala. 292, 8 So. 466.

Colorado.— Hughes *v.* Fisher, 10 Colo. 383, 15 Pac. 702.

Illinois.— Van Zandt *v.* Hopkins, 151 Ill. 248, 37 N. E. 845; Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286.

or otherwise, as a mere earmark.[95] If it was made after the bill or note was delivered it will not be construed as part of it;[96] and it is a question of fact for the jury to determine the time and circumstances under which it was made.[97]

b. Effect When Part of Instrument. The effect of a memorandum as part of the bill or note may be to render the instrument conditional.[98] Such a memo-

Indiana.— Woodward *v.* Mathews, 15 Ind. 339.

Kansas.— Doe *v.* Callow, (Kan. App. 1901) 63 Pac. 603.

Kentucky.— Farmers' Bank *v.* Ewing, 78 Ky. 264, 39 Am. Rep. 231.

Louisiana.— Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418.

Maine.— Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293; Johnson *v.* Heagan, 23 Me. 329.

Massachusetts.— Shaw *v.* First M. E. Soc., 8 Metc. (Mass.) 223; Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518.

Mississippi.— Key *v.* Cross, 23 Miss. 598.

Missouri.— Kalamazoo Nat. Bank *v.* Clark, 52 Mo. App. 593; Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501.

Nebraska.— Specht *v.* Beindorf, 56 Nebr. 553, 76 N. W. 1059, 42 L. R. A. 429; Grimison *v.* Russell, 14 Nebr. 521, 16 N. W. 819, 45 Am. Rep. 126; Polo Mfg. Co. *v.* Parr, 8 Nebr. 379, 1 N. W. 312, 30 Am. Rep. 830; Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479.

New Hampshire.— Gerrish *v.* Glines, 56 N. H. 9.

New York.— Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382.

Rhode Island.— Falkenburg *v.* Clark, 11 R. I. 278; Wilson *v.* Tucker, 10 R. I. 578.

South Dakota.— National Bank of Commerce *v.* Feeney, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L. R. A. 732.

Vermont.— Fletcher *v.* Blodgett, 16 Vt. 26, 42 Am. Dec. 487.

Wisconsin.— Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817; Kilkelly *v.* Martin, 34 Wis. 525.

United States.— Turnbull *v.* Thomas, 1 Hughes (U. S.) 172, 24 Fed. Cas. No. 14,243.

Canada.— Camphell *v.* McKinnon, 18 U. C. Q. B. 612.

See 7 Cent. Dig. tit. "Bills and Notes," § 330.

95. *Illinois.*— State Nat. Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657, holding that a memorandum for the depositor's convenience and as a guide to the bank to indicate the manner of appropriation of a certain fund does not change its character or the right or duty of the drawee.

Michigan.— Hudson *v.* Emmons, 107 Mich. 549, 65 N. W. 542 (the indorsement of a statement of the particular value of the maker's property); Buhl *v.* Trowbridge, 42 Mich. 44, 3 N. W. 245 (holding that a receipt for part payment and a memorandum of protest made are not part of the note and need not be included in the copy in the pleadings).

Mississippi.— Bay *v.* Shrader, 50 Miss. 326, holding that, being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed.

Missouri.— Black *v.* Epstein, 93 Mo. App. 459, 67 S. W. 736, an agreement providing for payment in instalments.

New York.— Brewster *v.* Silence, 8 N. Y. 207 (holding that a guaranty by S beneath B's note and delivered with it in accordance with a previous agreement is not a part of the note); Sanders *v.* Bacon, 8 Johns. (N. Y.) 485 (a statement that it was to be delivered to the payee in consideration of a judgment against a third person to be assigned to the maker by the payee).

North Carolina.— Bresee *v.* Crumpton, 121 N. C. 122, 28 S. E. 351, the number of the note or of an insurance policy for which it is given.

Tennessee.— State Bank *v.* Funding Bd., 16 Lea (Tenn.) 46, holding that the number and series of a bank-note forms no part of it.

England.— Brill *v.* Crick, 1 Gale 441, 5 L. J. Exch. 143, 1 M. & W. 232.

96. Stone *v.* Metcalf, 4 Camph. 217, 1 Stark. 53, 2 E. C. L. 30. And where by the memorandum itself it did not appear that the words were placed on the note at the time of its execution, it was held that it could not be regarded as part of the contract. Gift *v.* Hall, 1 Humphr. (Tenn.) 480.

97. Tuckerman *v.* Hartwell, 3 Me. 147, 14 Am. Dec. 225.

98. *Iowa.*— State *v.* Stratton, 27 Iowa 420, 1 Am. Rep. 282, providing that the note was to be considered paid "when the said Brown sells fifty dollars worth" of certain machines.

Kansas.— Doe *v.* Callow, 10 Kan. App. 581, 63 Pac. 603.

Maine.— Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293 (where it was provided that "this note is subject to" a certain contract); Ulmer *v.* Reed, 11 Me. 293 (where the words "surety ninety days from date" added to his signature by one of the makers, were held part of the note).

Massachusetts.— Franklin Sav. Inst. *v.* Reed, 125 Mass. 365, where it was provided that the note was not to be sued till a certain time.

Michigan.— Wait *v.* Pomeroy, 20 Mich. 425, 4 Am. Rep. 395, where it was provided that the note was not to be paid if a certain machine was not delivered.

Pennsylvania.— Zimmerman *v.* Rote, 75 Pa. St. 188, holding that a statement printed on the margin of the note to the effect that it was given for a patent and was not to be paid till a specified profit was obtained was part of the note, but that the alteration made by cutting off this marginal statement was no

randum may relate to and qualify the time,[99] place,[1] or medium[2] of payment, the amount to be paid,[3] the rate of interest,[4] or the particular fund to which it is referred

defense to maker at suit of *bona fide* holder, the maker being negligent.

Vermont.— Henry *v.* Colman, 5 Vt. 402, where payment is expressly made dependent on a certain contingency.

England.— Hartley *v.* Wilkinson, 1 Campb. 127, 4 M. & S. 25, where the provision was, "on condition that if any dispute shall arise . . . respecting the fir, the note to be void."

An agreement by the payee not to sell the note indorsed on the back thereof is not a part of the note and does not prevent recovery by an indorsee. Leland *v.* Parriott, 35 Iowa 454.

Expressing the payee's desire that indulgence be given the maker is not part of the note and does not constitute a condition. Stone *v.* Metcalf, 4 Camph. 217, 1 Stark. 53, 2 E. C. L. 30.

99. Thus it may correct an erroneous date (Fitch *v.* Jones, 5 E. & B. 238, 1 Jur. N. S. 854, 24 L. J. Q. B. 293, 3 Wkly. Rep. 507, 85 E. C. L. 238; Fanshawe *v.* Peet, 2 H. & N. 1, 26 L. J. Exch. 314, 5 Wkly. Rep. 489) or may render the time of payment contingent (Barnard *v.* Cushing, 4 Metc. (Mass.) 230, 38 Am. Dec. 362 [where there was a memorandum on the back of the note "not to compel payment thereof, but to receive the amount when convenient"]; Effinger *v.* Richards, 35 Miss. 540 [where it was payable "when a dividend . . . shall be declared"]).

The word "renewed" indorsed on the note has been held to have a similar effect as part of the note. Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673. But not so where indorsed without signature on the envelope containing the note. Central Bank *v.* Willard, 17 Pick. (Mass.) 150, 28 Am. Dec. 284. An indorsement "to be extended, if desired" by the makers is indefinite and immaterial. Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

Payment of the note may be postponed by a memorandum at the bottom "not to be collected until Nathaniel Treat takes it up, . . . as Mr. Heagan has paid said Treat" (Johnson *v.* Heagan, 23 Me. 329), "not to be compelled to pay said note before April 1st" (Franklin Sav. Inst. *v.* Reed, 125 Mass. 365), or "one half to be paid in 12 months, the balance in 24 months" (Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518); or on the back until the old mill is "sold for a fair price" (Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53), relieving from payment of the principal as long as the interest is paid (Oskaloosa College *v.* Hickok, 46 Iowa 237), "to be paid when C. McCalla collects a certain note on Thomas Pledger" (McCalla *v.* McCalla, 48 Ga. 502), or in the case of a negotiable municipal bond payable in twenty-nine years making it due on default of interest coupons (Griffin *v.* Macon City Bank, 58 Ga. 584).

A repugnant memorandum, or one in conflict with the tenor of the note as to time of payment, will be rejected. Tufts *v.* Shepherd, 49 Me. 312; Way *v.* Batchelder, 129 Mass. 361; Fisk *v.* McNeal, 23 Nebr. 726, 37 N. W. 616, 8 Am. St. Rep. 162. And see as to effect on days of grace of a memorandum that the note was "due" on the day named Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13.

1. Thus the words "Accepted to pay in Boston . . . A. F. Howe & Co." were held to indicate the office of A. F. Howe & Co. as a place of payment (Tuckerman *v.* Hartwell, 3 Me. 147, 14 Am. Dec. 225). And a marginal memorandum, "Payable at the Bank of America," has been held to be a part of the note, and when added after delivery to be a material alteration (Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239). In some jurisdictions, however, a memorandum pointing out the place of payment is held not to be a part of the instrument. American Nat. Bank *v.* Bangs, 42 Mo. 450, 97 Am. Dec. 329; Exon *v.* Russell, 4 M. & S. 506.

2. So of the words "foreign bills" (Jones *v.* Fales, 4 Mass. 245); "to be paid in notes on the bank of Kentucky," written across the end (Osborne *v.* Fulton, 1 Blackf. (Ind.) 233), "payable in merchantable fulled cloth one year from the month of October next," written on the margin (Fletcher *v.* Blodgett, 16 Vt. 26, 42 Am. Dec. 487); or "to be paid in wheat at ninety-five cents per bushel," on the back (Polo Mfg. Co. *v.* Parr, 8 Nebr. 379, 1 N. W. 312, 30 Am. Rep. 830) or "in facilities" (Springfield Bank *v.* Merrick, 14 Mass. 322). But if on a check for court deposits is written the number of the case this is not a direction for payment out of a special deposit (State Nat. Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657), and a memorandum that "this note is secured by real estate for their exclusive payment" does not make it payable in real estate (Branning *v.* Markham, 12 Allen (Mass.) 454). So a memorandum that the note may be paid by discharging the payee from another indorsement. Pool *v.* McCrary, 1 Ga. 319, 44 Am. Dec. 655.

3. To explain an omission of the word "dollars" or "pounds." Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286; Sweetser *v.* French, 13 Metc. (Mass.) 262; McCoy *v.* Gilmore, 7 Ohio 268.

4. Kilkelly *v.* Martin, 34 Wis. 525 (where the words "ten per cent. interest if not paid when due" were written on the face of a note after the last line of the printed form, and before the signatures of the makers); Warrington *v.* Early, 2 C. L. R. 398, 2 E. & B. 763, 18 Jur. 42, 23 L. J. Q. B. 47, 2 Wkly. Rep. 78, 75 E. C. L. 763 (where the words "with lawful interest" were written on the corner of the note at the time of its execution). But the words, "when due to draw fifteen per cent.," written below the signature by the payee have been held to be no part of the note in the absence of evidence as to

for payment;[5] it may relate to the consideration for the paper[6] or to the collateral securing it;[7] or it may be a waiver of presentment or notice of dishonor.[8]

5. Parts or Sets. A foreign bill of exchange is generally drawn in a set of two or three parts designated as "first," "second," etc. Each part calls for payment only in case the other designated parts remain unpaid; all the parts together constitute one bill,[9] and the direction does not make the instrument conditional.[10] If the face of the bill does not designate that it is in parts the payment of one part will not avail as a defense against the *bona fide* holder of another part.[11] The parts do not, however, constitute a set, although they are designated "first" and "second," if they are filled up differently.[12] So the word "duplicate" generally indicates a new draft, given without new liability, to replace one that has been lost or destroyed.[13]

D. Conflict of Laws — 1. General Principles — a. In General. An ordinary negotiable instrument often includes many contracts, each several signature — as maker, drawer, accepter, guarantor, surety, or indorser — being a separate contract.[14] Each contract may bring into question a different place and law, for each

when they were written. Knoles *v.* Hill, 25 Ill. 288.

Alteration.— A provision for interest to be paid semiannually, written on the face of a note after its execution, is a material alteration. Dewey *v.* Reed, 40 Barb. (N. Y.) 16.

5. Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382, where a memorandum under the signature provided for payment "from the profits of machines when sold." And it has been held that by a contemporaneous indorsement signed by the parties as follows: "The within mentioned note is confined to a certain mortgage of even date, given by said Amando D. Higgins and Mary T. Higgins to Waldo J. Elmore," the payee was confined for his recovery to the foreclosure of the mortgage, and the maker was relieved from personal liability. Elmore *v.* Higgins, 20 Iowa 250. But if a note provides for payment "in labor" within a specified time, and payment is not made in that way within the time limited, the provision expires and is not thereafter a part of the note. Odiorne *v.* Sargent, 6 N. H. 401. And see *supra*, I, C, 1, d, (II), (C), (2), (b).

6. Preston *v.* Whitney, 23 Mich. 260, "to be valid as part-pay for a piano-forte."

A marginal memorandum that the note is "given as collateral security with agreement" is part of the note and renders it contingent and non-negotiable. Costelo *v.* Crowell, 127 Mass. 293, 34 Am. Rep. 367; Haskell *v.* Lambert, 16 Gray (Mass.) 592; American Nat. Bank *v.* Sprague, 14 R. I. 410; Traders' Nat. Bank *v.* Smith, (Tex. Civ. App. 1893) 22 S. W. 1056 (where the consideration was a joint business subscription); Leeds *v.* Lancashire, 2 Camph. 205 (a recital that it is "for security of all such balances as James Marriott may happen to owe." In Sanders *v.* Bacon, 8 Johns. (N. Y.) 485, however, it was held that a contemporaneous indorsement showing the consideration formed no part of the note. So Tappan *v.* Ely, 15 Wend. (N. Y.) 362. But the authority of these cases was questioned in Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382, and they are no longer followed. A similar provision written on the back of the note "for securing floating advances . . . with lawful interest . . . commission," etc., has been held in England to be an agreement requiring an agreement stamp, although part of the note. Cholmley *v.* Darley, 14 L. J. Exch. 328, 14 M. & W. 344.

7. Memoranda reciting that collateral security has been given form no part of the note on which they are written (Fancourt *v.* Thorne, 9 Q. B. 312, 10 Jur. 639, 15 L. J. Q. B. 344, 58 E. C. L. 312; Wise *v.* Charlton, 4 A. & E. 786, 2 H. & W. 49, 6 L. J. K. B. 80, 6 N. & M. 364, 31 E. C. L. 346. *Contra*, Shaw *v.* First M. E. Soc., 8 Metc. (Mass.) 223) and do not affect its negotiability (Howry *v.* Eppinger, 34 Mich. 29), although the mortgage may contain a clause as to acceleration which in the bond would affect its negotiability (American Nat. Bank *v.* American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746, 29 L. R. A. 103). See also Aspen First Nat. Bank *v.* Mineral Farm Consol. Min. Co., (Colo. App. 1902) 68 Pac. 981.

8. Farmers' Bank *v.* Ewing, 78 Ky. 264, 39 Am. Rep. 231. And this is said to be the effect of the word "memorandum" written on the face of a check. Turnbull *v.* Osborne, 12 Abb. Pr. N. S. (N. Y.) 200.

9. Durkin *v.* Cranston, 7 Johns. (N. Y.) 442; Miller *v.* Hackley, 5 Johns. (N. Y.) 375, Anth. N. P. (N. Y.) 91, 4 Am. Dec. 372. See also Cal. Civ. Code, § 8173; Neg. Instr. L. § 310 (which reads: "Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill"); Bills Exch. Act, § 71.

10. Merchants' Nat. Bank *v.* Ritzinger, 118 Ill. 484, 8 N. E. 834.

11. Roswell Mfg. Co. *v.* Hudson, 72 Ga. 24.

12. Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323.

13. Benton *v.* Martin, 40 N. Y. 345 [*overruling* 31 N. Y. 382].

Such duplicate may even be by indorsement on a mortgage securing the original note. Grinnell *v.* Baxter, 17 Pick. (Mass.) 386.

14. Greathead *v.* Walton, 40 Conn. 226; Lee *v.* Selleck, 33 N. Y. 615; Matter of Ooster-

contract involves a place of contract and a place of payment, which may be governed by different laws. In like manner one law may determine the validity of a contract, while other laws regulate its form or construction or the steps to be taken for its maintenance or enforcement.[15]

b. Foreign Laws — (i) *Conflict of Public Policy.* All judicial recognition of foreign law is subject to the well-established principle that no court will enforce provisions of foreign law which are repugnant to the public policy of its own forum.[16]

(ii) *Proof of.* Foreign laws must be proved.[17] Courts will not take judicial

houdt, 15 Misc. (N. Y.) 566, 38 N. Y. Suppl. 179, 72 N. Y. St. 808; Home *v.* Rouquette, 3 Q. B. D. 514, 39 L. T. Rep. N. S. 219, 26 Wkly. Rep. 894; Gibbs *v.* Freemont, 9 Exch. 31, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482.

15. These will be considered in their place *passim*.

16. King *v.* Sarria, 69 N. Y. 24, 25 Am. Rep. 128. See also Thompson *v.* Taylor, 66 N. J. L. 253, 258, 49 Atl. 544, 88 Am. St. Rep. 485, 54 L. R. A. 585, where Garrison, J., speaking of the Married Woman's Acts, said: "What is indicated by this legislation, as a whole, is the abandonment of a public policy upon the subject and the future regulation of it by acts of legislative discretion. The distinction between regulative legislation and the adoption of a principle of public law is too important to be lost sight of. To declare, as the common law did, that the welfare of society required that wives be incapable of making contracts, is an illustration of the adoption of a principle which, so long as it was adhered to, constituted a rule of public policy. . . . With the abandonment of the political principle, the matter was broken up into discretionary exercises of legislative regulation, in the course of which different bodies, or the same legislative body, at different periods, might lay down varying rules without destroying that comity that is so essential to commercial confidence and intercourse. . . . The respective regulations of the subject equally rest upon the common ground that women have a capacity to make contracts, subject to legislative control. If this be so, comity requires that we mutually give effect to these discretionary acts by recognizing the validity of the resulting contracts and enforcing them in our courts, even when they are in opposition to our own declared discretion upon the subject." In this case a wife's note to her husband's order, signed in New Jersey, where it was of no effect, was taken to New York, and there delivered with her consent; and it was afterward enforced in New Jersey as a valid New York contract. And to the same effect see Wright *v.* Remington, 41 N. J. L. 48, 32 Am. Rep. 180 [*affirmed* in 43 N. J. L. 451]. *Contra*, as to a mortgage given to secure futures on stock gambling in New York. Flagg *v.* Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308.

17. *Alabama.*— McDougald *v.* Rutherford, 30 Ala. 253; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42.

California.— Norris *v.* Harris, 15 Cal. 226.

Connecticut.— Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179.

Illinois.— McDeed *v.* McDeed, 67 Ill. 545; Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368.

Indiana.— Mendenhall *v.* Gately, 18 Ind. 149.

Iowa.— Bean *v.* Briggs, 4 Iowa 464.

Kentucky.— Goddin *v.* Shipley, 7 B. Mon. (Ky.) 575; Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576.

Louisiana.— Crozier *v.* Hodge, 3 La. 357.

Maine.—Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661.

Maryland.— Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688; Gardner *v.* Lewis, 7 Gill (Md.) 377; De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555; Harper *v.* Hampton, 1 Harr. & J. (Md.) 622.

Massachusetts.— Kline *v.* Baker, 99 Mass. 253; Bowditch *v.* Soltyk, 99 Mass. 136; Knapp *v.* Abell, 10 Allen (Mass.) 485; Palfrey *v.* Portland, etc., R. Co., 4 Allen (Mass.) 55; Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

Mississippi.— Martin *v.* Martin, 1 Sm. & M. (Miss.) 176.

New Jersey.— Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102; Uhler *v.* Semple, 20 N. J. Eq. 288; Campion *v.* Kille, 14 N. J. Eq. 229.

New York.— Hunt *v.* Johnson, 44 N. Y. 27, 4 Am. Rep. 631; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367; Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475; Francis *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 404; Delafield *v.* Hand, 3 Johns. (N. Y.) 310; Smith *v.* Blagge, 1 Johns. Cas. (N. Y.) 238.

Rhode Island.— Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283.

South Carolina.— Allen *v.* Watson, 2 Hill (S. C.) 319.

Texas.— Bryant *v.* Kelton, 1 Tex. 434.

Vermont.— Territt *v.* Woodruff, 19 Vt. 182.

Wisconsin.— Walsh *v.* Dart, 12 Wis. 635; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

United States.—Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15.

England.— Nelson *v.* Bridport, 8 Beav. 527, 10 Jur. 871; Benham *v.* Mornington, 3 C. B. 133, 4 D. & L. 213, 15 L. J. C. P. 221, 54 E. C. L. 133; Mostyn *v.* Fabrigas, Cowp. 174; Male *v.* Roberts, 3 Esp. 163; Freemoult *v.* Dedire, 1 P. Wms. 431.

notice even of the laws of another state,[18] but will presume them to be the same as the *lex fori* in the absence of other proof,[19] although this rule is generally relaxed where the effect of such presumption would be to render the instrument void.[20] The customary law merchant is *prima facie* the law of the foreign state.[21] If the law is different it must be so pleaded.[22]

(III) *CONSTRUCTION OF.* The courts of one state will follow the construction by foreign courts of the law of their own state,[23] but they are not concluded by such decision as to the application of the law merchant or the common law in

As to manner of proving foreign laws see, generally, EVIDENCE.

18. *Alabama.*— Camp *v.* Randle, 81 Ala. 240, 2 So. 287.

Iowa.— Bean *v.* Briggs, 4 Iowa 464.

Massachusetts.— Legg *v.* Legg, 8 Mass. 99.

New York.— Hunt *v.* Johnson, 44 N. Y. 27, 4 Am. Rep. 631.

England.— Mostyn *v.* Fabrigas, Cowp. 174; Male *v.* Roberts, 3 Esp. 163.

19. *Alabama.*— Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; McDougald *v.* Rutherford, 30 Ala. 253; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42.

Colorado.— Martin *v.* Hazzard Powder Co., 2 Colo. 596.

Georgia.— Hill *v.* Wilker, 41 Ga. 449, 5 Am. Rep. 540.

Illinois.— Hakes *v.* National State Bank, 164 Ill. 273, 45 N. E. 444.

Indiana.— Straughan *v.* Fairchild, 80 Ind. 598; Farhni *v.* Ramsee, 19 Ind. 400.

Iowa.— Bean *v.* Briggs, 4 Iowa 464; Bernard *v.* Barry, 1 Greene (Iowa) 388.

Louisiana.— Kuenzi *v.* Elvers, 14 La. Ann. 391, 74 Am. Dec. 434; Hawley *v.* Sloo, 12 La. Ann. 815; Harris *v.* Alexander, 9 Rob. (La.) 151; Crozier *v.* Hodge, 3 La. 357.

Maine.— Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661.

Maryland.— Laird *v.* State, 61 Md. 309; Fouke *v.* Fleming, 13 Md. 392; Harper *v.* Hampton, 1 Harr. & J. (Md.) 622.

Massachusetts.— Dubois *v.* Mason, 127 Mass. 37, 34 Am. Rep. 335; Wood *v.* Corl, 4 Metc. (Mass.) 203; Legg *v.* Legg, 8 Mass. 99.

Minnesota.— Brimball *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118; Cooper *v.* Reaney, 4 Minn. 528.

Missouri.— Johnston *v.* Gawtry, 83 Mo. 339; Flato *v.* Mulhall, 72 Mo. 522.

Nebraska.— Stark *v.* Olsen, 44 Nebr. 646, 63 N. W. 37, and the rule applies to the unwritten as well as the written law.

New Jersey.— Seyfert *v.* Edison, 45 N. J. L. 393, that being also the common law.

New York.— Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Hunt *v.* Johnson, 44 N. Y. 27, 4 Am. Rep. 631; Cutler *v.* Wright, 22 N. Y. 472; Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118; Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Misc. (N. Y.) 757, 48 N. Y. Suppl. 148; Low *v.* Learned, 13 Misc. (N. Y.) 150, 34 N. Y. Suppl. 68, 68 N. Y. St. 23; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367; Leavenworth *v.* Brockway, 2 Hill (N. Y.) 201; Holmes *v.* Broughton, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536.

Pennsylvania.— Musser *v.* Stauffer, 178 Pa. St. 99, 35 Atl. 709.

South Carolina.— Allen *v.* Watson, 2 Hill (S. C.) 319.

England.— Brown *v.* Gracey, Dowl. N. P. 41; Thompson *v.* Powles, 2 Sim. 194, 2 Eng. Ch. 194.

No presumption of statutory change.— But see Lucas *v.* Ladew, 28 Mo. 342, where the common law as to grace, which had been changed in the place of forum, was presumed to have remained unchanged in the place of contract. So Mendenhall *v.* Gately, 18 Ind. 149, where the statute law of Indiana changing the commercial law was not extended by inference to another state.

20. *Arkansas.*— White *v.* Friedlander, 35 Ark. 52.

Georgia.— See Craven *v.* Bates, 96 Ga. 78, 23 S. E. 202, holding that even if proved to be usurious by such foreign law it will not be presumed to be void but will be enforced to the extent of the legal interest.

Illinois.— Forsyth *v.* Baxter, 3 Ill. 9.

Indiana.— Engler *v.* Ellis, 16 Ind. 475.

Kentucky.— Greenwade *v.* Greenwade, 3 Dana (Ky.) 495.

Michigan.—O'Rourke *v.* O'Rourke, 43 Mich. 58, 4 N. W. 531.

Mississippi.— Martin *v.* Martin, 1 Sm. & M. (Miss.) 176.

New Hampshire.— Jones *v.* Rider, 60 N. H. 452.

New York.— Thompson *v.* Ketchum, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332.

Tennessee.— Hubble *v.* Morristown Land, etc., Co., 95 Tenn. 585, 32 S. W. 965.

West Virginia.— Pugh *v.* Cameron, 11 W. Va. 523.

But a foreign bill made on Sunday has been presumed to be void as at common law. Hill *v.* Wilker, 41 Ga. 449, 5 Am. Rep. 540; Sayre *v.* Wheeler, 31 Iowa 112; Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118.

A married woman's indorsement to her husband has been presumed to be void also. Seyfert *v.* Edison, 45 N. J. L. 393.

21. Lucas *v.* Ladew, 28 Mo. 342; Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294; Reed *v.* Wilson, 41 N. J. L. 29.

22. Midland Steel Co. *v.* Citizens' Nat. Bank, 26 Ind. App. 71, 59 N. E. 211.

23. Stix *v.* Matthews, 75 Mo. 96; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

So where a foreign statute is adopted and enacted as the law of the forum. Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

that state,[24] and the common law will be presumed to be the law of states once governed by it.[25]

c. State Law in Federal Courts. The United States courts in general recognize and give effect to the state law[26] and follow the construction given by state courts to the constitution and statutes of their own state,[27] provided such decision was made on the specific point raised,[28] and before the making of the instrument in suit,[29] or before rights have been acquired under it by *bona fide* holders.[30] The construction of the state constitution by the state court has, however, no force against citizens of other states not parties to it and may be disregarded by the federal courts.[31] On the other hand the federal courts may follow a reasonable construction by the state courts in cases where it cannot be regarded as binding on them.[32]

2. What Law Governs — a. In General — (i) *Lex Loci Solutionis* — (a) *What Is Place of Payment* — (1) Place of Date. Where no place of payment is expressed[33] a note is payable *prima facie* where it is dated.[34]

(2) Place of Drawee's Address. In default of other express place of pay-

24. Michigan Nat. Bank *v.* Green, 33 Iowa 140.

25. *Alabama.*— Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42.

Illinois.— Crouch *v.* Hall, 15 Ill. 263.

Louisiana.— Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286.

Missouri.— Lucas *v.* Ladew, 28 Mo. 342.

New Jersey.—Seyfert *v.* Edison, 45 N. J. L. 393.

Virginia.— Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353.

Contra, as to Texas (Flato *v.* Mulhall, 72 Mo. 522) and Russia (Savage *v.* O'Neil, 44 N. Y. 298).

26. Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743. But see opinion of Bradley, J., in Burgess *v.* Seligman, 107 U. S. 20, 33, 2 S. Ct. 10, 27 L. ed. 359.

On the other hand the law merchant and not the local statute will determine the negotiability of a note within the meaning of the United States statute of 1875 relating to the jurisdiction of the federal courts. Windsor Sav. Bank *v.* McMahon, 38 Fed. 283, 3 L. R. A. 192. See too Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61, where the United States court rejected as to a New York contract the New York rule denying the character of *bona fide* holder for value to one who took the paper as collateral security for an existing debt.

27. Phipps *v.* Harding, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203.

In a matter of commercial law, in the language of Taft, J., in Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 193, 6 U. S. App. 312, 3 C. C. A. 1, 17 L. R. A. 595: "Upon such questions courts of the United States, in exercising a jurisdiction concurrent with that of the state courts, have always asserted an independence of judgment as to the state law, even if they differ with the state supreme court. But where the question is a new one with the federal courts it is their rule, as it is their duty, to give weight to the decisions of the courts of the state, whose law they are administering."

28. Quaker City Nat. Bank *v.* Nolan County, 59 Fed. 660.

29. Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93; Bolles *v.* Brimfield, 120 U. S. 759, 7 S. Ct. 736, 30 L. ed. 786; New Buffalo Tp. *v.* Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024; Gelpecke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520.

Will not follow the later decision of a state court where bonds of the same issue were upheld at first by the state courts and after the issue of the bonds in suit the ruling was reversed and the issue held to be invalid. Anderson *v.* Santa Anna Tp., 116 U. S. 356, 6 S. Ct. 413, 29 L. ed. 633; Marshal *v.* Elgin, 3 McCrary (U. S.) 35, 8 Fed. 783.

30. Taylor *v.* Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; Chicago First Nat. Bank *v.* Mitchell, 84 Fed. 90; Wade *v.* Travis County, 81 Fed. 742, 52 U. S. App. 395, 26 C. C. A. 589; Aurora Second Nat. Bank *v.* Basuier, 65 Fed. 58, 27 U. S. App. 541, 12 C. C. A. 517; St. Paul Capital Bank *v.* Barnes County School Dist. No. 26, 63 Fed. 938, 27 U. S. App. 479, 11 C. C. A. 514.

31. Carroll County *v.* Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. ed. 517 [*overruling* the construction given in Hawkins *v.* Carroll County, 50 Miss. 735].

32. New York *v.* Cook, 148 U. S. 397, 13 S. Ct. 645, 37 L. ed. 498 [*following* Woodruff *v.* Okolona, 57 Miss. 806].

33. On the other hand a place of payment designated in the bill will control the implication from the date. Hanover Nat. Bank *v.* Johnson, 90 Ala. 549, 8 So. 42. But where the payee's residence was in a different state from that of the date and delivery, and there was an unfilled blank for the place of payment, the intention of the parties was held to be a question for the jury. Shillito *v.* Reineking, 30 Hun (N. Y.) 345.

34. See *infra,* XIV, E [8 Cyc.].

ment the drawee's address is *prima facie* the place of payment of the bill,[35] and if not otherwise designated of the acceptance.[36]

(3) PLACE OF HOLDER'S OR INDORSER'S RESIDENCE. On the other hand an indorser is presumed to pay at the holder's residence,[37] unless circumstances show an intention to prefer the residence of the indorser.[38]

(B) *Election by Parties.* Where the paper is made in one place and payable in another the parties may elect to be governed by the law of either place,[39] and the naming of a place of payment is *prima facie* evidence of election of that place and law.[40] In such case the law of the place of performance governs rather than that of the contract.[41]

35. *Maryland.*— Lizardi *v.* Cohen, 3 Gill (Md.) 430.

Massachusetts.— Worcester Bank *v.* Wells, 8 Metc. (Mass.) 107.

New Jersey.— Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239.

New York.— Hibernia Nat. Bank *v.* Lacombe, 21 Hun (N. Y.) 166 [*affirmed* in 84 N. Y. 367, 38 Am. Rep. 518].

South Carolina.— Where a drawer, at the time abroad, draws on himself, payable in South Carolina, and the bill is presented for payment in South Carolina, after due acceptance, the contract is governed by the laws of South Carolina. McCandlish *v.* Cruger, 2 Bay (S. C.) 377.

36. Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. ed. 967. The accepter's residence. Frierson *v.* Galbraith, 12 Lea (Tenn.) 129. The accepter's place of residence at the maturity of the bill. Don *v.* Lippmann, 5 Cl. & F. 1, 7 Eng. Reprint 303.

But another place may be designated by the accepter. Todd *v.* State Bank, 3 Bush (Ky.) 626.

37. Lee *v.* Selleck, 33 N. Y. 615.

38. Vanzant *v.* Arnold, 31 Ga. 210; Bullard *v.* Thompson, 35 Tex. 313.

39. Arnold *v.* Potter, 22 Iowa 194; Smith *v.* Parsons, 55 Minn. 520, 57 N. W. 311; Newman *v.* Kershaw, 10 Wis. 333. So a note signed by one maker in Washington and by another in Kentucky and mailed by him to the payee in New York, where it would have been void for usury, was held to be a Kentucky contract and so intended. William Glenny Glass Co. *v.* Taylor, 99 Ky. 24, 17 Ky. L. Rep. 1331, 34 S. W. 711. But a bill cannot be made payable in another state for the mere purpose of evading a statute against private banking. Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377.

40. See *infra*, XIV, E [8 Cyc.].

41. *Georgia.*— Stricker *v.* Tinkham, 35 Ga. 176, 89 Am. Dec. 280; Vanzant *v.* Arnold, 31 Ga. 210.

Illinois.— Abt *v.* American Trust, etc., Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175; National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401, as to the right of the payee of a check to sue the bank without first obtaining an acceptance or certification.

Indiana.— Fordyce *v.* Nelson, 91 Ind. 447; Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79 (as to the indorser's right to diligence in prosecution of the maker).

Iowa.— Thorp *v.* Craig, 10 Iowa 461, as to the drawer's liability.

Kentucky.— Stevens *v.* Gregg, 89 Ky. 461, 11 Ky. L. Rep. 686, 12 S. W. 775; Tyler *v.* Trabue, 8 B. Mon. (Ky.) 306 (as to the effect of payment made to the payee after indorsement of the note); Goddin *v.* Shipley, 7 B. Mon. (Ky.) 575 (as to the allowance of grace).

Massachusetts.— Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753; Prentiss *v.* Savage, 13 Mass. 20 (as to the indorser's liability).

Mississippi.— Fellows *v.* Harris, 12 Sm. & M. (Miss.) 462, to give effect to the general law merchant, as against the Mississippi statute. See also Kendrick *v.* Kyle, 78 Miss. 278, 28 So. 951.

New Jersey.— Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239 (as to the question of usury); Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102.

New York.— Hyde *v.* Goodnow, 3 N. Y. 266 (as to the sufficiency and validity of the consideration); Shillito *v.* Reineking, 30 Hun (N. Y.) 345; Agricultural Nat. Bank *v.* Sheffield, 4 Hun (N. Y.) 421 (as to rate of interest recoverable); Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. (N. Y.) 1; Fanning *v.* Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442.

North Carolina.— Hatcher *v.* McMorine, 15 N. C. 122, what is a default by the maker.

Tennessee.— Pioneer Sav., etc., Co. *v.* Cannon, 96 Tenn. 599, 36 S. W. 386, 54 Am. St. Rep. 858, 33 L. R. A. 112.

Virginia.— Fant *v.* Miller, 17 Gratt. (Va.) 47.

United States.— Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61; Bainbridge *v.* Wilcocks, Baldw. (U. S.) 536, 2 Fed. Cas. No. 755.

England.— Rothschild *v.* Currie, 1 Q. B. 43, 5 Jur. 865, 10 L. J. Q. B. 77, 4 P. & D. 737, 41 E. C. L. 428 (as to due diligence in notice of dishonor to an English indorser of a bill payable in France); Robinson *v.* Bland, 2 Burr. 1077, 1 W. Bl. 256; Allen *v.* Kemble, 13 Jur. 287, 6 Moore P. C. 314, 13 Eng. Reprint 704 (the drawer's right to a set-off against the bankrupt accepter).

See 7 Cent. Dig. tit. "Bills and Notes," § 249.

The Bills of Exchange Act, section 72, refers the validity in matters of form and the interpretation to the place of contract; of presentment, protest and notice to the place of

(II) *Lex Loci Contractus* — (A) *What Is Place of Contract* — (1) Prima Facie Shown by Date. The contract may be dated in one place, signed in another, and delivered in a third, but the date is *prima facie* the place of contract,[42] and this presumption is conclusive in favor of a *bona fide* holder who has relied upon it.[43]

(2) Determined by Delivery — (a) In General. The delivery of the contract, however, is its completion, and the place of delivery is in general the place of contract.[44] The place of delivery need not, however, appear on the face of the

payment. And the exception "as regards the payer" of an inland bill indorsed abroad does not apply to the indorsee's right as against his indorser under a foreign indorsement. Alcock *v.* Smith, [1892] 1 Ch. 238, 61 L. J. Ch. 161, 65 L. T. Rep. N. S. 335.

42. *Kentucky.*— Short *v.* Trabue, 4 Metc. (Ky.) 299.

Missouri.— See Plahto *v.* Patchin, 26 Mo. 389, holding that the presumption is that the maker of a note resides at the place where the note is dated.

New Hampshire.— Lougee *v.* Washburn, 16 N. H. 134.

New York.— Thompson *v.* Ketcham, 4 Johns. (N. Y.) 285.

Pennsylvania.— Lennig *v.* Ralston, 23 Pa. St. 137.

Vermont.— Blodgett *v.* Durgin, 32 Vt. 361.

Virginia.— Backhouse *v.* Selden, 29 Gratt. (Va.) 581; Wilson *v.* Lazier, 11 Gratt. (Va.) 477.

West Virginia.— Hefflebower *v.* Detrick, 27 W. Va. 16.

England.— Snaith *v.* Mingay, 1 M. & S. 82.

Compare Mansfield Sav. Bank *v.* Flowers, 11 Cinc. L. Bul. 141, 9 Ohio Dec. (Reprint) 169, where the place of actual execution was held to be the place of contract of a note, although dated and payable in another state.

See also *infra*, XIV, E [8 Cyc.].

Where a bill did not designate the place where it was drawn, but it appeared that the drawer resided in one state and the drawee in another, the presumption is that it was drawn at the drawer's residence. Harmon *v.* Wilson, 1 Duv. (Ky.) 322.

43. *District of Columbia.*— Leavenworth Second Nat. Bank *v.* Smoot, 2 MacArthur (D. C.) 371.

Massachusetts.— Towne *v.* Rice, 122 Mass. 67.

New York.— Potter *v.* Tallman, 35 Barb. (N. Y.) 182.

Pennsylvania.— Lennig *v.* Ralston, 23 Pa. St. 137.

West Virginia.— Quaker City Nat. Bank *v.* Showacre, 26 W. Va. 48.

England.—Barker *v.* Sterne, 2 C. L. R. 1020, 9 Exch. 684, 23 L. J. Exch. 201, 2 Wkly. Rep. 418.

44. *Arkansas.*— Kelley *v.* Telle, 66 Ark. 464, 51 S. W. 633.

District of Columbia.—Leavenworth Second Nat. Bank *v.* Smoot, 2 MacArthur (D. C.) 371; Gallaudet *v.* Sykes, 1 MacArthur (D. C.) 489.

Illinois.— Gay *v.* Rainey, 89 Ill. 221, 31 Am. Rep. 76; Evans *v.* Anderson, 78 Ill. 558; Schuttler *v.* Piatt, 12 Ill. 417 (as against place of maker's domicile).

Indiana.— Butler *v.* Myer, 17 Ind. 77.

Kansas.— Briggs *v.* Latham, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546.

Louisiana.— Whiston *v.* Stodder, 8 Mart. (La.) 95, 13 Am. Dec. 281.

Maine.— Bell *v.* Packard, 69 Me. 105, 31 Am. Rep. 251.

Massachusetts.— Lawrence *v.* Bassett, 5 Allen (Mass.) 140.

Missouri.— Johnston *v.* Gawtry, 83 Mo. 339 [*affirming* 11 Mo. App. 322].

New Hampshire.— Orcutt *v.* Hough, 54 N. H. 472.

New Jersey.— Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239; Campbell *v.* Nichols, 33 N. J. L. 81.

New York.— Hyde *v.* Goodnow, 3 N. Y. 266; Matter of Oosterhoudt, 15 Misc. (N. Y.) 566, 38 N. Y. Suppl. 179, 72 N. Y. St. 808 (as against place of payment).

Pennsylvania.— Ludlow *v.* Bingham, 4 Dall. (Pa.) 47, 1 L. ed. 736.

Rhode Island.— Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777.

Tennessee.— Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874 (as against place of drawing, acceptance, and payment); Hubble *v.* Morristown Land, etc., Co., 95 Tenn. 585, 32 S. W. 965 (as against place of domicile and forum).

United States.—Wells *v.* Vansickle, 64 Fed. 944; Stubbs *v.* Colt, 30 Fed. 417 (as against place of indorsement).

England.— Chapman *v.* Cottrell, 3 H. & C. 865, 11 Jur. N. S. 530, 34 L. J. Exch. 186, 12 L. T. Rep. N. S. 706, 13 Wkly. Rep. 843.

Ut res magis valeat.— But to save a note, otherwise usurious, preference has been given to the place of date and drawing as against the place of delivery (Scott *v.* Perlee, 39 Ohio St. 63, 48 Am. Rep. 421), especially where the place of drawing was also the *situs* of the mortgage security (Pine *v.* Smith, 11 Gray (Mass.) 38). So preference has been given to the place of contract as against the place of payment. Stansell *v.* Georgia L. & T. Co., 96 Ga. 227, 22 S. E. 898. And a renewal in Connecticut was held to purge the original New York note of its usury in Jacks *v.* Nichols, 5 Barb. (N. Y.) 38, but this case was afterward reversed in 5 N. Y. 178, on the ground that the renewal showed on its face, being dated in New York, that there was no intention to change the place of contract. If, however, there is no evidence as to the place of contract, although it is illegal and void

bill or note,[45] and the actual place of delivery will control the apparent place under the law of the forum, it will be presumed that the note was executed in that state. Bowen *v.* Kemerer, 11 Phila. (Pa.) 557, 33 Leg. Int. (Pa.) 170.

Place of consideration.— A note made in the state where suit is brought, and payable generally, is governed by the laws of such state, and not by those of a different state in which the consideration arose. Pratt *v.* Wallbridge, 16 Ind. 147. So a note drawn and expressly payable in the place of the forum, especially where such foreign consideration was against the policy of the forum and in intended violation of its laws, although such intended violation was not known to the payee (Lewis *v.* Headley, 36 Ill. 433, 87 Am. Dec. 227), a bill drawn on New York in carrying out a contract in Georgia (Georgia Bank *v.* Lewin, 45 Barb. (N. Y.) 340), a New York contract and note for the purchase-money (Hosford *v.* Nichols, 1 Paige (N. Y.) 220), a note in Texas for goods purchased and delivered in another state (Applebaum *v.* Bates, 3 Tex. App. Civ. Cas. § 166), for goods purchased in another state and delivered in the place of the forum where the note was made and the maker lived (Hanover Nat. Bank *v.* Johnson, 90 Ala. 549, 8 So. 42), New York notes for goods purchased from a foreign corporation through its New York agent (Grand Rapids School Furniture Co. *v.* Hammerstein, 18 N. Y. Suppl. 766), a Canadian note for insurance of Canadian property by the local agent of a foreign corporation (*In re* Pennsylvania Ins. Co., 22 Fed. 109), a Georgia loan and note, which had been previously agreed on in another state where the lender lived and the borrower happened to be temporarily (Davis *v.* Coleman, 33 N. C. 303), and bills of exchange drawn in another state against shipments to the state where the action was brought (Kuenzi *v.* Elvers, 14 La. Ann. 391, 74 Am. Dec. 434). But to sustain a note as valid regard may be had to the place of the purchase of goods for which it was given, as against the place of its execution and delivery (Atlantic Phosphate Co. *v.* Ely, 82 Ga. 438, 9 S. E. 170; Western Transp., etc., Co. *v.* Kilderhouse, 87 N. Y. 430; *In re* Town, 24 Fed. Cas. No. 14,111, 8 Nat. Bankr. Reg. 38) or as against the place of the forum (Torrey *v.* Corliss, 33 Me. 333; Com. *v.* Aves, 18 Pick. (Mass.) 193). So a note given in the place of the forum in renewal of a note made in another state and valid there. Rhawn *v.* Grant, 1 MacArthur (D. C.) 31. On the other hand a note cannot be sustained by the law where it was made, if given for goods sold in the place of the forum in violation of its laws (Fuller *v.* Bean, 30 N. H. 181) or for goods which were sold legally in one state with the purpose of delivering them in violation of law in another state (Banchor *v.* Mansel, 47 Me. 58).

Place of discount.— A note made in one state to be used in another, and first negotiated there, is governed by the laws of the latter. Wayne County Sav. Bank *v.* Low, 81 N. Y. 566, 37 Am. Rep. 533 [*affirming* 6 Abb. N. Cas. (N. Y.) 76]; *In re* Conrad, 6 Fed. Cas. No. 3,126, 6 Am. L. Rev. 385, 4 Am. L. T. 189, 1 Leg. Gaz. Rep. (Pa.) 284, 3 Leg. Gaz. (Pa.) 331, 1 Leg. Op. (Pa.) 201, 8 Phila. (Pa.) 147, 28 Leg. Int. (Pa.) 324 (although not made with exclusive reference to the laws of either state). This is true also of an accommodation acceptance (Gallaudet *v.* Sykes, 1 MacArthur (D. C.) 489; Akers *v.* Demond, 103 Mass. 318) or indorsement (Akers *v.* Demond, 103 Mass. 318; Merchants' Bank *v.* Griswold, 9 Hun (N. Y.) 561 [*affirmed* in 72 N. Y. 472, 28 Am. Rep. 159]; Jewell *v.* Wright, 12 Abb. Pr. (N. Y.) 55) so made. So too the place where bills for discount are negotiated is the place of the contract, irrespective of the place where they were signed and indorsed. *In re* Dodge, 9 Ben. (U. S.) 480, 7 Fed. Cas. No. 3,948, 17 Nat. Bankr. Reg. 504; Orr *v.* Lacy, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10,589. But a promissory note made in New York by a resident thereof, dated and payable therein, and not intended by the maker to be discounted elsewhere, if first negotiated in another state is nevertheless governed by the laws of New York. Dickinson *v.* Edwards, 77 N. Y. 573, 33 Am. Rep. 671, 7 Abb. N. Cas. (N. Y.) 65 [*affirming* 13 Hun (N. Y.) 405 (*reversing* 2 Abb. N. Cas. (N. Y.) 300, 53 How. Pr. (N. Y.) 40)]. And whether a note by a Massachusetts insolvent for a debt discharged there, if sold by the creditor to a person living in New York, is to be considered a contract, as between the debtor and such third person, made or to be performed in New York *quære*. Towne *v.* Smith, 1 Woodb. & M. (U. S.) 115, 24 Fed. Cas. No. 14,115, 9 Law Rep. 12. Other cases have given preference to the place where the loan was made as against the place of delivery (Stark *v.* Olsen, 44 Nebr. 647, 63 N. W. 37; Sands *v.* Smith, 1 Nebr. 108, 93 Am. Dec. 327 [thereby avoiding the contract as usurious]), or of payment (New England Mortg. Security Co. *v.* McLaughlin, 87 Ga. 1, 13 S. E. 81 [it being provided in the note that it should be governed by the law of the place of contract which sustained it]; Kilcrease *v.* Johnson, 85 Ga. 600, 11 S. E. 870 [thereby rendering it usurious and void]; Martin *v.* Johnson, 84 Ga. 481, 10 S. E. 1092, 8 L. R. A. 170; Bascom *v.* Zediker, 48 Nebr. 380, 67 N. W. 148 [thereby saving the contract from the taint of usury]), or as against the law of the foreign place where the bills were to be discounted (New York Dry Dock Co. *v.* American L. Ins., etc., Co., 3 Sandf. Ch. (N. Y.) 215). So preference has been given to the place of delivery and loan as against that of drawing, indorsement, and payment (Orr *v.* Lacy, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10,589) or of the lender's domicile and place of payment (Thompson *v.* Edwards, 85 Ind. 414).

45. Evans *v.* Anderson, 78 Ill. 558.

shown by the date,[46] except in the case of a *bona fide* holder for value, as already stated above.[47]

(b) WHERE EXECUTED BY SEVERAL. In the case of notes more especially it often happens that several makers sign the paper in different states. If it is delivered in the state where the last signature is affixed that is the place of contract.[48] If it is returned by the last signer and delivered in the place where it was first signed that is the place of contract.[49]

(c) WHERE DELIVERED BY MAIL. If the instrument is sent by mail to the payee or indorsee the place where it is received is the place of delivery and contract.[50]

(B) *Determines What.* Subject to the rule which has been stated above with reference to the parties' choice of the law of the place of payment,[51] the law of the place of contract determines in general the validity of the instrument[52]

46. *District of Columbia.*— Leavenworth Second Nat. Bank *v.* Smoot, 2 MacArthur (D. C.) 371.

New York.— Hyde *v.* Goodnow, 3 N. Y. 266.

North Carolina.— Davis *v.* Coleman, 29 N. C. 424.

Ohio.— Findlay *v.* Hall, 12 Ohio St. 610.

Tennessee.— Overton *v.* Bolton, 9 Heisk. (Tenn.) 762, 24 Am. Rep. 367.

Texas.— Connor *v.* Donnell, 55 Tex. 167.

United States.— Wells *v.* Vansickle, 64 Fed. 944; Davis *v.* Clemson, 6 McLean (U. S.) 622, 7 Fed. Cas. No. 3,630. So where it is drawn, dated, signed, and indorsed at Philadelphia where the drawer and indorser reside and delivered and discounted in New York. *In re* Conrad, 6 Fed. Cas. No. 3,126, 6 Am. L. Rev. 385, 4 Am. L. T. 189, 3 Leg. Gaz. (Pa.) 331, 1 Leg. Gaz. Rep. (Pa.) 284, 1 Leg. Op. (Pa.) 201, 8 Phila. (Pa.) 147, 28 Leg. Int. (Pa.) 324. And *a fortiori* where it is also the place of payment. Cook *v.* Moffat, 5 How. (U. S.) 295, 12 L. ed. 159.

See 7 Cent. Dig. tit. "Bills and Notes," § 248.

So where it is dated and signed in blank in one state and the blanks filled and note delivered in another. Fant *v.* Miller, 17 Gratt. (Va.) 47.

47. See *supra*, I, D, 2, a, (II), (A), (1).

48. Hart *v.* Wills, 52 Iowa 56, 2 N. W. 619, 35 Am. Rep. 255; William Glenny Glass Co. *v.* Taylor, 99 Ky. 24, 17 Ky. L. Rep. 1331, 34 S. W. 711; Alcalda *v.* Morales, 3 Nev. 132; Read *v.* Edwards, 2 Nev. 262.

The law of the first place was held to govern where the note was dated there (Bryant *v.* Edson, 8 Vt. 325, 30 Am. Dec. 472) and the loan consummated there as well (Backhouse *v.* Selden, 29 Gratt. (Va.) 581).

49. Hefflebower *v.* Detrick, 27 W. Va. 16. Whether the last signer be a surety (Stanford *v.* Pruet, 27 Ga. 243, 73 Am. Dec. 734; Houston *v.* Potts, 64 N. C. 41) or an accepter (Gallaudet *v.* Sykes, 1 MacArthur (D. C.) 489; Dickinson *v.* Edwards, 77 N. Y. 573, 33 Am. Rep. 671 [*affirming* 13 Hun (N. Y.) 405]; New York First Nat. Bank *v.* Morris, 1 Hun (N. Y.) 680; Georgia Bank *v.* Lewin, 45 Barb. (N. Y.) 340; Bowen *v.* Bradley, 9 Abb. Pr. N. S. (N. Y.) 395), although another place of payment was designated in the bill for the convenience of the accepter or to facilitate the negotiation of the paper (Tilden *v.* Blair, 21 Wall. (U. S.) 241, 22 L. ed. 632).

This is true of an accommodation acceptance, although the bill was drawn payable at the accepter's residence and the accepter held collateral security from the drawer and was discharged in the place where the bill was discounted for usury there (Akers *v.* Demond, 103 Mass. 318), and of an accommodation indorser (Gay *v.* Rainey, 89 Ill. 221, 31 Am. Rep. 76; Young *v.* Harris, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330; Overton *v.* Bolton, 9 Heisk. (Tenn.) 762, 24 Am. Rep. 367; Davis *v.* Clemson, 6 McLean (U. S.) 622, 7 Fed. Cas. No. 3,630).

50. Bell *v.* Packard, 69 Me. 105, 31 Am. Rep. 251; Hyde *v.* Goodnow, 3 N. Y. 266; Mott *v.* Wright, 4 Biss. (U. S.) 53, 17 Fed. Cas. No. 9,883. Especially where this is also the place designated for payment (Carnegie Steel Co. *v.* Chattanooga Constr. Co., (Tenn. Ch. 1896) 38 S. W. 102; Phipps *v.* Harding, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L. R. A. 513), but not if otherwise intended (William Glenny Glass Co. *v.* Taylor, 99 Ky. 24, 17 Ky. L. Rep. 1331, 34 S. W. 711; Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753; Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777), and this intention to prefer the place of drawing may be implied from its being void for usury in the place designated for payment (William Glenny Glass Co. *v.* Taylor, 99 Ky. 24, 17 Ky. L. Rep. 1331, 34 S. W. 711; Pine *v.* Smith, 11 Gray (Mass.) 38; Bascom *v.* Zediker, 48 Nebr. 380, 67 N. W. 148), the contract not being a mere evasion of the usury law of the place of payment (Sheldon *v.* Haxtun, 91 N. Y. 124). *Contra*, as to notes drawn and made payable in New York to the payee residing abroad. Heidenheimer *v.* Mayer, 42 N. Y. Super. Ct. 506.

As to place of mailing being held to be place of delivery and contract see Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753 (where the place of payment was expressed); Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777 (where no place of payment was expressed).

51. See *supra*, I, D, 2, a, (I), (B).

52. *Alabama.*— McDougald *v.* Rutherford, 30 Ala. 253.

and of the consideration,[53] the legal capacity of the parties,[54] the effect to be given to the contract,[55] the liability of the parties,[56] notwithstanding that another

Illinois.— Phinney *v.* Baldwin, 16 Ill. 108, 61 Am. Dec. 62.

Louisiana.— Ory *v.* Winter, 4 Mart. N. S. (La.) 277.

Massachusetts.— Carnegie *v.* Morrison, 2 Metc. (Mass.) 381.

Michigan.— Bissell *v.* Lewis, 4 Mich. 450.

Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.

Nebraska.— Benton *v.* German-American Nat. Bank, 45 Nebr. 850, 64 N. W. 227; Joslin *v.* Miller, 14 Nebr. 91, 15 N. W. 214.

New Hampshire.— Fessenden *v.* Taft, 65 N. H. 39, 17 Atl. 713.

New Jersey.— Armour *v.* Michael, 36 N. J. L. 92; Atwater *v.* Walker, 16 N. J. Eq. 42 [*affirming* 15 N. J. Eq. 502]; Andrews *v.* Torrey, 14 N. J. Eq. 355; Dolman *v.* Cook, 14 N. J. Eq. 56; Cotheal *v.* Blydenburgh, 5 N. J. Eq. 17 [*affirmed* in 5 N. J. Eq. 631].

Tennessee.— Western, etc., R. Co. *v.* Taylor, 6 Heisk. (Tenn.) 408.

Virginia.—Wilson *v.* Lazier, 11 Gratt. (Va.) 477.

United States.— Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377; Fitch *v.* Remer, 1 Biss. (U. S.) 337, 1 Flipp. (U. S.) 15, 9 Fed. Cas. No. 4,836, 8 Am. L. Reg. 654, 5 Quart. L. J. 266; Green *v.* Sarmiento, Pet. C. C. (U. S.) 74, 3 Wash. (U. S.) 17, 10 Fed. Cas. No. 5,760.

If valid there it is in general valid in the place of the forum (Robinson *v.* Queen, 87 Tenn. 445, 11 S. W. 38, 10 Am. St. Rep. 690, 3 L. R. A. 214), and if valid there it cannot be enforced in another state (Barnes *v.* Whitaker, 22 Ill. 606).

By the Bills of Exchange Act, section 72, the validity of bills as regards requisite form is determined by the law of the place of contract, but compliance with the laws of the United Kingdom is sufficient as to parties there obtaining or holding a bill which was drawn in a foreign country.

53. *Illinois.*— Evans *v.* Anderson, 78 Ill. 558.

Massachusetts.— Bride *v.* Clark, 161 Mass. 130, 36 N. E. 745.

Missouri.—Roselle *v.* McAuliffe, (Mo. 1896) 35 S. W. 1135, irrespective of the domicile of the maker of the note.

New York.— Hyde *v.* Goodnow, 3 N. Y. 266.

United States.— Kansas Bank *v.* National Bank of Commerce, 38 Fed. 800, irrespective of a different law of the place of transfer by which it would be valid there.

England.— Quarrier *v.* Colston, 6 Jur. 959, 12 L. J. Ch. 57, 1 Phil. 147.

But see Wilson *v.* Stratton, 47 Me. 120 (holding that the place of the contract for sale of goods being that of the forum also, and not of the note given for it, will determine the validity of the note); Sands *v.* Smith, 1 Nebr. 108, 93 Am. Dec. 331 (where a note drawn and valid in Nebraska and secured by mortgage there but payable in New York for a New York loan was held to be a mere incident of the New York contract and as such governed by the usury law of New York); Robinson *v.* Bland, 2 Burr. 1077, 1 W. Bl. 256 (holding that an English court will not enforce a bill drawn in France for a gaming loss and valid there but payable in England and not valid there).

For other cases relating to conflict of laws as to consideration see *infra*, III, C, 3.

54. See *infra*, II, C, 3.

55. *Alabama.*— Camp *v.* Randle, 81 Ala. 240, 2 So. 287; McDougald *v.* Rutherford, 30 Ala. 253.

District of Columbia.—Leavenworth Second Nat. Bank *v.* Smoot, 2 MacArthur (D. C.) 371.

Illinois.— Abt *v.* American Trust, etc., Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175 (effect of a draft as an assignment of the drawer's fund); Evans *v.* Anderson, 78 Ill. 558.

Iowa.— Arnold *v.* Potter, 22 Iowa 194.

Kentucky.— Steele *v.* Curle, 4 Dana (Ky.) 381.

Massachusetts.— Carnegie *v.* Morrison, 2 Metc. (Mass.) 381.

Michigan.— Bissell *v.* Lewis, 4 Mich. 450.

Minnesota.— Cooper *v.* Reaney, 4 Minn. 528.

Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.

New Hampshire.— Stevens *v.* Norris, 30 N. H. 466.

New York.— Herdic *v.* Roessler, 109 N. Y. 127, 16 N. E. 198 (as to the effect of the omission of the words "given for a patent-right" as required by the statute); Sheldon *v.* Haxtun, 91 N. Y. 124. But a Missouri statute as to terms of sale and issue of bonds of Missouri corporations may receive a different construction as to the rights of a *bona fide* holder in the place of the forum. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553.

Ohio.— Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62.

Pennsylvania.— Hunter *v.* Blodget, 2 Yeates (Pa.) 480.

Texas.— Armendiaz *v.* Serna, 40 Tex. 291.

West Virginia.—Pugh *v.* Cameron, 11 W. Va. 523.

United States.— Kuhn *v.* Morrison, 75 Fed. 81; Courtois *v.* Carpentier, 1 Wash. (U. S.) 376, 6 Fed. Cas. No. 3,286.

England.— Cooper *v.* Waldegrave, 2 Beav. 282; Alcock *v.* Smith, [1892] 1 Ch. 238, 61 L. J. Ch. 161, 65 L. T. Rep. N. S. 335 (effect of an indorsement after the bill matured); Allen *v.* Kemble, 13 Jur. 287, 6 Moore P. C. 314, 13 Eng. Reprint 704.

56. *Alabama.*— Goodman *v.* Munks, 8 Port. (Ala.) 84.

Illinois.— Mineral Point R. Co. *v.* Barron, 83 Ill. 365; Evans *v.* Anderson, 78 Ill. 558.

Iowa.— Thorp *v.* Craig, 10 Iowa 461.

Kentucky.— Short *v.* Trabue, 4 Metc. (Ky.) 299; Steele *v.* Curie, 4 Dana (Ky.) 381.

Maryland.— Trasher *v.* Everhart, 3 Gill & J. (Md.) 234.

Massachusetts.— Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Bulger *v.* Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359.

place of payment has been designated for the convenience of the accepters or to facilitate the negotiation of the bill,[57] and generally in the United States the nature of the contract.[58] The interpretation of the instrument is in like manner referred to the law of the place where it was made,[59] especially where no place of payment is expressed.[60]

(III) *LEX LOCI REI SITÆ.* The law of the place where the land is situated in the case of mortgage security comes in question chiefly in the conflict of usury laws.[61]

(IV) *LEX DOMICILII.* The law of the domicile comes in question, if at all, only in contests relating to the personal or corporate capacity of a party.[62]

(V) *LEX FORI.* The law of the forum is applied in general only to questions of procedure,[63] except so far as it may be asserted on questions of validity or construction to defeat the enforcement of foreign laws that are repugnant to the policy of the laws of the forum.[64]

Michigan.— Bissell *v.* Lewis, 4 Mich. 450.
Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.
New Jersey.— Atwater *v.* Walker, 16 N. J. Eq. 42 [*affirming* 15 N. J. Eq. 502].
New York.— Hyde *v.* Goodnow, 3 N. Y. 266.
Ohio.— Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62.
Texas.— Armendiaz *v.* Serna, 40 Tex. 291.
Vermont.— Churchill *v.* Cole, 32 Vt. 93; Porter *v.* Munger, 22 Vt. 191; Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364.
United States.— Wallace *v.* Agry, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096.

This is true as to the maker's liability to the payee (Hyatt *v.* State Bank, 8 Bush (Ky.) 193; Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777) or to an indorsee (Woodruff *v.* Hill, 116 Mass. 310), and as to the liability of the indorser (Rose *v.* Park Bank, 20 Ind. 94, 83 Am. Dec. 306; Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79; Chatham Bank *v.* Allison, 15 Iowa 357; Hyatt *v.* State Bank, 8 Bush (Ky.) 193; Dow *v.* Rowell, 12 N. H. 49), of the drawer (Crawford *v.* Mobile Branch Bank, 6 Ala. 12, 41 Am. Dec. 33; Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 6 U. S. App. 312, 3 C. C. A. 1, 17 L. R. A. 595 [*following* Tilden *v.* Blair, 21 Wall. (U. S.) 241, 22 L. ed. 632]), and of the accepter (Bissell *v.* Lewis, 4 Mich. 450).

57. Tilden *v.* Blair, 21 Wall. (U. S.) 241, 22 L. ed. 632.

58. *Alabama.*— Goodman *v.* Munks, 8 Port. (Ala.) 84.
Illinois.— Mineral Point R. Co. *v.* Barron, 83 Ill. 365; Evans *v.* Anderson, 78 Ill. 558.
Maryland.— Trasher *v.* Everhart, 3 Gill & J. (Md.) 234.
Massachusetts.— Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Bulger *v.* Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359; Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35.
Michigan.— Bissell *v.* Lewis, 4 Mich. 450.
Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.
New Hampshire.— Stevens *v.* Norris, 30 N. H. 466.
New York.— Hyde *v.* Goodnow, 3 N. Y. 266.
Vermont.— Blodgett *v.* Durgin, 32 Vt. 361.

59. *Alabama.*— Goodman *v.* Munks, 8 Port. (Ala.) 84.
Connecticut.— Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225; Smith *v.* Mead, 3 Conn. 253, 8 Am. Dec. 183.
Illinois.— Mineral Point R. Co. *v.* Barron, 83 Ill. 365; Evans *v.* Anderson, 78 Ill. 558.
Iowa.— Arnold *v.* Potter, 22 Iowa 194.
Kentucky.— Steele *v.* Curle, 4 Dana (Ky.) 381.
Louisiana.— Chartres *v.* Cairnes, 4 Mart. N. S. (La.) 1.
Maine.— Bell *v.* Packard, 69 Me. 105, 31 Am. Rep. 251.
Massachusetts.— Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Bulger *v.* Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359; Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35.
Michigan.— Bissell *v.* Lewis, 4 Mich. 450.
New Jersey.—Armour *v.* Michael, 36 N. J. L. 92; Varick *v.* Crane, 4 N. J. Eq. 128.
New York.— Hyde *v.* Goodnow, 3 N. Y. 266; Smith *v.* Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Chapman *v.* Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264.
Pennsylvania.— Benners *v.* Clemens, 58 Pa. St. 24.
Utah.— Crofoot *v.* Thatcher, 19 Utah 212, 57 Pac. 171, 75 Am. St. Rep. 725.
Vermont.— Porter *v.* Munger, 22 Vt. 191.
Virginia.— Warder *v.* Arell, 2 Wash. (Va.) 282, 1 Am. Dec. 488.

60. Stickney *v.* Jordan, 58 Me. 106, 4 Am. Rep. 251; Orange County Bank *v.* Colby, 12 N. H. 520; Peck *v.* Hibbard, 26 Vt. 698, 62 Am. Dec. 605; Wilson *v.* Lazier, 11 Gratt. (Va.) 477.

61. Notes are governed by the laws of the state where executed and made payable, although the maker resides and intends to use the money borrowed in another state where the property mortgaged to secure the payment of the notes is situated. New York Cent. Trust Co. *v.* Burton, 74 Wis. 329, 43 N. W. 141.

62. As to parties generally see *infra*, XIV, C [8 Cyc.].

The holder's domicile, however, the situs of the debt secured by a note irrespective of the whereabouts of the note. Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502.

63. As to form of action see *infra*, XIV, A [8 Cyc.].

As to parties to action see *infra*, XIV, C [8 Cyc.].

As to pleading see *infra*, XIV, D [8 Cyc.].

64. See *supra*, I, D, 1, b, (I).

(VI) *Lex Temporis.* A bill or note is in general governed by the law which was in force when the paper was executed;[65] and the extension of a note by agreement after the statute has changed the law will not subject it to the change of law.[66] If a foreign law is once proved the burden of proof of change is upon the party affirming the change.[67] On the other hand a statutory change passed before the execution and taking effect after the execution, and before the maturity of a note, will determine the time for its presentment.[68]

b. Negotiability. If a bill is negotiable by the common law merchant it is presumed to be negotiable by the law of the place of contract in the absence of proof to the contrary;[69] and the law of the place of contract in general determines the negotiability of the instrument,[70] except so far as it may be controlled by the place of payment,[71] or, in case of conflict between place of contract and place of payment, by the law of the forum.[72]

c. Form of Instrument. The law of the place of contract regulates in general the formalities of its execution,[73] and if invalid there by reason of formal

65. This is true as to the liability of the parties (Cook *v.* Mutual Ins. Co., 53 Ala. 37; Evans *v.* Anderson, 78 Ill. 558; Duerson *v.* Alsop, 27 Gratt. (Va.) 229), the amount of damages recoverable (White *v.* McQuillan, 12 La. 530; Lennig *v.* Ralston, 23 Pa. St. 137), the rate of interest (Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469; White *v.* McQuillan, 12 La. 530; Kellogg *v.* Lavender, 15 Nebr. 256, 18 N. W. 38, 48 Am. Rep. 339), the maturity of demand notes (Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469), the discharge of a party as insolvent (Lambert *v.* Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834), the effect of a new promise upon the statute of limitations (Buckingham *v.* Orr, 6 Colo. 587), the recoupment of usury paid (Sims *v.* Squires, 80 Ind. 42; Sager *v.* Schnewind, 83 Ind. 204), the statute abolishing days of grace (Button *v.* Belding, 22 N. Y. App. Div. 618, 48 N. Y. Suppl. 981), and the statutory restriction on transfers by certain corporations (Bowlby *v.* Kline, 28 Ind. App. 659, 63 N. E. 723).

66. Lambert *v.* Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834.

67. Parks *v.* Evans, 5 Houst. (Del.) 576.

68. Barlow *v.* Gregory, 31 Conn. 261, where the statute made the day named in the note for its maturity a legal holiday.

69. *Alabama.*—Holmes *v.* Ft. Gaines Bank, 120 Ala. 493, 24 So. 959.

Connecticut.— Goff *v.* Billinghurst, 2 Root (Conn.) 527; Bowne *v.* Olcott, 2 Root (Conn.) 353; Elderkin *v.* Elderkin, 1 Root (Conn.) 139.

Georgia.— Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 S. E. 109.

Massachusetts.— Warren *v.* Copelin, 4 Metc. (Mass.) 594.

Michigan. — Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281.

Missouri.— Stix *v.* Matthews, 75 Mo. 96; Tyrell *v.* Cairo, etc., R. Co., 7 Mo. App. 294.

United States.— Kansas Sav. Bank *v.* National Bank of Commerce, 38 Fed. 800.

70. Especially where there is no other place of payment expressed (Strawberry Point Bank *v.* Lee, 117 Mich. 122, 75 N. W. 444), or where the same place is named for place of payment (Cope *v.* Daniel, 9 Dana (Ky.) 415; Corbin *v.* Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673).

71. State *v.* Cobb, 64 Ala. 127; Fordyce *v.* Nelson, 91 Ind. 447; Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281; Stix *v.* Mathews, 63 Mo. 371.

72. Especially where it is also the place of payment (Freeman's Bank *v.* Buckman, 16 Gratt. (Va.) 126) or place of contract (Howenstein *v.* Barnes, 5 Dill. (U. S.) 482, 12 Fed. Cas. No. 6,786, 20 Alb. L. J. 318, 8 Am. L. Rec. 163, 9 Centr. L. J. 48, 8 Reporter 326, 1 Wkly. Jur. 249), although not the place of indorsement (Reddick *v.* Jones, 28 N. C. 107, 44 Am. Dec. 68). So where it is the place of indorsement but not of original contract (Hakes *v.* Terre Haute Nat. Bank, 61 Ill. App. 501; Grace *v.* Hannah, 51 N. C. 94), and the action is brought on the indorsement against the indorser (Nichols *v.* Porter, 2 W. Va. 13, 94 Am. Dec. 500). So where the forum is the place of original contract and indorsement but not of payment (Woods *v.* Ridley, 11 Humphr. (Tenn.) 194) or where it is the place both of contract and payment but not of indorsement (Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727). In favor of negotiability, however, the law of the place of payment has been allowed to control that of the contract and forum. Stevens *v.* Gregg, 89 Ky. 461, 11 Ky. L. Rep. 686, 12 S. W. 775. But the real place of contract and payment has been held to control the place of delivery by mail and of the forum, although the effect was to render the note non-negotiable and subject to defense. Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753.

73. *Illinois.*— Evans *v.* Anderson, 78 Ill. 558.

Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.

New Jersey.—Da Costa *v.* Davis, 24 N. J. L. 319.

New York.— Hyde *v.* Goodnow, 3 N. Y. 266.

England.— Bills Exch. Act, § 72.

defects it is invalid everywhere.[74] This rule is one of general application,[75] but one country will not regard or enforce the revenue or stamp laws of another country.[76]

II. THE ORIGINAL CONTRACT.[77]

A. Classification. The original contract is either an order for payment, as in the case of a bill of exchange, check, draft, or order,[78] a promise to pay, as in the case of a promissory note, bond, or certificate of deposit;[79] or a secondary promise by way of guaranty or suretyship for the original promise.[80]

B. Particular Contracts — 1. Contract of Drawer — a. Nature of Contract —(I) *Conditional Liabilty* — (A) *General Principles.* The drawer is the person by whom a bill is drawn. The instrument signed by him, whether bill of exchange, draft, order, or check is in the form of an order addressed to the drawee for payment of money to be made by the drawee and there is no express contract on the drawer's part. The law merchant has, however, attached certain implied representations and promises to the drawer's signature of a negotiable bill.[81] His signature is a representation to all holders of the bill that the drawee has funds of the drawer to meet the bill.[82] He agrees further with the payee and subsequent holders that the drawee will accept the bill, if duly presented,[83] and that the drawee will pay it at its maturity on due presentment;[84] and that he will pay it, if the bill is duly presented, acceptance or payment refused, and due notice of such refusal given to him.[85] The drawer's contract with the drawee

74. Ford *v.* Buckeye State Ins. Co., 6 Bush (Ky.) 133, 99 Am. Dec. 663; Thayer *v.* Elliott, 16 N. H. 102; Van Schaick *v.* Edwards, 2 Johns. Cas. (N. Y.) 355; Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Palmer *v.* Yarrington, 1 Ohio St. 253.

75. It has been applied to determine the sufficiency of a scroll seal (Warren *v.* Lynch, 5 Johns. (N. Y.) 239), of a parol acceptance (Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368; Rutland Bank *v.* Woodruff, 34 Vt. 89; Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245), of a parol agreement to accept (Hubbard *v.* Yorkville Exch. Bank, 72 Fed. 234, 38 U. S. App. 289, 18 C. C. A. 525; Yorkville Exch. Bank *v.* Hubbard, 62 Fed. 112, 26 U. S. App. 133, 10 C. C. A. 295), of an authority to draw on the promisor (Bissell *v.* Lewis, 4 Mich. 450), of a blank indorsement (Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 27 E. C. L. 584, 6 C. & P. 25, 25 E. C. L. 303, 3 L. J. C. P. 246, 4 M. & S. 695), as against the maker in a suit by the indorsee (De la Chaumette *v.* Bank of England, 9 B. & C. 208, 17 E. C. L. 100), of an indorsement without statutory certificate of consideration (Moore *v.* Clopton, 22 Ark. 125), and of a transfer by delivery without indorsement (Roosa *v.* Crist, 17 Ill. 450, 65 Am. Dec. 679).

76. James *v.* Catherwood, 3 D. & R. 190; Wynne *v.* Jackson, 2 Russ. 351. Especially if the bill is payable in the place where suit is brought (Ludlow *v.* Van Rensselaer, 1 Johns. (N. Y.) 94) or if the stamp act simply relates to the admissibility of the instrument in evidence (Fant *v.* Miller, 17 Gratt. (Va.) 47; Lambert *v.* Jones, 2 Patt. & H. (Va.) 144).

Formerly bills drawn in any part of the British empire required stamping according to the law of that place. Clegg *v.* Levy, 3 Campb. 166; Alves *v.* Hodgson, 2 Esp. 528, 7 T. R. 241, 4 Rev. Rep. 433. But the Bills of Exchange Act, section 72, now provides that such a bill shall not be invalid for the want of such stamp.

77. The contracts entered into by the parties to a bill or note are: (1) The original contract or contracts made upon its inception or delivery which are here considered. (2) In the case of a bill the acceptance of the order (see *infra*, IV; V). (3) The transfer contracts (see *infra*, VI).

78. See *infra*, II, B, 1; II, B, 2; II, B, 6.

79. See *infra*, II, B, 3; II, B, 6.

80. See *infra*, II, B, 4; II, B, 5; II, B, 6.

81. Non-negotiable bills.—Where the drawer's obligation is to the payee "alone" the indorsee cannot maintain an action against him. Hackney *v.* Jones, 3 Humphr. (Tenn.) 612.

82. Heuertematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657.

83. Cummings *v.* Kent, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796 [*affirming* 6 Ohio Dec. (Reprint) 1178, 12 Am. L. Rec. 163].

As to presentment for acceptance see *infra*, IV.

As to acceptance see *infra*, V.

84. As to presentment for payment see *infra*, X.

As to payment see *infra*, XI.

85. The Negotiable Instruments Law, section 111, reads: "The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing

is that he will credit the drawee with the amount of the bill when paid by him, and will reimburse him for any payment not previously provided for.[86]

(B) *Non-Acceptance*—(1) REFUSAL BY DRAWEE. Subject to the conditions of presentment and notice, if the drawee refuses to accept the bill, the drawer becomes immediately liable for its payment to the holder.[87] The holder's right to sue the drawer on non-acceptance of the bill is not waived by his afterward having it presented and protested for non-payment,[88] and the drawer's liability on the drawee's refusal to accept is not affected by a subsequent acceptance of the bill.[89]

(2) CONDITIONAL ACCEPTANCE. If the holder takes a qualified acceptance[90] he will discharge the drawer,[91] unless the latter consent[92] or had no right to draw a bill upon the drawee.[93]

(3) ACCEPTANCE SUPRA PROTEST. After non-acceptance by the drawee the acceptance of the bill by another for the honor of the drawee or of an indorser will not affect the drawer's liability.[94]

(C) *Non-Payment*—(1) REFUSAL BY DRAWEE. Subject to the requirement of due notice the drawer becomes liable for the payment of the bill on its non-payment at maturity by the accepter or drawee.[95]

or limiting his own liability to the holder." So also Bills Exch. Act, § 55.

The California civil code, section 3177, makes the drawer liable as the first indorser of a negotiable instrument.

86. See *infra*, II, B, 1, a, (IV).

87. *Alabama.*— Evans *v.* Bridges, 4 Port. (Ala.) 348.

Connecticut.— Sterry *v.* Robinson, 1 Day (Conn.) 11.

Maryland.—Schuchardt *v.* Hall, 36 Md. 590, 11 Am. Rep. 514.

Massachusetts.— Lenox *v.* Cook, 8 Mass. 460; Watson *v.* Loring, 3 Mass. 557.

Pennsylvania.— Taan *v.* Le Gaux, 1 Yeates (Pa.) 204.

South Carolina.— Winthrop *v.* Pepoon, 1 Bay (S. C.) 468.

Texas.— Wood *v.* McMeans, 23 Tex. 481.

United States.—Watson *v.* Tarpley, 18 How. (U. S.) 517, 15 L. ed. 509.

England.— Bright *v.* Purrier, Bull. N. P. 269, 3 Burr. 1687; Milford *v.* Mayor, 1 Dougl. 56; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268; Whitehead *v.* Walker, 11 L. J. Exch. 168, 9 M. & W. 506.

The Negotiable Instruments Law, section 248, provides: "When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary." So also Bills Exch. Act, § 43.

Non-negotiable order.—The payee of an order payable out of a particular fund, and not expressed to be for value received, which has never been presented for acceptance or payment, cannot maintain an action thereon against the drawer, although the latter admitted the amount to be due from him to the payee. Wheeler *v.* Souther, 4 Cush. (Mass.) 606. And in a non-negotiable order by A on B for payment in lumber it has been held that there is no undertaking on A's part to pay the same in case of B's refusal. Hyland *v.* Blodgett, 9 Oreg. 166, 42 Am. Rep. 799.

88. Decatur Branch Bank *v.* Hodges, 17 Ala. 42; Lenox *v.* Cook, 8 Mass. 460; Hickling *v.* Hardey, 1 Moore C. P. 61, 7 Taunt. 312, 2 E. C. L. 378.

89. Merchants' Nat. Bank *v.* McCarger, 9 Heisk. (Tenn.) 401.

90. Need not accept qualified acceptance.— When an order is payable on presentment, and is presented within a reasonable time, the payee is not bound to take an acceptance on time from the drawee but may, on the latter's refusal to pay at once, proceed immediately against the drawer. Gallagher *v.* Raleigh, 7 Ind. 1. See also *infra*, V, B, 1, note 27.

91. Minehart *v.* Handlin, 37 Ark. 276; Gibson *v.* Smith, 75 Ga. 33; Bridge *v.* Livingston, 11 Iowa 57 (an acceptance to pay in instalments). See also *infra*, V, B, 1, note 31.

92. Knox *v.* Reeside, 1 Miles (Pa.) 294.

93. Taylor *v.* Newman, 77 Mo. 257.

94. Chitty Bills 386.

95. *Illinois.*— Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

Indiana.— Sweetser *v.* Snodgrass, 7 Ind. App. 609, 34 N. E. 842.

Massachusetts.— Shepard, etc., Lumber Co. *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 68 Am. St. Rep. 446, 41 L. R. A. 617.

New York.— Manchester *v.* Braedner, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829; Hargous *v.* Lahens, 3 Sandf. (N. Y.) 213; Mottram *v.* Mills, 1 Sandf. (N. Y.) 37; Foster *v.* Dayton, 10 Daly (N. Y.) 225; Suckley *v.* Furse, 15 Johns. (N. Y.) 338.

North Carolina.— Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

Ohio.— Cummings *v.* Kent, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796.

Tennessee.— Schoolfield *v.* Moon, 9 Heisk. (Tenn.) 171.

Texas.— Lewis *v.* Parker, 33 Tex. 121, especially where the acceptance was for the drawer's accommodation.

Wisconsin.— Batavian Bank *v.* North, (Wis. 1902) 90 N. W. 1016, although the check was not to be presented until the drawer provided funds, the drawer having failed so to provide within a reasonable time.

United States.— Armstrong *v.* Brolaski, 46 Fed. 903, holding that the drawer is liable on

(2) PAYMENT SUPRA PROTEST. The payment of a bill *supra protest* is not a satisfaction of the bill, if made for the honor of any party who is secondarily liable, and the rights of the party honored pass in such case to the payer with the same rights of action against prior parties.[96]

(D) *Certification of Check.* A check being payable on presentment its certification is often to be regarded, as against the drawer, as a payment by which he is discharged. This is so where the certification is procured by the holder after the check has been delivered.[97] On the other hand the drawer will not be discharged by a certification procured by himself.[98]

(II) *PLACE OF PAYMENT.* The drawer's contract is for payment at the place where the bill was drawn, if no other place is expressed or indicated in the bill.[99]

(III) *CONSIDERATION.* The presumption in the drawing of a bill is that the drawee has funds of the drawer for the purpose.[1] A bill may, however, be drawn by an agent on his principal for the purpose of paying the drawee's debt to the payee.[2] Or the drawer may be the payee's agent and the bill be drawn on the payee's debtor for the purpose of transmitting the payment directly to the

non-payment of his check as "agent," although he had directed the bank to pay the check out of another account kept in his individual name.

The Negotiable Instruments Law, section 144, provides for "immediate right of recourse to all parties secondarily liable" on dishonor by non-payment.

Payment after conditional acceptance.— The drawer is liable only on the accepter's failure to pay according to the terms of his acceptance. Andrews *v.* Baggs, Minor (Ala.) 173, 12 Am. Dec. 47; Campbell *v.* Pettengill, 7 Me. 126, 20 Am. Dec. 349; Gallery *v.* Prindle, 14 Barb. (N. Y.) 186.

Where several parts have been accepted and the accepter has paid the first part and refused payment of the second the drawer for whose benefit both parts were negotiated will be liable to the holder of the second part. Wright *v.* McFall, 8 La. Ann. 120.

Non-negotiable order.— The drawer of such order may be sued on the common counts on non-payment of the order. Pleiss *v.* Maule, 2 Miles (Pa.) 186.

96. Mertens *v.* Winnington, 1 Esp. 112. And see *infra*, XII, B, 8, c.

97. National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; Neg. Instr. L. § 324. See also BANKS AND BANKING, 5 Cyc. 542, note 21. But writing the word "accepted" across a check and making a payment on account does not discharge the drawer, the payee not consenting to any delay. Warrensburg Co-operative Bldg. Assoc. *v.* Zoll, 83 Mo. 94.

98. Born *v.* Indianapolis First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 18 Am. St. Rep. 312, 7 L. R. A. 442; Cincinnati Oyster, etc., Co. *v.* National Lafayette Bank, 51 Ohio St. 106, 36 N. E. 833. Although he procured it at the payee's request. Randolph Nat. Bank *v.* Hornblower, 160 Mass. 401, 35 N. E. 850.

Known insolvency of accepter.— The drawer's liability on a check is not affected by the fact that all the parties knew at the time the drawee accepted the check that the bank had suspended, and that the drawer had funds therein to an amount greater than that of the check. American Emigrant Co. *v.* Clark, 47 Iowa 671. In case of the accepter's insolvency the holder waives no rights against the drawer by giving notice to the assignee of the accepter not to pay over any money to the drawer out of assets which might come to his hands in that capacity. Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

99. As to the drawer's liability for damages this is true (Page *v.* Page, 24 Mo. 595; Bouldin *v.* Page, 24 Mo. 594; Price *v.* Page, 24 Mo. 65; Lennig *v.* Ralston, 23 Pa. St. 137), even where the place of payment is shown by the drawee's address (Kuenzi *v.* Elvers, 14 La. Ann. 391, 74 Am. Dec. 434).

The drawer's right to demand and notice is also determined by the law of the place where the bill is drawn. Raymond *v.* Holmes, 11 Tex. 54.

The drawer's release by discharge in bankruptcy is also governed by the law of the place where the bill was drawn and not by that of the place of payment. Potter *v.* Brown, 5 East 124, 1 Smith K. B. 351, 7 Rev. Rep. 663.

Lex loci solutionis determines the drawer's liability as to rate of interest and usury in acceptance, the accepter being governed by that law and being the principal debtor. Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239. It also determines the drawer's liability on the question of the sufficiency of form of indorsement made in another county and valid there and at the place of payment. Everett *v.* Vendryes, 19 N. Y. 436, 439, where Denio, J., said: "When, therefore, he directed the drawees to pay to the order of the payee, he must be intended to contemplate that whatever would be understood in New York to be the payee's order, was the thing which he intended by that expression in the bill."

1. Heuertematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657.

2. In such case the drawer still remains liable to the holder individually, although his relation to the drawee is known (Newhall *v.*

payee. In such case the drawer is not liable to the payee in the United States,[3] but is held to be liable in England.[4] Or it may be drawn for the accommodation of the drawee or payee,[5] or as a gift or *donatio causa mortis* to the payee.[6]

(IV) *Liability to Drawee.* The drawer contracts by implication with the drawee to reimburse any payment made by him on the bill, if funds have not been provided by the drawer for the payment,[7] and this is the case where a depositor's checks overdraw his account with the drawee bank.[8] If the bill is accepted and paid by the accepter for the accommodation of the drawer the law implies a promise on the drawer's part to indemnify the accepter;[9] and if such accommodation accepter pays the bill he can sue the drawer on such implied promise,[10] and may sue with the drawer a third party who has made himself co-drawer by indorsing the bill at the time of its delivery;[11] but his payment extinguishes the bill,

Dunlap, 14 Me. 180, 31 Am. Dec. 45; Leadbitter *v.* Farrow, 5 M. & S. 545, 17 Rev. Rep. 345) and although the bill directs a charge to the principal's account (Mayhew *v.* Prince, 11 Mass. 54). *Contra*, where the principal was disclosed. Roberts *v.* Austin, 5 Whart. (Pa.) 313 [*reversing* 2 Miles (Pa.) 254]. See too Hall *v.* Couk, 13 Ky. L. Rep. 606, 17 S. W. 1022, where the case was decided on a question of pleading.

3. Jones *v.* Lathrop, 44 Ga. 598; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384.

4. Sowerby *v.* Butcher, 2 Cr. & M. 368, 3 L. J. Exch. 80, 4 Tyrw. 320; Le Fevre *v.* Lloyd, 1 Marsh. 318, 5 Taunt. 749, 15 Rev. Rep. 644, 1 E. C. L. 383.

5. See *infra*, III, B, 3.

6. See *infra*, III, B, 4.

7. Church *v.* Swope, 38 Ohio St. 493.

8. *Illinois.*— Casey *v.* Carver, 42 Ill. 225; Thomas *v.* International Bank, 46 Ill. App. 461.

Iowa.— Bremer County Bank *v.* Mores, 73 Iowa 289, 34 N. W. 863.

Maine.— Franklin Bank *v.* Byram, 39 Me. 489, 63 Am. Dec. 643.

Massachusetts.— Hubbard *v.* Charlestown Branch R. Co., 11 Metc. (Mass.) 124.

Michigan.— Frankenberg *v.* Decatur First Nat. Bank, 33 Mich. 46.

New York.— Buffalo Mar. Bank *v.* Butler Colliery Co., 52 Hun (N. Y.) 612, 5 N. Y. Suppl. 291, 23 N. Y. St. 318 [*affirmed* in 125 N. Y. 695, 25 N. E. 751, 34 N. Y. St. 1011].

North Carolina.— Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101.

Pennsylvania.— U. S. Bank *v.* Macalester, 9 Pa. St. 475. But so far as the form of procedure (statutory judgment by default) is concerned, an accidental overdraft is said to negative the idea of an actual contract and to take it out of the category of "contract for the loan or advance of money." Farmers', etc., Bank *v.* Sellers, 2 Miles (Pa.) 329. And where the drawer made his check payable at a future day and on the day named paid the amount of it to the payee without receiving the check in return, and a year afterward the drawee of the check paid it, when the drawer had no funds in the bank, it was held that evidence of a custom of the bank to pay overdrafts of solvent drawers was inadmissible and that the drawer was not liable. Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 57 Am. Dec. 618.

United States.— Bell *v.* Davidson, 3 Wash. (U. S.) 328, 3 Fed. Cas. No. 1,248, unless there is an express direction to charge to the account of another.

But a suit on the implied promise is a waiver of the tort and is subject to the general right of set-off. U. S. Bank *v.* Macalester, 9 Pa. St. 475.

As to the drawer's liability for interest see *infra*, XIV, G [8 Cyc.].

Application of deposits.— When a customer of a bank who has overdrawn his account makes a deposit the presumption is, in the absence of evidence, that the deposit was general and was made and received toward the payment of the overdraft. Nichols *v.* State, 46 Nebr. 715, 65 N. W. 774. Although it may be known by the bank not to be his private money. Hale *v.* Richards, 80 Iowa 164, 45 N. W. 734. But see *contra*, U. S. Bank *v.* Macalester, 9 Pa. St. 475.

9. Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640.

10. Dickerson *v.* Turner, 15 Ind. 4; Pomeroy *v.* Tanner, 70 N. Y. 547; Griffith *v.* Read, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267; Chester Nat. Bank *v.* Gunhouse, 17 S. C. 489; Christian *v.* Keen, 80 Va. 369.

But this contract to indemnify does not necessarily extend to costs of action against accepter. Bagnall *v.* Andrews, 7 Bing. 217, 9 L. J. C. P. O. S. 21, 4 M. & P. 839, 20 E. C. L. 103.

11. Principal or surety.— He may recover against all drawers, if there are several, although one is a surety for the other (Swilley *v.* Lyon, 18 Ala. 552) and known to the accommodation accepter as such (Suydam *v.* Westfall, 2 Den. (N. Y.) 205 [*reversing* 4 Hill (N. Y.) 211]).

But the accepter cannot look to the drawer, where both drawer and accepter have signed for the accommodation of the payee (Barnet *v.* Young, 29 Ohio St. 7), where such drawer and accepter have both signed for the accommodation of another drawer (Turner *v.* Browder, 5 Bush (Ky.) 216), or where the last drawer has added the word "surety" to his name and the accepter signed for the accommodation of the other drawer (Griffith *v.* Reed, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267).

and his action against the drawer is on the implied contract and not on the bill.[12] He may also retain or proceed against funds which have been subjected to its payment by agreement with the drawer,[13] but an action can only be brought by the drawee on the overdraft or accommodation acceptance after he has paid the bill.[14]

(v) *Restricted Liability.* The drawer's liability may be qualified by express terms[15] or the bill may contain an express condition of which the performance must be shown;[16] but in general the addition of words of description like "agent" or "surety" after the drawer's signature will not affect his personal liability to holders of the paper.[17]

(vi) *Joint Drawers.* A bill like a note may be signed by several individual names as drawers. In such case there will be in general a joint liability.[18]

(vii) *Admissions Implied.* The law implies certain admissions on the drawer's part from the drawing of a negotiable bill or order. Thus he admits the payee's legal capacity to receive and indorse the bill.[19] He also admits the payee's authority to act as public officer[20] or as a corporation;[21] and in like manner a drawer who knows the payee named in the bill to be fictitious cannot set up the fact in his defense against a *bona fide* holder.[22]

12. Church *v.* Swope, 38 Ohio St. 493.

13. **On the drawer's insolvency before the bill matures** the drawee's lien on the fund deposited will be for the whole amount of the bill at maturity without deducting a discount for premature payment (Coats *v.* Donnell, 94 N. Y. 168), although the funds of a solvent drawer in the hands of a drawee cannot be applied to the paper before its maturity (Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153).

14. *Louisiana.*— Porter *v.* Sandidge, 32 La. Ann. 449.

New Jersey.—Suydam *v.* Combs, 15 N. J. L. 133.

Pennsylvania.— De Barry *v.* Withers, 44 Pa. St. 356.

Tennessee.— Planters' Bank *v.* Douglass, 2 Head (Tenn.) 699, foreclosure of collateral mortgage.

Virginia.— Christian *v.* Keen, 80 Va. 369. Or he must discharge the drawer from further liability on the bill. Braxton *v.* Willing, 4 Call (Va.) 288.

United States.— Parker *v.* U. S., Pet. C. C. (U. S.) 262, 18 Fed. Cas. No. 10,750.

The action will not be supported by mere acceptance (Planters' Bank *v.* Douglass, 2 Head (Tenn.) 699) or payment made after action begun (Suydam *v.* Combs, 15 N. J. L. 133), and the payment is not complete if the remittance made for it is stopped by the accepter before it reaches the holder and the drawer is not charged with the payment (Carley *v.* Potter's Bank, (Tenn. Ch. 1897) 46 S. W. 328).

15. Jones *v.* Heiliger, 36 Wis. 149; Bills Exch. Act, § 16.

Illustrations.— Thus the drawer of an order payable to a person named "when Mr. Dakin retires the notes of Dakin & Co.," is not liable to the person named on non-payment by the drawee after Dakin had retired the notes, unless notice was given to the drawee that the notes had been retired (Dakin *v.* Graves, 48 N. H. 45); the bill may be made payable out of a special fund (see *supra*, I, C, 1, d, (II), (C), (2), (B)), or there may be a contemporaneous agreement for acceptance payable "out of the first money of the drawer" that should come to the drawee's hands (Travis *v.* Duffau, 20 Tex. 49), and although such a provision in the bill renders it non-negotiable this will not affect the drawer's liability to the payee (Jolliffe *v.* Higgins, 6 Munf. (Va.) 3). But the holder of such a bill cannot sue the drawer on a general liability on the bill without proof as to fund received (Nichols *v.* Davis, 1 Bibb (Ky.) 490), especially where the fund referred to was withdrawn by the drawer after he had induced the holder not to present the bill for payment (North *v.* Campbell, 72 Ill. 380).

16. **As to pleading performance of condition** see *infra*, XIV, D [8 Cyc.].

17. See *supra*, I, C, 1, c, (I), (E), (2), (d); *infra*, II, B, 6, a, (II).

18. In Louisiana a bill requesting the drawees "to charge the same to account," signed by the drawers, binds the latter jointly only and not *in solido*. Cooper *v.* Polk, 2 La. Ann. 158.

19. **Bankrupt.**— Drayton *v.* Dale, 2 B. & C. 293, 3 D. & R. 534, 2 L. J. K. B. O. S. 20, 26 Rev. Rep. 356, 9 E. C. L. 135; Pitt *v.* Chappelow, 10 L. J. Exch. 487, 8 M. & W. 616.

Infant.— Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101; Grey *v.* Cooper, 3 Dougl. 65, 1 Selw. N. P. 306.

Married woman.— Cathell *v.* Goodwin, 1 Harr. & G. (Md.) 468.

The Negotiable Instruments Law, section 111, provides that the drawer "admits the existence of the payee and his then capacity to indorse." So also Bills Exch. Act, § 55.

Who may be payee see *supra*, I, C, 1, c, (II), (B).

20. Knox *v.* Reeside, 1 Miles (Pa.) 294.

21. For cases relating to implied admissions of this sort by the maker of a note see *infra*, II, B, 3, a, (II), notes 65, 66.

22. **As to availability of defense** see *infra*, XIV, B [8 Cyc.].

(VIII) *ASSIGNMENT OF FUND.* It has been much discussed whether and how far a bill or check transfers the fund against which it is drawn, thereby enabling the holder of the bill to sue the drawee without acceptance and also enabling him to maintain his claim to the fund against assignee or creditors.[23]

(IX) *MEASURE OF DAMAGES.* The amount recoverable against the drawer, including certain statutory damages, is considered in a later division of this article.[24]

(X) *DISCHARGE OF DRAWER.* The promise of the drawer being conditioned on due presentment and notice of dishonor, he is in general discharged by the want of such presentment or notice.[25] As his liability is secondary to that of the accepter he is in effect a surety for him, and as such is in some states liable to be discharged by want of diligence in prosecution of the principal debtor.[26]

b. Revocability of Contract — (I) *BILLS AND DRAFTS.* A bill of exchange or draft is sometimes a mere authority to receive money and can in that case be revoked by the drawer before its acceptance or transfer to a *bona fide* holder for value.[27]

(II) *CHECKS* — (A) *In General.* In like manner a check may be revoked or countermanded by the drawer until it is paid, certified, or transferred to a *bona fide* holder;[28] but it cannot be countermanded after it has been accepted[29]

As to fictitious payee see *supra*, I, C, 1, c, (II), (B), (6).

So one who accepts for the honor of the drawer, like the drawer himself, cannot set up the defense that the payee and indorser was a fictitious person. Phillips *v.* Im Thurn, 18 C. B. N. S. 694, 11 Jur. N. S. 489, 12 L. T. Rep. N. S. 457, 13 Wkly. Rep. 750, 114 E. C. L. 694 [*affirmed* in L. R. 1 C. P. 463, 35 L. J. C. P. 220, 14 L. T. Rep. N. S. 406, 14 Wkly. Rep. 653].

Forged indorsement.— If the drawer issues a bill with the payee's indorsement forged he admits its genuineness, as against the accepter who pays the bill. Coggill *v.* American Exch. Bank, 1 N. Y. 113, 49 Am. Dec. 310.

23. For cases on this point see *infra*, II, B, 2, b.

24. See *infra*, XIV, G [8 Cyc.].

25. As to presentment for payment see *infra*, X.

As to notice of dishonor see *infra*, XIII.

26. As to the requirement of diligence in prosecution see *infra*, XIV, B [8 Cyc.].

27. Harriman *v.* Sanborn, 43 N. H. 128.

Acts amounting to revocation.—Where the drawee refuses to accept the order and the drawer brings action against him on the original debt, for which the order was drawn, it is a revocation of the order. Seargent *v.* Seward, 31 Vt. 509. So if an order does not take effect during the drawer's life it becomes void by his death. McKee *v.* Myer, Add. (Pa.) 31. But where the payee has received the order in payment of a valid claim against the drawer it cannot be revoked by the drawer by mere notice to the drawee not to pay (Gray *v.* New York, 46 N. Y. Super. Ct. 494), it is not revoked by the drawer's death (Cutts *v.* Perkins, 12 Mass. 206), and the drawer cannot revoke an order which has been accepted and transferred to a *bona fide* holder (Sansone *v.* Alexander, 16 Misc. (N. Y.) 368, 38 N. Y. Suppl. 66).

A non-negotiable order in the hands of a payee for value cannot be revoked by the drawer and, upon the refusal of him on whom it is drawn to pay it, an action may be maintained against him. Foster *v.* Dayton, 10 Daly (N. Y.) 225.

28. Tramell *v.* Farmers' Nat. Bank, 11 Ky. L. Rep. 900; State Sav. Bank *v.* Buhl, (Mich. 1901) 88 N. W. 471 (especially where it was given under a mistake of fact); Cloyes *v.* Cloyes, 36 Hun (N. Y.) 145 (especially where it was a gift from the drawer to the payee); Florence Min. Co. *v.* Brown, 124 U. S. 385, 8 S. Ct. 531, 31 L. ed. 424. See also BANKS AND BANKING, 5 Cyc. 540, note 7.

A cashier's check on his own bank is in effect a note of the bank and cannot be revoked. See BANKS AND BANKING, 5 Cyc. 474, note 25.

Effect of countermand.— Countermand of a check by the drawer exonerates the bank from liability to the holder, if it has not accepted or certified the check (Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355), and the payee of an uncertified check which has been countermanded by the drawer cannot sue the bank (Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612). The bank is liable to the drawer if it pays a check after due notice of countermand from the drawer (Schneider *v.* Irving Bank, 1 Daly (N. Y.) 500, 30 How. Pr. (N. Y.) 190), but not for payment made by it before notice (Frankenberg *v.* Decatur First Nat. Bank, 33 Mich. 46).

29. See BANKS AND BANKING, 5 Cyc. 540.

A check cannot be revoked after it has been placed in the hands of the bank for certification, although presented by a holder without the payee's indorsement. Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352 [*affirming* 12 Hun (N. Y.) 537].

The bank is liable if it certifies a check after countermand by the drawer. Public Grain, etc., Exch. *v.* Kune, 20 Ill. App. 137.

or after it has come by due transfer in the course of business into the hands of a *bona fide* holder for value.[30]

(B) *What Amounts to Revocation.*[31] In some cases the death of the drawer is a revocation of a check which has not been presented to the bank,[32] but the filing of a petition in bankruptcy is not a revocation of a check already given by the petitioner, although the bank had notice of it.[33] An express revocation by notice of countermand must be specific.[34]

c. Recourse to Accepter. The right of the depositor in a bank to bring an action against the bank for not honoring his check arises out of the implied contract of bank deposits and is a question of banking law.[35] So in general the drawer's right of action against the drawee upon his refusal to accept a bill depends on previous contract relations and such action cannot be brought on the bill itself, but if the drawer is obliged to pay the bill and pays it, he is in general entitled to have recourse to the accepter for his reimbursement.[36]

d. Conflict of Laws. The law of the place of contract determines in general the contract and liability of the drawer.[37] This law governs his liability to an indorsee,[38] determines his right to set up defenses against the indorsee,[39] and, so far as that place is his intended place of payment, the measure of his liability for interest and damages;[40] but this is controlled by the law of the place of payment where that appears.[41]

2. Contract of Drawee — a. Acceptance Necessary. As a general rule the liability of the drawee on a bill or order begins with his acceptance. Until then he is not liable to the holder of the paper,[42] and this is true, although the bill

30. Gage Hotel Co. *v.* Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 63 Am. St. Rep. 270, 39 L. R. A. 479; Union Nat. Bank *v.* Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185. And the drawer is liable to be a *bona fide* holder for value if he stops its payment by the bank. McLean *v.* Clydesdale Banking Co., L. R. 9 App. Cas. 95, 50 L. T. Rep. N. S. 457.

Who is a bona fide holder.— The drawer may stop payment of the check in the hands of the payee's collecting agent. German Nat. Bank *v.* Farmers' Deposit Nat. Bank, 118 Pa. St. 294, 12 Atl. 303. But where a drawer has given his check to a bank on its surrender of a forged check, which it had paid to him as holder and returned after discovery of the forgery, the drawer cannot afterward countermand his check. Charles River Nat. Bank *v.* Davis, 100 Mass. 413. And the drawer cannot countermand the check after the bank has received it from the holder and charged it to the drawer and credited the amount to the holder. Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355.

31. **The Bills of Exchange Act,** section 75, provides for revocation of checks by countermand and by death of drawer.

32. Weiand *v.* State Nat. Bank, 23 Ky. L. Rep. 1517, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178. *Compare* Raesser *v.* National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, 56 L. R. A. 174. See also Banks and Banking, 5 Cyc. 540, notes 9, 10.

33. Chambers *v.* Northern Bank, 5 Ky. L. Rep. 123.

34. Thus a general notice to the bank not to allow his account to be overdrawn is not sufficient revocation. Bremer County Bank *v.* Mores, 73 Iowa 289, 34 N. W. 863.

35. See, generally, Banks and Banking, 5 Cyc. 535.

36. **As to rights growing out of payment by drawer** see *infra*, XI, B, 4.

37. Thorp *v.* Craig, 10 Iowa 461; Carroll *v.* Upton, 2 Sandf. (N. Y.) 171 (as to place where notice to drawer should be sent); Orr *v.* Lacy, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10,589 (as to liability for damages); Gibbs *v.* Freemont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482 (as to rate of interest chargeable).

38. Everett *v.* Vendryes, 19 N. Y. 436.

39. Stacy *v.* Baker, 2 Ill. 417; Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240; Wilson *v.* Lazier, 11 Gratt. (Va.) 477; Babston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131.

40. Crawford *v.* Mobile Branch Bank, 6 Ala. 12, 41 Am. Dec. 33; Hendricks *v.* Franklin, 4 Johns. (N. Y.) 119; Orr *v.* Lacy, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10,589.

41. As to admissibility of defense (Wood *v.* Gibbs, 35 Miss. 559), measure of damages (Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532; *Ex p.* Heidelback, 2 Lowell (U. S.) 526, 11 Fed. Cas. No. 6,322, 9 Chic. Leg. N. 183, 1 Cinc. L. Bul. 21, 23 Int. Rev. Rec. 73, 15 Nat. Bankr. Reg. 495; *In re* Commercial Bank, 36 Ch. D. 522), and time for presentment (Sylvester *v.* Crohan, 138 N. Y. 494, 34 N. E. 273).

As to presentment see *infra*, X.

As to notice of dishonor see *infra*, XI.

As to defenses see *infra*, XIV, B [8 Cyc.].

As to damages see *infra*, XIV, G [8 Cyc.].

42. *Arkansas.*— Wilamouicz *v.* Adams, 13 Ark. 12, an order payable in government scrip.

Colorado.—Woodruff *v.* Hensel, 5 Colo. App. 103, 37 Pac. 948.

Delaware.— Watson *v.* Lofland, 4 Harr.

is drawn against a consignment of goods which has been received by the drawee.[43]

b. Assignment of Fund—(i) *Bill or Draft.* A bill of exchange[44] is not of itself an assignment of the funds of the drawer in the hands of the drawee,[45] but it may take effect, if so intended, as an equitable assignment of the fund,[46] especially where it is drawn for the entire fund[47] or where the fund drawn against

(Del.) 60, holding that the treasurer of a corporation is not liable to an employee on an unaccepted order on him by the managers of the company.

Indiana.— Goodwin *v.* Hazzard, 1 Ind. 514, Smith (Ind.) 320, no action lies against a postmaster upon an unaccepted draft upon him from the post-office department in favor of the holder.

Massachusetts.— Clement *v.* Earle, 130 Mass. 585 note; Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478.

New York.— Harris *v.* Dolmetch, 12 N. Y. St. 456.

Pennsylvania.— Reilly *v.* Daly, 159 Pa. St. 605, 34 Wkly. Notes Cas. (Pa.) 74, 28 Atl. 493; Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529.

United States.— Hankin *v.* Squires, 5 Biss. (U. S.) 186, 11 Fed. Cas. No. 6,025; Dickey *v.* Harmon, 1 Cranch C. C. (U. S.) 201, 7 Fed. Cas. No. 3,894.

Canada.— Hall *v.* Prittie, 17 Ont. App. 306.

See also *infra*, V, A, 2, a, note 26; and 7 Cent. Dig. tit. "Bills and Notes," § 107.

Negotiable Instruments Law, section 211, provides: "A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same." So Bills Exch. Act, § 53, except as to Scotland.

So where the holder of a note drew an order on the maker for the amount. Weinstock *v.* Bellwood, 12 Bush (Ky.) 139. And to the effect that such an order is not an independent instrument upon which an action could be maintained see Noyes *v.* Gilman, 65 Me. 589, although the maker wrote a reply that the note was good and promised to pay it.

Drawee in funds.— The drawee is not liable to the holder of a draft by reason of his having funds of the drawer in his hands. Rockville Nat. Bank *v.* Lafayette Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Hopkins *v.* Beebe, 26 Pa. St. 85.

Usage as to other drafts.— The fact that the holder was induced to purchase the draft by knowledge that other like drafts had always been paid by the drawee is immaterial. Marriner *v.* John L. Roper Lumber Co., 113 N. C. 52, 18 S. E. 94.

43. Helm *v.* Meyer, 30 La. Ann. 943; St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1 (consignment received and credited to drawer on general account); Clements *v.* Yeates, 69 Mo. 623; Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. (N. Y.) 416, not drawn for entire proceeds and with no express reference to the bill of lading]; Cochran *v.* Sherman, 5 Duer (N. Y.) 13 (consignment being received and credited on another account). But where a consignee takes a consignment with notice that a draft has been drawn against it he cannot retain the consignment or its proceeds and repudiate the draft (Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546; McCausland *v.* Wheeler Sav. Bank, 43 Ill. App. 381) and where he has accepted the draft the accepted bill operates as an assignment of the proceeds of the goods to the holder and is not revoked by the drawer's death (Cutts *v.* Perkins, 12 Mass. 206) and this is true where the advances for the shipment were made by the payee to the drawer, and the drawee credits the proceeds on another account of the drawer in which the payee has no interest (Nutting *v.* Sloan, 57 Ga. 392). See also *infra*, V, A, 2, a, note 30.

44. A non-negotiable order is not a bill of exchange and may be construed as an assignment. Johnson *v.* Thayer, 17 Me. 401; McPherson *v.* Johnston, 3 Brit. Col. 465. In like manner an order drawn by a partner on the receiver of the partnership effects to pay a certain sum to a named person out of money coming to the drawer does not require acceptance by the receiver to render it operative. Moore *v.* Robinson, 35 Ark. 293.

45. *Alabama.*— *Ex p.* Jones, 77 Ala. 330, as against assignee.

Illinois.—Abt *v.* American Trust, etc., Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175, under New York law as against assignee in Illinois.

Iowa.— Poole *v.* Carhart, 71 Iowa 37, 32 N. W. 16; Canton First Nat. Bank *v.* Dubuque South Western R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280.

Minnesota.— Lewis *v.* Traders' Bank, 30 Minn. 134, 14 N. W. 587.

Missouri.— Engler *v.* Rice, 20 Mo. 583.

New York.— Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671 (unless clearly so intended); People *v.* Remington, 45 Hun (N. Y.) 329.

Vermont.— Seargent *v.* Seward, 31 Vt. 509.

United States.—Dickey *v.* Harmon, 1 Cranch C. C. (U. S.) 201, 7 Fed. Cas. No. 3,894. Especially where the draft is for part only of the fund. Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Randolph *v.* Canby, 20 Fed. Cas. No. 11,559, 11 Nat. Bankr. Reg. 296.

Canada.— McPherson *v.* Johnston, 3 Brit. Col. 465.

See also ASSIGNMENTS, 4 Cyc. 49, note 57; 4 Cent. Dig. tit. "Assignments," § 85.

46. Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671.

47. Moore *v.* Davis, 57 Mich. 251, 23 N. W. 800 (draft attached to account); Lewis *v.* Traders' Bank, 30 Minn. 134, 14 N. W. 587;

is expressly and particularly referred to in the bill,[48] although this is not always the effect of a reference to the fund.[49] But while the courts have been disinclined to subject the drawee to a suit by the holder of a bill which he had not accepted they have given the effect of an assignment of the fund to the bill as against a later assignment for creditors[50] or attachment.[51]

(11) *CHECK.* It has been said that a check differs from other bills and orders because of the implied contract of the bank, as drawee, to honor the checks of its depositor.[52] Under this view it has been held in some states that a check is an

Brem *v.* Covington, 104 N. C. 589, 10 S. E. 706 (an order indorsed on an account for its entire amount); Maginn *v.* Dollar Sav. Bank, 131 Pa. St. 362, 18 Atl. 901 (an unaccepted order on a bank for the drawer's entire deposit). See also ASSIGNMENTS, 4 Cyc. 54.

48. Georgia M. & F. Ins. Bank *v.* Jauncey, 3 Sandf. (N. Y.) 257 [*overruling* 1 Barb. (N. Y.) 486]; Robbins *v.* Klein, 6 Ohio St. 199, 54 N. E. 94. See also ASSIGNMENTS, 4 Cyc. 55, note 67; 56.

Contractor's orders.— An order drawn against the moneys becoming due on a contract has been held to be a valid transfer of the fund (Moody *v.* Kyle, 34 Miss. 506 [against subsequent assignee of contract]; Bradley, etc., Co. *v.* Ward, 15 N. Y. App. Div. 386, 44 N. Y. Suppl. 164; Gurnee *v.* Hutton, 63 Hun (N. Y.) 197, 17 N. Y. Suppl. 667, 44 N. Y. St. 926), but it will be subject to the conditions of the contract and defeated by their non-performance (Hazleton *v.* Union Imp. Co., 143 Pa. St. 573, 22 Atl. 906), and an order payable on the completion of a building contract will not entitle the holder to any claim against the intermediate payments by the owner (Wakeman *v.* Noble, (N. J. 1890) 20 Atl. 388). If, however, it is payable out of an intermediate payment and the contract is fully performed up to that point it will not be affected by a failure to complete the contract afterward. Herter *v.* Goss, etc., Co., 57 N. J. L. 42, 30 Atl. 252.

The assignment of a certificate of deposit carries the fund. Springfield M. & F. Ins. Co. *v.* Peck, 102 Ill. 265.

49. A draft is not converted into a partial assignment of the fund by the words "charge to account of" (Whitney *v.* Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316 [with a reference to a particular fund]; Noe *v.* Christie, 51 N. Y. 270; Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. (N. Y.) 416]; Harris *v.* Dolmetch, 12 N. Y. St. 456; Marriner *v.* John L. Roper Lumber Co., 113 N. C. 52, 18 S. E. 94), a recital of the consideration (Seyfried *v.* Stoll, 56 N. J. Eq. 187, 38 Atl. 955), the designation of a particular fund for reimbursement (Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515), an order for payment "out of the next payment when due on the brick building" (Harvin *v.* Galluchat, 28 S. C. 211, 5 S. E. 359, 13 Am. St. Rep. 671, the drawee having afterward paid the drawer without notice of the draft), an order to pay "on completion of contract on building," without reference to the fund (Thomson *v.* Huggins, 23 Ont. App. 191), an order by the beneficiary of a trust upon the trustee to pay "as my income becomes due" (Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194), or by an order on an attorney to pay to the bearer "the amount which may be received" on a judgment left with him for collection (Spalding *v.* Lesley, 2 Speers (S. C.) 754).

50. Voorhes *v.* Hesket, 1 Ohio Cir. Ct. 1. So of a check where the facts disclosed an intention to make it payable out of a particular fund on deposit with the drawee. Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855. But see *contra*, Grammel *v.* Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363 (where the fund had been paid to the receiver before the draft was presented); Guthrie Nat. Bank *v.* Gill, 6 Okla. 560, 54 Pac. 434 (where the draft was marked "paid" before notice of the assignment and without the knowledge of the holder, but was protested and returned with the word "paid" erased as soon as notice was received).

51. Merchants', etc., Nat. Bank *v.* Barnes, 18 Mont. 335, 45 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737; Miller *v.* Hubbard, 4 Cranch C. C. (U. S.) 451, 17 Fed. Cas. No. 9,574; King *v.* Gorsline, 4 Cranch C. C. (U. S.) 150, 14 Fed. Cas. No. 7,796 (the drawee having no notice of the draft until after the fund was attached); Corser *v.* Craig, 1 Wash. (U. S.) 424, 6 Fed. Cas. No. 3,255.

Many cases, however, hold such assignment to be at best only equitable, and therefore ineffectual against attaching creditors of the drawer (Sands *v.* Matthews, 27 Ala. 399; Cushman *v.* Haynes, 20 Pick. (Mass.) 132; Missouri Pac. R. Co. *v.* Wright, 38 Mo. App. 141; De Liquero *v.* Munson, 11 Heisk. (Tenn.) 15), at least in the absence of evidence of valuable consideration (Conroy *v.* Ferree, 68 Minn. 325, 71 N. W. 383), and the fund is subject to attachment by a creditor of the drawer, where the drawer had drawn a bill against it which the drawee had refused to accept, although he had expressed himself as willing to pay it out of the proceeds of the consignment (Dolsen *v.* Brown, 13 La. Ann. 551).

52. This is true where a priority is created between the bank and the holder by reason of the character of the deposit, such as a special deposit made to provide for the particular check (Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; Central Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Seligman *v.* Wells, 17 Blatchf. (U. S.) 410, 1 Fed. 302) and the bank was duly informed of that fact (Van Allen *v.* American Nat. Bank, 3 Lans. (N. Y.) 517).

assignment of the funds of the drawer in bank up to the amount named in it[53] and that the payee or subsequent holder may sue the drawee upon the check without acceptance or certification.[54] It has also been held that the drawer may sue the drawee for the use of the holders of his outstanding checks.[55] In most of the United States, however, and in England it is held that a check is not an assignment of any part of the funds in bank;[56] that it is revocable until accepted or paid;[57] that it cannot be regarded as a debt due from the drawee to the holder

53. Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 77 N. W. 346; Raesser *v.* National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, 56 L. R. A. 174; Marler *v.* Molsons Bank, 23 L. C. Jur. 293. See also ASSIGNMENTS, 4 Cyc. 51, note 58; BANKS AND BANKING, 5 Cyc. 538, note 95; 556, note 83.

If the holder delays presentment at the request of the drawer and the drawer without his consent appropriates the funds to other uses he will be liable to the holder for misappropriation of his money. North *v.* Campbell, 72 Ill. 380.

Within the statute against fraudulent assignments a check has been held in Kentucky to be an assignment and preference. Taylor *v.* Taylor, 78 Ky. 470.

Check and agreement.— If the check is drawn under a prior agreement for an assignment of the fund *pro tanto* it will become an equitable assignment (Coates *v.* Emporia First Nat. Bank, 91 N. Y. 20; Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421), and this is true as against the drawer and his assignee in insolvency, although the agreement did not expressly relate to the particular fund in bank (Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855 [*reversing* 55 Fed. 850]); but an agreement between the parties to the check and the bank that all funds standing to the drawer's credit should immediately on the levy of any attachment pass to the payee's credit will not make the check an equitable assignment of the fund in the bank (Loyd *v.* McCaffrey, 46 Pa. St. 410).

54. Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146; Romanski *v.* Thompson, (Miss. 1892) 11 So. 828; State Sav. Assoc. *v.* Boatmen's Sav. Bank, 11 Mo. App. 292; Senter *v.* Continental Bank, 7 Mo. App. 532; Zelle *v.* German Sav. Inst., 4 Mo. App. 401; McGrade *v.* German Sav. Inst., 4 Mo. App. 330; Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 77 N. W. 346. See also BANKS AND BANKING, 5 Cyc. 538, note 95.

The Bills of Exchange Act, section 75, gives the holder of a check the right to sue the bank when the drawer is discharged by the want of due presentment.

Necessity of bank having funds of drawer. — The right of the payee of a check to recover its amount from the drawee bank does not depend absolutely on the question whether the drawer had a cash credit to meet it; the bank may create some different arrangement by contract. Springfield Mar. Bank *v.* Mitchell, 48 Ill. App. 486. It is enough if the amount was there when the check was presented for certification and refused, although it was presented through a bank for payment a day later and after countermand by the drawer. American Exch. Nat. Bank *v.* Chicago Nat. Bank, 27 Ill. App. 538 [*affirmed* in 131 Ill. 547, 22 N. E. 523].

Check and agreement.— In like manner even an agreement between drawer and drawee, not in itself amounting to an acceptance, may sustain an action by the holder of a check against the drawee. Chanute Nat. Bank *v.* Crowell, 6 Kan. App. 533, 51 Pac. 575 (a verbal agreement by the drawee to pay the check); Mittenbeyer *v.* Atwood, 18 How. Pr. (N. Y.) 330 (a promise by the drawees to the drawers after they had a settlement of accounts on which the drawers had left in their hands sufficient money to pay the bill).

As to right of action against drawee arising out of implied acceptance where the implication was itself due to a payment or part payment made by the bank to a wrongful holder see *infra*, V, A, 5, a, (II), (D).

55. And that he might bring several actions for the use of the respective payees or holders of the several checks. Chicago M. & F. Ins. Co. *v.* Stanford, 28 Ill. 168, 81 Am. Dec. 270.

56. *Alabama.*— Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Colorado.— Snedden *v.* Harmes, 5 Colo. App. 477, 39 Pac. 68, special deposit.

Louisiana.—State *v.* Bank of Commerce, 49 La. Ann. 1060, 22 So. 207.

Michigan.— McIntyre *v.* Farmer's, etc., Bank, 115 Mich. 255, 73 N. W. 233, as against attachment.

New York.— People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159, 28 N. Y. Suppl. 407, 58 N. Y. St. 712, 28 N. Y. Suppl. 422, 59 N. Y. St. 881, irrespective of clearing-house rules.

North Carolina.—Commercial Nat. Bank *v.* Gastonia First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, 32 L. R. A. 712.

United States.— Dickey *v.* Harmon, 1 Cranch C. C. (U. S.) 201, 7 Fed. Cas. No. 3,894, against assignee.

See also ASSIGNMENTS, 4 Cyc. 51, note 58; BANKS AND BANKING, 5 Cyc. 536, note 94.

The Negotiable Instruments Law, section 325, provides: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

57. As to revocation by drawer see *supra*, II, B, 1, b, (II), (A).

so as to avail the holder as a set-off against an insolvent drawee;[58] and that the holder cannot sue the bank upon an unaccepted check.[59]

3. CONTRACT OF MAKER — a. Nature of — (I) *IN GENERAL.* The contract of the maker of a note is for its payment unconditionally at the time and place named.[60] It is not conditioned on presentment to any other party for payment or otherwise, unless expressed in the instrument itself,[61] and on its face it renders the maker liable for the payment as the primary and principal debtor.[62] The liability to the *bona fide* holder of a negotiable note may be greater than that originally incurred toward the payee.[63] In a non-negotiable note the liability remains the same as that originally assumed toward the payee.[64]

(II) *ADMISSIONS.* The making of a promissory note is held to be an admission on the part of the maker of the payee's capacity to receive it[65] and to

58. Case *v.* Marchand, 23 La. Ann. 60; Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; Northern Trust Co. *v.* Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526.

59. *Colorado.*— Boettcher *v.* Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582.

New York.— O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816, 36 N. Y. St. 277 [*reversing* 54 Hun (N. Y.) 272, 7 N. Y. Suppl. 380, 27 N. Y. St. 1].

North Carolina.—Commercial Nat. Bank *v.* Gastonia First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, 32 L. R. A. 712.

Pennsylvania.— Tamaqua First Nat. Bank *v.* Shoemaker, 117 Pa. St. 94, 11 Atl. 304, 2 Am. St. Rep. 649.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

See also BANKS AND BANKING, 5 Cyc. 536, note 94.

60. Neg. Instr. L. § 110; Bills Exch. Act, § 88.

Place of payment.— His contract is to pay at the place where the note is made if no other place is named (Smith *v.* Mead, 3 Conn. 253, 8 Am. Dec. 183), and where he provides funds at such place which are lost by the negligence of the holder in presenting the note the maker may be discharged (Charleston Bank Nat. Banking Assoc. *v.* Zorn, 14 S. C. 444, 37 Am. Rep. 733), but in general the maker is not discharged by failure to present the note at the place named for payment (Dockray *v.* Dunn, 37 Me. 442; Carter *v.* Smith, 9 Cush. (Mass.) 321; Nichols *v.* Pool, 47 N. C. 23). See also *infra*, XIV, E [8 Cyc.].

61. **Liability as indorser.**— It is said that he may be liable both as maker and as indorser when he makes and indorses a note payable to his own order (Hall *v.* Burton, 29 Ill. 321, 81 Am. Dec. 310), but a maker cannot become liable as indorser only (Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761; Ewan *v.* Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094, 60 Am. St. Rep. 719, 35 L. R. A. 786). If, however, one of several joint makers indorses a note he may become and remain liable as indorser, although discharged as maker by suit and judgment against his co-makers only (Oneida County Bank *v.* Lewis, 23 Misc. (N. Y.) 34, 51 N. Y. Suppl. 826), but if one of two makers pays the note at maturity and marks it paid he will not afterward become liable in any way by indorsing it "without recourse" to another (Cross *v.* Hollister, 47 Kan. 652, 28 Pac. 693).

Liability as drawer.— So a maker will not become liable only as drawer of a bill by addressing the note to another person (Brazelton *v.* McMurray, 44 Ala. 323) or by using the form of a draft addressed to no drawee (Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166). Where B signs a draft on A which is not accepted and C signs his name across the face of it it is in effect B's note with C as his surety. Patillo *v.* Mayer, 70 Ga. 715.

As to parties entitled to insist on due presentment for payment see *infra*, X, A.

Additional provision treated as surplusage. — So a promise to collect as soon as possible the note of another given as collateral is mere surplusage. James *v.* Robinson, 1 Mo. 595.

As to conditions generally see *supra*, I, C, 1, d, (II), (C).

As to parol evidence of such conditions see *infra*, XIV, E [8 Cyc.].

62. As to another party, for whose accommodation he signs, he may be a surety, but as to subsequent holders he is the principal. Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438; Lewis *v.* Hanchman, 2 Pa. St. 416.

As to accommodation paper see *infra*, III, B, 3.

63. **As to bona fide holder** see *infra*, IX.

As to defenses available against such holder see *infra*, XIV, B [8 Cyc.].

64. Backus *v.* Danforth, 10 Conn. 297; Warren *v.* Scott, 32 Iowa 22.

65. **Alien enemy.**— Rogers *v.* Gibbs, 25 La. Ann. 563.

Corporate officer.— It admits the official capacity of a corporate officer described as "treasurer." Abbott *v.* Chase, 75 Me. 83.

Corporation.— It admits the existence of the corporation as such (Reynolds *v.* Roth, 61 Ark. 317, 33 S. W. 105; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Brickley *v.* Edwards, 131 Ind. 3, 30 N. E. 708; Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101; Camp *v.* Byrne, 41 Mo. 525; Exchange Nat. Bank *v.* Capps, 32 Nebr. 242, 49 N. W. 223, 29 Am. St. Rep. 433; Platte Valley Bank *v.* Harding, 1 Nebr. 461; Nashua Fire Ins. Co.

indorse it.[66] So where the payee named is a fictitious person and known to the maker to be such;[67] but the insanity of the payee and indorser may be set up by the maker.[68]

(III) *JOINT MAKERS*—(A) *Who Are*—(1) IN GENERAL—(a) RULE STATED. Where two or more persons sign the note they are liable as joint makers in the absence of express words qualifying their liability. Such a note is generally in the form "we promise." The obligation or debt is joint.[69] In some jurisdictions, however, this rule is changed by statute making all obligations which are joint in form joint and several unless otherwise expressed.[70]

v. Moore, 55 N. H. 48; Troy Cong. Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455), and its power to take the note (St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Holmes, etc., Mfg. Co. *v.* Holmes, etc., Metal Co., 53 Hun (N. Y.) 52, 5 N. Y. Suppl. 937, 23 N. Y. St. 538 [*affirmed* in 127 N. Y. 252, 27 N. E. 831, 38 N. Y. St. 155, 24 Am. St. Rep. 448]; St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188), although the note is non-negotiable (Trenton First Nat. Bank *v.* Gillilan, 72 Mo. 77), and notwithstanding a general prohibition against doing business as a foreign corporation (Shook *v.* Singer Mfg. Co., 61 Ind. 520; Gorrell *v.* New York Home L. Ins. Co., 63 Fed. 371, 24 U. S. App. 188, 11 C. C. A. 240; Mutual Life Ins. Co. *v.* Wilcox, 8 Biss. (U. S.) 203, 17 Fed. Cas. No. 9,980, 17 Alb. L. J. 426, 10 Chic. Leg. N. 269, 8 Ins. L. J. 815, 7 N. Y. Wkly. Dig. 13, 5 Reporter 681). Indeed the taking of such note is held to be a "doing business" within the meaning of the statute. Tallapoosa Lumber Co. *v.* Holbert, 5 N. Y. App. Div. 559, 39 N. Y. Suppl. 432. See, generally, CORPORATIONS.

Infant.— Hastings *v.* Dollarhide, 24 Cal. 195; Frazier *v.* Massey, 14 Ind. 382.

State.— Esley *v.* Illinois, 23 Kan. 510.

66. Neg. Instr. L. § 110; Bills Exch. Act, § 88.

Attorney-general.— Wolke *v.* Kuhne, 109 Ind. 313, 10 N. E. 116.

Infant.— Hastings *v.* Dollarhide, 24 Cal. 195; Frazier *v.* Massey, 14 Ind. 382; Hardy *v.* Waters, 38 Me. 450.

Corporation.— Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266; Ehrman *v.* Union Cent. L. Ins. Co., 35 Ohio St. 324.

Unincorporated society.— Mayer *v.* Old, 57 Mo. App. 639.

67. Lane *v.* Krekle, 22 Iowa 399; Maniort *v.* Roberts, 4 E. D. Smith (N. Y.) 83.

As a rule all parties having knowledge of the fictitious character of the payee are liable on the paper at suit of a *bona fide* holder for value, whether the party be maker (Farnsworth *v.* Drake, 11 Ind. 101), drawer (Forbes *v.* Espy, 21 Ohio St. 474), or accepter (McCall *v.* Corning, 3 La. Ann. 409, 48 Am. Dec. 454).

As to fictitious payee generally see *supra*, I, C, 1, c, (II), (B), (6).

As to availability of defense see *infra*, XIV, B [8 Cyc.].

68. Peaslee *v.* Robbins, 3 Metc. (Mass.) 164; Burke *v.* Allen, 29 N. H. 106, 61 Am. Dec. 642 (plaintiff being "bound to show a legal transfer of the note").

69. *Indiana.*—Barnett *v.* Juday, 38 Ind. 86.

Kentucky.— Harrow *v.* Dugan, 6 Dana (Ky.) 341, a note reciting "I have borrowed," etc., "for the benefit of my father, Joseph Harrow," and signed by two persons.

Louisiana.— Lafourche Transp. Co. *v.* Pugh, 52 La. Ann. 1517, 27 So. 958, where an agent signed once for several makers.

New York.— Palmer *v.* Stephens, 1 Den. (N. Y.) 471, where the second signature was merely initials.

Wisconsin.— Bacon *v.* Bicknell, 17 Wis. 523, a due-bill signed by several without words of express promise.

Canada.— See Noble *v.* Forgrave, 17 Quebec Super. Ct. 234.

See 7 Cent. Dig. tit. "Bills and Notes," § 257.

As between themselves they are each bound to pay an equal share of the note. Peaks *v.* Dexter, 82 Me. 85, 19 Atl. 100.

In Louisiana it is a joint obligation and not solidary and binds each only for his proportion of the debt unless otherwise expressed. New Orleans *v.* Ripley, 5 La. 120, 25 Am. Dec. 175; Bennett *v.* Allison, 2 La. 419; Groves *v.* Sentell, 153 U. S. 465, 14 S. Ct. 898, 38 L. ed. 785; La. Rev. Civ. Code, arts. 2080, 2086, 2093.

It has been held not to be prima facie a joint note where one signed at the right hand with a seal and the other at the left with the word "witness" printed above his name. Hopkins *v.* Lane, 4 Thomps. & C. (N. Y.) 311; Steininger *v.* Hoch, 39 Pa. St. 263, 80 Am. Dec. 521.

Note of partners.— Where a note is signed by two parties as makers it is immaterial to their liability thereon whether they are partners or not (Whitwell *v.* Thomas, 9 Cal. 499; Small *v.* Bladworth, 1 Misc. (N. Y.) 507, 20 N. Y. Suppl. 663), and a note may be made by individual partners as joint makers to the partnership and indorsed by it (Norfolk Nat. Bank *v.* Griffin, 107 N. C. 173, 11 S. E. 1049, 22 Am. St. Rep. 868), but a joint and several partnership note for a partnership debt must exhaust its share of the partnership assets before it can have recourse to the estate of an individual bankrupt partner (*In re* Mosier, 112 Fed. 138).

70. Farmers' Exch. Bank *v.* Morse, 129 Cal. 239, 61 Pac. 1088 (the statute makes the note *prima facie* joint and several, but it is a joint note if so agreed by the parties);

(b) Presumption From Signatures. The presumption as to the character of parties is that their relation is rightly expressed by their signatures,[71] and even the addition of the word "surety" or "security" to one maker's name will not in general affect his liability as maker to the payee and subsequent holders of the note.[72]

Kaestner *v.* Chicago First Nat. Bank, 170 Ill. 322, 48 N. E. 998; Sully *v.* Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161. But it has been held in Delaware that a similar statutory provision that "an obligation, or written contract, of several persons, shall be joint and several, unless otherwise expressed" does not apply to a negotiable promissory note made by two persons. Gale *v.* Myers, 4 Houst. (Del.) 546.

71. Lord *v.* Moody, 41 Me. 127.

If a note is signed by two or more makers it is presumed that they are liable as joint makers (Davis *v.* Smith, 29 Ill. App. 313) and not as principal and surety (Jackson *v.* Wood, 108 Ala. 209, 19 So. 312; Johnson *v.* King, 20 Ala. 270; California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38 [although known to be surety for one another]; Chandler *v.* Ruddick, 1 Ind. 391), irrespective of the order in which the makers have signed (Summerhill *v.* Tapp, 52 Ala. 227).

Change from surety to maker.— A maker may become principal on a new note in renewal of a former note on which he was surety. Lamoille County Nat. Bank *v.* Hunt, 72 Vt. 357, 47 Atl. 1078.

Effect of agreement between co-makers.— Where makers agree between themselves that one of them shall be held harmless it will not render him a mere surety as against the payee (Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608), and an accommodation indorser whose indorsement was procured by one of two joint makers in possession of the note may on payment of the note have recourse to both makers as principals irrespective of their relation to one another (Hoffman *v.* Butler, 105 Ind. 371, 4 N. E. 681). The rights of a payee cannot be restricted by an arrangement between the principals, made after the note has passed from their hands, and changing their relations between themselves so that one becomes a mere surety for the other. Patch *v.* King, 29 Me. 448. So where some of the original makers became sureties in effect by a change of their firm and the assumption of debts by the new firm. Norman *v.* Jackson Fertilizer Co., 79 Miss. 747, 31 So. 419.

As to presumptions and parol evidence concerning the relations of co-makers see *infra*, XIV, E [8 Cyc.].

72. *California.*— Southern California Nat. Bank *v.* Wyatt, 87 Cal. 616, 25 Pac. 918.

Connecticut.—Bond *v.* Storrs, 13 Conn. 412; Palmer *v.* Grant, 4 Conn. 389.

Kansas.— Rose *v.* Madden, 1 Kan. 445.

Massachusetts.— Hunt *v.* Adams, 7 Mass. 518, 6 Mass. 519, 5 Mass. 358, 4 Am. Dec. 68, "holden as surety." On the other hand it has been held that a note reading "I promise" signed by K and W, "surety," is not a joint note but a collateral undertaking. Little *v.* Weston, 1 Mass. 156.

Michigan.— Inkster *v.* Marshall First Nat. Bank, 30 Mich. 143.

Mississippi.— Stevens *v.* West, 1 How. (Miss.) 308, 29 Am. Dec. 630.

New York.— Hoyt *v.* Mead, 13 Hun (N. Y.) 327; Beaman *v.* Lyon, 27 N. Y. Wkly. Dig. 168.

Pennsylvania.—Kleckner *v.* Klapp, 2 Watts & S. (Pa.) 44; Craddock *v.* Armor, 10 Watts (Pa.) 258 ("security for the fulfilment of the above").

Vermont.— He is liable *prima facie* as a maker, but this presumption may be controlled by evidence of a different liability which was known to the payee. Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

See 7 Cent. Dig. tit. "Bills and Notes," § 256.

The only value of the word "surety" is to show his right to reimbursement from the principal and not to limit his liability to the payee. Aud *v.* Magruder, 10 Cal. 282.

Relation inter se.— Where the last of four makers adds "surety" to his signature he is presumed to be surety for the first three, but it may be shown *inter se* that the second and third are cosureties with him for the first (Whitehouse *v.* Hanson, 42 N. H. 9), or that the second and third were sureties for the first and the fourth was surety for all the others (Robison *v.* Lyle, 10 Barb. (N. Y.) 512). In like manner if a note is signed by A, B, and C, and B and C are sureties for A, and D afterward signs as "surety" at A's request, supposing all to be principals, he cannot be called on by B and C for contribution as their cosurety. Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247. Where A, B, and C give their note to C, adding "security" to his signature, in renewal of a note of A and B to C, B remains as he was, surety for A, and not cosurety with C, and C is surety for A and B. Stump *v.* Richardson County Bank, 24 Nebr. 522, 39 N. W. 433. So where the last two of three makers add "surety" to their signatures they are presumed to be cosureties for the first, but a different relation may be shown *inter se*. Apgar *v.* Hiler, 24 N. J. L. 812.

A person signing a note as guarantor at the time the note is executed by the principal is liable as an original maker and may be sued thereon as such, either alone or jointly with the principal (Leonard *v.* Sweetzer, 16 Ohio 1), but if an express guaranty is written beneath a note of a third person the guarantor is not a joint maker of the note (Brewster *v.* Silence, 8 N. Y. 207 [*affirming* 11 Barb. (N. Y.) 144]).

"Indorser" added.— Where one signs a note with others on the face and adds the word "indorser" after his name his liability is that of an indorser and not that of a joint maker (Schwenk *v.* Yost, 9 Wkly. Notes Cas.

(2) PAYEE SIGNING BELOW MAKER. Where the payee signs a note which is payable to him "or bearer" below the maker's signature on transferring it and at the request of the person receiving it he becomes jointly liable as maker.[73]

(3) PERSON SIGNING AFTER DELIVERY. One who adds his signature to a joint note or to a joint and several note after its delivery for sufficient consideration is in like manner a maker.[74] So if he adds his name below the signature of a sole maker.[75]

(B) *Liability of*—(1) IN GENERAL. The original liability of joint makers is not dependent upon that of one another,[76] although the release or discharge of one will in general discharge all.[77]

(2) ON DEATH OF CO-MAKER. On the death of one joint maker the holder's right of action is at common law against the survivor.[78] In some states the origi-

(Pa.) 16. *Contra*, notwithstanding Cal. Civ. Code, § 3108. Southern California Nat. Bank *v.* Wyatt, 87 Cal. 616, 25 Pac. 918), but it has been held that the liability created by such a signature is not that of a mere guarantor (Callaway *v.* Harrold, 61 Ga. 111).

73. *Illinois.*— Coates *v.* Harmon, 32 Ill. App. 204, holding that he cannot be treated by a third person as an indorser in blank.

Indiana.— Schmidt *v.* Archer, 113 Ind. 365, 14 N. E. 543, where it was payable to the "order of ourselves" and indorsed by the makers.

Kansas.— Raymond *v.* McNeal, 36 Kan. 471, 13 Pac. 814, holding that he cannot claim to be an indorser only.

Michigan.— See Cook *v.* Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. Rep. 870, holding that his transferee may prove that defendant intended by his act to become a joint maker and to waive notice.

Nebraska.—Dusenbury *v.* Albright, 31 Nebr. 345, 47 N. W. 1047, where the note was payable to bearer and the original holder transferred it by writing his name to the left of the original maker.

New York.— Partridge *v.* Colby, 19 Barb. (N. Y.) 248.

South Carolina.— Devore *v.* Mundy, 4 Strobh. (S. C.) 15, where the payee named in the note transferred it after maturity by adding his signature as maker. But it has been held that he thereby becomes a several, but not a joint, maker of the note (Freeman *v.* Clark, 3 Strobh. (S. C.) 281) and that he signs as a guarantor (Cason *v.* Wallace, 4 Bush (Ky.) 388).

See 7 Cent. Dig. tit. "Bills and Notes," § 82.

74. Tiller *v.* Shearer, 20 Ala. 596; Farmer *v.* Perry, 70 Iowa 358, 30 N. W. 752; Butler *v.* Gambs, 1 Mo. App. 466; Arlington First Nat. Bank *v.* Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393.

As to previous makers who do not assent to the new signature it will not be a joint note. Ives *v.* Pickett, 2 McCord (S. C.) 271. But where a note reading "We, A. P. Whitfield & Co., principal, and John T. Stovall and Thomas J. Lee, securities, promise to pay," was signed by Lee after the others had signed, and without the knowledge of Stovall, Lee was bound as cosurety with Stovall, and liable to contribute notwithstanding a private agreement with the first named unknown to Stovall, that they would take care of the note. Stovall *v.* Border Grange Bank, 78 Va. 188.

How liability affected by discharge or death of former maker.— The liability of one who becomes a co-maker on a note after its execution is not affected by the fact that the other signers were thereby discharged from liability, or that one of them has died and another has allowed judgment to be entered against him thereon. Rhoades *v.* Leach, 93 Iowa 337, 61 N. W. 988, 57 Am. St. Rep. 281.

An additional maker executing the note after maturity is a guarantor. Frech *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123.

75. As a joint and several maker. Sargent *v.* Robbins, 19 N. H. 572.

The new contract is collateral to the first and the additional maker does not become a joint and several promisor with the maker, if the original obligation of the latter on the note is not destroyed. Howe *v.* Taggart, 133 Mass. 284. He is in effect a guarantor and is liable thereon, although the original makers of the note did not assent to his signature (Stone *v.* White, 8 Gray (Mass.) 589), especially where the original maker had already died (Ives *v.* McHard, 2 Ill. App. 176).

76. Note void as to some makers.— One of the makers of a note is liable thereon, although the note be void as to the other maker (Browning *v.* Carson, 163 Mass. 255, 39 N. E. 1037), as where one is not bound as a married woman (Atkinson *v.* Weidner, 83 Mich. 412, 47 N. W. 317) or as an infant (Reid *v.* Degener, 82 Ill. 508; Taylor *v.* Dansby, 42 Mich. 82, 3 N. W. 267; Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066; Hartness *v.* Thompson, 5 Johns. (N. Y.) 160; Rohrer *v.* Morningstar, 18 Ohio 579), after disaffirmance (Wamsley *v.* Lindenberger, 2 Rand. (Va.) 478), where one maker signed on Saturday and one signed on Sunday (Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332), and where a maker adds the names of co-makers without their authority (Taylor *v.* Jones, Smith (Ind.) 5).

A note apparently intended to be joint and several binds one promisor who puts it in circulation with only his own signature. Dickerson *v.* Burke, 25 Ga. 225.

77. See *infra*, XIV, B [8 Cyc.].

78. Yorks *v.* Peck, 14 Barb. (N. Y.) 644; Chandler *v.* Neale, 2 Hen. & M. (Va.) 124.

nal liability of a deceased joint maker is kept alive by statute as against his personal representatives,[79] and courts of equity in general preserve the remedy against the decedent's estate for the protection of his coöbligors and of the payee.[80]

(IV) *Joint and Several Makers.* The usual form of a joint and several note is a promise "jointly and severally" to pay. A promise in the singular number, "I promise," signed by several makers is generally held to be a joint and several note,[81] and this is true as to the holder of the paper, although "surety" is added to some of the signatures;[82] but the note has been held to be a joint note although written "I promise,"[83] and a several note, although written

Whether the survivor is principal debtor (Getty *v.* Binsse, 49 N. Y. 385, 10 Am. Rep. 379) or surety (Moore *v.* Gray, 26 Ohio St. 525).

The death of one of three joint makers of a promissory note does not affect the character of the joint contract between the survivors. Corlies *v.* Fleming, 30 N. J. L. 349.

As to actions against the survivor see *infra*, XIV, C [8 Cyc.].

79. Redman *v.* Marvil, 73 Ind. 593; Hudelson *v.* Armstrong, 70 Ind. 99; Curtis *v.* Mansfield, 11 Cush. (Mass.) 152; Keller's Estate, 1 Leg. Chron. (Pa.) 189; Mays *v.* Cockrum, 57 Tex. 352.

80. But the decedent's estate will, under the chancery rule, be charged with only half the amount, unless it is shown that he is the principal debtor or that the other is insolvent. Brooks *v.* Dent, 1 Md. Ch. 523.

81. *Connecticut.*— Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

Indiana.— Maiden *v.* Webster, 30 Ind. 317; Groves *v.* Stephenson, 5 Blackf. (Ind.) 584; Lambert *v.* Lagow, 1 Blackf. (Ind.) 388, the last case holding that a note executed by two persons, beginning, "I promise to pay," etc., and concluding, "Witness my hand and seal," etc., may be treated as the several obligation of each.

Louisiana.— State Bank *v.* Sterling, 2 La. 60.

Massachusetts.— Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27; Chaffee *v.* Jones, 19 Pick. (Mass.) 260.

Michigan.— Dow Law Bank *v.* Godfrey, 126 Mich. 521, 85 N. W. 1075, 86 Am. St. Rep. 559.

New Hampshire.— Ladd *v.* Baker, 26 N. H. 76, 57 Am. Dec. 355.

New York.— Ely *v.* Clute, 19 Hun (N. Y.) 35; Partridge *v.* Colby, 19 Barb. (N. Y.) 248; Hopkins *v.* Lane, 4 Thomps. & C. (N. Y.) 311; Lane *v.* Salter, 4 Rob. (N. Y.) 239. But see Brownell *v.* Winnie, 29 N. Y. 409, to the effect that such a note is in substance several and joint only for form of procedure.

Ohio.— Warren First Nat. Bank *v.* Fowler, 36 Ohio St. 524, 38 Am. Rep. 610 (holding that a note "I promise to pay to the order of myself," signed by A and B and placed in B's hands to be used for his sole benefit is virtually a joint and several note payable "to the order of ourselves or either of us" and may be transferred by B's indorsement); Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48 [*criticizing* Brownell *v.* Winnie, 29 N. Y. 400, 86 Am. Dec. 314].

Pennsylvania.—Higerty *v.* Higerty, 1 Phila. (Pa.) 232, 8 Leg. Int. (Pa.) 134, 5 Clark (Pa.) 74.

South Carolina.— Karck *v.* Avinger, Riley (S. C.) 201, 3 Hill (S. C.) 215; Barnet *v.* Skinner, 2 Bailey (S. C.) 88.

Vermont.— Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

Wisconsin.— Dill *v.* White, 52 Wis. 456, 9 N. W. 404.

England.— Clerk *v.* Blackstock, Holt N. P. 474, 17 Rev. Rep. 667, 3 E. C. L. 188; March *v.* Ward, Peake 130.

Canada.— Creighton *v.* Fretz, 26 U. C. Q. B. 627.

See also Neg. Instr. L. § 36, subs. 7.

Two partners may become severally liable on a note in the form "I promise" signed by one in the firm-name and afterward ratified by the other. Sherman *v.* Christy, 17 Iowa 322.

The indorsement by a third party of an express guaranty before delivery of the note has been treated as a joint and several note. Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68; Miller *v.* Gaston, 2 Hill (N. Y.) 188; Luqueer *v.* Prosser, 1 Hill (N. Y.) 256 [*affirmed* in 4 Hill (N. Y.) 420, 40 Am. Dec. 288]. *Contra*, Cole *v.* Merchants' Bank, 60 Ind. 350; Tinker *v.* McCauley, 3 Mich. 188 [*overruling* Higgins *v.* Watson, 1 Mich. 428].

82. Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68; Keller *v.* McHuffman, 15 W. Va. 64; Dart *v.* Sherwood, 7 Wis. 523, 76 Am. Dec. 228.

83. *Kentucky.*— Harrow *v.* Dugan, 6 Dana (Ky.) 341.

Louisiana.— Monget *v.* Penny, 7 La. Ann. 134.

Maine.— Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767.

Michigan.— Dederick *v.* Barber, 44 Mich. 19, 5 N. W. 1064.

New Hampshire.— Humphreys *v.* Guillow, 13 N. H. 387, 38 Am. Dec. 499.

New York.— Luqueer *v.* Prosser, 1 Hill (N. Y.) 256; Doty *v.* Bates, 11 Johns. (N. Y.) 544.

Pennsylvania.— Knisely *v.* Shenberger, 7 Watts (Pa.) 193.

Virginia.— Holman *v.* Gilliam, 6 Rand. (Va.) 39.

A fortiori this is so where the note was a promise "for . . . Peck, Howlett & Foster" signed by the several partners. Staats *v.*

"we promise."[84] "We, or either of us, promise" is in like manner a joint and several note.[85] A joint and several note is either a joint note of all or the several note of each maker.[86] It may be valid as a joint note and invalid as a several note,[87] or complete as a several note and incomplete as a joint note.[88] It remains joint and several as to the surviving makers after the death of one maker;[89] but it is not both joint and several, and the holder must elect to treat it as one or the other.[90] This election by the holder to treat the paper as joint or several does not, however, affect the right of the makers *inter se* to look to one another for contribution as joint makers.[91]

b. Conflict of Laws. In general the maker's liability will be determined by the law of the place of payment,[92] and as a rule his liability to others[93] or his

Howlett, 4 Den. (N. Y.) 559; Gallway *v.* Mathew, 1 Campb. 403, 10 East 264, 10 Rev. Rep. 289; *In re* Clarke, 8 Jur. 919, 14 M. & W. 469 [*overruling* Hall *v.* Smith, 1 B. & C. 407, 2 D. & R. 584, 1 L. J. K. B. O. S. 142, 8 E. C. L. 174]; Smith *v.* Jarves, 2 Ld. Raym. 1484.

84. Dickerson *v.* Burke, 25 Ga. 225; Holmes *v.* Sinclair, 19 Ill. 71; Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257; Rice *v.* Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724.

85. Pogue *v.* Clark, 25 Ill. 333. So a note reading "I or we promise," etc., and signed, "Coleman & Ames White Lead Co., per C. I. Williams, Sec. George J. Williams, Gen'l Mangr.," must be construed as the joint and several obligation of the company and G. J. Williams. Harris *v.* Coleman, etc., White Lead Co., 58 Ill. App. 366. But "we, or either of us, promise . . . in behalf" of a school district is the note of the district and not of the trustees. Harvey *v.* Irvine, 11 Iowa 82; Lyon *v.* Adamson, 7 Iowa 509; Winter *v.* Hite, 3 Iowa 142; Harkins *v.* Edwards, 1 Iowa 426; Baker *v.* Chambles, 4 Greene (Iowa) 428.

86. Owen *v.* Wilkinson, 5 C. B. N. S. 526, 5 Jur. N. S. 102, 28 L. J. C. P. 3, 94 E. C. L. 526; Beecham *v.* Smith, E. B. & E. 442, 4 Jur. N. S. 1018, 27 L. J. Q. B. 257, 6 Wkly. Rep. 627, 96 E. C. L. 442; Bulbeck *v.* Jones, 5 Jur. N. S. 1317; King *v.* Hoare, 13 M. & W. 494; Fletcher *v.* Dyche, 2 T. R. 32, 1 Rev. Rep. 414.

Either maker may be held liable or the note set off against either. Pate *v.* Gray, Hempst. (U. S.) 155, 18 Fed. Cas. No. 10,794*a*.

All are presumed to be principals (Orvis *v.* Newell, 17 Conn. 97), and this presumption is conclusive where the note reads "all as principals" (Derry Bank *v.* Baldwin, 41 N. H. 434).

Where proportion of each stipulated.— A note signed by several and stipulating the proportion each is to pay is a several note. McBean *v.* Todd, 2 Bibb (Ky.) 320; Western Wheel Scraper Co. *v.* Locklin, 100 Mich. 339, 58 N. W. 1117. It has been held, however, that where several persons jointly and severally promise to pay the sums set opposite their names each is jointly and severally liable for the whole amount described, and the only effect of the subdivision of amounts opposite each name is to determine their rights between themselves. Ballard *v.* Burnside, 49 Barb. (N. Y.) 102.

87. Maclae *v.* Sutherland, 2 C. L. R. 1320, 3 E. & B. 1, 18 Jur. 942, 23 L. J. Q. B. 229, 2 Wkly. Rep. 161, 77 E. C. L. 1.

88. Bryan *v.* Berry, 6 Cal. 394; Dickerson *v.* Burke, 25 Ga. 225.

89. Corlies *v.* Fleming, 30 N. J. L. 349.

90. Streatfield *v.* Halliday, 3 T. R. 779. So where it reads "jointly or severally." Rees *v.* Abbott, Cowp. 832.

Suing one maker equivalent to election.— Where the payee sues one of the makers alone and obtains judgment, such proceeding is an election to treat it as a several contract respecting them all. Bangor Bank *v.* Treat, 6 Me. 207, 19 Am. Dec. 210.

91. Byles Bills 9.

92. *Alabama.*— Camp *v.* Randle, 81 Ala. 240, 2 So. 287.

Arkansas.— Pryor *v.* Wright, 14 Ark. 189.

Connecticut.— Smith *v.* Mead, 3 Conn. 253, 8 Am. Dec. 183.

Indiana.— Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413 (municipal bonds); Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79.

New York.—Thompson *v.* Ketcham, 4 Johns. (N. Y.) 285.

United States.— Davis *v.* Clemson, 6 McLean (U. S.) 622, 7 Fed. Cas. No. 3,630.

This is true also of the liability of joint makers (Phipps *v.* Harding, 70 Fed. (U. S.) 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L. R. A. 513), although the law of the place of payment, New York, discharging a joint maker by the recovery of judgment against his co-maker only will not be enforced in Missouri to give that effect to a judgment recovered in Louisiana (Wiley *v.* Holmes, 28 Mo. 286, 75 Am. Dec. 126).

If no particular place of payment is specified in a note the law of the place of contract governs as to the obligation and duty imposed on the maker. Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777.

As to conflict of laws in case of discharge or release see *infra*, XI, G, 3.

As to rate of interest and damages recoverable see *infra*, XIV, G [8 Cyc.].

As to defense of usury see *infra*, XIV, B [8 Cyc.].

93. Ory *v.* Winter, 4 Mart. N. S. (La.) 277.

right to set up an equitable defense[94] will be unaffected by the law of the place of transfer.

4. CONTRACT OF GUARANTOR — a. Nature of — (I) *IN GENERAL.* In regard to the liability of one who guarantees a negotiable instrument, as distinguished from an indorser and from a surety, the rule in general is that the surety makes himself liable absolutely upon default of the principal, that the indorser is liable in such case only on formal demand and notice of dishonor, and that the guarantor is liable on reasonable demand and notice of default.[95]

(II) *NEGOTIABILITY.* The guaranty of a negotiable instrument does not affect the negotiability of the original paper.[96] On the other hand the guaranty does not itself acquire the attribute of negotiability in a strict sense, by reason of its being written on such an instrument.[97] Only the rights of the party guaranteed pass in general to subsequent holders, subject to any defense available against such original party.[98] It will be presumed that the guaranty was made for the benefit of the first holder of it for value.[99] Where the guaranty is general and

The liability of the maker to the indorsee is determined by the law of the state where the note is made and not of that where it is indorsed. Woodruff *v.* Hill, 116 Mass. 310; Miller *v.* Mayfield, 37 Miss. 688.

94. *Illinois.*— Stacy *v.* Baker, 2 Ill. 417.
Indiana.— Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240.
Mississippi.—Allen *v.* Bratton, 47 Miss. 119.
Virginia.—Wilson *v.* Lazier, 11 Gratt. (Va.) 477.
United States.—Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131.
As to admissibility of defenses see *infra,* XIV, B [8 Cyc.].

95. **As to contracts of guaranty generally** see GUARANTY.
Duty of holder of guaranteed paper as to presentment for payment see *infra,* X, A, 1, c.
Duty of holder of guaranteed paper as to notice of dishonor see *infra,* XIII.

96. A non-negotiable guaranty indorsed on a negotiable note does not render the note non-negotiable (Upham *v.* Prince, 12 Mass. 14; Taylor *v.* Binney, 7 Mass. 479; Ege *v.* Kyle, 2 Watts (Pa.) 222; Andrews *v.* Hart, 17 Wis. 297), although contained in the transfer of the note (Andrews *v.* Hart, 17 Wis. 297).

97. Belcher *v.* Smith, 7 Cush. (Mass.) 482; Tuttle *v.* Bartholomew, 12 Metc. (Mass.) 452; True *v.* Fuller, 21 Pick. (Mass.) 140; Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551; Leggett *v.* Raymond, 6 Hill (N. Y.) 639; Miller *v.* Gaston, 2 Hill (N. Y.) 188; Lamourieux *v.* Hewit, 5 Wend. (N. Y.) 307; McDoal *v.* Yoemans, 8 Watts (Pa.) 361. This is so whether it is a general guaranty of payment (Springer *v.* Hutchinson, 19 Me. 359; True *v.* Fuller, 21 Pick. (Mass.) 140), a guaranty of collection indorsed on a note payable to a person named or bearer (Lamourieux *v.* Hewit, 5 Wend. (N. Y.) 307; McDoal *v.* Yoemans, 8 Watts (Pa.) 361), or is included in the payee's indorsement as a guaranty of payment (Myrick *v.* Hasey, 27 Me. 9, 45 Am. Dec. 583; Belcher *v.* Smith, 7 Cush. (Mass.) 482; Northumberland County Bank *v.* Eyer, 58 Pa. St. 97) or of collection (Bissell *v.* Gowdy, 31 Conn. 47; Taylor *v.* Binney, 7 Mass. 479).
Guaranty indorsed on collateral mortgage. — Where a stranger indorsed a guaranty upon a mortgage which secured certain promissory notes it was held that such guaranty was not a negotiable contract and did not pass to a subsequent *bona fide* holder of the notes any right but that of the party originally guaranteed. Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 129.

98. Levi *v.* Mendell, 1 Duv. (Ky.) 77; Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977; Waldron *v.* Harring, 28 Mich. 493; Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582 (a guaranty by separate instrument of A's debts, including the note in suit); Omaha Nat. Bank *v.* Walker, 2 McCrary (U. S.) 565, 5 Fed. 399. *Contra,* apparently, to the exclusion of defenses: Jones *v.* Berryhill, 25 Iowa 289 (where the defense of usury was heard and determined adversely and the defense of want of consideration was overruled on the same ground that would have excluded the defense of accommodation by an indorser); Commercial Bank *v.* Cheshire Provident Inst., 59 Kan. 361, 53 Pac. 131, 68 Am. St. Rep. 368, 41 L. R. A. 175 (where the defenses of no consideration and *ultra vires* were heard and determined adversely on a general denial).

99. Northumberland County Bank *v.* Eyer, 58 Pa. St. 97. Thus a guaranty to an accepter will not extend to subsequent holders (*Ex p.* Stephens, L. R. 3 Ch. 753, 19 L. T. Rep. N. S. 198, 16 Wkly. Rep. 1162) unless expressly made to be so used (*Ex p.* Agra Bank, L. R. 3 Ch. 555, 37 L. J. Bankr. 23, 18 L. T. Rep. N. S. 866, 16 Wkly. Rep. 879).
Accommodation indorsement by payee.—A general guaranty on a promissory note, indorsed by the payee for the accommodation of the maker, is for the benefit, not of the payee, but of the first holder, for value, who takes the note with the guaranty upon it. Baldwin *v.* Dow, 130 Mass. 416.
Presumption arising from possession.— In Pennsylvania it has been held that no presumption arises that a holder not named either in the note or in the guaranty was the party to whom the guaranty was given.

evidently intended to protect any person taking the note on the strength of it, it follows the note into the hands of subsequent holders;[1] and in some jurisdictions a guaranty is assignable so as to pass to the assignee the right to sue thereon in his own name;[2] but originally an action on such guaranty could be brought only by the party to whom it was given or in his name.[3]

b. Form of Contract — (I) *In General* — (A) *When Expressed.*[4] An express guaranty may be made by the addition of appropriate words to the signature of one who signs as maker, accepter, or indorser, or it may be by the independent writing of a third party on the face or on the back of the bill. Thus the addition of the word "surety" or words of similar purport to the signature of a

McDoal *v.* Yoemans, 8 Watts (Pa.) 361. But in Michigan where a general guaranty is regarded as extending to any one who takes the note upon the guarantor's credit, possession of the instrument raises a presumption that the guaranty was made to the holder, at least until rebutted by a showing that such guaranty had previously been operative in other hands. Waldron *v.* Harring, 28 Mich. 493; Nevius *v.* Lansingburgh Bank, 10 Mich. 547.

1. Lemmon *v.* Strong, 59 Conn. 448, 22 Atl. 293, 21 Am. St. Rep. 123, 12 L. R. A. 270; Hopson *v.* Ætna Axle, etc., Co., 50 Conn. 597; Cole *v.* Merchants' Bank, 60 Ind. 350; Herrick *v.* Guarantor's Finance Co., 58 N. Y. App. Div. 30, 68 N. Y. Suppl. 560; Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; Small *v.* Sloan, 1 Bosw. (N. Y.) 352; Sexton *v.* Fleet, 2 Hilt. (N. Y.) 477; Prosser *v.* Luqueer, 4 Hill (N. Y.) 420, 40 Am. Dec. 288; Luqueer *v.* Prosser, 1 Hill (N. Y.) 256; McLaren *v.* Watson, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260; Ketchell *v.* Burns, 24 Wend. (N. Y.) 456.

It will pass by a mere delivery without indorsement, although the note guaranteed was payable to the maker's order (Jones *v.* Thayer, 12 Gray (Mass.) 443, 74 Am. Dec. 602) or by an assignment after the maturity of the note (Ellsworth *v.* Harmon, 101 Ill. 274; Partridge *v.* Davis, 20 Vt. 499).

Guaranty to payee by name, indorsed on a negotiable note to the payee or order, passes with the further indorsement of the note. Everson *v.* Gere, 122 N. Y. 290, 25 N. E. 492.

Guaranty in assignment.— It has been held that a subsequent indorsement will carry the guaranty with it, although it is contained in a prior transfer of the note which was made by a separate instrument. *In re* Barrington, 2 Sch. & Lef. 112.

Guaranty in collateral mortgage will pass to subsequent holder of note secured by it. Cumberland Nat. Bank *v.* St. Clair, 93 Me. 35, 44 Atl. 123.

Guaranty by letter.— Defendant A wrote to B a letter saying: "Any drafts that you may draw on Mr. A. Fiegelstoch, of our city, we guaranty to be paid at maturity." Thereafter B drew a draft on the person named and presented the same, together with A's letter to D, who discounted the draft which was afterward dishonored. It was held that the discounting of the draft by D upon the delivery to him of the letter rendered him an equitable assignee of the promise contained in the letter. Evansville Nat. Bank *v.* Kaufmann, 24 Hun (N. Y.) 612; Lawrason *v.* Mason, 3 Cranch (U. S.) 492, 2 L. ed. 509. But the promise contained in such a letter will not inure to the assignee of the bank which made the discount on the credit of the letter. Lyon *v.* Van Raden, 126 Mich. 259, 85 N. W. 727.

Guaranty by separate instrument will not in general pass by a mere transfer of the note guaranteed (McLaren *v.* Watson, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260; Watson *v.* McLaren, 19 Wend. (N. Y.) 557), and a promise by a third person to pay a note has been held not to inure to the benefit of a subsequent holder (Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582).

2. *Illinois.*— Ellsworth *v.* Harmon, 101 Ill. 274.

Indiana.— Cole *v.* Merchants' Bank, 60 Ind. 350.

Iowa.— Dubuque First Nat. Bank *v.* Carpenter, 41 Iowa 518.

Michigan.— Green *v.* Burrows, 47 Mich. 70, 10 N. W. 111; Waldron *v.* Harring, 28 Mich. 493.

Minnesota.— Phelps *v.* Sargent, 69 Minn. 118, 71 N. W. 927; Harbord *v.* Cooper, 43 Minn. 466, 45 N. W. 860.

New York.— Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; Small *v.* Sloan, 1 Bosw. (N. Y.) 352. But before the adoption of the code the action could be brought by the assignee in his own name only when the guaranty was written on the note itself. McLaren *v.* Watson, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260; Ketchell *v.* Burns, 24 Wend. (N. Y.) 456; Watson *v.* McLaren, 19 Wend. (N. Y.) 557.

3. *Maine.*— Springer *v.* Hutchinson, 19 Me. 359.

Massachusetts.— True *v.* Fuller, 21 Pick. (Mass.) 140.

Michigan.— Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977.

New Jersey.—Jacques *v.* Knight, 26 N. J. L. 92 note.

New York.—Miller *v.* Gaston, 2 Hill (N. Y.) 188; Lamourieux *v.* Hewit, 5 Wend. (N. Y.) 307.

Pennsylvania.— Northumberland County Bank *v.* Eyer, 58 Pa. St. 97; McDoal *v.* Yoemans, 8 Watts (Pa.) 361.

4. Scope of section.— The guarantor may be a stranger to the instrument or a party to it as maker, indorser, or accepter, and his contract may be by separate instrument or in or upon the bill or note. The latter only are here considered.

maker has been held to make him a guarantor for his co-maker.[5] Or the contract may be in more express terms, as where one who is not a party writes on the face of the bill, "I bind myself to paying it promptly after maturity, if not paid by the drawers,"[6] and such words as "holden," "good," etc., indorsed by a third party on the bill or note may constitute a guaranty.[7] So the formal acceptance of a bill by one who is not named in it as drawee or referee "in case of need" is construed to be a guaranty.[8] An express guaranty may be indorsed by the payee or holder at the time of the transfer of the paper,[9] even after its maturity,[10] and it may be included in the indorsement[11] and have the double effect of an indorsement and a guaranty.[12]

(B) *When Implied.* In many cases a contract of guaranty is implied from the mere signature without any words added to express the liability assumed. Thus one who adds his name to a note after its delivery as an additional maker is a guarantor,[13] although if he signs at the inception of the instrument he can be regarded only as a co-maker.[14] The most frequent form of implied guaranty is, however, by the blank indorsement of a third party at the inception of the instrument[15] or after its delivery;[16] and the same effect is to be attributed to a

5. Rice *v.* Cook, 71 Me. 559; True *v.* Harding, 12 Me. 193; Craddock *v.* Armor, 10 Watts (Pa.) 258.

6. Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274. So "We sign the above note for security for payment thereof." Beardsley *v.* Hawes, 71 Conn. 39, 40 Atl. 1043.

7. Bunker *v.* Ireland, 81 Me. 519, 17 Atl. 706 (where an attested indorsement containing a "promise to pay within note" was held to be a guaranty and not an attested note under statute of limitations); Bray *v.* Marsh, 75 Me. 452, 46 Am. Rep. 416; Irish *v.* Cutter, 31 Me. 536; Bagley *v.* Buzzell, 19 Me. 88; Furber *v.* Caverly, 42 N. H. 74. But other cases have held such an indorsement to be an indorsement (Seabury *v.* Hungerford, 2 Hill (N. Y.) 80) or an original promise (Brett *v.* Marston, 45 Me. 401; Amsbaugh *v.* Gearhart, 11 Pa. St. 482), especially where it is a formal promise fully expressed (Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444).

8. Jackson *v.* Hudson, 2 Campb. 447.

9. Wilson *v.* Mullen, 3 McCord (S. C.) 236, an indorsement on a non-negotiable note "to make the same good if it was not." But an indorsement "good to Joshua Lane or order without notice" on a negotiable note is not a guaranty. Lane *v.* Steward, 20 Me. 98.

10. Gunn *v.* Madigan, 28 Wis. 158; *Ex p.* Yates, 2 De G. & J. 191, 4 Jur. N. S. 649, 27 L. J. Bankr. 9, 6 Wkly. Rep. 178, 59 Eng. Ch. 152 (demand note long after date). Or it is an original promise. Burnham *v.* Gallentine, 11 Ind. 295.

11. Myrick *v.* Hasey, 27 Me. 9, 45 Am. Dec. 583; Tatum *v.* Bonner, 27 Miss. 760; Partridge *v.* Davis, 20 Vt. 499.

12. *Georgia.*— Vanzant *v.* Arnold, 31 Ga. 210.

Illinois.— At least so far as to effect a transfer of the paper. Heaton *v.* Hulbert, 4 Ill. 489.

Iowa.— Robinson *v.* Lair, 31 Iowa 9.

Michigan.— Green *v.* Burrows, 47 Mich. 70, 10 N. W. 111.

Nebraska.—Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811.

New York.— Deck *v.* Works, 18 Hun (N. Y.) 266.

Vermont.— Partridge *v.* Davis, 20 Vt. 499.

But other cases have held such indorsement to be a guaranty only. Canfield *v.* Vaughan, 8 Mart. (La.) 682; Belcher *v.* Smith, 7 Cush. (Mass.) 482; Tuttle *v.* Bartholomew, 12 Metc. (Mass.) 452; New York Cent. Trust Co. *v.* Wyandotte First Nat. Bank, 101 U. S. 68, 25 L. ed. 876.

Cannot change character of liability after suit brought.— Where the holder of a note has elected to sue the indorser as such he cannot afterward set up a different and absolute liability as guarantor. Clayes *v.* White, 65 Ill. 357, 83 Ill. 540.

13. Ives *v.* McHard, 2 Ill. App. 176; Howe *v.* Taggart, 133 Mass. 284 (and not a joint promisor with the original maker); Frech *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123; Jones *v.* Ritter, 32 Tex. 717.

14. Frech *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123; Partridge *v.* Colby, 19 Barb. (N. Y.) 248; Parks *v.* Brinkerhoff, 2 Hill (N. Y.) 663.

15. As to **irregular indorsements** see *infra*, II, B, 6.

Indorsement on blank.— A blank indorsement on a blank bill or note stamp intended as a suretyship is a guaranty in England. Matthews *v.* Bloxsome, 10 Jur. N. S. 998, 33 L. J. Q. B. 209, 10 L. T. Rep. N. S. 415, 12 Wkly. Rep. 795.

16. *Kansas.*— Withers *v.* Berry, 25 Kan. 373. At least *prima facie* so. Fuller *v.* Scott, 8 Kan. 25.

Massachusetts.— Scott *v.* Calkin, 139 Mass. 529, 2 N. E. 675. But where it is written below the payee's prior indorsement it is simply a second indorsement. Howe *v.* Merrill, 5 Cush. (Mass.) 80. And even without such prior indorsement it was held to be an original promise in Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179.

Minnesota.— Peterson *v.* Russell, 62 Minn. 220, 64 N. W. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612.

blank indorsement by the payee of a non-negotiable note;[17] to the blank indorsement of one who holds a negotiable note without proper prior indorsement;[18] or by Illinois statute to all indorsements of negotiable instruments payable to bearer unless otherwise expressed.[19]

(II) *Application of Statute of Frauds*—(A) *Necessity of Writing.*[20] In general the statute of frauds requires that an agreement to pay the debt of another shall be in writing, but a contract of guaranty on a bill or note is very seldom, if ever, fully expressed. Thus the person guaranteed is generally not named, and this has been held to be necessary.[21] So it has been held to be necessary to designate the amount of the note guaranteed.[22] On the other hand where courts have refused to apply the rule of the statute a blank indorsement has been held to be a sufficient writing.[23] Where a guaranty is contained in the transfer of the paper it is the personal obligation and debt of the indorser and does not fall within the statute;[24] and even parol agreements of the nature of a guaranty have been sustained where they have been acted upon by other parties.[25]

(B) *Necessity of Expressing Consideration.* The requirement of the statute of frauds that the agreement should be in writing has been construed to require

Missouri.— Howard *v.* Jones, 13 Mo. App. 596, 10 Mo. App. 81.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

17. Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52; Ford *v.* Mitchell, 15 Wis. 304. *Contra*, Talbott *v.* Suit, 68 Md. 443, 13 Atl. 356; Tryon *v.* De Hay, 7 Rich. (S. C.) 12.

Parol evidence is admissible to show such indorsement to be a guaranty. Jacques *v.* Knight, 26 N. J. L. 92 note.

18. Withers *v.* Berry, 25 Kan. 373; Whiton *v.* Mears, 11 Metc. (Mass.) 563, 45 Am. Dec. 233.

19. Ill. Rev. Stat. c. 98, § 8.

20. As to statute of frauds generally see FRAUDS, STATUTE OF.

21. Williams *v.* Lake, 2 E. & E. 349, 6 Jur. N. S. 45, 29 L. J. Q. B. 1, 1 L. T. Rep. N. S. 56, 8 Wkly. Rep. 41, 105 E. C. L. 349. *Contra*, Thomas *v.* Dodge, 8 Mich. 51; Tyler *v.* Stevens, 11 Barb. (N. Y.) 485. See also Palmer *v.* Baker, 23 U. C. C. P. 302.

22. Ordeman *v.* Lawson, 49 Md. 135.

23. Howland *v.* Aitch, 38 Cal. 133; Ulen *v.* Kittredge, 7 Mass. 233 (with authority to write a guaranty expressed); Peterson *v.* Russell, 62 Minn. 220, 64 N. W. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612 (the signature being in execution of an earlier agreement to sign as guarantor). *Contra*, as to a blank indorsement by a stranger to the paper after its delivery (Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551) and as to a guaranty at the time of delivery by a separate instrument (Ordeman *v.* Lawson, 49 Md. 135).

24. *Georgia.*— Mobile, etc., R. Co. *v.* Jones, 57 Ga. 198.

Indiana.— King *v.* Summitt, 73 Ind. 312, 38 Am. Rep. 145.

Michigan.— Huntington *v.* Wellington, 12 Mich. 10; Thomas *v.* Dodge, 8 Mich. 51.

New York.— Cardell *v.* McNiel, 21 N. Y. 336; Durham *v.* Manrow, 2 N. Y. 533 [*affirming* 3 Hill (N. Y.) 584]; Brown *v.* Curtiss, 2 N. Y. 225; Dauber *v.* Blackney, 38 Barb. (N. Y.) 432.

Tennessee.— Hall *v.* Rodgers, 7 Humphr. (Tenn.) 536.

Vermont.— Knapp *v.* Parker, 6 Vt. 642.

Virginia.— Hopkins *v.* Richardson, 9 Gratt. (Va.) 485.

United States.— How *v.* Kemball, 2 McLean (U. S.) 103, 12 Fed. Cas. No. 6,748.

25. *Illinois.*— Smith *v.* Finch, 3 Ill. 321, a parol guaranty by the transferrer of the note.

Indiana.— Hassinger *v.* Newman, 83 Ind. 124, 43 Am. Rep. 64 (a verbal guaranty by the vendor of a note of the maker's solvency); King *v.* Summitt, 73 Ind. 312, 38 Am. Rep. 145 (guaranty of the validity and genuineness of the note).

Kansas.— Kohn *v.* Ft. Scott First Nat. Bank, 15 Kan. 428, an agreement to pay a draft.

Michigan.— Knauss *v.* Major, 111 Mich. 239, 69 N. W. 489.

Missouri.— Barker *v.* Scudder, 56 Mo. 272.

New Jersey.— Cortelyou *v.* Hoagland, 40 N. J. Eq. 1, agreement to indemnify against an indorsement.

New York.— Milks *v.* Rich, 80 N. Y. 269; Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280 (agreement to pay a draft).

North Carolina.— Ashford *v.* Robinson, 30 N. C. 114.

Ohio.— Union Nat. Bank *v.* Delaware First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884.

Pennsylvania.— Malone *v.* Keener, 44 Pa. St. 107.

Wisconsin.— Vogel *v.* Melms, 31 Wis. 306, 11 Am. Rep. 608.

But see *contra*, as to a parol agreement to indemnify an indorser (Kelsey *v.* Hibbs, 13 Ohio St. 340), to pay an acceptance if dishonored (Maggs *v.* Ames, 4 Bing. 470, 6 L. J. C. P. O. S. 75, 1 M. & P. 294, 13 E. C. L. 593), to pay a note in consideration of forbearance to the maker (Crooks *v.* Tully, 50 Cal. 254; Peabody *v.* Harvey, 4 Conn. 119, 10 Am. Dec. 103; Nelson *v.* Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Smith *v.* Ives, 15 Wend. (N. Y.) 182), or to guarantee A's note to B on its receipt by B in payment of the guarantor C's debt to B (Dows *v.* Swett, 134 Mass. 140, 45 Am. Rep. 310).

an express statement of the consideration,[26] but various phrases have been accepted by the courts as enabling them to "see it in the transaction."[27]

5. Contract of Surety — a. Nature of — (I) *In General*.[28] The surety undertakes to pay if the debtor cannot. His promise is to pay a debt which becomes his own when the principal fails to pay.[29] In general the surety's liability as a party to the paper corresponds to that of his principal toward holders of the paper,[30] but his contract is strictly construed and will not be extended

26. **Necessary by express statute.**—Nichols *v.* Allen, 23 Minn. 542; Brewster *v.* Silence, 8 N. Y. 207; Spicer *v.* Norton, 13 Barb. (N. Y.) 542; Leggett *v.* Raymond, 6 Hill (N. Y.) 639; Hunt *v.* Brown, 5 Hill (N. Y.) 145; Manrow *v.* Durham, 3 Hill (N. Y.) 584; Packer *v.* Willson, 15 Wend. (N. Y.) 343; Smith *v.* Ives, 15 Wend. (N. Y.) 182; Sears *v.* Brink, 3 Johns. (N. Y.) 210, 3 Am. Dec. 475; Parry *v.* Spikes, 49 Wis. 384, 5 N. W. 794, 35 Am. Rep. 782. *Contra*, where the original debt was discharged in consideration of the guaranty given. Sheldon *v.* Butler, 24 Minn. 513.

Necessary under statute in English form since repeal of express statute.— Crooks *v.* Tully, 50 Cal. 254; Castle *v.* Beardsley, 10 Hun (N. Y.) 343; Clark *v.* Hampton, 1 Hun (N. Y.) 612. *Contra*, Speyers *v.* Lambert, 37 How. Pr. (N. Y.) 315. And an indorsement "For value received, I guaranty payment of the within bond" satisfies the statute. Greene *v.* Odell, 43 N. Y. App. Div. 494, 60 N. Y. Suppl. 78.

Necessary under statute in English form.— Henderson *v.* Johnson, 6 Ga. 390; Raikes *v.* Todd, 8 A. & E. 846, 8 L. J. Q. B. 35, 1 P. & D. 138, 35 E. C. L. 873; Saunders *v.* Wakefield, 4 B. & Ald. 595, 23 Rev. Rep. 409, 6 E. C. L. 616; Morley *v.* Boothby, 3 Bing. 107, 3 L. J. C. P. O. S. 177, 10 Moore C. P. 395, 11 E. C. L. 61; Wain *v.* Warlters, 5 East 10, 1 Smitn K. B. 299, 7 Rev. Rep. 645; Lock *v.* Reid, 6 U. C. Q. B. O. S. 295. *Contra*, Sage *v.* Wilcox, 6 Conn. 81; Little *v.* Nabb, 10 Mo. 3; Tyler *v.* Stevens, 11 Barb. (N. Y.) 485. So of a guaranty contained in the payee's indorsement not being the debt of another within the statute. Darst *v.* Bates, 95 Ill. 493; Brown *v.* Curtiss, 2 N. Y. 225; Colston *v.* Pemberton, 21 Misc. (N. Y.) 619, 47 N. Y. Suppl. 1110. So a written promise absolutely to pay the note of a third person, written at the foot of the note, is an original undertaking and need not express the consideration (Fowler *v.* McDonald, 4 Cranch C. C. (U. S.) 297, 9 Fed. Cas. No. 5,002) and the consideration may be presumed from plain inference (Neelson *v.* Sanborne, 2 N. H. 413, 9 Am. Dec. 108; Laing *v.* Lee, 20 N. J. L. 337; Douglass *v.* Howland, 24 Wend. (N. Y.) 35).

Unnecessary by express statute where the statute follows the later English act (19 & 20 Vict. c. 3). Gillighan *v.* Boardman, 29 Me. 79; Packard *v.* Richardson, 17 Mass. 122, 9 Am. Dec. 123.

27. **Forbearance indicated** raises the inference of consideration.

Massachusetts.— Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68.

New Hampshire.— Neelson *v.* Sanborne, 2 N. H. 413, 9 Am. Dec. 108.

New York.— Staats *v.* Howlett, 4 Den. (N. Y.) 559.

South Carolina.— Fyler *v.* Givens, 3 Hill (S. C.) 48.

England.— Shortrede *v.* Cheek, 1 A. & E. 57, 3 L. J. K. B. 125, 3 N. & M. 366, 28 E. C. L. 51; Emmott *v.* Kearns, 5 Bing. N. Cas. 559, 7 Dowl. P. C. 630, 3 Jur. 436, 8 L. J. C. P. 329, 7 Scott 687, 35 E. C. L. 301; Edwards *v.* Jevons, 8 C. B. 436, 14 Jur. 131, 19 L. J. C. P. 50, 65 E. C. L. 436; Boehm *v.* Campbell, Gow 55, 5 E. C. L. 867, 3 Moore C. P. 15, 8 Taunt. 679, 4 E. C. L. 332; Morris *v.* Stacey, Holt N. P. 153, 3 E. C. L. 68.

Contra, as to words merely indicating forbearance by reference to time of payment or debt credited. Rigby *v.* Norwood, 34 Ala. 129; Parkman *v.* Brewster, 15 Gray (Mass.) 271; Stephens *v.* Winn, 2 Nott & M. (S. C.) 372 note; Raikes *v.* Todd, 8 A. & E. 846, 8 L. J. Q. B. 35, 1 P. & D. 138, 35 E. C. L. 873; Saunders *v.* Wakefield, 4 B. & Ald. 595, 23 Rev. Rep. 409, 6 E. C. L. 616; Jenkins *v.* Reynolds, 3 B. & B. 14, 6 Moore C. P. 86; Hawes *v.* Armstrong, 1 Bing. N. Cas. 761, 1 Hodges 179, 4 L. J. C. P. 254, 1 Scott 661, 27 E. C. L. 851; Bell *v.* Welch, 9 C. B. 154, 14 Jur. 432, 19 L. J. C. P. 184, 67 E. C. L. 154.

Presumption of consideration in the bill will support a guaranty indorsed on it at the time of its delivery, but a guaranty indorsed afterward would require the consideration to be expressed in the guaranty. Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743, under the Alabama statute. *Contra*, under earlier New York statute. Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408; Brewster *v.* Silence, 8 N. Y. 207; Sears *v.* Brink, 3 Johns. (N. Y.) 210, 3 Am. Dec. 475.

"Value received" in the note itself has been held sufficient. Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965; Miller *v.* Cook, 23 N. Y. 495, 22 How. Pr. (N. Y.) 66; Mosher *v.* Hotchkiss, 3 Abb. Dec. (N. Y.) 326, 2 Keyes (N. Y.) 589, 3 Keyes (N. Y.) 161; Etz *v.* Place, 81 Hun (N. Y.) 203, 30 N. Y. Suppl. 765, 62 N. Y. St. 707; Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Day *v.* Elmore, 4 Wis. 190.

28. As to general liabilities of surety see Principal and Surety.

29. Woodward, C. J., in Kramph *v.* Hatz, 52 Pa. St. 525.

30. Thus a surety for the drawer is liable as drawer (Suydam *v.* Westfall, 2 Den. (N. Y.) 205 [*reversing* 4 Hill (N. Y.) 211]), and one who signs as a maker is liable as

against him beyond its precise terms,[31] and any reservation made in favor of the maker inures to his benefit.[32] He may be principal as to one party and surety for another.[33]

(II) *Admissions.* The surety's contract is an implied admission of the principal's capacity. This is true as to the capacity of an individual[34] and as to the authority of an officer of a corporation principal.[35] It also admits by implication the genuineness of all prior signatures.[36]

b. Form of Contract — (I) *When Expressed.* The surety's contract is usually expressed or indicated on commercial paper by addition to his signature of the word "surety" or "security." Such addition, although it is notice of his character as a surety, does not diminish his liability to the holder of the bill;[37] but where several persons sign a note as co-makers they will be liable alike as such, although the word "surety" is added to the signature of some of them,[38] and where the body of the note describes the makers as principals and as sureties respectively they are all liable as makers to the holder of the note.[39] The word "surety," when added to the signature of one of several makers, implies a suretyship for all whose names precede his signature.[40] So an indorsement with

such, notwithstanding the addition of the word "surety" to his signature (Southern California Nat. Bank *v.* Wyatt, 87 Cal. 616, 25 Pac. 918).

31. Waters *v.* Simpson, 7 Ill. 570; Ulmer *v.* Reed, 11 Me. 293 ("surety ninety days from date").

32. Franklin Sav. Inst. *v.* Reed, 125 Mass. 365, a memorandum below the signatures that the maker is "not to be compelled to pay said note before April 1st."

33. Coffman *v.* Hopkins, 75 Va. 645. Thus several makers of a joint and several note, which describes them "each as principal," may be principal and surety between themselves and all principals as to the payee or holder of the paper (Benedict *v.* Cox, 52 Vt. 247), and in such case the makers of a note cannot set up, as against the payee, that some of them were sureties (Menaugh *v.* Chandler, 89 Ind. 94; Waterville Bank *v.* Redington, 52 Me. 466), even though the fact was known to the holder (Derry Bank *v.* Baldwin, 41 N. H. 434). So in the case of an accommodation co-maker and a subsequent accommodation indorser, although the principal maker had agreed with his co-maker to procure another surety (Nurre *v.* Chittenden, 56 Ind. 462), and in the case of an accommodation co-maker followed by the signature of a surety who supposed himself to be, and who becomes, surety for the joint makers (Wells *v.* Miller, 66 N. Y. 255).

Parol evidence to explain true relation of parties see *infra*, XIV, E [8 Cyc.].

34. *Indiana.*— Davis *v.* Statts, 43 Ind. 103, 13 Am. Rep. 382.

Iowa.— Jones *v.* Crosthwaite, 17 Iowa 393.

Michigan.— Taylor *v.* Dansby, 42 Mich. 82, 3 N. W. 267.

Mississippi.— Whitworth *v.* Carter, 43 Miss. 61.

New York.— Kimball *v.* Newell, 7 Hill (N. Y.) 116.

South Carolina.— Smyley *v.* Head, 2 Rich. (S. C.) 590, 45 Am. Dec. 750.

Tennessee.— Hicks *v.* Randolph, 3 Baxt. (Tenn.) 352, 27 Am. Rep. 760.

Texas.— Lee *v.* Yandell, 69 Tex. 34, 6 S. W. 665.

35. Maledon *v.* Leflore, 62 Ark. 387, 35 S. W. 1102.

36. Of principal.—Chase *v.* Hathorn, 61 Me. 505 (forgery); Weare *v.* Sawyer, 44 N. H. 198 (unauthorized agent).

Of earlier cosurety.— Wayne Agricultural Co. *v.* Cardwell, 73 Ind. 555; Helms *v.* Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147; Selser *v.* Brock, 3 Ohio St. 302.

37. *California.*— Southern California Nat. Bank *v.* Wyatt, 87 Cal. 616, 25 Pac. 918, and will note entitle him to notice of dishonor like an indorser.

Iowa.— But the addition has been held to be a material alteration. Laub *v.* Paine, 46 Iowa 550, 26 Am. Rep. 163.

Maine.— Rice *v.* Cook, 71 Me. 559; Hughes *v.* Littlefield, 18 Me. 400.

Michigan.— Inkster *v.* Marshall First Nat. Bank, 30 Mich. 143.

Pennsylvania.—Kleckner *v.* Klapp, 2 Watts & S. (Pa.) 44.

A maker remains none the less liable as principal to the payee because of an agreement between the maker and another person, not a party to the note, that the latter should pay the note. Goodson *v.* Cooley, 19 Ga. 599.

38. *California.*— Aud *v.* Magruder, 10 Cal. 282.

Connecticut.— Palmer *v.* Grant, 4 Conn. 389.

New York.— Orleans Bank *v.* Barry, 1 Den. (N. Y.) 116.

West Virginia.— Keller *v.* McHuffman, 15 W. Va. 64.

Wisconsin.— Dart *v.* Sherwood, 7 Wis. 523, 76 Am. Dec. 228.

39. Bond *v.* Storrs, 13 Conn. 412; National Pemberton Bank *v.* Lougee, 108 Mass. 371, 11 Am. Rep. 367.

40. Salter *v.* Salter, 6 Bush (Ky.) 624; Sayles *v.* Sims, 73 N. Y. 551; Sherman *v.* Black, 49 Vt. 198. Especially where such instrument is a renewal of a note in the hands of the indorsee and the third maker

the word "surety" added to the signature has been held to create an obligation of suretyship.[41]

(II) *When Implied.* One who signs in ordinary form as maker, drawer, accepter, or indorser may often be shown to be a surety for another party;[42] but the only contract implied from unqualified signatures is the ordinary contract and relation of parties as shown by the position of the signature.[43]

c. Conflict of Laws. The law of the place of contract, except so far as it is controlled by that of an express place of payment, governs the liability of the surety to other parties and the liability of the principal to the surety.[44] His right to insist on diligent prosecution of the principal is governed by the law of the place of payment.[45]

6. Contract of Irregular or Anomalous Indorser — a. Nature of — (I) *In General.*[46] The name of one who is not a party to the paper as maker, payee, or holder is often placed on the back of a note at its inception, for the purpose generally of adding to the maker's credit with the payee or purchaser. Where the note is payable to a designated person or order, such signature before the payee has indorsed the paper is anomalous on its face and has been variously held to be that of an indorser,[47] maker,[48] surety,[49] or guarantor.[50] This apparent divergence of opinion is due in large part to the difference in the questions presenting themselves for decision in the different cases. Is he entitled to presentment and notice as an indorser would be? Is he liable to the payee as a maker, guarantor, or surety would be? Is he discharged by neglect to proceed against the principal debtor as, in some states, a surety would be? Is there a sufficient consideration and writing as a guaranty would require? In many cases, where the question raised did not render a precise distinction necessary, the courts have obviously used the different terms without more precision than the case required. Thus the cases which hold the contract to be that of indorser, maker, guarantor, or surety are not to be strictly distinguished in general from those which make it to be *prima facie* such, and both rulings are found in the same jurisdiction. This is due in part to the absence of conflicting evidence in the particular case.[51]

(II) *Liable in General* — (A) *As Indorser* — (1) In General — (a) "New York Rule." In form such a signature is a blank indorsement and seems to contemplate, on the signer's part, the restricted and conditional liability of an indorser. The so-called "New York rule" has therefore with some consistency held him to be an indorser.[52] And this intention may be indicated by words

who signed the renewal as "surety" was the original payee, the second maker being surety for the first in the original note. Stump *v.* Richardson County Bank, 24 Nebr. 522, 39 N. W. 433.

41. Phillips *v.* Cox, 61 Ind. 345; Robinson *v.* Reed, 46 Iowa 219; Marberger *v.* Pott, 16 Pa. St. 9, 55 Am. Dec. 479. And such indorser has been held to be liable both as indorser and surety. Bradford *v.* Corey, 5 Barb. (N. Y.) 461.

Where a stranger to the paper at its inception indorses on it a pledge of all his property for its payment he is a surety only. McIntyre *v.* Moore, 105 Ga. 112, 31 S. E. 144.

42. As to parol evidence see *infra*, XIV, E [8 Cyc.].

43. See Hardester *v.* Tate, 85 Mo. App. 624.

44. Long *v.* Templeman, 24 La. Ann. 564.

45. Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532.

46. Blank indorsements by a party and indorsements of blank paper or of paper containing blanks are not under discussion here but are considered elsewhere in this article. Thus if the payee's name has been left blank and afterward filled up with the name of a person who has previously signed his name on the back such signer is liable as an ordinary indorser (Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665; Weaver *v.* Marvel, 12 La. Ann. 517) and where the blank is left open by the indorser he is liable as indorser to a subsequent holder who inserts his own name as payee (Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377). And see *supra*, I, C, 2.

47. See *infra*, II, B, 6, a, (II), (A).

48. See *infra*, II, B, 6, a, (II), (B).

49. See *infra*, II, B, 6, a, (II), (C).

50. See *infra*, II, B, 6, a, (II), (D).

51. Conclusive presumption, excluding all proof between immediate parties of a different intention, has been held to be the rule in very few jurisdictions, and even in these the later cases will be generally found to incline to the more liberal rule. See *infra*, II, B, 6, a, (II), (E), (1).

52. *Alabama.*— Hooks *v.* Anderson, 58 Ala. 238, 29 Am. Rep. 745; Price *v.* Lavender, 38 Ala. 389; Milton *v.* De Yampert, 3 Ala. 648.

added by the signer himself above or below his signature,[53] or more clearly still by his signing after the payee and under the payee's signature.[54] In this view he is as to the maker an accommodation indorser.[55]

(b) WHERE NOTE PAYABLE TO MAKER'S ORDER. Where the note[56] is payable to the maker's own order and indorsed by him in blank before delivery such note is in effect payable to bearer, and a third person who writes his name in blank upon the back is generally regarded as an indorser only.[57]

California.— Fessenden *v.* Summers, 62 Cal. 484; Jones *v.* Goodwin, 39 Cal. 493, 2 Am. Rep. 473.

Connecticut.— Spencer *v.* Allerton, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806, by statute of 1884.

Georgia.— Collins *v.* Everett, 4 Ga. 266.

Indiana.— Houston *v.* Bruner, 39 Ind. 376.

Iowa.— Fear *v.* Dunlap, 1 Greene (Iowa) 331.

Kentucky.— Arnold *v.* Bryant, 8 Bush (Ky.) 668 (if indorsed below payee); Young *v.* Harris, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170 (under Ohio law, which governed).

Massachusetts.— Wylie *v.* Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305, stating this to be the "New York rule."

Minnesota.— Rogers *v.* Stevenson, 16 Minn. 68.

New Hampshire.— New York L. Ins. Co. *v.* McKellar, 68 N. H. 326, 44 Atl. 516, under Massachusetts statute.

New York.— Spies *v.* Gilmore, 1 N. Y. 321 [*affirming* 1 Barb. (N. Y.) 158]; Haviland *v.* Haviland, 14 Hun (N. Y.) 627; Zellweger *v.* Caffe, 5 Duer (N. Y.) 87; Cottrell *v.* Conklin, 4 Duer (N. Y.) 45; Hall *v.* Newcomb, 7 Hill (N. Y.) 416, 42 Am. Dec. 82, 3 Hill (N. Y.) 233 [*overruling* Nelson *v.* Dubois, 13 Johns. (N. Y.) 175, where he shared in the consideration and was held to be a guarantor and where his liability as indorser was not brought in question].

North Carolina.— Johnson *v.* Hooker, 47 N. C. 29.

Wisconsin.— Davis *v.* Barron, 13 Wis. 227.

See 7 Cent. Dig. tit. "Bills and Notes," § 549.

53. Drexel *v.* Pusey, 57 Nebr. 30, 77 N. W. 351 ("notice and protest waived"); Prosser *v.* Luqueer, 4 Hill (N. Y.) 420, 40 Am. Dec. 288 ("I guaranty the payment of the within note"); Seabury *v.* Hungerford, 2 Hill (N. Y.) 80 ("John I. Hungerford, backer"); Kamm *v.* Holland, 2 Oreg. 59 ("F. S. Holland, . . . security"); Pinnes *v.* Ely, 4 McLean (U. S.) 173, 19 Fed. Cas. No. 11,169 (as if "made payable to my order, and by me indorsed").

In Georgia a third person who writes his name on the face of a note followed by the word "indorser," is liable either as a joint maker or as an indorser. Callaway *v.* Harrold, 61 Ga. 111.

54. *Arkansas.*— Perry *v.* Friend, 57 Ark. 437, 21 S. W. 1065.

Georgia.— Ware *v.* Macon City Bank, 59 Ga. 840.

Indiana.— McGaughey *v.* Elliott, 18 Ind. 121; Vore *v.* Hurst, 13 Ind. 551, 74 Am. Dec. 268.

Kansas.— Bradford *v.* Pauly, 18 Kan. 216.

Louisiana.— Johnson *v.* Downs, 3 La. Ann. 590.

Maine.— Yates *v.* Goodwin, 96 Me. 90, 51 Atl. 804.

Massachusetts.— Bigelow *v.* Colton, 13 Gray (Mass.) 309, 74 Am. Dec. 633; Barker *v.* Parker, 10 Gray (Mass.) 339.

Minnesota.— People's Bank *v.* Rockwood, 59 Minn. 420, 61 N. W. 457.

Missouri.— Marshall *v.* Cabanne, 40 Mo. App. 38.

Where payee signs above indorser's signature.— So where, although the stranger signs first, the payee in accordance with their previous agreement signs afterward above his signature. Greusel *v.* Hubbard, 51 Mich. 95, 16 N. W. 248, 47 Am. Rep. 549; Chalmers *v.* McMurdo, 5 Munf. (Va.) 252, 7 Am. Dec. 684. On the other hand where he inadvertently signs above the payee's indorsement and afterward takes up the note in the hands of a subsequent indorser he can sue the payee in the name of such indorser. Slack *v.* Kirk, 67 Pa. St. 380, 5 Am. Rep. 438.

55. Clarke *v.* Smith, 2 Cal. 605; Commonwealth Nat. Bank *v.* Law, 127 Mass. 72; Greenough *v.* Smead, 3 Ohio St. 415; Guldin *v.* Linderman, 34 Pa. St. 58.

56. So too on a bill payable to the drawer's order and indorsed by him. O'Conor *v.* Clarke, (Cal. 1896) 44 Pac. 482; Rickey *v.* Dameron, 48 Mo. 61 (and indorsed by third party below payee).

57. *District of Columbia.*— Boteler *v.* Dexter, 20 D. C. 26.

Illinois.— Chicago Trust, etc., Bank *v.* Nordgren, 157 Ill. 663, 42 N. E. 148 [*affirming* 57 Ill. App. 346]; Kayser *v.* Hall, 85 Ill. 511, 28 Am. Rep. 624; Blatchford *v.* Milliken, 35 Ill. 434.

Louisiana.— Field *v.* New Orleans Delta Newspaper Co., 21 La. Ann. 24, 99 Am. Dec. 699.

Massachusetts.— Du Bois *v.* Mason, 127 Mass. 37, 34 Am. Rep. 335; Bigelow *v.* Colton, 13 Gray (Mass.) 309, 74 Am. Dec. 633; Lake *v.* Stetson, 13 Gray (Mass.) 310 note. *Compare* National Pemberton Bank *v.* Lougee, 108 Mass. 371, 11 Am. Rep. 367, where the indorser's name appeared in the body of the note as surety.

Missouri.— St. Charles First Nat. Bank *v.* Payne, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520, although in other cases a joint maker.

(2) As Second Indorser. The so-called "Pennsylvania rule" makes him, as to the payee, whose signature is necessary to the orderly transfer of the paper, a second indorser.[58] After an indorsement by the payee above such signature no contract but that of an indorser is shown by the paper. In such case he would be entitled to look to the payee as first indorser for his reimbursement if called on to pay the note.[59]

(B) *As Maker* — "*Massachusetts Rule.*" The earlier cases generally held the signer to be an original promisor and maker, and many of the later cases have followed this rule.[60] Under a modified form of this rule he is held to be a maker

Pennsylvania.— Central Nat. Bank *v.* Dreydoppel, 134 Pa. St. 499, 19 Atl. 689, 26 Wkly. Notes Cas. 240, 19 Am. St. Rep. 713, a second indorser, although the maker afterward indorsed below him.

Texas.— Heidenheimer *v.* Blumenkron, 56 Tex. 308.

Wisconsin.—Heath *v.* Van Cott, 9 Wis. 516.

Firm note payable to member.— A third person who signs his name on the back of a note by partnership payable to a member of the firm is liable as indorser only. Bogue *v.* Melick, 25 Ill. 91. But see Woodman *v.* Boothby, 66 Me. 389.

Special indorsement by maker.— Where the maker's indorsement is not in blank but is to the order of a designated indorsee the doctrine stated in the text does not apply, and the irregular indorser is, under the "Massachusetts rule," liable as an original promisor. Stevens *v.* Parsons, 80 Me. 351, 14 Atl. 741.

58. Bowler *v.* Braun, 63 Minn. 32, 65 N. W. 124, 56 Am. St. Rep. 449; Herrick *v.* Carman, 12 Johns. (N. Y.) 159; Cogswell *v.* Hayden, 5 Oreg. 22 (and entitled to sue the payee on his indorsement as first indorser); Central Nat. Bank *v.* Dreydoppel, 134 Pa. St. 499, 19 Atl. 689, 19 Am. St. Rep. 713 (although payable to the maker's order and afterward indorsed by him below the other); Losee *v.* Bissell, 76 Pa. St. 459; Jack *v.* Morrison, 48 Pa. St. 113.

Payee's indorsement essential.—It has been held that in the absence of any different contract one indorsing a note before the payee is not liable thereon to a subsequent holder until the payee indorses it. Eilbert *v.* Finkbeiner, 68 Pa. St. 243, 8 Am. Rep. 176; Swain *v.* Halberstadt, 2 Leg. Chron. (Pa.) 173.

59. But where the new indorser inadvertently indorsed above the payee and afterward took up the note in the hands of the party who discounted it he can sue the payee only in the name of such later holder. Slack *v.* Kirk, 67 Pa. St. 380, 5 Am. Rep. 438.

Inverted indorsements.— Where it appears on the face of the note that a party assumes only the responsibility of a second indorser the locality of the names is immaterial; and whether the name of the payee appear above or below, or before or after in point of time, does not change his position as second indorser. Bacon *v.* Burnham, 37 N. Y. 614.

60. *Arkansas.*—Scanland *v.* Porter, 64 Ark. 470, 42 S. W. 897 (on proof of intention); Heise *v.* Bumpass, 40 Ark. 545 (written across face of note); Nathan *v.* Sloan, 34 Ark. 524; Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519.

Colorado.— Best *v.* Hoppie, 3 Colo. 137; Good *v.* Martin, 2 Colo. 218 [*affirming* 1 Colo. 165, 91 Am. Dec. 706]; Byers *v.* Tritch, 12 Colo. App. 377, 55 Pac. 622.

Delaware.— Gilpin *v.* Marley, 4 Houst. (Del.) 284; Massey *v.* Turner, 2 Houst. (Del.) 79.

District of Columbia. — Randle *v.* Davis Coal, etc., Co., 15 App. Cas. (D. C.) 357; Hutchinson *v.* Brown, 19 D. C. 136.

Georgia.— Hardy *v.* White, 60 Ga. 454; Quin *v.* Sterne, 26 Ga. 223, 71 Am. Dec. 204.

Indiana.— Phillips *v.* Cox, 61 Ind. 345, signing as "surety."

Maine.—Merchants' Trust, etc., Co. *v.* Jones, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412; Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461; Stevens *v.* Parsons, 80 Me. 351, 14 Atl. 741; Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; Rice *v.* Cook, 71 Me. 559 (afterward indorsed by payee below); Woodman *v.* Boothby, 66 Me. 389 (indorsed "holden without demand"); Brett *v.* Marston, 45 Me. 401 (indorsed "holden on the within"); Childs *v.* Wyman, 44 Me. 433, 69 Am. Dec. 111 (indorsing "without recourse"); Lowell *v.* Gage, 38 Me. 35 (indorsed "without demand or notice"); Leonard *v.* Wildes, 36 Me. 265; Malbon *v.* Southard, 36 Me. 147 (indorsed "responsible without demand or notice"); Adams *v.* Hardy, 32 Me. 339; Colburn *v.* Averill, 30 Me. 310, 50 Am. Dec. 630.

Maryland.— Schroeder *v.* Turner, 68 Md. 506, 13 Atl. 331; Walz *v.* Alback, 37 Md. 404; Ives *v.* Bosley, 35 Md. 262, 6 Am. Rep. 411; Sullivan *v.* Violett, 6 Gill (Md.) 181.

Massachusetts.— Mulcare *v.* Welch, 160 Mass. 58, 35 N. E. 97; Spaulding *v.* Putnam, 128 Mass. 363; Woods *v.* Woods, 127 Mass. 141; Gilson *v.* Stevens Mach. Co., 124 Mass. 546; Allen *v.* Brown, 124 Mass. 77; Way *v.* Butterworth, 108 Mass. 509; National Pemberton Bank *v.* Lougee, 108 Mass. 371, 11 Am. Rep. 367; Stoddard *v.* Penniman, 108 Mass. 366, 11 Am. Rep. 363; Brown *v.* Butler, 99 Mass. 179; Phœnix Cotton Mfg. Co. *v.* Fuller, 3 Allen (Mass.) 441; Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752; Patch *v.* Washburn, 16 Gray (Mass.) 82 (intention proved); Clapp *v.* Rice, 13 Gray (Mass.) 403, 64 Am. Dec. 639; Essex Co. *v.* Edmands, 12 Gray (Mass.) 273, 71 Am. Dec. 758; Wright *v.* Morse, 9 Gray (Mass.) 337, 69 Am. Dec. 291; Pearson *v.* Stoddard, 9 Gray (Mass.) 199; Riley *v.* Gerrish, 9 Cush. (Mass.) 104; Bryant *v.* Eastman, 7 Cush. (Mass.) 111;

if he has placed his signature on the paper in order to give it credit with the payee.[61]

Benthall *v.* Judkins, 13 Metc. (Mass.) 265; Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; Samson *v.* Thornton, 3 Metc. (Mass.) 275, 37 Am. Dec. 135; Austin *v.* Boyd, 24 Pick. (Mass.) 64; Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Baker *v.* Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; Sumner *v.* Gay, 4 Pick. (Mass.) 311; Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179; White *v.* Howland, 9 Mass. 314, 6 Am. Dec. 71 (indorsed "we, jointly and severally, undertake to pay"); Carver *v.* Warren, 5 Mass. 545; Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68 (indorsed "holden as surety for the payment").

Michigan.— Peninsular Sav. Bank *v.* Hosie, 112 Mich. 351, 70 N. W. 890; Gumz *v.* Giegling, 108 Mich. 295, 66 N. W. 48; Allison *v.* Kinne, 104 Mich. 141, 62 N. W. 152; Fay *v.* Jenks, 78 Mich. 312, 44 N. W. 380; Sweet *v.* Woodin, 72 Mich. 393, 40 N. W. 471; Moynahan *v.* Hanaford, 42 Mich. 329, 3 N. W. 944; Sibley *v.* Muskegon Nat. Bank, 41 Mich. 196, 1 N. W. 930; Herbage *v.* McEntee, 40 Mich. 337, 29 Am. Rep. 536; Rothschild *v.* Grix, 31 Mich. 150, 18 Am. Rep. 171; Wetherwax *v.* Paine, 2 Mich. 555. These cases practically overrule Barkhead *v.* Williams, 1 Mich. N. P. 38.

Minnesota.— Dennis *v.* Jackson, 57 Minn. 286, 59 N. W. 198, 47 Am. St. Rep. 603; Wolford *v.* Bowen, 57 Minn. 267, 59 N. W. 195; Stein *v.* Passmore, 25 Minn. 256; Peckham *v.* Gilman, 7 Minn. 446.

Missouri.— Cox *v.* Sloan, 158 Mo. 411, 57 S. W. 1052 (the indorser being in this case principal debtor and maker signing for his accommodation); Semple *v.* Turner, 65 Mo. 696; Kuntz *v.* Tempel, 48 Mo. 71; Schmidt *v.* Schmaelter, 45 Mo. 502 (on proof of intention); Baker *v.* Block, 30 Mo. 225; Lewis *v.* Harvey, 18 Mo. 74, 59 Am. Dec. 286; Powell *v.* Thomas, 7 Mo. 440, 38 Am. Dec. 465; State *v.* McWilliams, 7 Mo. App. 99.

Nebraska.— Salisbury *v.* Cambridge City First Nat. Bank, 37 Nebr. 872, 56 N. W. 727, 40 Am. St. Rep. 527, as against a *bona fide* holder.

New Hampshire.— McFetrich *v.* Woodrow, 67 N. H. 174, 38 Atl. 18 (at suit of *bona fide* holder); Currier *v.* Fellows, 27 N. H. 366; Martin *v.* Boyd, 11 N. H. 385, 35 Am. Dec. 501.

New Jersey.— Chaddock *v.* Vanness, 35 N. J. L. 517, 10 Am. Rep. 256; Ackerman *v.* Westervelt, 26 N. J. L. 92 note.

Ohio.— Church *v.* Swope, 38 Ohio St. 493 (co-drawer of bill); Bright *v.* Carpenter, 9 Ohio 139, 34 Am. Dec. 432; Penterman *v.* Dorman, 8 Ohio Dec. (Reprint) 391, 7 Cinc. L. Bul. 281. See also Wright *v.* Denham, 4 Ohio Dec. (Reprint) 428, 2 Clev. L. Rep. 146.

Pennsylvania.— Amsbaugh *v.* Gearhart, 11 Pa. St. 482, indorsed "I will see the within paid."

Rhode Island.— Jackson Bank *v.* Irons, 18 R. I. 718, 30 Atl. 420 ("indorse and guarantee" — "waiving demand and notice"); Carpenter *v.* McLaughlin, 12 R. I. 270, 34 Am. Rep. 638; Manufacturers', etc., Bank *v.* Follett, 11 R. I. 92, 23 Am. Rep. 418.

South Carolina.—Sylvester, etc., Co. *v.* Alewine, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86; Johnston *v.* McDonald, 41 S. C. 81, 19 S. E. 65; McCreary *v.* Bird, 12 Rich. (S. C.) 554 (although payee afterward indorsed below him); Carpenter *v.* Oaks, 10 Rich. (S. C.) 17; Baker *v.* Scott, 5 Rich. (S. C.) 305 (although payee afterward indorsed above him); Stoney *v.* Beaubien, 2 McMull. (S. C.) 313, 39 Am. Dec. 128.

Tennessee.— Provident Sav. L. Assur. Soc. *v.* Edmonds, 95 Tenn. 53, 31 S. W. 168.

Texas.— Latham *v.* Houston Flour Mills, 68 Tex. 127, 3 S. W. 462; Carr *v.* Rowland, 14 Tex. 275.

Vermont.— Brooks *v.* Thacher, 49 Vt. 492, maker or surety.

United States.— Phipps *v.* Harding, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L. R. A. 513; Miller *v.* Ridgely, 22 Fed. 889. These cases refused to follow the state ruling in Tennessee.

See 7 Cent. Dig. tit. "Bills and Notes," § 542.

Whether jointly or severally liable.— He has been held to be liable with other makers jointly and severally (Tabor *v.* Miles, 5 Colo. App. 127, 38 Pac. 64; Auburn First Nat. Bank *v.* Marshall, 73 Me. 79 [and maker not discharged by his release]; Schultz *v.* Howard, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470 [although in joint form]; Wolford *v.* Bowen, 57 Minn. 267, 59 N. W. 195 ["I promise"]; Perkins *v.* Barstow, 6 R. I. 505; Mathewson *v.* Sprague, 1 R. I. 8; Latham *v.* Houston Flour Mills, 68 Tex. 127, 3 S. W. 462) or jointly (Palmer *v.* Grant, 4 Conn. 389 [designated "as surety" in body of note]; Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Sibley *v.* Muskegon Nat. Bank, 41 Mich. 196, 1 N. W. 930; Wetherwax *v.* Paine, 2 Mich. 555; Manufacturers', etc., Bank *v.* Follett, 11 R. I. 92, 23 Am. Rep. 418).

61. *California.*— Clarke *v.* Smith, 2 Cal. 605.

Colorado.—Kiskadden *v.* Allen, 7 Colo. 206, 3 Pac. 221; Good *v.* Martin, 2 Colo. 218, 1 Colo. 165, 91 Am. Dec. 706.

Delaware.— Massey *v.* Turner, 2 Houst. (Del.) 79.

Florida.— McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407; Melton *v.* Brown, 25 Fla. 461, 6 So. 211.

Maine.— Childs *v.* Wyman, 44 Me. 433, 69 Am. Dec. 111.

Massachusetts.— Bryant *v.* Eastman, 7 Cush. (Mass.) 111; Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68.

Minnesota.— Stein *v.* Passmore, 25 Minn. 256; Robinson *v.* Bartlett, 11 Minn. 410; Peckham *v.* Gilman, 7 Minn. 446; McComb *v.* Thompson, 2 Minn. 139, 72 Am. Dec. 84; Rey

(c) *As Surety.* Other courts have held that such indorser is a surety for the maker[62] and not entitled to look to the payee.[63] Or they have held him to be a joint maker as to the payee and as to the principal maker a surety,[64] or as the case may be a cosurety.[65]

(d) *As Guarantor.* Other courts have for many years held that such indorser is a guarantor[66] or that he guarantees that the note is collectable by due dili-

v. Simpson, 1 Minn. 380; Pierse *v.* Irvine, 1 Minn. 369.

Mississippi.— Polkinghorne *v.* Hendricks, 61 Miss. 366; Thomas *v.* Jennings, 5 Sm. & M. (Miss.) 627.

New Jersey.—Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551; Chaddock *v.* Vanness, 35 N. J. L. 517, 10 Am. Rep. 256.

North Carolina.— Hoffman *v.* Moore, 82 N. C. 313, maker or surety.

South Carolina.— McCreary *v.* Bird, 12 Rich. (S. C.) 554; Carpenter *v.* Oaks, 10 Rich. (S. C.) 17; Baker *v.* Scott, 5 Rich. (S. C.) 305; Cockrell *v.* Milling, 1 Strobh. (S. C.) 444.

Tennessee.— Jamaica Bank *v.* Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100.

Vermont.— Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

See 7 Cent. Dig. tit. "Bills and Notes," § 542.

62. *Connecticut.*— So if designated in the body of the note as a surety. Palmer *v.* Grant, 4 Conn. 389.

Georgia.— Ridley *v.* Hightower, 112 Ga. 476, 37 S. E. 733; Eppens *v.* Forbes, 82 Ga. 748, 9 S. E. 723; Camp *v.* Simmons, 62 Ga. 73 (unless indorsed by payee); Collins *v.* Everett, 4 Ga. 266.

Iowa.— Before the present statute. Rodabaugh *v.* Pitkin, 46 Iowa 544; Picket *v.* Hawes, 14 Iowa 460; Sibley *v.* Van Horn, 13 Iowa 209.

Kentucky.—Richardson *v.* Flournoy, 7 J. J. Marsh. (Ky.) 155, indorsing that he held himself "bound as security."

Louisiana.— Rogers *v.* Gibbs, 24 La. Ann. 467; O'Leary *v.* Martin, 21 La. Ann. 389 (without indorsement of payee above him); Collins *v.* Trist, 20 La. Ann. 348; Crane *v.* Trudeau, 19 La. Ann. 307; McCausland *v.* Lyons, 4 La. Ann. 273 (two such indorsers being liable *in solido*, each for the whole); Wall *v.* Bry, 1 La. Ann. 312 (by agreement with payee); Penny *v.* Parham, 1 La. Ann. 274 (subsequently indorsed by payee); Cooley *v.* Lawrence, 4 Mart. (La.) 639.

Massachusetts.— So if designated in the body of the note as a surety. National Pemberton Bank *v.* Lougee, 108 Mass. 371, 11 Am. Rep. 367.

Minnesota.—Priedman *v.* Johnson, 21 Minn. 12.

New York.— Brown *v.* Mechanics', etc., Bank, 16 N. Y. App. Div. 207, 44 N. Y. Suppl. 645; Bank of Orleans *v.* Barry, 1 Den. (N. Y.) 116. So under an express agreement to that effect known to him at the time of indorsing. Jaffray *v.* Brown, 74 N. Y. 393 (signing below, but liable as surety to payee); Clothier *v.* Adriance, 51 N. Y. 322. This is also true of a blank indorsement by a third party placed on a certificate of deposit to give it credit with the party taking it. *In re* Baldwin, 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122.

Pennsylvania.— Ashton *v.* Sproule, 35 Pa. St. 492; Amsbaugh *v.* Gearhart, 11 Pa. St. 482 (indorsed "I will see the within paid," maker or surety).

Texas.— Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210. So where the whole consideration goes to the maker. Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181.

Vermont.— Brooks *v.* Thacher, 52 Vt. 559, maker or surety.

See 7 Cent. Dig. tit. "Bills and Notes," § 559.

63. As surety (Labron *v.* Woram, 1 Hill (N. Y.) 91) or as maker (Sweet *v.* Woodin, 72 Mich. 393, 40 N. W. 471).

64. *Arkansas.*— Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519.

Massachusetts.— Chaffee *v.* Jones, 19 Pick. (Mass.) 260, 263 (where Shaw, C. J., said: "A promissory note of this description is rather peculiar to New England, but it has received a construction here. It has been held, that where one not promisee nor indorsee, puts his name on the note, meaning to make himself liable with the promisor, he is to be regarded as a joint promisor and surety. He is not liable as indorser, for the note is not negotiated or title to it made through his indorsement, nor as guarantor, because there is no separate or distinct consideration; but he means to give security and validity to the note by his credit and promise to pay it if the promisor does not, and that upon the original consideration, and therefore he is a promisor and surety. . . . This is the legal import and effect of such a note, independent of any extrinsic evidence"); Baker *v.* Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311.

Minnesota.—Priedman *v.* Johnson, 21 Minn. 12.

North Carolina.— Hoffman *v.* Moore, 82 N. C. 313.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

65. With other similar indorsers (Camp *v.* Simmons, 62 Ga. 73), with an accommodation maker (Edsell *v.* Briggs, 20 Mich. 429, both signing for the payee's accommodation), or with the makers who are sureties for other principal makers (Flint *v.* Day, 9 Vt. 345).

66. *California.*—Before code of 1872. Jones *v.* Goodwin, 39 Cal. 493, 2 Am. Rep. 473; Brady *v.* Reynolds, 13 Cal. 31; Pierce *v.* Kennedy, 5 Cal. 138; Clarke *v.* Smith, 2 Cal. 605 (on proof of intention). Since the civil code

gence,[67] especially where this construction is aided by express words added to his signature.[68]

(E) *According to Intent* — (1) RULE STATED. Apart from the solution by statute law the rule upon which there is a general tendency to agreement is that the contract implied by such signature is not fixed by the law merchant (to which it was not known) but depends upon the intention of the parties. Such cases hold that it is a question of intention and fact,[69] and some cases hold that parol evidence is necessary for its determination.[70] Between the immediate parties at least, and

he is an indorser if the instrument be negotiable. See *infra*, II, B, 6, a, (II), (F).

Illinois.— Golsen *v.* Brand, 75 Ill. 148.

Iowa.— Rodabaugh *v.* Pitkin, 46 Iowa 544; Veach *v.* Thompson, 15 Iowa 380; Sibley *v.* Van Horn, 13 Iowa 209.

Kansas.— Talley *v.* Burtis, 45 Kan. 147, 25 Pac. 603; Firman *v.* Blood, 2 Kan. 496.

Ohio.— Parker *v.* Riddle, 11 Ohio 102.

Pennsylvania.—Heilbruner *v.* Wayte, 51 Pa. St. 259, on evidence of intention and consideration.

Tennessee.— Harding *v.* Water, 6 Lea (Tenn.) 324.

Texas.— Horton *v.* Manning, 37 Tex. 23; Jones *v.* Ritter, 32 Tex. 717; Chandler *v.* Westfall, 30 Tex. 475.

Virginia.— Watson *v.* Hurt, 6 Gratt. (Va.) 633.

West Virginia.— Kearnes *v.* Montgomery, 4 W. Va. 29.

United States.— Lyon *v.* Sioux City First Nat. Bank, 85 Fed. 120, 55 U. S. App. 747, 29 C. C. A. 45, under Iowa Code, § 3265.

England.— Jackson *v.* Hudson, 2 Campb. 447.

See 7 Cent. Dig. tit. "Bills and Notes," § 556.

67. Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 167, 189 (where Stoddard, J., said: "The fact is that in the state of Connecticut the rule of law applying to indorsements of this character is no part of the law merchant"); Gillespie *v.* Wheeler, 46 Conn. 410; Clayton *v.* Coburn, 42 Conn. 348; Greathead *v.* Walton, 40 Conn. 226 (although payee afterward indorsed below him under special agreement); Holbrook *v.* Camp, 38 Conn. 23; Rhodes *v.* Seymour, 36 Conn. 1; Clark *v.* Merriam, 25 Conn. 576; Bradly *v.* Phelps, 2 Root (Conn.) 325.

68. Express guaranty.—Reeves *v.* Howe, 16 Cal. 152; Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356; Sample *v.* Martin, 46 Ind. 226.

Express guaranty with waiver of demand and notice and indorsement placed below that of payee. Farrer *v.* People's Trust Co., (Kan. 1901) 64 Pac. 1031.

Express waiver of demand, notice, and protest.— Ford *v.* Hendricks, 34 Cal. 673.

Under Iowa statute (Code, § 2089): "I will extend my name" (Picket *v.* Hawes, 14 Iowa 460) or "I hereby indorse" (Conger *v.* Babbet, 67 Iowa 13, 24 N. W. 569). But in the absence of a statute the signing of a note on its back under the words "indorsed by" will prevent the contract of the signer from being construed as a guaranty. Delamater *v.* Kearns, 35 Ill. App. 634.

69. *District of Columbia.*— Boteler *v.* Dexter, 20 D. C. 26.

Indiana.— Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101.

Maryland.— Owings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353.

Massachusetts.— Carver *v.* Warren, 5 Mass. 545.

New Jersey.— Cadwallader *v.* Hirshfeld, 62 N. J. L. 747, 42 Atl. 1075, 72 Am. St. Rep. 671; Crozer *v.* Chambers, 20 N. J. L. 256.

New York.— Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576 [*affirming* 39 Barb. (N. Y.) 42].

North Carolina.— Baker *v.* Robinson, 63 N. C. 191, surety or joint principal.

Ohio.— Bright *v.* Carpenter, 9 Ohio 139, 34 Am. Dec. 432.

Pennsylvania.— Schollenberger *v.* Nehf, 28 Pa. St. 189; Kyner *v.* Shower, 13 Pa. St. 444; Taylor *v.* McCune, 11 Pa. St. 460; Leech *v.* Hill, 4 Watts (Pa.) 448.

South Carolina.— McCelvey *v.* Noble, 12 Rich. (S. C.) 167, indorsement after maturity.

Tennessee.— Harding *v.* Water, 6 Lea (Tenn.) 324 [*overruling* Comparree *v.* Brockway, 11 Humphr. (Tenn.) 355].

Utah.— McGee *v.* Connor, 1 Utah 92.

West Virginia.— Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197; Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

United States.— Rey *v.* Simpson, 22 How. (U. S.) 341, 16 L. ed. 260.

England.— Gwinnell *v.* Herbert, 5 A. & E. 436, 2 Hurl. & W. 194, 5 L. J. Q. B. 250, 31 E. C. L. 679.

The original intention cannot be varied by a different understanding between maker and payee at time of delivery, to which the indorser was not a party. De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46.

70. Holmes *v.* Preston, 70 Miss. 152, 12 So. 202; Crozer *v.* Chambers, 20 N. J. L. 256. At least this has been held to be so to render him liable as maker or guarantor (Boteler *v.* Dexter, 20 D. C. 26; Bogue *v.* Melick, 25 Ill. 91; Camden *v.* McKoy, 4 Ill. 437, 38 Am. Dec. 91; Dale *v.* Moffitt, 22 Ind. 113; Birchard *v.* Bartlet, 14 Mass. 279; Thomas *v.* Jennings, 5 Sm. & M. (Miss.) 627; Gwinnell *v.* Herbert, 5 A. & E. 436, 2 Hurl. & W. 194, 5 L. J. Q. B. 250, 31 E. C. L. 679) and it has been held that to render him liable as maker it must also be shown that he was privy to the original consideration (Dean *v.* Hall, 17 Wend. (N. Y.) 214) and that he indorsed the note before its delivery (Robinson *v.* Abell, 17 Ohio 36).

generally in behalf of subsequent holders, parol evidence is admissible to show the actual intention of the parties in the irregular indorsement;[71] but some cases have excluded parol evidence as in effect varying the legal effect of the contract,[72]

71. *California.*— Clarke *v.* Smith, 2 Cal. 605, guaranty.

Connecticut.— Clark *v.* Merriam, 25 Conn. 576; Lockwood *v.* Crawford, 18 Conn. 361; Castle *v.* Candee, 16 Conn. 223; Laflin *v.* Pomeroy, 11 Conn. 440 (surety); Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282.

Georgia.— Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54; Hardy *v.* White, 60 Ga. 454 (under Ga. Code, § 3808).

Illinois.— Milligan *v.* Holbrook, 168 Ill. 343, 48 N. E. 157 (indorser); Kingsland *v.* Koeppe, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; De Witt County Nat. Bank *v.* Nixon, 125 Ill. 615, 18 N. E. 203 (indorser); Wallace *v.* Goold, 91 Ill. 15; Eberhart *v.* Page, 89 Ill. 550; Stowell *v.* Raymond, 83 Ill. 120; Hamilton *v.* Johnston, 82 Ill. 39; Boynton *v.* Pierce, 79 Ill. 145; Lincoln *v.* Hinzey, 51 Ill. 435 (maker); White *v.* Weaver, 41 Ill. 409; Klein *v.* Currier, 14 Ill. 237; Carroll *v.* Weld, 13 Ill. 682, 56 Am. Dec. 481; Cushman *v.* Dement, 4 Ill. 497; Camden *v.* McKoy, 4 Ill. 437, 38 Am. Dec. 91; Varley *v.* Title Guarantee, etc., Co., 60 Ill. App. 565; Featherstone *v.* Hendrick, 59 Ill. App. 497; Donovan *v.* Griswold, 37 Ill. App. 616; Kingsland *v.* Koeppe, 35 Ill. App. 81.

Indiana.— Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51 (surety); Cottrell *v.* Shadley, 77 Ind. 348 (surety); Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101 (original promisor at suit of payee); Browning *v.* Merritt, 61 Ind. 425 (maker or guarantor); Nurre *v.* Chittenden, 56 Ind. 462 (surety); Roberts *v.* Masters, 40 Ind. 461 (maker); Houston *v.* Bruner, 39 Ind. 376; Sill *v.* Leslie, 16 Ind. 236 (surety); Early *v.* Foster, 7 Blackf. (Ind.) 35 (maker). But he is held not to be a surety without clear evidence of such agreement. Schulz *v.* Klenk, 49 Ind. 212.

Kansas.— Commercial Nat. Bank *v.* Atkinson, 62 Kan. 775, 64 Pac. 617, maker.

Kentucky.— Arnold *v.* Bryant, 8 Bush (Ky.) 668 (indorsement below payee shown to be surety); Levi *v.* Mendell, 1 Duv. (Ky.) 77 (guaranty).

Maryland.— Owings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353.

Massachusetts.— Mulcare *v.* Welch, 160 Mass. 58, 35 N. E. 97 (cosurety with payee for maker); Patch *v.* Washburn, 16 Gray (Mass.) 82 (second indorser); Wright *v.* Morse, 9 Gray (Mass.) 337, 69 Am. Dec. 291 (guaranty); Riley *v.* Gerrish, 9 Cush. (Mass.) 104. See also Clapp *v.* Rice, 13 Gray (Mass.) 403, 64 Am. Dec. 639; Pierce *v.* Mann, 17 Pick. (Mass.) 244; Ulen *v.* Kittredge, 7 Mass. 233 (guaranty).

Minnesota.—McComb *v.* Thompson, 2 Minn. 139, 72 Am. Dec. 84; Rey *v.* Simpson, 1 Minn. 380 (maker); Pierce *v.* Irvine, 1 Minn. 369 (maker).

Mississippi.— Jennings *v.* Thomas, 13 Sm. & M. (Miss.) 617.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327; Mammon *v.* Hartman, 51 Mo. 168; Seymour *v.* Farrell, 51 Mo. 95; Kuntz *v.* Tempel, 48 Mo. 71; Lewis *v.* Harvey, 18 Mo. 74, 59 Am. Dec. 286; Noll *v.* Oberhellmann, 20 Mo. App. 336 (surety).

Nebraska.— Drexel *v.* Pusey, 57 Nebr. 30, 77 N. W. 351.

New Jersey.— Watkins *v.* Kirkpatrick, 26 N. J. L. 84, surety.

New York.— Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576; McPhillips *v.* Jones, 73 Hun (N. Y.) 516, 26 N. Y. Suppl. 101, 56 N. Y. St. 164.

North Carolina.— Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237.

Ohio.— Seymour *v.* Mickey, 15 Ohio St. 515; Robinson *v.* Abell, 17 Ohio 36; Champion *v.* Griffith, 13 Ohio 228; Bright *v.* Carpenter, 9 Ohio 139, 34 Am. Dec. 432; Hoffman *v.* Levy, 2 Cinc. Super. Ct. (Ohio) 224.

Pennsylvania.— Eilbert *v.* Finkbeiner, 68 Pa. St. 243, 8 Am. Rep. 176 (guaranty to payee); Schafer *v.* Farmers', etc., Bank, 59 Pa. St. 144, 99 Am. Dec. 323 (guaranty); Heilbruner *v.* Wayte, 51 Pa. St. 259; Fegenbush *v.* Lang, 28 Pa. St. 193 (surety at suit of payee); Schollenberger *v.* Nehf, 28 Pa. St. 189 (guaranty); Liszman *v.* Marx, 20 Wkly. Notes Cas. (Pa.) 69, 9 Atl. 477 (surety).

South Carolina.— McCelvey *v.* Noble, 12 Rich. (S. C.) 167.

Tennessee.— Morrison Lumber Co. *v.* Lookout Mountain Hotel Co., 92 Tenn. 6, 20 S. W. 292; Harding *v.* Water, 6 Lea (Tenn.) 324 [*overruling* Comparree *v.* Brockway, 11 Humphr. (Tenn.) 355].

Texas.— Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181.

Utah.— McGee *v.* Connor, 1 Utah 92.

Vermont.— Pitkin *v.* Flanagan, 23 Vt. 160, 56 Am. Dec. 61; Sylvester *v.* Downer, 20 Vt. 355, 49 Am. Dec. 786; Strong *v.* Riker, 16 Vt. 554; Sanford *v.* Norton, 14 Vt. 228; Flint *v.* Day, 9 Vt. 345; Knapp *v.* Parker, 6 Vt. 642; Barrows *v.* Lane, 5 Vt. 161, 26 Am. Dec. 293 (guaranty).

Virginia.— Welsh *v.* Ebersole, 75 Va. 651, guaranty.

Washington.— Wilkie *v.* Chandon, 1 Wash. 355, 25 Pac. 464, indorser.

West Virginia.— Roanoke Grocery, etc., Co. *v.* Watkins, 41 W. Va. 787, 24 S. E. 612; Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

Wisconsin.—Heath *v.* Van Cott, 9 Wis. 516, recitals in collateral mortgage.

United States.— Rey *v.* Simpson, 22 How. (U. S.) 341, 16 L. ed. 260.

72. Inadmissible to enlarge the indorser's liability.— *Connecticut.*—Spencer *v.* Allerton, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806.

Georgia.— Collins *v.* Everett, 4 Ga. 266.

Illinois.— Hately *v.* Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304.

especially as against a *bona fide* holder who is entitled to rely on the contract shown by the paper.[73] At most they find in the contract, in the absence of other evidence, a *prima facie* contract implied from the signature. Thus many cases hold him to be presumptively an indorser.[74] Other cases (bearing chiefly on his relation to the payee) hold him to be *prima facie* a second indorser,[75] others hold

Indiana.— McGaughey *v.* Elliott, 18 Ind. 121; Vore *v.* Hurst, 13 Ind. 551, 74 Am. Dec. 268 (indorsed below payee).

Massachusetts.— Draper *v.* Weld, 13 Gray (Mass.) 580.

Minnesota.— Even in favor of a *bona fide* holder. Bowler *v.* Braun, 63 Minn. 32, 65 N. W. 124, 56 Am. St. Rep. 449.

New York.— Zillweger *v.* Caffe, 5 Duer (N. Y.) 187; Cottrell *v.* Conklin, 4 Duer (N. Y.) 45; Seabury *v.* Hungerford, 2 Hill (N. Y.) 80.

Pennsylvania.— Jack *v.* Morrison, 48 Pa. St. 113.

Wisconsin.— Heath *v.* Van Cott, 9 Wis. 516.

Inadmissible to lessen the indorser's liability (Essex Co. *v.* Edmands, 12 Gray (Mass.) 273, 71 Am. Dec. 758; Wright *v.* Morse, 9 Gray (Mass.) 337, 69 Am. Dec. 291; Gumz *v.* Giegling, 108 Mich. 295, 66 N. W. 48; Dennis *v.* Jackson, 57 Minn. 286, 59 N. W. 198, 47 Am. St. Rep. 603; Peckham *v.* Gilman, 7 Minn. 446), especially where the payee had no knowledge of any other than the usual legal intendment (Spaulding *v.* Putnam, 128 Mass. 363; Gilson *v.* Stevens Mach. Co., 124 Mass. 546; Patch *v.* Washburn, 16 Gray (Mass.) 82; Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197).

Inadmissible under statute of frauds to prove a guaranty. Temple *v.* Baker, 125 Pa. St. 634, 17 Atl. 516, 24 Wkly. Notes Cas. (Pa.) 1, 11 Am. St. Rep. 926, 3 L. R. A. 709; Allwine *v.* Garberick, 8 Phila. (Pa.) 637 [*citing* Jack *v.* Morrison, 48 Pa. St. 113]; Iser *v.* Cohen, 1 Baxt. (Tenn.) 421 (surety).

73. *Maine.*— Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461.

Maryland.— Owings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353; Ives *v.* Bosley, 35 Md. 262, 6 Am. Rep. 411.

Massachusetts.— Allen *v.* Brown, 124 Mass. 77; Way *v.* Butterworth, 108 Mass. 509.

Minnesota.— Dennis *v.* Jackson, 57 Minn. 286, 59 N. W. 198, 47 Am. St. Rep. 603.

Missouri.— Chaffe *v.* Memphis, etc., R. Co., 64 Mo. 193; Schneider *v.* Schiffman, 20 Mo. 571; Cayuga County Nat. Bank *v.* Dunklin, 29 Mo. App. 442.

Nebraska.— Salisbury *v.* Cambridge City First Nat. Bank, 37 Nebr. 872, 56 N. W. 727, 40 Am. St. Rep. 527.

Vermont.— Sanford *v.* Norton, 17 Vt. 285, 14 Vt. 228.

74. *Alabama.*— Carrington *v.* Odom, 124 Ala. 529, 27 So. 510; Marks *v.* Montgomery First Nat. Bank, 79 Ala. 550, 58 Am. Rep. 620.

Indiana.— De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46; Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739; Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Cottrell *v.* Shadley, 77 Ind. 348; Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Browning *v.* Merritt, 61 Ind. 425; Nurre *v.* Chittenden, 56 Ind. 462; Schulz *v.* Klenk, 49 Ind. 212; Bronson *v.* Alexander, 48 Ind. 244; Roberts *v.* Masters, 40 Ind. 461; Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358; Snyder *v.* Oatman, 16 Ind. 265; Sill *v.* Leslie, 16 Ind. 236.

Massachusetts.— Lewis *v.* Monahan, 173 Mass. 122, 53 N. E. 150, successive indorsements of note to maker's order.

Mississippi.— Jennings *v.* Thomas, 13 Sm. & M. (Miss.) 617.

New York.— Dean *v.* Hall, 17 Wend. (N. Y.) 214.

Pennsylvania.— Guldin *v.* Linderman, 34 Pa. St. 58.

United States.— McComber *v.* Clarke, 3 Cranch C. C. (U. S.) 6, 15 Fed. Cas. No. 8,711.

75. *Georgia.*— Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54.

Illinois.— Bogue *v.* Melick, 25 Ill. 91, indorsed under payee. And with no liability to subsequent holders as indorser until after the payee has indorsed the note. Blatchford *v.* Milliken, 35 Ill. 434.

Kentucky.—Arnold *v.* Bryant, 8 Bush (Ky.) 668, indorsed below payee.

Maine.— Sturtevant *v.* Randall, 53 Me. 149.

New York.— Phelps *v.* Vischer, 50 N. Y. 69, 10 Am. Rep. 433; Bacon *v.* Burnham, 37 N. Y. 614; Howard *v.* Van Gieson, 46 N. Y. App. Div. 77, 61 N. Y. Suppl. 349; Holz *v.* Woodside Brewing Co., 83 Hun (N. Y.) 192, 31 N. Y. Suppl. 397, 63 N. Y. St. 810; McPhillips *v.* Jones, 73 Hun (N. Y.) 516, 26 N. Y. Suppl. 101, 56 N. Y. St. 164; Edison General Electric Co. *v.* Zebley, 72 Hun (N. Y.) 166, 25 N. Y. Suppl. 389, 55 N. Y. St. 62; Lester *v.* Paine, 39 Barb. (N. Y.) 616; Baker *v.* Martin, 3 Barb. (N. Y.) 634; Hull *v.* Marvin, 2 Thomps. & C. (N. Y.) 420.

Oregon.— Wade *v.* Creighton, 25 Oreg. 455, 36 Pac. 289; Deering *v.* Creighton, 19 Oreg. 118, 24 Pac. 198, 20 Am. St. Rep. 800; Cogswell *v.* Hayden, 5 Oreg. 22.

Pennsylvania.— Temple *v.* Baker, 125 Pa. St. 634, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709; Arnot *v.* Symonds, 85 Pa. St. 99, 27 Am. Rep. 630; Eilbert *v.* Finkbeiner, 68 Pa. St. 243, 8 Am. Rep. 176; Schafer *v.* Farmers', etc., Bank, 59 Pa. St. 144, 98 Am. Dec. 323; Guldin *v.* Linderman, 34 Pa. St. 58; Barto *v.* Schmeck, 28 Pa. St. 447, 70 Am. Dec. 145 (although payee afterward indorsed below him); Fegenbush *v.* Lang, 28 Pa. St. 193; Taylor *v.* McCune, 11 Pa. St. 460.

Tennessee.— Morrison Lumber Co. *v.* Lookout Mountain Hotel Co., 92 Tenn. 6, 20 S. W. 292, payee indorsed below him.

Wisconsin.— Cady *v.* Shepard, 12 Wis. 639.

that he is *prima facie* a maker,[76] *prima facie* a guarantor,[77] or as to the maker *prima facie* a surety.[78]

(2) Filling Indorsement. In accordance with the view last expressed the blank indorsement as between the immediate parties can and should be filled with the actual contract which the parties have entered into,[79] or in default of an actual contract with the contract which the legal presumption has created.[80] It

76. *Maryland.*— Owings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353.

Minnesota.— Marienthal *v.* Taylor, 2 Minn. 147; Pierse *v.* Irvine, 1 Minn. 369.

Missouri.— Chaffe *v.* Memphis, etc., R. Co., 64 Mo. 193; Cahn *v.* Dutton, 60 Mo. 297; Mammon *v.* Hartman, 51 Mo. 168; Seymour *v.* Farrell, 51 Mo. 95; Otto *v.* Bent, 48 Mo. 23; Western Boatmen's Benev. Assoc. *v.* Wolff, 45 Mo. 104; Perry *v.* Barret, 18 Mo. 140; Goode *v.* Jones, 9 Mo. 876; Hooper *v.* Pritchard, 7 Mo. 492; Schmidt Malting Co. *v.* Miller, 38 Mo. App. 251; Noll *v.* Oberhellmann, 20 Mo. App. 336; Boyer *v.* Boogher, 11 Mo. App. 130; Grelle *v.* Loxen, 7 Mo. App. 97 (above payee); Bosbyshell *v.* Ehninger, 3 Mo. App. 574.

Nebraska.— Drexel *v.* Pusey, 57 Nebr. 30, 77 N. W. 351.

Utah.— McGee *v.* Connor, 1 Utah 92, maker or surety.

Vermont.— Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664 (certificate of deposit indorsed "O. A. Burton, surety"); Bellows Falls Nat. Bank *v.* Dorset Marble Co., 61 Vt. 106, 17 Atl. 42, 2 L. R. A. 428; Pitkin *v.* Flanagan, 23 Vt. 160, 56 Am. Dec. 61; Sylvester *v.* Downer, 20 Vt. 355, 49 Am. Dec. 786 (indorsed "I promise to pay"); Sanford *v.* Norton, 17 Vt. 285, 14 Vt. 228; Strong *v.* Riker, 16 Vt. 554; Flint *v.* Day, 9 Vt. 345; Knapp *v.* Parker, 6 Vt. 642; Barrows *v.* Lane, 5 Vt. 161, 26 Am. Dec. 293.

Washington.— Donohoe Kelly Banking Co. *v.* Puget Sound Sav. Bank, 13 Wash. 407, 43 Pac. 359, 942, 52 Am. St. Rep. 57.

West Virginia.— Roanoke Grocery, etc., Co. *v.* Watkins, 41 W. Va. 787, 24 S. E. 612.

77. *Connecticut.*— Laflin *v.* Pomeroy, 11 Conn. 440; Huntington *v.* Harvey, 4 Conn. 124.

Illinois.— Milligan *v.* Holbrook, 168 Ill. 343, 48 N. E. 157; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 935; Kingsland *v.* Koeppe, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649 [*affirming* 35 Ill. App. 81]; De Witt County Nat. Bank *v.* Nixon, 125 Ill. 615, 18 N. E. 203; Wallace *v.* Goold, 91 Ill. 15; Eberhart *v.* Page, 89 Ill. 550; Stowell *v.* Raymond, 83 Ill. 120; Hamilton *v.* Johnston, 82 Ill. 39; Boynton *v.* Pierce, 79 Ill. 145; Pahlman *v.* Taylor, 75 Ill. 629; Parkhurst *v.* Vail, 73 Ill. 343 (in hands of payee); Lincoln *v.* Hinzey, 51 Ill. 435; Webster *v.* Cobb, 17 Ill. 459 (in hands of payee); Klein *v.* Currier, 14 Ill. 237 (in hands of payee, indorsed "I guarantee the payment"); Carroll *v.* Weld, 13 Ill. 682, 56 Am. Dec. 481 (in hands of payee); Cushman *v.* Dement, 4 Ill. 497 (in hands of payee); Camden *v.* McKoy, 4 Ill. 437, 38 Am. Dec. 91; Varley *v.* Title Guarantee, etc., Co., 60 Ill. App. 565; Donovan *v.* Griswold, 37 Ill. App. 616; Swigart *v.* Weare, 37 Ill. App. 258; Brown *v.* Reasner, 5 Ill. App. 45.

Kansas.— Fullerton *v.* Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33 (in hands of payee); Sarbach *v.* Jones, 20 Kan. 497.

Kentucky.— Arnold *v.* Bryant, 8 Bush (Ky.) 668.

North Carolina.— Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237, shown to be cosureties.

Ohio.— Seymour *v.* Mickey, 15 Ohio St. 515 (shown to be conditional on demand and notice); Greenough *v.* Smead, 3 Ohio St. 415 [*affirming* 1 Ohio Dec. (Reprint) 516, 10 West. L. J. 271]; Hoffman *v.* Levy, 2 Cinc. Super. Ct. (Ohio) 224.

Tennessee.— Rivers *v.* Thomas, 1 Lea (Tenn.) 649, 27 Am. Rep. 784.

78. *Louisiana.*— Collins *v.* Trist, 20 La. Ann. 348; Drew *v.* Robertson, 2 La. Ann. 592; McGuire *v.* Bosworth, 1 La. Ann. 248; Gilbert *v.* Cooper, 4 Rob. (La.) 161; Dwight *v.* Linton, 3 Rob. (La.) 57; Hereford *v.* Chase, 1 Rob. (La.) 212; Lawrence *v.* Oakey, 14 La. 386; Louisiana State Bank *v.* Senecal, 11 La. 29; Leckie *v.* Scott, 10 La. 412; Smith *v.* Gorton, 10 La. 374; Dorsey *v.* His Creditors, 7 Mart. N. S. (La.) 498; Nolte *v.* His Creditors, 7 Mart. N. S. (La.) 9; Guidrey *v.* Vives, 3 Mart. N. S. (La.) 659; Cooley *v.* Lawrence, 4 Mart. (La.) 639.

Maine.— Auburn First Nat. Bank *v.* Marshall, 73 Me. 79.

Massachusetts.— Baker *v.* Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311, surety or maker.

North Carolina.— Hoffman *v.* Moore, 82 N. C. 313; Baker *v.* Robinson, 63 N. C. 191.

Ohio.— Ewan *v.* Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094, 60 Am. St. Rep. 719, 35 L. R. A. 786.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

79. Blatchford *v.* Milliken, 35 Ill. 434; Fear *v.* Dunlap, 1 Greene (Iowa) 331; Riley *v.* Gerrish, 9 Cush. (Mass.) 104; Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576.

If it is not filled in accordance with the contract actually made it will be disregarded on the trial (Sylvester *v.* Downer, 20 Vt. 355, 49 Am. Dec. 786) and may be canceled if filled by mistake (Allen *v.* Brown, 124 Mass. 77; Bosbyshell *v.* Ehninger, 3 Mo. App. 574; Seymour *v.* Mickey, 15 Ohio St. 515).

80. Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179. But the holder is not authorized to insert anything by which the liability of the indorser would be different from the one implied by law. Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347.

may be filled with an absolute promise as maker, if that was the contract,[81] and in like manner where that is the contract or presumption the payee may write a contract of guaranty,[82] but it has been held that he cannot write a contract of suretyship.[83]

(F) *Under Statutes.* By recent American and English statutes the ambiguity of this contract is ended in at least one half of the United States and in Great Britain. The prevailing tendency is to make his liability that of an indorser.[84]

(G) *Where Instrument Non-Negotiable.* Where one who is neither maker nor payee indorses a non-negotiable note before its delivery to the payee it has been said that it must be a guaranty, as there is properly speaking no indorse-

81. Riley *v.* Gerrish, 9 Cush. (Mass.) 104 (a joint promise or a joint and several promise); Bright *v.* Carpenter, 9 Ohio 139, 34 Am. Dec. 432 (original promise); Kyner *v.* Shower, 13 Pa. St. 444 (as against a purchaser after maturity).

82. *Arkansas.*— Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519.

California.— Brady *v.* Reynolds, 13 Cal. 31, joint guaranty.

Connecticut.— Beckwith *v.* Angell, 6 Conn. 315.

Illinois.— Stowell *v.* Raymond, 83 Ill. 120; Boynton *v.* Pierce, 79 Ill. 145; White *v.* Weaver, 41 Ill. 409; Heintz *v.* Cahn, 29 Ill. 308; Webster *v.* Cobb, 17 Ill. 459; Cushman *v.* Dement, 4 Ill. 497; Camden *v.* McKoy, 4 Ill. 437, 38 Am. Dec. 91; Smith *v.* Finch, 3 Ill. 321; Duncanson *v.* Kirby, 90 Ill. App. 15; Swigart *v.* Weare, 37 Ill. App. 258.

Kentucky.— Arnold *v.* Bryant, 8 Bush (Ky.) 668; Levi *v.* Mendell, 1 Duv. (Ky.) 77.

New York.— Small *v.* Sloan, 1 Bosw. (N. Y.) 352; Campbell *v.* Butler, 14 Johns. (N. Y.) 349; Nelson *v.* Dubois, 13 Johns. (N. Y.) 175.

Tennessee.— Harding *v.* Water, 6 Lea (Tenn.) 324 [*overruling* Brinkley *v.* Boyd, 9 Heisk. (Tenn.) 149]; Rivers *v.* Thomas, 1 Lea (Tenn.) 649, 27 Am. Rep. 784; Clouston *v.* Barbiere, 4 Sneed (Tenn.) 336.

Texas.— Horton *v.* Manning, 37 Tex. 23; Chandler *v.* Westfall, 30 Tex. 475.

Virginia.—Orrick *v.* Colston, 7 Gratt. (Va.) 189.

United States.— Offutt *v.* Hall, 1 Cranch C. C. (U. S.) 504, 18 Fed. Cas. No. 10,449.

In pursuance of a special agreement to that effect but not otherwise.

Illinois.— Windheim *v.* Ohlendorf, 3 Ill. App. 436. Or it may be restricted by the actual contract to a guaranty of the prior indorser's contract. Allen *v.* Coffil, 42 Ill. 293.

Kentucky.— Needhams *v.* Page, 3 B. Mon. (Ky.) 465.

Maryland.— Hoffman *v.* Coombs, 9 Gill (Md.) 284.

New Jersey.—Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551.

Pennsylvania.— Schafer *v.* Farmers', etc., Bank, 59 Pa. St. 144, 98 Am. Dec. 323.

Tennessee.— Clouston *v.* Barbiere, 4 Sneed (Tenn.) 336.

Where a note is payable to the maker's own order a guaranty cannot be written over such indorsement. Blatchford *v.* Milliken, 35 Ill. 434.

83. Kearnes *v.* Montgomery, 4 W. Va. 29, bond.

84. **The California civil code,** section 3117, provides that: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon, as an indorser," but this statute applies only to negotiable notes, leaving the rule (guaranty) unchanged as to non-negotiable notes. San Diego First Nat. Bank *v.* Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94.

The Negotiable Instruments Law, section 113, provides as follows: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." And section 114 reads: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: 1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

The Bills of Exchange Act, section 56, provides that "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course."

Guarantor.— The Iowa statute makes such irregular indorser a guarantor. This applies to one who writes on it "I hereby indorse the within note." Conger *v.* Babbet, 67 Iowa 13, 24 N. W. 569. In Illinois the statute makes such indorsement a guaranty on notes "payable to bearer," which does not include a note payable to the maker's order and indorsed by maker and third party below him. Chicago Trust, etc., Bank *v.* Nordgren, 157 Ill. 663, 42 N. E. 148.

Surety.— In North Carolina the statute makes him a surety to all holders except in case of foreign and inland bills of exchange. Hoffman *v.* Moore, 82 N. C. 313.

ment of such paper.[85] In other states he is held to be an original maker.[86] The better rule, however, seems to be that the contract is a question of intention and that the indorser is a guarantor, maker, or surety, according to the intention of the parties,[87] and that there is no implied contract with the payee to be presumed from the production of the paper.[88]

(H) *Where Indorsement Made After Delivery* — (1) RULE STATED. If the indorsement is made after the delivery of a note it is not an original contract but is a contract of guaranty.[89] In other cases, however, the indorser has been held to be a maker or surety.[90] If made on a bill of exchange after indorsement by

85. Rogers *v.* Schulenburg, 111 Cal. 281, 43 Pac. 899; San Diego First Nat. Bank *v.* Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384. At least *prima facie.* Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576 [*affirming* 39 Barb. (N. Y.) 42]. And *prima facie* a guaranty that it is collectable, as in the case of negotiable paper. Ranson *v.* Sherwood, 26 Conn. 437; Castle *v.* Candee, 16 Conn. 223; Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282; Welton *v.* Scott, 4 Conn. 527; Huntington *v.* Harvey, 4 Conn. 124.

86. *Indiana.*— Pool *v.* Anderson, 116 Ind. 88, 18 N. E. 445, 1 L. R. A. 712, maker or surety.

Massachusetts.— Sweetser *v.* French, 13 Metc. (Mass.) 262.

Michigan.— Rothschild *v.* Grix, 31 Mich. 150, 18 Am. Rep. 171.

Missouri.— Powell *v.* Thomas, 7 Mo. 440, 38 Am. Dec. 465. At least *prima facie.* Lewis *v.* Harvey, 18 Mo. 74, 59 Am. Dec. 286.

Oregon.— Barr *v.* Mitchell, 7 Oreg. 346.

South Carolina.— Cockrell *v.* Milling, 1 Strobh. (S. C.) 444.

Wisconsin.— Gorman *v.* Ketchum, 33 Wis. 427; Houghton *v.* Ely, 26 Wis. 181, 7 Am. Rep. 52.

Canada.— Piers *v.* Hall, 18 N. Brunsw. 34. *Compare* McMurray *v.* Talbot, 5 U. C. C. P. 157.

Contra, Huntington *v.* Harvey, 4 Conn. 124; *In re* Wrentham Mfg. Co., 2 Lowell (U. S.) 119, 30 Fed. Cas. No. 18,063.

87. Jacques *v.* Knight, 26 N. J. L. 92 note; McMullen *v.* Rafferty, 89 N. Y. 456; Cromwell *v.* Hewitt, 40 N. Y. 491, 100 Am. Dec. 527; New York Security, etc., Co. *v.* Storm, 81 Hun (N. Y.) 33, 30 N. Y. Suppl. 605, 62 N. Y. St. 539; Roe *v.* Hallett, 34 Hun (N. Y.) 128; Cawley *v.* Costello, 15 Hun (N. Y.) 303; Griswold *v.* Slocum, 10 Barb. (N. Y.) 402; Paine *v.* Noelke, 43 N. Y. Super. Ct. 176 [*affirming* 53 How. Pr. (N. Y.) 273].

It may be filled according to such intention. Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576; Leech *v.* Hill, 4 Watts (Pa.) 448.

Parol evidence is admissible to show the intention. Baltimore Third Nat. Bank *v.* Lange, 51 Md. 138, 34 Am. Rep. 304.

88. Absecom Bldg., etc., Soc. *v.* Leeds, 50 N. J. L. 399, 18 Atl. 82, 5 L. R. A. 353 (Dixon, J., dissenting); Lang *v.* Fegenbush, 2 Phila. (Pa.) 20, 13 Leg. Int. (Pa.) 12. See too Tucker *v.* English, 2 Speers (S. C.) 673.

89. *Arkansas.*— Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519.

Illinois.— Ives *v.* McHard, 2 Ill. App. 176.

Kansas.— Withers *v.* Berry, 25 Kan. 373; Fuller *v.* Scott, 8 Kan. 25.

Maine.— Irish *v.* Cutter, 31 Me. 536; Colburn *v.* Averill, 30 Me. 310, 50 Am. Dec. 630.

Massachusetts.— Way *v.* Butterworth, 108 Mass. 509; Mecorney *v.* Stanley, 8 Cush. (Mass.) 85; Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347, 7 Pick. (Mass.) 243; Ulen *v.* Kittredge, 7 Mass. 233.

Minnesota.— Peterson *v.* Russell, 62 Minn. 220, 64 N. W. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612.

Mississippi.— Thomas *v.* Jennings, 5 Sm. & M. (Miss.) 627.

Missouri.— Burnham *v.* Gosnell, 47 Mo. App. 637; Corbyn *v.* Brokmeyer, 84 Mo. App. 649; Howard *v.* Jones, 13 Mo. App. 596. Although intended as a transfer by one who acts as executor *de son tort* of the deceased payee (appointed but not qualified). Stagg *v.* Linnenfelser, 59 Mo. 336.

North Carolina.— Hoffman *v.* Moore, 82 N. C. 313.

Ohio.— Castle *v.* Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839 (indorsement under payee to procure discount); Champion *v.* Griffith, 13 Ohio 228.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

Indorsement after maturity.— So of an indorsement after maturity. Crooks *v.* Tully, 50 Cal. 254; Rivers *v.* Thomas, 1 Lea (Tenn.) 649, 27 Am. Rep. 784.

Filling indorsement.— A guaranty may be written over the indorsement. Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519; Scott *v.* Calkin, 139 Mass. 529, 2 N. E. 675. But where the indorser intends to make himself liable as an accommodation indorser or surety a guaranty cannot be written over his indorsement (Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551), and where he might have written a guaranty and failed so to do he cannot be held as guarantor (Moor *v.* Folsom, 14 Minn. 340, 100 Am. Dec. 227).

90. Where the indorsement was made in pursuance of the original agreement (Childs *v.* Wyman, 44 Me. 433, 69 Am. Dec. 111; Leonard *v.* Wildes, 36 Me. 265; Hawkes *v.* Phillips, 7 Gray (Mass.) 284; Samson *v.* Thornton, 3 Metc. (Mass.) 275, 37 Am. Dec. 135 [with subsequent redelivery]; Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179. And see Leidy *v.* Tammany, 9 Watts (Pa.) 353; Bank of North America *v.* Barriere, 1 Yeates

the payee and at the time of transfer it will be regarded as the drawing of a new bill so far as the indorser and subsequent holders are concerned,[91] and if made after transfer by the payee it may be an indorsement as to subsequent holders[92] or it may be a guaranty to subsequent holders but not to the payee.[93] It seems, however, to be the better rule that the contract must be proved and that no contract will be implied by such indorsement after delivery of the paper,[94] especially where the paper is already overdue at the time of the indorsement.[95]

(2) Presumption as to Time of Indorsement. The indorsement of a stranger to the paper, who is neither payee nor holder, is presumed to have been made at the inception of the paper,[96] and parol evidence is admissible in all cases to show when such indorsement was made.[97]

(Pa.) 360); to induce a purchaser to take the note (Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256); where the indorser had assumed the debt and become the principal debtor (Palmer *v.* Tripp, 8 Cal. 95; Rodocanachi *v.* Buttrick, 125 Mass. 134) or indorsed the note in resumption of his original liability as principal debtor (Knapp *v.* Parker, 6 Vt. 642). And to the effect that he is *prima facie* a maker whether he sign before or after delivery see Sylvester *v.* Downer, 20 Vt. 355, 49 Am. Dec. 786; Sanford *v.* Norton, 17 Vt. 285. But other cases refuse to hold him liable as a maker. Joyslin *v.* Kent, 47 Minn. 271, 50 N. W. 1110. So where he signs as accommodation indorser to enable the payee to discount the paper and the payee signs above him (Pierce *v.* Mann, 17 Pick. (Mass.) 244) or if he signs after the payee for that purpose (Barker *v.* Parker, 10 Gray (Mass.) 339).

91. Penny *v.* Innes, 1 C. M. & R. 439, 4 L. J. Exch. 12, 5 Tyrw. 107.

92. Boteler *v.* Dexter, 20 D. C. 26 (payee indorsed below); Cornett *v.* Hafer, 43 Kan. 60, 22 Pac. 1015 (after indorsement by the payee); Buck *v.* Hutchins, 45 Minn. 270, 47 N. W. 808 (before indorsement by the payee).

93. Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384; Nelson *v.* Harrington, 16 Gray (Mass.) 139.

94. Badger *v.* Barnabee, 17 N. H. 120; Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303 (after delivery and transfer). See also Ryan *v.* McKerral, 15 Ont. 460.

It is not an indorsement within the Massachusetts statute of 1874 (Equitable Mar. Ins. Co. *v.* Adams, 173 Mass. 436, 53 N. E. 883) or within the Negotiable Instruments Law as to irregular indorsements (Kohn *v.* Consolidated Butter, etc., Co., 30 Misc. (N. Y.) 265, 63 N. Y. Suppl. 265).

95. Tiller *v.* Shearer, 20 Ala. 596; Hullum *v.* State Bank, 18 Ala. 805 (*prima facie* indorser); Patterson *v.* Todd, 18 Pa. St. 426, 57 Am. Dec. 622; McKinney *v.* Crawford, 8 Serg. & R. (Pa.) 351; McCelvey *v.* Noble, 12 Rich. (S. C.) 167; Pride *v.* Berkley, 5 Rich. (S. C.) 537 (indorser); Garrett *v.* Butler, 2 Strobh. (S. C.) 193 (not maker). And the contract may be filled in as intended (Beckwith *v.* Angell, 6 Conn. 315. *Contra*, Brown *v.* Butler, 99 Mass. 179) or it may operate merely as a transfer of the note without liability on the indorser's part (Moor *v.* Folsom, 14 Minn. 340, 100 Am. Dec. 227; Crawford *v.* Lytle, 70 N. C. 385).

96. *Delaware.*— Gilpin *v.* Marley, 4 Houst. (Del.) 284, where the note was still in the hands of the payee.

Illinois.— Parkhurst *v.* Vail, 73 Ill. 343; Gridley *v.* Capen, 72 Ill. 11; White *v.* Weaver, 41 Ill. 409; Webster *v.* Cobb, 17 Ill. 459; Klein *v.* Currier, 14 Ill. 237; Grier *v.* Cable, 45 Ill. App. 405.

Indiana.— Snyder *v.* Oatman, 16 Ind. 265; Cecil *v.* Mix, 6 Ind. 478; Bates *v.* Pricket, 5 Ind. 22, 61 Am. Dec. 73; Ewing *v.* Sills, 1 Ind. 125.

Kentucky.—Arnold *v.* Bryant, 8 Bush (Ky.) 668.

Maine.— Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461; Childs *v.* Wyman, 44 Me. 433, 69 Am. Dec. 111; Lowell *v.* Gage, 38 Me. 35; Colburn *v.* Averill, 30 Me. 310, 50 Am. Dec. 630.

Massachusetts.— Way *v.* Butterworth, 108 Mass. 509; National Pemberton Bank *v.* Lougee, 108 Mass. 371, 11 Am. Rep. 367; Benthall *v.* Judkins, 13 Metc. (Mass.) 265; Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541.

Missouri.— Powell *v.* Thomas, 7 Mo. 440, 38 Am. Dec. 465.

New Hampshire.— Martin *v.* Boyd, 11 N. H. 385, 35 Am. Dec. 501.

North Carolina.— Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237.

Pennsylvania.— Amsbaugh *v.* Gearhart, 11 Pa. St. 482.

Texas.—Carr *v.* Rowland, 14 Tex. 275; Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181; Haymond *v.* Friberg, 1 Tex. App. Civ. Cas. § 1047. But to charge the indorser as maker it is in some states sufficient to show that the indorsement was made before delivery but this must be shown affirmatively. Best *v.* Hoppie, 3 Colo. 137; Good *v.* Martin, 2 Colo. 218, 1 Colo. 165, 91 Am. Dec. 706; Johnston *v.* McDonald, 41 S. C. 81, 19 S. E. 65.

97. *Illinois.*— Parkhurst *v.* Vail, 73 Ill. 343; White *v.* Weaver, 41 Ill. 409.

Maine.— Sturtevant *v.* Randall, 53 Me. 149.

Maryland.— Baltimore Third Nat. Bank *v.* Lange, 51 Md. 138, 34 Am. Rep. 304.

Massachusetts.— Way *v.* Butterworth, 108 Mass. 509; Brown *v.* Butler, 99 Mass. 179; Essex Co. *v.* Edmands, 12 Gray (Mass.) 273, 71 Am. Dec. 758; Pearson *v.* Stoddard, 9 Gray (Mass.) 199; Austin *v.* Boyd, 24 Pick. (Mass.) 64.

Michigan.— Freeman *v.* Ellison, 37 Mich. 459.

(III) *Liability to Payee.* The liability of such irregular indorser to the payee depends upon the intention of the parties at the time the paper was executed, according to which he is liable as guarantor,[98] as maker,[99] as indor-

South Carolina.— McCreary *v.* Bird, 12 Rich. (S. C.) 554.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

98. *Connecticut.*— Clayton *v.* Coburn, 42 Conn. 348. Although his understanding with the maker, unknown to the payee, was that he should not be liable to the payee. Greathead *v.* Walton, 40 Conn. 226.

Maryland.— Gist *v.* Drakely, 2 Gill (Md.) 330, 41 Am. Dec. 426.

New York.— Jaffray *v.* Brown, 74 N. Y. 393; Port Jefferson Bank *v.* Darling, 91 Hun (N. Y.) 236, 36 N. Y. Suppl. 153, 72 N. Y. St. 54; Campbell *v.* Butler, 14 Johns. (N. Y.) 349. Although the payee afterward indorsed above him "without recourse." Lynch *v.* Levy, 11 Hun (N. Y.) 145.

Pennsylvania.— Jack *v.* Morrison, 48 Pa. St. 113, on special consideration therefor.

South Carolina.— Although the indorser had refused, without the knowledge of the payee, to become the maker's surety, and was ignorant of the effect of his indorsement. Carpenter *v.* Oaks, 10 Rich. (S. C.) 17.

England.— Morris *v.* Walker, 15 Q. B. 589, 69 E. C. L. 589.

Canada.— Vanleuven *v.* Vandusen, 7 U. C. Q. B. 176.

In West Virginia the payee may treat him as maker or guarantor at his election. Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197; Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

Necessity of proving intention.— The intention is presumed in some states (Fullerton *v.* Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33; Scott *v.* Calkin, 139 Mass. 529, 2 N. E. 675) but must be proved in others (Lester *v.* Paine, 39 Barb. (N. Y.) 616; Smith *v.* Kessler, 44 Pa. St. 142; Barto *v.* Schmeck, 28 Pa. St. 447, 70 Am. Dec. 145; Shenk *v.* Robeson, 2 Grant (Pa.) 372).

99. *Delaware.*—Massey *v.* Turner, 2 Houst. (Del.) 79.

District of Columbia.— Hutchinson *v.* Brown, 19 D. C. 136.

Georgia.— Quin *v.* Sterne, 26 Ga. 223, 71 Am. Dec. 204.

Maine.— Stevens *v.* Parsons, 80 Me. 351, 14 Atl. 741; Colburn *v.* Averill, 30 Me. 310, 50 Am. Rep. 630.

Maryland.— Walz *v.* Alback, 37 Md. 404.

Massachusetts.— Patch *v.* Washburn, 16 Gray (Mass.) 82; Hawkes *v.* Phillips, 7 Gray (Mass.) 284 (indorsement after delivery under original agreement).

Michigan.— Allison *v.* Kinne, 104 Mich. 141, 62 N. W. 152; Sibley *v.* Muskegon Nat. Bank, 41 Mich. 196, 1 N. W. 930; Rothschild *v.* Grix, 31 Mich. 150, 18 Am. Rep. 171.

Minnesota.— Stein *v.* Passmore, 25 Minn. 256; Peckham *v.* Gilman, 7 Minn. 446; McComb *v.* Thompson, 2 Minn. 139, 72 Am. Dec. 84; Rey *v.* Simpson, 1 Minn. 380; Pierse *v.* Irvine, 1 Minn. 369.

New Hampshire.— Martin *v.* Boyd, 11 N. H. 385, 35 Am. Dec. 501.

New Jersey.— Ackerman *v.* Westervelt, 26 N. J. L. 92 note.

Pennsylvania.— Amshaugh *v.* Gearhart, 11 Pa. St. 482.

Rhode Island.— Jackson Bank *v.* Irons, 18 R. I. 718, 30 Atl. 420; Carpenter *v.* McLaughlin, 12 R. I. 270, 34 Am. Rep. 638 (although only surety for maker to payee's knowledge); Mathewson *v.* Sprague, 1 R. I. 8 (although surety for maker).

South Carolina.— Sylvester, etc., Co. *v.* Alewine, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86; Baker *v.* Scott, 5 Rich. (S. C.) 305.

Tennessee.— Provident Sav. L. Assur. Soc. *v.* Edmonds, 95 Tenn. 53, 31 S. W. 168.

Vermont.— Bellows Falls Nat. Bank *v.* Dorset Marble Co., 61 Vt. 106, 17 Atl. 42, 2 L. R. A. 428 (although below payee's indorsement); Sylvester *v.* Downer, 20 Vt. 355, 49 Am. Dec. 786 (indorsed "I promise to pay this note").

United States.— Phipps *v.* Harding, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L. R. A. 513; Miller *v.* Ridgely, 22 Fed. 889.

Extent of rule.— This is especially true if made to induce the payee to take the note (Melton *v.* Brown, 25 Fla. 461, 6 So. 211; Marienthal *v.* Taylor, 2 Minn. 147; Gorman *v.* Ketchum, 33 Wis. 427) and notwithstanding a fraudulent representation by the maker to him, unknown to the payee, that the payee wanted him to indorse the note for his accommodation (Spaulding *v.* Putnam, 128 Mass. 363, before act of 1874), although he is strictly speaking an indorser (Griswold *v.* Slocum, 10 Barb. (N. Y.) 402), although maker and indorser intended only an indorsement (Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338, intention being unknown to payee), and although the payee indorsed above him in order to negotiate the note (McCreary *v.* Bird, 12 Rich. (S. C.) 554 [security to payee intended]; Bellows Falls Nat. Bank *v.* Dorset Marble Co., 61 Vt. 106, 17 Atl. 42, 2 L. R. A. 428), and the payee may treat him as maker, indorser, or guarantor according to such intention (Miller *v.* Clendenin, 42 W. Va. 416, 26 S. E. 512). In Woodman *v.* Boothby, 66 Me. 389, it was held that the payee having taken up the note in the hands of the indorsee could enforce it against the irregular indorser in the indorsee's name, although it was said he could not sue in his own name.

Necessity of proving intention.— In some states the law presumes such an intention (Benthall *v.* Judkins, 13 Metc. (Mass.) 265; Martin *v.* Boyd, 11 N. H. 385, 35 Am. Dec. 501), while in others it must be specially proved (Phelps *v.* Vischer, 50 N. Y. 69, 10 Am. Rep. 433; Hahn *v.* Hull, 4 E. D. Smith (N. Y.) 664; Guldin *v.* Linderman, 34 Pa. St. 58).

ser,[1] or as surety.[2] On a bill of exchange he may be a drawer as to the payee and a surety as to the principal drawer.[3] In each case, between the immediate parties, the intention may be determined by parol evidence.[4] On the other hand many cases, following the form of the contract, have held that such indorser was *prima facie* not liable to the payee, as he was a mere indorser,[5] and natu-

1. *Alabama.*— Marks *v.* Montgomery First Nat. Bank, 79 Ala. 550, 58 Am. Rep. 620.

California.— Fessenden *v.* Summers, 62 Cal. 484.

Connecticut.—Spencer *v.* Allerton, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806, by statute of 1884, and the liability as indorser is not changed by the fact that the payee afterward indorses below the signature of the irregular indorser.

Illinois.— Milligan *v.* Holbrook, 168 Ill. 343, 48 N. E. 157.

New York.— Coulter *v.* Richmond, 59 N. Y. 478; Clothier *v.* Adriance, 51 N. Y. 322; Meyer *v.* Hibsher, 47 N. Y. 265; Moore *v.* Cross, 19 N. Y. 227, 75 Am. Dec. 326, 17 How. Pr. (N. Y.) 385 [*affirming* 23 Barb. (N. Y.) 534]; Holz *v.* Woodside Brewing Co., 83 Hun (N. Y.) 192, 31 N. Y. Suppl. 397, 63 N. Y. St. 810; Gates *v.* Williams, 9 Misc. (N. Y.) 176, 29 N. Y. Suppl. 712, 60 N. Y. St. 636 [*reversing* 3 Misc. (N. Y.) 376, 22 N. Y. Suppl. 925, 52 N. Y. St. 425]; Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22. So "John I. Hungerford, backer" indorsed on a note to a named person or bearer. Seabury *v.* Hungerford, 2 Hill (N. Y.) 80. And such liability, it is held, can only be that of an indorser. Cottrell *v.* Conklin, 4 Duer (N. Y.) 45.

Oregon.— Wade *v.* Creighton, 25 Oreg. 455, 36 Pac. 289; Deering *v.* Creighton, 19 Oreg. 118, 24 Pac. 198, 20 Am. St. Rep. 800.

Virginia.— Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377, although indorsed with payee blank and holder's name afterward inserted as payee.

Wisconsin.— Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105 (and not second indorser); King *v.* Ritchie, 18 Wis. 554; Davis *v.* Barron, 13 Wis. 227; Cady *v.* Shepard, 12 Wis. 639. And see Cahoon *v.* Wisconsin Cent. R. Co., 10 Wis. 290, as to pleading.

So by Neg. Instr. L. § 64.

Proof of intention.— *Prima facie* he is second indorser and not liable to the payee (Reed *v.* Photo-Gravure Co., 13 N. Y. Suppl. 798, 38 N. Y. St. 467. But see Pentland *v.* McClelland, 1 Pittsb. (Pa.) 164, holding that a stranger who has indorsed a note is *prima facie* liable to the payee) and the liability must be specially averred and proved (Ives *v.* Jacobs, 1 N. Y. Suppl. 330, 17 N. Y. St. 843, 21 Abb. N. Cas. (N. Y.) 151; Mitchell *v.* Spaulding, 11 N. Y. St. 283. So under the New York code, before the passage of the Negotiable Instruments Law. McMoran *v.* Lange, 25 N. Y. App. Div. 11, 48 N. Y. Suppl. 1000).

In Kentucky he is by statute liable as an assignor to the payee. Williams *v.* Obst, 12 Bush (Ky.) 266.

2. *Connecticut.*— Laflin *v.* Pomeroy, 11 Conn. 440.

Georgia.— Collins *v.* Everett, 4 Ga. 266, by statute.

Indiana.— Sill *v.* Leslie, 16 Ind. 236. But in Indiana he has been held to be liable to the payee on a negotiable note as indorser and on a non-negotiable note as surety. Pool *v.* Anderson, 116 Ind. 88, 18 N. E. 445, 1 L. R. A. 712; Wells *v.* Jackson, 6 Blackf. (Ind.) 40.

Louisiana.— Rogers *v.* Gibbs, 24 La. Ann. 467.

Massachusetts.— Baker *v.* Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311.

Minnesota.— Priedman *v.* Johnson, 21 Minn. 12.

New York.— Schwarzansky *v.* Averill, 7 Daly (N. Y.) 254.

Ohio.— Ewan *v.* Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094, 60 Am. St. Rep. 719, 35 L. R. A. 786. On the other hand he will not be liable to the payee, if the intention was to make him surety for the payee on his transfer of the note. Smith *v.* Bruggeman, 5 Ohio Dec. (Reprint) 456, 6 Am. L. Rec. 38.

3. Church *v.* Swope, 38 Ohio St. 493.

4. See *supra*, II, B, 6, a, (II), (E), (1).

The holder's intention is not the question but the indorser's (Montgomery *v.* Schenck, 82 Hun (N. Y.) 24, 31 N. Y. Suppl. 42, 63 N. Y. St. 336), and the intention of the indorser to become liable to the payee must be specially proved (Early *v.* Foster, 7 Blackf. (Ind.) 35; Wells *v.* Jackson, 6 Blackf. (Ind.) 40).

5. Bogue *v.* Melick, 25 Ill. 91; Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Dale *v.* Moffitt, 22 Ind. 113 (proved to be indorsers); Cottrell *v.* Conklin, 4 Duer (N. Y.) 45; Bornstein *v.* Kauffman, 4 Misc. (N. Y.) 83, 23 N. Y. Suppl. 852, 53 N. Y. St. 69 [*reversing* 3 Misc. (N. Y.) 133, 22 N. Y. Suppl. 693, 51 N. Y. St. 500]; Losee *v.* Bissell, 76 Pa. St. 459; Schollenberger *v.* Nehf, 28 Pa. St. 189; Taylor *v.* McCune, 11 Pa. St. 460; Shenk *v.* Robeson, 2 Grant (Pa.) 372. Especially if the payee has indorsed above him after he had indorsed under an agreement with the maker to become second indorser (Greusel *v.* Hubbard, 51 Mich. 95, 16 N. W. 248, 47 Am. Rep. 549), as a different ruling would in effect invert the apparent relation of first and second indorsers (Ellis *v.* Brown, 6 Barb. (N. Y.) 282). So where he refused to be maker and intended to become an indorser only (Seymour *v.* Leyman, 10 Ohio St. 283, refusal known to payee); where there was no special evidence of a different intention (Phelps *v.* Vischer, 50 N. Y. 69, 10 Am. Rep. 433); notwithstanding an agree-

rally a second indorser after the payee,[6] and that he was for the same reason *prima facie* not liable to one who purchased the note directly from the payee.[7] And the payee cannot create a liability to himself by taking up the note in the hands of his indorsee, striking out his own indorsement, and writing a guaranty over the irregular indorsement, which had been originally written under his own indorsement.[8]

b. Statute of Frauds. It has been questioned whether such an indorsement falls under and satisfies the requirement of a contract in writing found in the statute of frauds. It would seem that the contract, if made at the time of the inception of the paper, is not subject to the statute, either as to the form of the promise,[9] or as to the statutory requirement of an express consideration.[10]

c. Consideration.[11] Where the note and indorsement are one transaction and simultaneous, the consideration for the note is sufficient for the indorsement, whether the indorser be regarded as a guarantor[12] or as a joint maker.[13]

C. Capacity of Parties — 1. In General. By the law merchant only bills of exchange between merchants received recognition originally as mercantile contracts governed by the custom of merchants,[14] but in the United States and

ment between maker and payee, unknown to him, for a surety to the payee (Hull *v.* Marvin, 2 Thomps. & C. (N. Y.) 420; Tillman *v.* Wheeler, 17 Johns. (N. Y.) 326); where he intended to become an accommodation indorser for the payee after delivery to him (Badger *v.* Barnabee, 17 N. H. 120; Morrison Lumber Co. *v.* Lookout Mountain Hotel Co., 92 Tenn. 6, 20 S. W. 292); after transfer by him as further security to his indorsee (Nelson *v.* Harrington, 16 Gray (Mass.) 139); or where he indorsed a note with the payee's name blank and it was diverted from the intended form by filling in another's name as payee (Riddle *v.* Stevens, 32 Conn. 378, 87 Am. Dec. 181).

6. Fear *v.* Dunlap, 1 Greene (Iowa) 331; Howard *v.* Van Gieson, 46 N. Y. App. Div. 77, 61 N. Y. Suppl. 349; Hendrie *v.* Kinnear, 84 Hun (N. Y.) 141, 32 N. Y. Suppl. 417; Edison Gen. Electric Co. *v.* Zebley, 72 Hun (N. Y.) 166, 25 N. Y. Suppl. 389, 55 N. Y. St. 62; Baker *v.* Martin, 3 Barb. (N. Y.) 634; Hull *v.* Marvin, 2 Thomps. & C. (N. Y.) 420; Tillman *v.* Wheeler, 17 Johns. (N. Y.) 326; Schafer *v.* Farmers', etc., Bank, 59 Pa. St. 144, 98 Am. Dec. 323.

7. Phelps *v.* Vischer, 50 N. Y. 69, 10 Am. Rep. 433; McPhillips *v.* Jones, 73 Hun (N. Y.) 516, 26 N. Y. Suppl. 101, 56 N. Y. St. 164; Lincoln Nat. Bank *v.* Butler, 14 Misc. (N. Y.) 464, 36 N. Y. Suppl. 1112, 72 N. Y. St. 261; Herrick *v.* Carman, 12 Johns. (N. Y.) 159 (purchase with notice); Losee *v.* Bissell, 76 Pa. St. 459. Especially if taken without the payee's indorsement (Blatchford *v.* Milliken, 35 Ill. 434; Barto *v.* Schmeck, 28 Pa. St. 447, 70 Am. Dec. 145) or after maturity with the payee's indorsement (Bacon *v.* Burnham, 37 N. Y. 614). See also Gibson *v.* Miller, 29 Mich. 355, 18 Am. Rep. 98.

8. Case *v.* Spaulding, 24 Conn. 578.

9. Ford *v.* Hendricks, 34 Cal. 673; Ulen *v.* Kittredge, 7 Mass. 233; Chaddock *v.* Vanness, 35 N. J. L. 517, 524, 10 Am. Rep. 256 (where Depue, J., said: "If a defendant puts his name upon the back of a promissory note, as a surety or guaranty for its payment, in pursuance of an original agreement entered into before or at the time of giving the note, in consideration of which the payee agrees to accept it, the payee may write over such signature a guaranty or promise to pay, which shall be a sufficient memorandum within the statute of frauds"); Houghton *v.* Ely, 26 Wis. 181, 7 Am. Rep. 52; King *v.* Ritchie, 18 Wis. 554. But in other cases such indorsements have been held to be insufficient as express contracts under the statute. Van Doren *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498; Temple *v.* Baker, 125 Pa. St. 634, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709; Smith *v.* Kessler, 44 Pa. St. 142.

10. Van Doren *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498. And see *supra*, II, B, 4, b, (II), (B).

11. Sufficiency of consideration generally see *infra*, III, B.

12. *California.*— Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356.

Colorado.— Kiskadden *v.* Allen, 7 Colo. 206, 3 Pac. 221.

Illinois.— Heintz *v.* Cahn, 29 Ill. 308; Klein *v.* Currier, 14 Ill. 237; Carroll *v.* Weld, 13 Ill. 682, 56 Am. Dec. 481. At least *prima facie* so. Parkhurst *v.* Vail, 73 Ill. 343.

Iowa.— Veach *v.* Thompson, 15 Iowa 380, holding the original consideration to be *prima facie* sufficient for the indorsement.

Kentucky.—Kracht *v.* Obst, 14 Bush (Ky.) 34.

New York.— Schwarzansky *v.* Averill, 7 Daly (N. Y.) 254.

Contra, Jones *v.* Ritter, 32 Tex. 717.

It is not necessary that it should be adequate in value (Oakley *v.* Boorman, 21 Wend. (N. Y.) 588), except where the indorsement is made after delivery of the note (Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347).

13. Nathan *v.* Sloan, 34 Ark. 524.

To be a joint maker he must share in the original consideration. Hayden *v.* Weldon, 43 N. J. L. 128, 39 Am. Rep. 551.

14. See *supra*, I, A, 1.

Great Britain this restriction no longer exists and all persons who are capable of making valid and binding contracts are in general capable of becoming parties to negotiable bills and notes.[15] Where the legal incapacity grows out of the relation of the parties, as in the case of alien enemies, it will apply to any contract created by a bill or note.[16]

2. Limited Capacity — a. In General. As in other lawful contracts where there is a delegated authority (in the case of agents, partners, corporations, etc.) a general power to execute bills and notes does not generally extend to accommodation paper and contracts of guaranty and suretyship. In like manner the power that is given by statute to a married woman generally reserves and excludes such paper.[17] The restrictions upon corporations and partnerships as to bills and notes, in the absence of express statutory regulation, are substantially the same as in other contracts made by them.[18] As to municipal corporations the line seems to have been drawn more strictly, and it is generally held that the power to issue negotiable bills or notes or negotiable bonds must be expressly given[19] or clearly implied in the exercise of a power expressly given.[20]

b. To Transfer Under Statute. There may be sufficient legal capacity under the statute law to effect a transfer of the paper and yet insufficient capacity to render the party to the transfer personally liable.[21]

3. Conflict of Laws. The capacity of the parties is to be determined generally by the law of the place of contract.[22] In like manner the power to transfer a bill

15. Bromwich *v.* Loyd, Lutw. 1582; Fairley *v.* Roch, Lutw. 891; Hodges *v.* Steward, 12 Mod. 36, 1 Salk. 125; Sarsfield *v.* Witherly, 2 Vent. 292.

General questions of capacity are discussed under special heads in other articles of this work. They will be touched in this article only so far as they relate in a peculiar manner to commercial paper.

16. Drawer and drawee being alien enemies to one another. Tarleton *v.* Southern Bank, 49 Ala. 229; Woods *v.* Wilder, 43 N. Y. 164, 3 Am. Rep. 684.

Drawer and payee.— In like manner a bill of exchange is void if the drawer and drawee are both citizens of the United States and the payee is an enemy. Craft *v.* U. S., 12 Ct. Cl. 178.

Drawee and payee.— So if the drawer and payee are alien enemies and the drawee a citizen of the United States. Tarleton *v.* Southern Bank, 49 Ala. 229; Billgerry *v.* Branch, 19 Gratt. (Va.) 393, 100 Am. Dec. 679; Moore *v.* Foster, Chase (U. S.) 222, 17 Fed. Cas. No. 9,760.

Maker and payee.— Ledoux *v.* Buhler, 21 La. Ann. 130. But a subsequent promise to pay it is valid (Duhammel *v.* Pickering, 2 Stark. 90, 19 Rev. Rep. 686, 3 E. C. L. 330), and a note may be given after the end of the war for a debt created between alien enemies during the war (Borland *v.* Sharp, 1 Root (Conn.) 178).

Indorser and indorsee.— Russell *v.* Russell, 1 MacArthur (D. C.) 263. But the indorsement to an alien enemy by a British subject, the payee, residing in France of a bill of exchange drawn there by a British prisoner upon a British subject in England may be enforced in England. Antoine *v.* Morshead, 1 Marsh. 558, 6 Taunt. 237, 16 Rev. Rep. 610, 1 E. C. L. 594; Daubuz *v.* Morshead, 6 Taunt. 332, 16 Rev. Rep. 623, 1 E. C. L. 639.

Indorser and maker.— The transfer in this country of a note made by an alien enemy is valid. Morris *v.* Poillon, 50 Ala. 403; Morrison *v.* Lovell, 4 W. Va. 346.

17. See, generally, Husband and Wife.

18. But the power of a partner to execute or indorse commercial paper for his firm gives him no power to bind an individual partner by acting in his name (McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68), and although a firm is bound by a note in the partnership name the members of it will only be bound jointly on a joint and several note executed in the name of the partners (Perring *v.* Hone, 4 Bing. 28, 13 E. C. L. 384, 2 C. & P. 401, 12 E. C. L. 639, 12 Moore C. P. 135; Maclae *v.* Sutherland, 2 C. L. R. 1320, 3 E. & B. 1, 18 Jur. 942, 23 L. J. Q. B. 229, 2 Wkly. Rep. 161, 77 E. C. L. 1). And see, generally, Partnership.

19. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; Dively *v.* Cedar Falls, 21 Iowa 565; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; Wilson *v.* Shreveport, 29 La. Ann. 673; Hopper *v.* Covington, 10 Biss. (U. S.) 488, 8 Fed. 777; Gause *v.* City of Clarksville, 5 Dill. (U. S.) 165, 10 Fed. Cas. No. 5,276, 19 Alb. L. J. 253, 18 Am. L. Reg. N. S. 497, 8 Centr. L. J. 358, 4 Cinc. L. Bul. 585, 7 Reporter 519.

20. Knapp *v.* Hoboken, 39 N. J. L. 394; Swackhamer *v.* Hackettstown, 37 N. J. L. 191; Nashville *v.* Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164. *Contra*, Vicksburg *v.* Lombard, 51 Miss. 111; Andover *v.* Grafton, 7 N. H. 298. And see, generally, Municipal Corporations.

21. See *infra*, VI, A, 1, a, note 47.

22. So of the contract of a married woman (Bell *v.* Packard, 69 Me. 105, 31 Am. Rep. 251; Bowles *v.* Field, 83 Fed. 886), especially where the place of contract is also the domicile and the place of payment (Robinson *v.*

is determined by the law of the place of transfer, as in the case of transfer by an executor.[23] On the other hand the *lex loci contractus* will not govern, if it conflicts with the policy of the forum.[24] Where, however, the note is made and payable in another state, the fact that it would not have been lawful in the state where suit is brought does not of itself raise any question of conflict with the law or public policy of the forum.[25]

D. Completion of Contract — 1. Stamps — a. Statute Law. No stamps are now required in the United States for bills and notes, those designated in the war revenue act of 1898 having been repealed in 1901 and 1902.[26] The earlier act of 1797 was repealed in 1802. The questions that have arisen in this country belong in large part to the act of 1862,[27] which was repealed in 1872, as to bills and notes,[28] and in 1883 as to checks.[29] In England the act of 1870 is still in force and applies to all bills and notes "drawn or expressed to be payable or actually paid or indorsed or in any manner negotiated in the United Kingdom."[30]

b. Application in United States. The United States stamp act of 1862 did not apply to bills and notes made before its passage,[31] and it and its amendments did not apply to a mere due-bill,[32] to the certification of a check,[33] to the indorse-

Queen, 87 Tenn. 445, 11 S. W. 38, 10 Am. St. Rep. 690, 3 L. R. A. 214), although the contract is invalid by the law of the place where it was written (Johnston *v.* Gawtry, 83 Mo. 339), by the law where the mortgage security lies (Wood *v.* Wheeler, 111 N. C. 231, 16 S. E. 418, foreclosure being denied and judgment rendered on the note in the forum of the *rei sitæ*), or by the law of the domicile and the *rei sitæ* (Bowles *v.* Field, 78 Fed. 742). But in Louisiana and generally under the civil law the wife's domicile determines her capacity. Garnier *v.* Poydras, 13 La. 177. So in Mississippi as to Mississippi property specially charged, although the note was made and the maker resided in Louisiana, where it was void. Frierson *v.* Williams, 57 Miss. 451; Shacklett *v.* Polk, 51 Miss. 378.

So the power of a Connecticut corporation to give an accommodation acceptance will be governed by the law of New York, where the bill was accepted and made payable. Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.

23. Owen *v.* Moody, 29 Miss. 79; Andrews *v.* Carr, 26 Miss. 577; Harper *v.* Butler, 2 Pet. (U. S.) 239, 7 L. ed. 410. But it has been held in some early cases that an executor of the payee appointed in the state of his domicile cannot by his indorsement transfer a note, made by a resident of another state, the place of the forum. Stearns *v.* Burnham, 5 Me. 261, 17 Am. Dec. 228; Thompson *v.* Wilson, 2 N. H. 291.

24. So where the place of forum is also the domicile of the parties (Freeman's Appeal, 68 Conn. 533, 37 Atl. 420, 57 Am. St. Rep. 112, 37 L. R. A. 452 [where a married woman's guaranty of her husband's debt was signed by her in Connecticut where she was domiciled and had no capacity to make such contract and delivered in Illinois by an agent appointed by her in Connecticut]; Louisiana Bank *v.* Williams, 46 Miss. 618, 12 Am. Rep. 319; Armstrong *v.* Best, 112 N. C. 59, 17 S. E. 14, 34 Am. St. Rep. 473, 25 L. R. A. 188) or where the note is invalid in the place of the forum and was made there, but was payable in another state and valid there (Thompson *v.* Taylor, 65 N. J. L. 107, 46 Atl. 567), was valid where it was made but invalid where the mortgaged land lay and the suit was brought (Flagg *v.* Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308), or was valid where made and where the maker resided but invalid in the place of the forum where suit was brought by attachment against the maker's land (Hayden *v.* Stone, 13 R. I. 106, married woman). So the domicile and forum will control the place of payment (Cincinnati Second Nat. Bank *v.* Hall, 35 Ohio St. 158), especially where the forum is also the place of contract (Hanover Nat. Bank *v.* Howell, 118 N. C. 271, 23 S. E. 1005).

25. Benton *v.* German-American Nat. Bank, 45 Nebr. 850, 64 N. W. 227; Wright *v.* Remington, 41 N. J. L. 48, 32 Am. Rep. 180 [*affirmed* in 43 N. J. L. 451].

26. U. S. Stat. (1901), c. 806; U. S. Stat. (1902), No. 67.

27. 12 U. S. Stat. at L. 432.

28. U. S. Rev. Stat. (1872), § 3418.

29. 22 U. S. Stat. at L. 488.

30. 33 & 34 Vict. c. 97.

31. Bayly *v.* McKnight, 19 La. Ann. 321. This was also true of the amendatory acts of 1864 and 1865 (Whigham *v.* Pickett, 43 Ala. 140; Garland *v.* Lane, 46 N. H. 245), but not of the federal act of 1870 (Pugh *v.* McCormick, 14 Wall. (U. S.) 361, 20 L. ed. 789).

32. Jones *v.* Jones, 38 Cal. 584. *Contra*, Jacquin *v.* Warren, 40 Ill. 459.

So a mere order to pay money to an amount depending on future contingencies cannot be treated as an instrument requiring a stamp, owing to the impossibility of fixing the rate of duty. Union Bank *v.* Kerr, 7 Md. 88.

33. Merchants Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

ment of a bill or note,[34] or to instruments made during the war within the lines of the Confederate states.[35] Nor did the United States stamp acts require a fresh stamp on a new promise to take a stamped note out of the statute of limitations,[36] on the mere alteration of the date of a note,[37] or on a contemporaneous agreement securing and forming part of a stamped note.[38] The draft of a corporation officer on the corporation for wages was subject to the stamp law in force but might be stamped as a check rather than as a note.[39]

c. Amount For Stamp.[40] In England the amount for which a note is stamped need not include accruing interest.[41]

d. Cancellation of Stamp. Under the act of 1862 it was held to be a sufficient cancellation if the stamp was so defaced that it could not be used again.[42] It might be canceled by a stamp,[43] or by writing the maker's initials instead of his full name across the stamp.[44] If the stamp on the note was uncanceled the maker could not take advantage of his omission to cancel it as a defense to the note.[45]

e. Omission of Stamp. If an instrument bears a proper stamp when produced,[46] it is presumed that it was stamped at the proper time[47] and by the proper person.[48] If there is no stamp on it it is presumed that the omission was not fraudulent.[49] Omission of a stamp without fraud had no effect on the validity[50] of

34. Neither an indorsement of a promissory note (Pugh *v.* McCormick, 14 Wall. (U. S.) 361, 20 L. ed. 789) nor a waiver of demand and notice, etc., indorsed on a note (Pacific Bank *v.* De Ro, 37 Cal. 538; Muscatine Nat. Bank *v.* Smalley, 30 Iowa 564; Guyther *v.* Bourg, 20 La. Ann. 157; Pugh *v.* McCormick, 14 Wall. (U. S.) 361, 20 L. ed. 789) require a stamp, although it was necessary in England on the indorsement of a non-negotiable note to render the indorser liable to subsequent holders (Plimley *v.* Westley, 2 Bing. N. Cas. 249, 1 Hodges 324, 5 L. J. C. P. 51, 2 Scott 423, 29 E. C. L. 523).

35. Susong *v.* Williams, 1 Heisk. (Tenn.) 625; Van Alstyne *v.* Sorley, 32 Tex. 518.

A promissory note made before any collection district was organized or stamps prepared and placed on sale within the state, but after the passage of the internal revenue act, is valid and may be read in evidence, although unstamped. McElvain *v.* Mudd, 44 Ala. 48, 4 Am. Rep. 106.

36. Cook *v.* Shearman, 103 Mass. 21.

37. Prather *v.* Zulauf, 38 Ind. 155.

38. Bowker *v.* Goodwin, 7 Nev. 135.

Affixing stamps to both.— It is legal to affix United States revenue stamps to a note, or to the mortgage executed to secure its payment, or to both, if the amount on both is sufficient. Cummings *v.* Saux, 30 La. Ann. 207; Garrish *v.* Hyman, 29 La. Ann. 28; Griffith *v.* Hershfield, 1 Mont. 66.

39. U. S. *v.* Isham, 17 Wall. (U. S.) 496, 21 L. ed. 728.

40. Under the Confederate currency scaling acts it may be taken in the United States at the actual rather than the nominal value of the paper. Kile *v.* Johnson, 48 Ga. 189.

41. Israel *v.* Benjamin, 3 Campb. 40.

42. Taylor *v.* Duncan, 33 Tex. 440.

43. Foster *v.* Holley, 49 Ala. 593.

44. So the initials of one of several makers (Spear *v.* Alexander, 42 Ala. 572) or the initials of the payee (Schultz *v.* Herndon, 32 Tex. 390), the authority of an agent to write such initials being a question for the jury (Rees *v.* Jackson, 64 Pa. St. 486, 3 Am. Rep. 608).

45. Desmond *v.* Norris, 10 Allen (Mass.) 250; Mogelin *v.* Westhoff, 33 Tex. 788.

46. If the bill is lost it is presumed that it was properly stamped. Marine Invest. Co. *v.* Haviside, L. R. 5 H. L. 624, 42 L. J. Ch. 173.

47. Union Agricultural, etc., Assoc. *v.* Neill, 31 Iowa 95; Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281; Bradlaugh *v.* De Rin, L. R. 3 C. P. 286.

48. Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281. And stamps, which by the mark upon them appeared to have been used upon some former instrument, will not, in the absence of evidence of mistake, be regarded as fraudulently used. Rockwell *v.* Hunt, 40 Conn. 328.

49. *Alabama.*— Whigham *v.* Pickett, 43 Ala. 140.

Arkansas.— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623.

Illinois.— Craig *v.* Dimock, 47 Ill. 308.

Iowa.— Ricord *v.* Jones, 33 Iowa 26.

Massachusetts.— Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499.

Mississippi.— Waterbury *v.* McMillan, 46 Miss. 635; Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695.

New York.— Baker *v.* Baker, 6 Lans. (N. Y.) 509; New Haven, etc., Co. *v.* Quintard, 6 Abb. Pr. N. S. (N. Y.) 128. Even though shown to have been intentional. Howe *v.* Carpenter, 53 Barb. (N. Y.) 382.

West Virginia.—Weltner *v.* Riggs, 3 W. Va. 445.

Wisconsin.— Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125.

50. *Alabama.*— Hooper *v.* Whitaker, 130 Ala. 324, 30 So. 355; Bibb *v.* Bonds, 57 Ala. 509; Whigham *v.* Pickett, 43 Ala. 140.

Arkansas.— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623.

California.— Hallock *v.* Jaudin, 34 Cal. 167.

the instrument, and the act was held to be unconstitutional so far as it declared the instrument to be void for want of a stamp.[51]

f. Stamping After Delivery. Although the American statutes required an instrument to be stamped upon its delivery, it might be stamped afterward if the omission was not fraudulent,[52] and might even be stamped by the holder, notwithstanding the maker's refusal or protest.[53] If the stamp was omitted without fraud it might be stamped at the trial of the case,[54] and when once legally affixed it relates back to the date of the original delivery.[55]

g. Conflict of Laws. The law of the place of contract, as has been seen,

Illinois.—Bowen *v.* Byrne, 55 Ill. 467; Hanford *v.* Obrecht, 49 Ill. 146; Bunker *v.* Green, 48 Ill. 243; Craig *v.* Dimock, 47 Ill. 308. But see Topping *v.* Maxe, 39 Ill. 159.

Indiana.— Prather *v.* Zulauf, 38 Ind. 155.

Iowa.— Works *v.* Hershey, 35 Iowa 340.

Louisiana.— McLearn *v.* Skelton, 18 La. Ann. 514.

Maine.— Dudley *v.* Wells, 55 Me. 145.

Michigan.— Sammons *v.* Halloway, 21 Mich. 162, 4 Am. Rep. 465.

Minnesota.— Cabbott *v.* Radford, 17 Minn. 320.

Missouri.—More *v.* Clymer, 12 Mo. App. 11.

New York.— Baker *v.* Baker, 6 Lans. (N. Y.) 509; Vaughan *v.* O'Brien, 57 Barb. (N. Y.) 491, 39 How. Pr. (N. Y.) 515; Gregory *v.* Hitchcock Pub. Co., 31 Misc. (N. Y.) 173, 63 N. Y. Suppl. 975.

South Carolina.— Robinson *v.* Robinson, 20 S. C. 567.

Vermont.—Atkins *v.* Plympton, 44 Vt. 21.

Wisconsin.— State *v.* Hill, 30 Wis. 416; Rheinstrom *v.* Cone, 26 Wis. 163, 7 Am. Rep. 48.

United States.— Campbell *v.* Wilcox, 10 Wall. (U. S.) 421, 19 L. ed. 973.

Contra, Maynard *v.* Johnson, 2 Nev. 25 [*overruling* 2 Nev. 16].

See 7 Cent. Dig. tit. "Bills and Notes," § 215.

Although the omission was at the time intentional this is so (Patterson *v.* Gile, 1 Colo. 200), and *a fortiori* it is true where the stamp was omitted by an agent in violation of his principal's instructions (Vaughan *v.* O'Brien, 57 Barb. (N. Y.) 491).

In Maryland where the act of 1856, c. 352, repealing the act of 1844, c. 280, requiring notes to be stamped, provides that unstamped notes executed previous to the repeal shall be as valid as though stamped, a note upon which suit was pending at the time of the repeal was held to be a valid instrument of evidence, although not stamped. Reynolds *v.* Furlong, 10 Md. 318.

51. Craig *v.* Dimock, 47 Ill. 308; Hunter *v.* Cobb, 1 Bush (Ky.) 239; Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

52. *Alabama.*— Rowland *v.* Plummer, 50 Ala. 182, after transfer.

Arkansas.— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623, after suit brought.

Georgia.— Green *v.* Lowry, 38 Ga. 548.

Iowa.— Mitchell *v.* Smith, 32 Iowa 484, especially where it is stamped by the payee, in pursuance of authority given at the time of its execution. It may be stamped after issue joined. Sperry *v.* Horr, 32 Iowa 184; Robinson *v.* Lair, 31 Iowa 9; Blackwell *v.* Denie, 23 Iowa 63.

Louisiana.— Pavy *v.* Bertinot, 25 La. Ann. 469.

Massachusetts.— Willey *v.* Robinson, 13 Allen (Mass.) 128.

Missouri.— Day *v.* Baker, 36 Mo. 125.

New York.— Vaughan *v.* O'Brien, 39 How. Pr. (N. Y.) 515.

Pennsylvania.— Walsh *v.* Carroll, 6 Phila. (Pa.) 590, 25 Leg. Int. (Pa.) 133.

Texas.— Mays *v.* Rutledge, 37 Tex. 134, after transfer.

Virginia.— Under the Virginia act of 1812, c. 2, §§ 18–20, a note negotiable in bank will support an action if duly stamped before it became payable, although not so stamped when it was executed. Hannon *v.* Batte, 5 Munf. (Va.) 490.

See 7 Cent. Dig. tit. "Bills and Notes," § 217.

After it has matured and after the maker's death it cannot be stamped. Wayman *v.* Torreyson, 4 Nev. 124.

53. Day *v.* Baker, 36 Mo. 125. But where the holder of a promissory note, issued without a stamp, and afterward stamped without authority and in violation of express agreement, received it with notice of these facts they may be properly pleaded against him as a defense in an action on the note. Centreville First Nat. Bank *v.* Dougherty, 29 Iowa 260.

54. *Alabama.*— Foster *v.* Holley, 49 Ala. 593. And by the holder's attorney. Blunt *v.* Bates, 40 Ala. 470.

Arkansas.— Knott *v.* Knott, 26 Ark. 444.

Massachusetts.— Tobey *v.* Chipman, 13 Allen (Mass.) 123.

Mississippi.— Waterbury *v.* McMillan, 46 Miss. 635; Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695.

New Hampshire.— Garland *v.* Lane, 46 N. H. 245.

New York.— Redlich *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573.

As to the application of the act of 1864 to instruments made after its passage see Whigham *v.* Pickett, 43 Ala. 140; Tobey *v.* Chipman, 13 Allen (Mass.) 123.

55. Dorris *v.* Grace, 24 Ark. 326; Gibson *v.* Hibbard, 13 Mich. 214; Aldrich *v.* Hagan, 50 N. H. 60; Long *v.* Spencer, 78 Pa. St. 303. So if stamped by the collector, although the stamp had been omitted with fraudulent intent. Crews *v.* Farmers' Bank, 31 Gratt. (Va.) 348.

determines the validity of the instrument. This is true as to the stamp. If the statute makes the instrument void where it is made for want of a stamp, it is void everywhere,[56] but the revenue and stamp laws of one state or country are not ordinarily enforced in the courts of another state.[57]

2. Delivery — a. In General — (I) *Necessity of Delivery.* Delivery of commercial paper is necessary to its completion,[58] and this is necessary not only to the original contract but to an indorsement[59] or acceptance.[60]

(II) *Manner of Delivery*[61] — (A) *In General.* It is not necessary that

56. Clegg *v.* Levy, 3 Campb. 166; Alves *v.* Hodgson, 2 Esp. 528, 7 T. R. 241, 4 Rev. Rep. 433; Bristow *v.* Secqueville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289.

A contrary doctrine was formerly held (James *v.* Catherwood, 3 D. & R. 190, 16 E. C. L. 165; Wynne *v.* Jackson, 2 Russ. 351, 3 Eng. Ch. 351) and is now reëstablished in Great Britain by statute as to bills issued abroad (Bills Exch. Act, § 72), and an exception is made to the common-law rule where the bill or note is payable in the place where suit is brought (Ludlow *v.* Van Rensselaer, 1 Johns. (N. Y.) 94).

57. Ludlow *v.* Van Rensselaer, 1 Johns. (N. Y.) 94; Holman *v.* Johnson, Cowp. 341; James *v.* Catherwood, 3 D. & R. 190, 16 E. C. L. 165. So an early Maryland stamp act in Virginia courts. Fant *v.* Miller, 17 Gratt. (Va.) 47.

58. *Alabama.* — Jones *v.* Deyer, 16 Ala. 221.

California.— Garthwaite *v.* Tulare Bank, 134 Cal. 237, 66 Pac. 326.

Illinois.— Gordon *v.* Adams, 127 Ill. 223, 19 N. E. 557; Centralia First Nat. Bank *v.* Strang, 72 Ill. 559; King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131; Curtis *v.* Gorman, 19 Ill. 141; Buehler *v.* Galt, 35 Ill. App. 225; Reynolds *v.* Moshier, 24 Ill. App. 471.

Indiana.— Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Purviance *v.* Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319; Stokes *v.* Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; Nicholson *v.* Combs, 90 Ind. 515, 46 Am. Rep. 229; Sheehan *v.* Crosby, 58 Ind. 205; Fisher *v.* Hamilton, 48 Ind. 239; Prather *v.* Zulauf, 38 Ind. 155; Mahon *v.* Sawyer, 18 Ind. 73.

Maine.— Bickford *v.* Mattocks, 95 Me. 547, 50 Atl. 894; Leigh *v.* Horsum, 4 Me. 28; Marr *v.* Plummer, 3 Me. 73.

Maryland. — Devries *v.* Shumate, 53 Md. 211.

Massachusetts. — Lawrence *v.* Bassett, 5 Allen (Mass.) 140; Baird *v.* Williams, 19 Pick. (Mass.) 381.

Michigan.—Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Minnesota.— Stein *v.* Passmore, 25 Minn. 256.

Missouri.— Carter *v.* McClintock, 29 Mo. 464.

New York.— Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70; Gale *v.* Miller, 54 N. Y. 536; Van Buren *v.* Stokes, 1 Hun (N. Y.) 434, 3 Thomps. & C. (N. Y.) 511; Hall *v.* Wilson, 16 Barb. (N. Y.) 548; Powell *v.* Waters, 8 Cow. (N. Y.) 669; Marvin *v.* McCullum, 20 Johns. (N. Y.) 288; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422.

Ohio.— Portage County Branch Bank *v.* Lane, 8 Ohio St. 405.

South Carolina.— Brooks *v.* Bobo, 4 Strobh. (S. C.) 38.

Vermont.— Chamberlain *v.* Hopps, 8 Vt. 94.

Virginia.— Wright *v.* Smith, 81 Va. 777.

West Virginia.— Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

Wisconsin.— Roberts *v.* McGrath, 38 Wis. 52; Chipman *v.* Tucker, 38 Wis. 43, 20 Am. Rep. 1; Thomas *v.* Watkins, 16 Wis. 549.

United States.— Wells *v.* Vansickle, 64 Fed. 944.

England.— Marston *v.* Allen, 1 Dowl. N. S. 442, 11 L. J. Exch. 122, 8 M. & W. 494; Brind *v.* Hampshire, 2 Gale 33, 5 L. J. Exch. 197, 1 M. & W. 365, 1 Tyrw. & G. 790.

See also Neg. Instr. L. § 34, which provides that "where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

See also *supra*, I, C, 1, b, (I), (B), (3); and 7 Cent. Dig. tit. "Bills and Notes," § 95.

Delivery is necessary to the signature of an additional maker (Williams *v.* Williams, 67 Mo. 661; Chamberlain *v.* Hopps, 8 Vt. 94) or to reissue by one of several co-makers (Hopkins *v.* Farwell, 32 N. H. 425).

Drawing a check and having it certified, without delivery thereof to payee, does not entitle payee to the fund. Buehler *v.* Galt, 35 Ill. App. 225.

When delivery not necessary.— Where a note as a paper is in existence, and is fully identified by a will with which the note is folded up, it is not necessary that the note should have been made effective by delivery. The question is not whether the note exists as a valid promise to pay the money, but whether it is in existence as an instrument capable of identification and capable of forming by way of reference part of the will of the testator. Fickle *v.* Snepp, 97 Ind. 289, 49 Am. Rep. 449 [*citing* Fesler *v.* Simpson, 58 Ind. 83].

59. See *infra*, VI, D, 1, a, note 79.

60. See *infra*, V, A, 6.

61. "'Delivery' means transfer of possession, actual or constructive, from one person to another." Neg. Instr. L. § 2; Bills Exch. Act, § 2.

delivery should be by manual transfer.[62] Thus delivery may be made by mail,[63] although such delivery sometimes raises a conflict of laws between the place of mailing and the place of receiving the paper.[64] A bill of exchange or promissory note may be delivered to the payee in a sealed envelope[65] or it may be a

62. Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796. But placing the note in a bank depositor's papers without his knowledge to replace stolen money is no delivery and will not bar recovery of the money from the bank. Oshkosh Nat. Bank *v.* Munger, 95 Fed. 87, 36 C. C. A. 659.

63. *Illinois.*— Buehler *v.* Galt, 35 Ill. App. 225; Funk *v.* Lawson, 12 Ill. App. 229.

New York.— Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259 [*affirming* 6 Lans. (N. Y.) 472].

Ohio.— Wright *v.* Ellis, 1 Handy (Ohio) 546.

Rhode Island.— Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777.

South Carolina.— Mitchell *v.* Bryne, 6 Rich. (S. C.) 171.

Tennessee.— Kirkman *v.* Bank of America, 2 Coldw. (Tenn.) 397.

Wisconsin.— Canterbury *v.* Sparta Bank, 91 Wis. 53, 64 N. W. 311, 51 Am. St. Rep. 870, 30 L. R. A. 845.

England.— Sichel *v.* Borch, 2 H. & C. 954, 10 Jur. N. S. 107, 33 L. J. Exch. 179, 9 L. T. Rep. N. S. 657, 12 Wkly. Rep. 346.

See 7 Cent. Dig. tit. "Bills and Notes," § 102.

Delivery is complete when at the request of the payee the instrument is placed in the mail, and recovery can be had on the collateral, although the note is lost in the mail (Kirkman *v.* Bank of America, 2 Coldw. (Tenn.) 397), and the payee's request may be implied by his sending the note to the maker for his signature in another state without special instruction as to the manner of returning it (Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777). But where without request of the payee the maker deposits a check in the mail for transmission to the payee, and recovers possession of it under the post-office regulations, there is no complete delivery. Buehler *v.* Galt, 35 Ill. App. 225. So merely posting a bill or note to the payee's address is not a delivery that will vest ownership thereof in the payee. Wright *v.* Ellis, 1 Handy (Ohio) 546.

Revocation of delivery by mail.—According to the regulations of the French post-office, a person posting a letter may get it back, on complying with certain forms, at any time before the letter has left the town where posted, the post-office being the agent of the sender until the letter leaves the town; accordingly the maker may revoke delivery of a bill or note by reclaiming the letter containing it. In England, on the contrary, the sender of a letter cannot get it returned after it has been posted; therefore, when the indorsee of a bill authorizes the indorser to send the bill through the post-office, there is a complete delivery as soon as the letter containing the bill is posted (*Ex p.* Cote, L. R. 9 Ch. 27, 43 L. J. Bankr. 19, 29 L. T. Rep. N. S. 598, 22 Wkly. Rep. 39), but the delivery is incomplete where half of the note only is mailed and is revocable until the rest of the note is mailed (Smith *v.* Mundy, 3 E. & E. 22, 6 Jur. N. S. 977, 29 L. J. Q. B. 172, 2 L. T. Rep. N. S. 373, 8 Wkly. Rep. 561, 107 E. C. L. 22; Redmayne *v.* Burton, 2 L. T. Rep. N. S. 324). And in general mailing is a complete delivery, and the mere fact that after a draft is sent by mail the sender ascertains that the person at whose instigation it is sent has failed does not authorize the sender to stop payment of the draft or take it from the mail, the mailing of the letter inclosing the draft being in legal effect a delivery of the draft. Canterbury *v.* Sparta Bank, 91 Wis. 53, 64 N. W. 311, 51 Am. St. Rep. 870, 30 L. R. A. 845.

What is not mailing.— It is not mailing to give the letter containing the note to the purser of a steamer to mail on its arrival in port (Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259 [*affirming* 6 Lans. (N. Y.) 472], to give it to a servant for delivery to the postman (Rex *v.* Lambton, 5 Price 428, 19 Rev. Rep. 645), or to place it in a private office letter-box (Arnold *v.* Cheque Bank, 1 C. P. D. 578, 45 L. J. C. P. 562, 34 L. T. Rep. N. S. 729, 24 Wkly. Rep. 759).

64. **A note sent by mail should be regarded as delivered where mailed** for the purpose of determining the construction of the note and the obligation and duty it imposes on the maker (Barrett *v.* Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777) and the necessity for stamps (Barker *v.* Sterne, 2 C. L. R. 1020, 9 Exch. 684, 23 L. J. Exch. 201, 2 Wkly. Rep. 418; Snaith *v.* Mingay, 1 M. & S. 82), but the law of the place of receiving governs where the delivery was by a private messenger who was the maker's agent (Buckley *v.* Hann, 7 D. & L. 188, 5 Exch. 43, 14 Jur. 226, 19 L. J. Exch. 151).

65. Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608 [*affirming* 61 Ill. App. 62]; Williams *v.* Galt, 95 Ill. 172; *In re* Reeve, 11 Iowa 260, 82 N. W. 912 (where the maker who acted as banker for his daughter, the payee, kept it in a sealed envelope in his safe marked with her name, and informed her and his clerk about it); North *v.* Case, 2 Lans. (N. Y.) 264 [*affirmed* in 42 N. Y. 362], where the envelope was marked "to be returned to him on request"; Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682. But it is not sufficient to leave it in a sealed envelope addressed to the payee on the desk of the payee's clerk (Kinne *v.* Ford, 52 Barb. (N. Y.) 194 [*affirmed* in 43 N. Y. 587]; Chicopee Bank *v.* Philadelphia Seventh Nat. Bank, 8 Wall. (U. S.) 641, 19 L. ed. 422), and if notes are left for safe-keeping with an agent in a sealed

constructive delivery by order or agreement while the instrument is in the actual possession of another.[66]

(B) *Intention to Deliver.* Intention to deliver the instrument is necessary to a valid delivery,[67] and there can be no valid delivery where it was obtained by fraud,[68]

envelope specially indorsed "private property" a *bona fide* holder cannot obtain title under a fraudulent sale by the agent, although the payee had indorsed the note in blank (Scollans *v.* Rollins, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386).

The delivery is a question for the jury where the maker left it in his own desk in an envelope addressed to the payee and told the payee she could have it at any time (Lerch *v.* Bard, 162 Pa. St. 307, 29 Atl. 890); but leaving it in such an envelope among the maker's own papers with intention to give effect to it as a legacy on his death is not a sufficient delivery (Warren *v.* Durfee, 126 Mass. 338; Gough *v.* Findon, 7 Exch. 48, 21 L. J. Exch. 58), especially where it was never brought to the payee's knowledge (Disher *v.* Disher, 1 P. Wms. 204) or where the maker had mentioned it as deposited with a certain bank for the payee, but actually left it among his own private papers (Purviance *v.* Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319).

66. As by transfer of a note in the hands of a pledgee (Fisher *v.* Bradford, 7 Me. 28) or by order on the pledgee for its delivery (Howe *v.* Ould, 28 Gratt. (Va.) 1), although it was not actually delivered until after its maturity (Grimm *v.* Warner, 45 Iowa 106). So where the maker had recognized the note as delivered to the payee and had paid it to his agent and taken a surrender from him which he had no authority to give. Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

A mere agreement for delivery on arrival of the note is not a delivery (Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259 [*affirming* 6 Lans. (N. Y.) 472]), although a court of equity may in such case require an actual delivery (Purviance *v.* Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319); but a tender made under the agreement is a sufficient delivery where the note was burned before actual delivery (Des Arts *v.* Leggett, 16 N. Y. 582), and an agreement with the maker for satisfaction of the note amounts to a redelivery to him (Stewart *v.* Hidden, 13 Minn. 43); but a tender procured by fraud cannot avail as a constructive delivery (Lamott *v.* Butler, 18 Cal. 32).

67. Streissguth *v.* Kroll, 86 Minn. 325, 90 N. W. 577; Neg. Instr. L. § 35; Bills Exch. Act, § 21.

Intention wanting.— In the following cases the delivery was held to fail for want of an intention to deliver:

Alabama.— Hopper *v.* Eiland, 21 Ala. 714.

Illinois.— Shipley *v.* Carroll, 45 Ill. 285, note drawn in sport and carried off without maker's knowledge.

Indiana.— Hatton *v.* Jones, 78 Ind. 466, note made payable to a particular person at request of her father who was entitled to receive the money from the maker and taken by the payee from her father's private papers without his leave.

Iowa.— Caulkins *v.* Whisler, 29 Iowa 495, 4 Am. Rep. 236, signature on blank paper for other purpose and note fraudulently written over it.

Michigan.—Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497, note in hands of *bona fide* holder taken by payee from maker's table in his absence and against his express prohibition.

Minnesota.— Haas *v.* Sackett, 40 Minn. 53, 41 N. W. 237, 2 L. R. A. 449 (note left for inquiry and discount and fraudulently converted by payee); Ruggles *v.* Swanwick, 6 Minn. 526 (note left with payee for a memorandum).

Missouri.— Carter *v.* McClintock, 29 Mo. 464, note handed to payee to look at and carried off by him by violence.

Intention sufficient.— Where a note left for inquiry as to change of form but to be taken in any event by payee. Bodley *v.* Higgins, 73 Ill. 375.

68. *Indiana.*— Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469, in hands of holder with notice.

Maine.— Salley *v.* Terrill, 95 Me. 553, 50 Atl. 896, 85 Am. St. Rep. 433, 55 L. R. A. 730, in hands of *bona fide* holder and notwithstanding negligence of drawer's agent.

Michigan.— Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Minnesota.— Streissguth *v.* Kroll, (Minn. 1902) 90 N. W. 577.

Missouri.— Carter *v.* McClintock, 29 Mo. 464.

New York.— Hall *v.* Wilson, 16 Barb. (N. Y.) 548; Greeser *v.* Sugarman, 36 Misc. (N. Y.) 857, 76 N. Y. Suppl. 922 (in hands of *bona fide* holder, Neg. Instr. L. § 91).

Wisconsin.— Knott *v.* Tidyman, 86 Wis. 164, 56 N. W. 632 (in hands of indorsee with notice); Dodd *v.* Dunne, 71 Wis. 578, 37 N. W. 430 (in hands of *bona fide* holder); Roberts *v.* McGrath, 38 Wis. 52; Chipman *v.* Tucker, 38 Wis. 43, 20 Am. Rep. 1 (note left with custodian by maker and fraudulently negotiated by him in hands of *bona fide* holder).

So of a non-negotiable note stolen from the maker by the payee and indorsed to a purchaser without notice. Erickson *v.* Roehm, 33 Minn. 53, 21 N. W. 861. But see Marston *v.* Allen, 1 Dowl. N. S. 442, 11 L. J. Exch. 122, 8 M. & W. 494. And as to bank-notes stolen from the vault of the bank see Worcester County Bank *v.* Dorchester, etc., Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120. On the other hand where payee's blank indorsement was stolen from his desk it was held to be valid in the hands of a *bona fide* holder for value in Gould *v.* Segee, 5 Duer (N. Y.) 260. And a stolen government bond cannot be re-

duress,[69] or mistake.[70] On the other hand mere intention, not carried out, will not constitute a delivery.[71]

(iii) *Time of Delivery.* Delivery cannot be made in general after the death of the party to be bound by it.[72] Nor can a partnership note be delivered after the dissolution of the partnership.[73] The delivery must be on a day when legal business may be done and not on a Sunday.[74] In general commercial paper

covered by the owner from a *bona fide* holder for value. Jones *v.* Nellis, 41 Ill. 482, 89 Am. Dec. 389.

As to what constitutes fraud see FRAUD.

As to defenses available against a bona fide holder see *infra*, XIV, B [8 Cyc.].

69. Magoon *v.* Reber, 76 Wis. 392, 45 N. W. 112.

70. Taylor *v.* Atchison, 54 Ill. 196, 5 Am. Rep. 118, with fraud on payee's part.

71. Montgomery *v.* Montgomery, (Tex. Civ. App. 1899) 54 S. W. 414. So where the note was signed but not delivered to the lender, one of the makers being killed while carrying it to him, and was afterward destroyed (Leigh *v.* Horsum, 4 Me. 28), and where a donor procured a bond to be registered in the name of his donee without his knowledge and without further delivery (*In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71).

72. *Connecticut.*— Clark *v.* Sigourney, 17 Conn. 511.

Kansas.— Farmer *v.* Marvin, 63 Kan. 250, 65 Pac. 221.

Massachusetts.— Warren *v.* Durfee, 126 Mass. 338.

Missouri.— Lowrey *v.* Danforth, (Mo. App. 1902) 69 S. W. 39.

England.— Bromage *v.* Lloyd, 5 D. & L. 123, 1 Exch. 32, 16 L. J. Exch. 257.

Death of maker.— It cannot be delivered to an agent or trustee for delivery by him to the payee after the maker's death (Sessions *v.* Moseley, 4 Cush. (Mass.) 87; Waynesburg College Appeal, 111 Pa. St. 130, 3 Atl. 19, 56 Am. Rep. 252), unless the agent can be regarded as the payee's agent (Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682, in sealed envelope addressed to payees). And see Bowers *v.* Hurd, 10 Mass. 427. But if it is deposited in escrow by two makers in their lifetime it can be delivered in fulfilment of the condition after the death of one of them. Bostwick *v.* McEvoy, 62 Cal. 496. So bills may be delivered after the death of the drawer to a person who had made advances upon their faith to the drawer, who had them in his possession, for the purpose of raising money for the drawer (Perry *v.* Crammond, 1 Wash. (U. S.) 100, 19 Fed. Cas. No. 11,005), and delivery may be found as a fact, although the note is found among the maker's papers at his death (Norton *v.* Norton, 49 Hun (N. Y.) 605, 1 N. Y. Suppl. 552, 17 N. Y. St. 487).

Death of accommodation party.— Nor can it be delivered by the payee after the death of his accommodation maker (Perry *v.* Crammond, 1 Wash. (U. S.) 100, 19 Fed. Cas. No. 11,005) nor by an indorsee after the death of his accommodation indorser (Smith *v.* Wyckoff, 3 Sandf. Ch. (N. Y.) 77).

73. Woodford *v.* Dorwin, 3 Vt. 82, 21 Am. Dec. 573. Although drawn before the dissolution of the firm. Gale *v.* Miller, 54 N. Y. 536 [*affirming* 1 Lans. (N. Y.) 451, 44 Barb. (N. Y.) 420]; Grasswitt *v.* Connally, 27 Gratt. (Va.) 19.

74. *Alabama.*— Dodson *v.* Harris, 10 Ala. 566; O'Donnell *v.* Sweeney, 5 Ala. 467, 39 Am. Dec. 336.

Indiana.— Davis *v.* Barger, 57 Ind. 54; Bosley *v.* McAllister, 13 Ind. 565.

Maine.— Towle *v.* Larrabee, 26 Me. 464.

Massachusetts.— Pattee *v.* Greely, 13 Metc. (Mass.) 284.

Michigan.— Arbuckle *v.* Reaume, 96 Mich. 243, 55 N. W. 808 (statutory prohibition and penalty); Adams *v.* Hamell, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455.

Minnesota.— Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118.

See, generally, SUNDAY.

Not void under statute.— In Washington a Sunday note has been held to be valid under the statute. Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67. And to the effect that the prohibitory statute (29 Car. II, c. 7) did not make the instrument void in the hands of a *bona fide* holder but simply invalid *inter partes* see Begbie *v.* Levy, 1 Cr. & J. 180, 9 L. J. Exch. O. S. 51, 1 Tyrw. 130.

A note delivered on a week day is good, although signed (King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131; Conrad *v.* Kinzie, 105 Ind. 281, 4 N. E. 863; Bell *v.* Mahin, 69 Iowa 408, 29 N. W. 331; Hilton *v.* Houghton, 35 Me. 143; Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281; Fritsch *v.* Heislen, 40 Mo. 555; Goss *v.* Whitney, 24 Vt. 187; Lovejoy *v.* Whipple, 18 Vt. 379, 46 Am. Dec. 157) or dated (Marshall *v.* Russell, 44 N. H. 509) on Sunday, although it is preceded by a preliminary Sunday agreement (Love *v.* Wells, 25 Ind. 503, 87 Am. Dec. 375; Clough *v.* Davis, 9 N. H. 500; Smith *v.* Case, 2 Oreg. 190) or discussion (Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657), or although it is afterward transferred on Sunday (Steere *v.* Trebilcock, 108 Mich. 464, 66 N. W. 342). It has been held, however, that a Sunday note which is void by statute cannot be afterward ratified. Banks *v.* Werts, 13 Ind. 203; Day *v.* McAllister, 15 Gray (Mass.) 433.

The agent may, on a Sunday, legally receive an authority to deliver on a subsequent day. Flanagan *v.* Meyer, 41 Ala. 132; Beman *v.* Wessels, 53 Mich. 549, 19 N. W. 179. *Contra*, Davis *v.* Barger, 57 Ind. 54, the penal statute rendering the contract in effect void.

takes effect only on its delivery,[75] although under some circumstances its terms and construction have been held to relate back to its date, where that differs from the time of delivery.[76]

(IV) *To Whom Delivery Made.* Delivery need not be made to the payee himself, but the paper may be delivered to an agent of the maker for a special purpose,[77] to the payee's agent,[78] to a person who has no beneficial interest in it,[79]

75. *Colorado.*— Spencer *v.* Carstarphen, 15 Colo. 445, 24 Pac. 882.

Illinois.— Baldwin *v.* Freydendall, 10 Ill. App. 106.

Massachusetts.— Hill *v.* Dunham, 7 Gray (Mass.) 543.

Missouri.— Fritsch *v.* Heislen, 40 Mo. 555.

New York.— Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70; Gale *v.* Miller, 54 N. Y. 536 [*affirming* 1 Lans. (N. Y.) 451, 44 Barb. (N. Y.) 420]; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422.

Vermont.— Lovejoy *v.* Whipple, 18 Vt. 379, 46 Am. Dec. 157; Woodford *v.* Dorwin, 3 Vt. 82, 21 Am. Dec. 573.

Wisconsin.— Hepp *v.* Huefner, 61 Wis. 148, 20 N. W. 923.

Applicability of homestead exemption act to negotiable instrument.— Under a statute providing that the homestead law shall not extend to a judgment rendered on note made before a specified date, a note delivered after the date specified is not affected by the act if dated prior to the date specified, the note for the purposes of the statute taking effect from the date, and not from delivery, at any rate with regard to third parties. Ladd *v.* Dudley, 45 N. H. 61.

76. As in reckoning maturity from the expressed date (Bumpass *v.* Timms, 3 Sneed (Tenn.) 459), although it must be reckoned from the time of delivery, where no date is expressed (Giles *v.* Boune, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646).

Delivery dating back to deposit with third party.— The delivery of a note deposited with a third party for the benefit of the payee on the death of the maker relates back to the time of the deposit with such third party. Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682.

77. In such case delivery is not complete until it is delivered by the agent to the payee (Brind *v.* Hampshire, 2 Gale 33, 5 L. J. Exch. 197, 1 M. & W. 365, 1 Tyrw. & G. 790; Chapman *v.* Cottrell, 3 H. & C. 865, 11 Jur. N. S. 530, 34 L. J. Exch. 186, 12 L. T. Rep. N. S. 706, 13 Wkly. Rep. 843), unless he becomes the payee's agent by continuing to hold the note for him by his direction (McCurdy *v.* West Branch Tp. School Dist. No. 1, 127 Mich. 210, 86 N. W. 803).

As to effect of delivery by agent in violation of instructions see *infra*, XIV, B [8 Cyc.].

Delivery to bailee for transmission does not render a fraudulent transfer by him effectual. Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549.

78. *Arkansas.*— Scott *v.* State Bank, 9 Ark. 36.

California.— Stockton Sav., etc., Soc. *v.* Giddings, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181, 21 L. R. A. 406.

Georgia.— Elliott *v.* Deason, 64 Ga. 63.

Illinois.— Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608 [*affirming* 61 Ill. App. 62]; Gordon *v.* Adams, 127 Ill. 223, 19 N. E. 557. Although it is made subject to change of form. Bodley *v.* Higgins, 73 Ill. 375. But a note left with a third party in settlement of a suit cannot take effect unless expressly or impliedly accepted by the payee. Curtis *v.* Gorman, 19 Ill. 141.

Massachusetts.— Richardson *v.* Lincoln, 5 Metc. (Mass.) 201.

North Carolina.— Farmers' Bank *v.* Couch, 118 N. C. 436, 24 S. E. 737.

Texas.— Martin *v.* Jones, 3 Tex. App. Civ. Cas. § 205.

England.— Although not known to the payee at the time. Lysaght *v.* Bryant, 9 C. B. 46, 19 L. J. C. P. 160, 67 E. C. L. 46.

The delivery may be to a husband for his wife (Funk *v.* Lawson, 12 Ill. App. 229; Matthewson *v.* Caldwell, 59 Kan. 126, 52 Pac. 104; Spalding *v.* Cargill, 53 N. Y. Super. Ct. 453), to a father for his son (Mason *v.* Hyde, 41 Vt. 232), to a trustee for his *cestui que trust* (Tucker *v.* Bradley, 33 Vt. 324), or even to one who is not authorized at the time, but whose authority is afterward recognized by the payee's ratification (Crowell *v.* Osborne, 43 N. J. L. 335; Ancona *v.* Marks, 7 H. & N. 696, 8 Jur. N. S. 516, 31 L. J. Exch. 163, 5 L. T. Rep. N. S. 753, 10 Wkly. Rep. 251). But see, as to countermand in the hands of a trustee for creditors in a bankruptcy composition, Latter *v.* White, L. R. 5 H. L. 578, 41 L. J. Q. B. 342.

Maker as agent of payee.— Where the maker of a note holds possession of the same as agent for the payee, and after the latter's death delivers it to her administrator the delivery is complete. Welch *v.* Dameron, 47 Mo. App. 221. So where the maker constitutes himself the holder for his minor children and at his death gives the note to their aunt to hold for them. Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

As to proof of delivery see *infra*, XIV, E [8 Cyc.].

79. Austin *v.* Birchard, 31 Vt. 589. So it may be delivered to a trustee for his *cestui que trust* (Bowers *v.* Hurd, 10 Mass. 427; Tucker *v.* Bradley, 33 Vt. 324), to a depositary for the payee to be delivered to him on the maker's death (Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682), and where the note is payable to A "if she called for it" and if not then to B, and it is found at A's death among her papers it will be a sufficient delivery to B (Blanchard *v.* Sheldon, 43 Vt.

and in some states to a party not named in the paper who discounts it upon the refusal of the payee.[80]

b. Conditional Delivery. The delivery may be a conditional one to take effect only on the happening of the condition,[81] the paper may be delivered in

512). And see as to right of the depositary, who claims to have an interest in the note, to sue in the payee's name on his refusal Jarvis *v.* Rogers, 3 Vt. 336.

Implied assent of beneficiary.— The delivery of a bill of exchange to a friend of A for A's use and benefit is presumed to pass the right to A unless A dissent; and if he assent his ratification relates back to the time of the delivery. Theobald *v.* Hare, 8 B. Mon. (Ky.) 39.

80. The principle is that when a note is made to raise money it does not change the liability of the parties to the note that the money is advanced by a third party instead of the payee (Thompson *v.* Armstrong, 5 Ala. 383; Dunn *v.* Weston, 71 Me. 270, 36 Am. Rep. 310; Trible *v.* Grenada Bank, 2 Sm. & M. (Miss.) 523; Graves *v.* Mississippi, etc., R. Co., 6 How. (Miss.) 548; Commercial Bank *v.* Claiborne, 5 How. (Miss.) 301; Newbury Bank *v.* Rand, 38 N. H. 166; Farmers, etc., Bank *v.* Humphrey, 36 Vt. 554, 86 Am. Dec. 671; Newbury Bank *v.* Richards, 35 Vt. 281; Middlebury Bank *v.* Bingham, 33 Vt. 621; Montpelier Bank *v.* Joyner, 33 Vt. 481), especially if indorsed *pro forma* by the payee (Hinterberger *v.* Weindler, 2 Ill. App. 407; Meeker *v.* Shanks, 112 Ind. 207, 13 N. E. 712), if indorsed by payee and proceeds paid to him in cash (Greene County Bank *v.* Chapman, 134 Mo. 427, 35 S. W. 1150), if indorsed by him without recourse in blank and redelivered to the maker to negotiate for the payee's benefit (Morris *v.* Morton, 14 Nebr. 358, 15 N. W. 725) or to deliver to plaintiff (Garfield Nat. Bank *v.* Colwell, 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 380, 28 N. Y. St. 723), if deposited with the bank named as payee (Ward *v.* Northern Bank, 14 B. Mon. (Ky.) 351), if left with the payee as trustee for the party making the loan on it (Utica Bank *v.* Ganson, 10 Wend. (N. Y.) 314; Chenango Bank *v.* Hyde, 4 Cow. (N. Y.) 567), or if consideration and note both pass through the payee (Hayden *v.* Thayer, 5 Allen (Mass.) 162). So where the bearer is substituted as payee for the original name in a certified check. Abrams *v.* Union Nat. Bank, 31 La. Ann. 61.

When delivery to party not named insufficient.— A person receiving a promissory note not payable to himself, without indorsement, after its maturity, or in payment of a precedent debt, takes it subject to all legal and equitable defenses, and if it turns out that it never was delivered to the payee it cannot be collected (Centralia First Nat. Bank *v.* Strang, 72 Ill. 559; Farmers', etc., Bank *v.* Ross, 1 Blackf. (Ind.) 315; Prescott *v.* Brinsley, 6 Cush. (Mass.) 233; Adams Bank *v.* Jones, 16 Pick. (Mass.) 574; Herring *v.* Winans, Sm. & M. Ch. (Miss.) 466; Dewey *v.* Cochran, 49 N. C. 184); and if the principal sells the note to a third person, not the payee, without the express or implied consent of the sureties they are not liable (Conway *v.* U. S. Bank, 6 J. J. Marsh. (Ky.) 128; Granite Bank *v.* Ellis, 43 Me. 367; Battle *v.* Cushman, (Tex. Civ. App. 1896) 33 S. W. 1037). So as to accommodation maker (Rogge *v.* Cassidy, 10 Ky. L. Rep. 396; Boody *v.* Bartlett, 42 N. H. 558), drawer (Knox County Bank *v.* Lloyd, 18 Ohio St. 353), or indorser (Stone *v.* Vance, 6 Ohio 246, in hands of holder with notice); and an accommodation drawer is not liable to the holder by reason of the payee afterward discounting the note for such holder (Knox County Bank *v.* Lloyd, 18 Ohio St. 353) or by reason of a subsequent indorsement by the payee without consideration (Weyman *v.* Perry, 42 S. C. 415, 20 S. E. 287).

81. *Alabama.*— State Bank *v.* Whitlow, 6 Ala. 135.

Colorado.— Davis *v.* Bower, 29 Colo. 422, 68 Pac. 292.

Illinois.— Stricklin *v.* Cunningham, 58 Ill. 293.

Kansas.— Carter *v.* Moulton, 51 Kan. 9, 32 Pac. 633, 37 Am. St. Rep. 259, 20 L. R. A. 309.

Kentucky.— Taylor *v.* Craig, 2 J. J. Marsh. (Ky.) 449.

Maryland.— Devries *v.* Shumate, 53 Md. 211.

Massachusetts.— Watkins *v.* Bowers, 119 Mass. 383; Stevens *v.* Parker, 7 Allen (Mass.) 361; Canfield *v.* Ives, 18 Pick. (Mass.) 253.

Michigan.— Gibson *v.* Miller, 29 Mich. 355, 18 Am. Rep. 98.

Minnesota.— Hoit *v.* McIntire, 50 Minn. 466, 52 N. W. 918; Wager *v.* Brooks, 37 Minn. 392, 34 N. W. 745.

Missouri.— St. Louis Nat. Bank *v.* Flanagan, 129 Mo. 178, 31 S. W. 773.

New York.— Benton *v.* Martin, 52 N. Y. 570; Seymour *v.* Cowing, 4 Abb. Dec. (N. Y.) 200, 1 Keyes (N. Y.) 532; Claflin *v.* Tishler, 66 Barb. (N. Y.) 649; Cowles *v.* Gridley, 24 Barb. (N. Y.) 301; Miller *v.* Gambie, 4 Barb. (N. Y.) 146; Bernhard *v.* Brunner, 4 Bosw. (N. Y.) 528; French *v.* Wallack, 12 N. Y. St. 159. See also Williams *v.* Syracuse First Nat. Bank, 45 N. Y. App. Div. 239, 60 N. Y. Suppl. 1105 [*affirmed* in 167 N. Y. 594, 60 N. E. 1122].

Rhode Island.— Sweet *v.* Stevens, 7 R. I. 375.

South Carolina.— Fowler *v.* Allen, 32 S. C. 229, 10 S. E. 947, 7 L. R. A. 745; Carson *v.* Hill, 1 McMull. (S. C.) 76.

Virginia.— Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749.

Wisconsin.— Dodd *v.* Dunne, 71 Wis. 578, 37 N. W. 430.

United States.— Ware *v.* Allen, 128 U. S. 590, 9 S. Ct. 174, 32 L. ed. 563.

England.— Bell *v.* Ingestre, 12 Q. B. 317, 64 E. C. L. 316.

escrow,[82] or it may be delivered for the purpose of procuring certain other signatures for its completion.[83] The condition upon which the delivery is made if

It may provide for the return of the note on the happening of the condition (Simonton *v.* Steele, 1 Ala. 357; McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; Watkins *v.* Bowers, 119 Mass. 383), for subsequent alteration, when the terms are agreed on (Hopper *v.* Eiland, 21 Ala. 714), or for the note being held by the payee's agent until the maker could look into the insurance policy for which it was given (Mehlin *v.* Mutual Reserve Fund L. Assoc., 2 Indian Terr. 396, 51 S. W. 1063) or until the payee should give his deed (Ware *v.* Smith, 62 Iowa 159, 17 N. W. 459). So the object of a draft may be to conceal the drawer's funds from his creditors and it may be conditioned not to take effect unless an attachment is issued against the drawer. Stevens *v.* Parker, 7 Allen (Mass.) 361. On the other hand expressing a wish that the payee should not present the check until the drawer's death without agreement to that effect does not constitute a condition. Pullen *v.* Placer County Bank, (Cal. 1901) 66 Pac. 740.

Delivery to payee's agent for further delivery.— It is not a conditional delivery if a note is delivered to the payee's attorney to hold until the maker could investigate the alleged indebtedness for which it was given. Murray *v.* W. W. Kimball Co., 10 Ind. App. 184, 37 N. E. 734. Such delivery does not constitute the attorney agent of the maker (Murray *v.* W. W. Kimball Co., 10 Ind. App. 141, 37 N. E. 736) or render the delivery conditional (Scott *v.* State Bank, 9 Ark. 36; Martin *v.* Jones, 3 Tex. App. Civ. Cas. § 205).

Delivery to maker's agent for further delivery.— It may provide for delivery on performance of a certain condition. Goss *v.* Whitney, 24 Vt. 187.

There may be a waiver of the condition. Witmer Bros. Co. *v.* Weid, 108 Cal. 569, 41 Pac. 491; German-American Nat. Bank *v.* People's Gas, etc., Co., 63 Minn. 12, 65 N. W. 90.

82. *California.*— McLaughlin *v.* Clausen, 85 Cal. 322, 24 Pac. 636.

Connecticut.— Couch *v.* Meeker, 2 Conn. 302, 7 Am. Dec. 274.

Illinois.—Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246.

Indiana.— Stringer *v.* Adams, 98 Ind. 539; Wickhizer *v.* Bolin, 22 Ind. App. 1, 53 N. E. 238.

Indian Territory.— Garrett *v.* Campbell, 2 Indian Terr. 301, 51 S. W. 956.

Kansas.— Taylor *v.* Thomas, 13 Kan. 217.

New York.— Mickles *v.* Colvin, 4 Barb. (N. Y.) 304.

Texas.— Hodo *v.* Leeman, (Tex. Civ. App. 1901) 65 S. W. 381.

Wisconsin.— Lehigh Coal, etc., Co. *v.* West Superior Iron, etc., Co., 91 Wis. 221, 64 N. W. 746; Chipman *v.* Tucker, 38 Wis. 43, 20 Am. Rep. 1; McLean *v.* Nugent, 33 Wis. 353.

So coupon bonds may be deposited in escrow. Provident Life, etc., Co. *v.* Mercer County, 170 U. S. 593, 18 S. Ct. 788, 42 L. ed. 1156.

Where delivery in escrow not permissible. — There can be no delivery in escrow to the payee's agent (Scott *v.* State Bank, 9 Ark. 36; Stewart *v.* Anderson, 59 Ind. 375; Martin *v.* Jones, 3 Tex. App. Cas. § 205), to the maker's agent (Lehigh Coal, etc., Co. *v.* West Superior Iron, etc., Co., 91 Wis. 221, 64 N. W. 746), by one maker to his co-maker (Carter *v.* Moulton, 51 Kan. 9, 32 Pac. 633, 37 Am. St. Rep. 259, 20 L. R. A. 309; Jordan *v.* Jordan, 10 Lea (Tenn.) 124, 43 Am. Rep. 294), or as a general rule to the payee (Badcock *v.* Steadman, 1 Root (Conn.) 87; Clanin *v.* Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; Jones *v.* Shaw, 67 Mo. 667; Henshaw *v.* Dutton, 59 Mo. 139; Massmann *v.* Holscher, 49 Mo. 87; Johnson *v.* Branch, 11 Humphr. (Tenn.) 521). It may, however, be delivered to the payee to deliver to a third party to hold in escrow (Brown *v.* Reynolds, 5 Sneed (Tenn.) 639), and the escrow may be waived by its violation by the maker (Smith *v.* Smith, 13 C. B. N. S. 418, 32 L. J. C. P. 149, 8 L. T. Rep. N. S. 425, 106 E. C. L. 418).

As to the nature and requisites of an escrow see ESCROWS.

83. *Alabama.*— Sharp *v.* Allgood, 100 Ala. 183, 14 So. 16; Montgomery First Nat. Bank *v.* Dawson, 78 Ala. 67.

Arkansas.— Craighead *v.* Farmers' Bldg., etc., Assoc., 69 Ark. 332, 63 S. W. 668.

Georgia.— Cleghorn *v.* Robison, 8 Ga. 559.

Illinois.—Belleville Sav. Bank *v.* Bornman, 124 Ill. 200, 16 N. E. 210; Stoner *v.* Millikin, 85 Ill. 218; Knight *v.* Hurlbut, 74 Ill. 133.

Indiana.— Whitcomb *v.* Miller, 90 Ind. 384.

Iowa.— Ware *v.* Smith, 62 Iowa 159, 17 N. W. 459; Daniels *v.* Gower, 54 Iowa 319, 3 N. W. 424, 6 N. W. 525.

Kentucky.— Hubble *v.* Murphy, 1 Duv. (Ky.) 278.

Michigan.— Gibson *v.* Miller, 29 Mich. 355, 18 Am. Rep. 98.

Minnesota.— German-American Nat. Bank *v.* People's Gas, etc., Co., 63 Minn. 12, 65 N. W. 90; Merchants' Exch. Bank *v.* Luckow, 37 Minn. 542, 35 N. W. 434.

Missouri.— Hurt *v.* Ford, (Mo. 1896) 36 S. W. 671; Ayres *v.* Milroy, 53 Mo. 516, 14 Am. Rep. 465; Terrell *v.* Hunter, 21 Mo. 436; State Bank *v.* Phillips, 17 Mo. 29.

Nebraska.— Brumback *v.* German Nat. Bank, 46 Nebr. 540, 65 N. W. 198.

North Dakota.— Porter *v.* Andrus, 10 N. D. 558, 88 N. W. 567.

South Dakota.— McCormick Harvesting Mach. Co. *v.* Faulkner, 7 S. D. 363, 64 N. W. 163, 58 Am. St. Rep. 839.

Tennessee.— Alexander *v.* Wilkes, 11 Lea (Tenn.) 221; Jordan *v.* Jordan, 10 Lea

expressed in the bill or note or indorsed on it would of course render it non-negotiable.[84]

III. THE CONSIDERATION.

A. Necessity For — 1. In General. Like other contracts[85] each undertaking of any party to a negotiable bill or note requires the support of a valid consideration. This is true alike as to maker, drawer, guarantor, surety, accepter, and indorser;[86] and even an agreement for extension of the time for payment must be based on a valid consideration.[87] There are, however, some cases, where a consideration is said to be unnecessary, as where a surety consents to an alteration of the paper after it is signed,[88] where an indorser waives notice of dishonor by agreeing to an extension of the paper,[89] or where the maker confirms a note which was originally obtained by fraud;[90] but these cases will be found in general to be referable to some sufficient element existing in the original consideration, which was not so vitally affected by the taint or by the default as to be rendered absolutely void.

2. Between What Parties — a. In General. The same consideration may, however, serve for several undertakings, and a consideration moving to or from one party may support the obligation of another party. Thus a valid consideration received by the drawer of a bill from the payee is sufficient to support the liability of the accepter to the payee[91] or to a subsequent holder.[92] In like manner the consideration from the payee to the maker of a note will support the lia-

(Tenn.) 124, 43 Am. Rep. 294; Majors *v.* McNeilly, 7 Heisk. (Tenn.) 294. But see Johnson *v.* Branch, 11 Humphr. (Tenn.) 521. In Perry *v.* Patterson, 5 Humphr. (Tenn.) 133, 42 Am. Dec. 424, such a delivery is called an escrow.

Texas.—Davis *v.* Gray, 61 Tex. 506; Garrison *v.* Nelson, (Tex. App. 1892) 19 S. W. 248.

Washington.— Seattle *v.* L. H. Realty, etc., Co., (Wash. 1902) 68 Pac. 1036.

United States.— American Button-Hole, etc., Co. *v.* Murray, 1 Fed. Cas. No. 292.

England.— Jefferies *v.* Austin, 1 Str. 674.

Canada.— Commercial Bank *v.* Smith, 37 Can. L. J. 472; Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624.

84. Hartley *v.* Wilkinson, 4 Campb. 127.

As to evidence of condition see *infra*, XIV, E [8 Cyc.].

As to availability of condition as defense see *infra*, XIV, B [8 Cyc.].

85. See, generally, CONTRACTS.

86. Catlin *v.* Horne, 34 Ark. 169; Roberts *v.* Million, 17 Ky. L. Rep. 599, 32 S. W. 220; Williams *v.* Mellon, 56 Mo. 262; Hildeburn *v.* Curran, 65 Pa. St. 59.

Subsequent agreements require a fresh consideration as an agreement that the note should not be transferred except to a person named (Johnson *v.* Washburn, 98 Ala. 258, 13 So. 48), to allow a certain set-off (Gross *v.* Weary, 90 Ill. 256), to accept in payment a claim which the maker holds against a third person (Reid *v.* Degener, 82 Ill. 508), to permit the maker to pay in work (Gimmeson *v.* Butler, 12 Ill. App. 399), to change the place of payment (Colter *v.* Greenhagen, 3 Minn. 126), or to add an interest clause (Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770 [*affirming* 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743]); but the want of consideration for the subsequent agreement will not affect the validity of the original note (Thomason *v.* Dill, 30 Ala. 444; Gimmeson *v.* Butler, 12 Ill. App. 399).

87. See *infra*, III, B, 5, a.

88. Pelton *v.* Prescott, 13 Iowa 567.

89. Sheldon *v.* Horton, 43 N. Y. 93, 3 Am. Rep. 669. But a mere promise to pay an old note, except as a bar to the statute of limitations, requires a new consideration. Gilmore *v.* Green, 14 Bush (Ky.) 772.

90. Lyon *v.* Phillips, 106 Pa. St. 57.

91. Arpin *v.* Owens, 140 Mass. 144, 3 N. E. 25; Bradley *v.* McClellan, 3 Yerg. (Tenn.) 301.

Consideration from drawer to accepter.— So the accepter will be liable to the payee on a consideration moving to him from the drawer.

Alabama.— Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387.

Colorado.— Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486; Welch *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613.

Indiana.— Olds Wagon-Works *v.* Coombs, 124 Ind. 62, 24 N. E. 589.

Iowa.— Washington First Nat. Bank *v.* Snell, 32 Iowa 167.

New York.— Briggs *v.* Sizer, 30 N. Y. 647.

Vermont.— Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Dec. 174.

See 7 Cent. Dig. tit. "Bills and Notes," § 108.

92. Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; Heuertematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1. 54 Am. Rep. 657 [*reversing* 28 Hun (N. Y.) 77].

bility of a contemporaneous guarantor[93] or surety,[94] of an indorser for the maker's accommodation,[95] or of a co-maker.[96] The consideration need not move directly to the party who becomes liable[97] or directly from the party toward whom the liability is created. Thus the maker's liability to the payee may be supported by a consideration coming from a third person who is not a party to the instrument;[98] and the surety's liability to the payee may rest on a consideration proceeding from the principal maker.[99]

b. When Original Consideration Not Sufficient — (i) *In General.* The original consideration for the paper is not sufficient, however, to support an indorsement made after the delivery of the instrument,[1] and a mere admission on

93. *Illinois.*— Dillman *v.* Nadelhoffer, 160 Ill. 121, 43 N. E. 378.

Minnesota.—Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965.

New Hampshire.— Simons *v.* Steele, 36 N. H. 73.

New York.—Colston *v.* Pemberton, 20 Misc. (N. Y.) 410, 45 N. Y. Suppl. 1034 [*affirmed* in 21 Misc. (N. Y.) 619, 47 N. Y. Suppl. 1110]; Rogers *v.* Kneeland, 10 Wend. (N. Y.) 218 [*affirmed* in 13 Wend. (N.Y.) 114]; Bailey *v.* Freeman, 11 Johns. (N. Y.) 221, 6 Am. Dec. 371; Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317.

Ohio.— Leonard *v.* Sweetzer, 16 Ohio 1.

United States.— D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 7 L. ed. 227.

See also *infra*, III, B, 9, a, (I), note 77.

94. Brewster *v.* Baker, 97 Ind. 260; Crawford *v.* Shaw, 18 Ind. 495; Clark *v.* Clark, 86 Mo. 114; Ewan *v.* Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094, 60 Am. St. Rep. 719, 35 L. R. A. 786.

95. Kracht *v.* Obst, 14 Bush (Ky.) 34; Austin *v.* Boyd, 24 Pick. (Mass.) 64; Palmer *v.* Field, 76 Hun (N. Y.) 229, 27 N. Y. Suppl. 736, 59 N. Y. St. 123.

96. Westphal *v.* Nevills, 92 Cal. 545, 28 Pac. 678; Isaack *v.* Porter, 2 A. K. Marsh. (Ky.) 452; Briggs *v.* Beatrice First Nat. Bank, 41 Nebr. 17, 59 N. W. 351.

In case of a note joint as well as several, if the consideration is good as to one obligor it is good as to the other, and cannot be severed. Myers *v.* Sunderland, 4 Greene (Iowa) 567; Hoxie *v.* Hodges, 1 Oreg. 251. A joint note implies a joint consideration. Kinsman *v.* Birdsall, 2 E. D. Smith (N. Y.) 395. A debt due by the makers, jointly and severally, will support a joint note (Hapgood *v.* Polley, 35 Vt. 649), and conversely, a release of one maker by the payee may be supported by a transfer by one maker to the other (Hunt *v.* Dederick, 105 Ind. 555, 5 N. E. 710). So a consideration passing from one maker to his co-maker may support the liability of the latter to the payee. Arlington First Nat. Bank *v.* Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393.

97. It may go to a third person who is not a party to the instrument. Bingham *v.* Kimball, 33 Ind. 184; Anderson *v.* Meeker, 31 Ind. 245; Wright *v.* McKitrick, 2 Kan. App. 508, 43 Pac. 977; Clay *v.* Johnson, 5 Litt. (Ky.) 176; Sanborn *v.* French, 22 N. H. 246.

98. *Alabama.*— Hughes *v.* Young, 25 Ala. 483.

Indiana.— Moore *v.* Hubbard, 15 Ind. App. 84, 42 N. E. 962. So the note may be by the agent and the consideration may move to his principal. Crum *v.* Boyd, 9 Ind. 289.

Kansas.— Bowling *v.* Floyd, (Kan. App. 1897) 48 Pac. 875.

Kentucky.— Clay *v.* Johnson, 5 Litt. (Ky.) 176; Farrow *v.* Turner, 2 A. K. Marsh. (Ky.) 495.

Missouri.— Russell *v.* Barcroft, 1 Mo. 514.

New Hampshire.— Peterborough, etc., R. Co. *v.* Chamberlain, 44 N. H. 494; Newbury Bank *v.* Rand, 38 N. H. 166.

New York.— Hoxie *v.* Kennedy, 10 N. Y. St. 786.

Texas.— So for an injury to such third person's property held by payee as bailee. Dolson *v.* De Ganahl, 70 Tex. 620, 8 S. W. 321.

99. Tenny *v.* Porter, 61 Ark. 329, 33 S. W. 211.

1. *Iowa.*— Brenner *v.* Gundershiemer, 14 Iowa 82.

Maine.— Sawyer *v.* Fernald, 59 Me. 500.

Massachusetts.— Mecorney *v.* Stanley, 8 Cush. (Mass.) 85; Benthall *v.* Judkins, 13 Metc. (Mass.) 265; Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347.

Missouri.— Williams *v.* Williams, 67 Mo. 661.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

So with regard to a guaranty indorsed after delivery.— *Illinois.*— Joslyn *v.* Collinson, 26 Ill. 61.

Kansas.— Briggs *v.* Latham, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546.

Maine.— Ware *v.* Adams, 24 Me. 177.

Missouri.— Pfeiffer *v.* Kingsland, 25 Mo. 66.

North Carolina.— Greer *v.* Jones, 52 N. C. 581.

Utah.— Armstrong *v.* Cache Valley Land, etc., Co., 14 Utah 450, 48 Pac. 690.

Wisconsin.— Bank of Commerce *v.* Ross, 91 Wis. 320, 64 N. W. 993.

United States.— Bebee *v.* Moore, 3 McLean (U. S.) 387, 3 Fed. Cas. No. 1,202.

If by the statute of frauds a promise to answer for the debt of another must recite the consideration, this is necessary to an accommodation indorsement after delivery (Hood *v.* Robbins, 98 Ala. 484, 13 So. 574) and to a guaranty (Hall *v.* Farmer, 5 Den. (N. Y.)

the indorser's part that he had security for his indorsement will not dispense with the need of consideration and of due proof of it.[2] A consideration moving from the holder to the maker or principal debtor may, however, be a sufficient consideration for a subsequent indorsement for the maker's accommodation,[3] provided that it is known to the indorser or surety when he signs the instrument.[4] In like manner a new consideration is necessary for the signature of an additional maker added to a note after its delivery[5] or of a surety signing after delivery,[6] but a previous agreement between maker and payee for such additional signature is sufficient to support the later signature, if relied on by the payee.[7]

(ii) *For Indorsement but Not For Transfer.* The consideration for an indorsement may be sufficient to support it as a transfer, but not to create between the parties an indorser's liability, as in the case of a bill purchased or taken by an agent for his principal and indorsed by the agent to the principal.[8] So a bill or

484), but not to a contemporaneous indorsement (Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743).

2. Tenney *v.* Prince, 7 Pick. (Mass.) 243.

3. Gay *v.* Mott, 43 Ga. 252; Crawford *v.* Shaw, 18 Ind. 495.

4. The promisor must know the consideration or motive for the promise (Ellis *v.* Clark, 110 Mass. 389, 14 Am. Rep. 609) and the subsequent indorsement by a third person requires as against the indorser other consideration than an agreement for further time, made between maker and payee without his knowledge (Pratt *v.* Hedden, 121 Mass. 116).

5. *California.*— Leverone *v.* Hildreth, 80 Cal. 139, 22 Pac. 72, although the makers are partners and the proceeds are used by the firm.

Illinois.— Harwood *v.* Johnson, 20 Ill. 367; Davis *v.* Smith, 29 Ill. App. 313.

Indiana.— Crossan *v.* May, 68 Ind. 242.

Massachusetts.— Courtney *v.* Doyle, 10 Allen (Mass.) 122 (although the date has been altered to the time of the second signature); Green *v.* Shepherd, 5 Allen (Mass.) 589 (although the note contains the words "value received").

Mississippi.—Clopton *v.* Hall, 51 Miss. 482.

Missouri.— McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489.

Oregon.— Arlington First Nat. Bank *v.* Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393, although the note contains the words "value received."

Texas.— See Jones *v.* Ritter, 32 Tex. 717, holding that a person who signs a promissory note some months after its execution must be considered a guarantor, and that without a consideration moving to him his signature is void.

But where two were severally indebted in simultaneous transactions and were to give their joint notes for said two debts and one executed the notes, which were received by the creditor, and afterward the other signed the notes, it will be considered the same as if the latter signed when the notes were first made. Hinsdill *v.* Safford, 11 Vt. 309.

6. *Alabama.*— Savage *v.* Rome First Nat. Bank, 112 Ala. 508, 20 So. 398; Jackson *v.* Jackson, 7 Ala. 791.

Indiana.— Favorite *v.* Stidham, 84 Ind. 423; Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537. Even though he has said to an indorsee after purchase that such note was "all right." Crossan *v.* May, 68 Ind. 242.

Iowa.— Briggs *v.* Downing, 48 Iowa 550.

Kentucky.— So where the new maker signs as surety. Jackson *v.* Cooper, 19 Ky. L. Rep. 9, 39 S. W. 39.

Missouri.— McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489; Hartman *v.* Redman, 21 Mo. App. 124.

New York.— McNaught *v.* MacClaughry, 42 N. Y. 22, 1 Am. Rep. 487.

Tennessee.—Clark *v.* Small, 6 Yerg. (Tenn.) 418.

7. *Arkansas.*—Williams *v.* Perkins, 21 Ark. 18, delivery and acceptance being regarded as incomplete until the new signature is added and such signature being in effect contemporaneous.

California.— Pauly *v.* Murray, 110 Cal. 13, 42 Pac. 313; Winders *v.* Sperry, 96 Cal. 194, 31 Pac. 6.

Connecticut.— Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

Massachusetts.— Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179.

New York.— McNaught *v.* MacClaughry, 42 N. Y. 22, 1 Am. Rep. 487.

Necessity of new signer's knowledge of promise.— It has been held, where one took a note for a valuable consideration relying on the maker's promise that a third person should sign it, that the promise of the latter two years afterward was supported by the maker's promise of which he knew nothing; the question whether his act amounted to an authority or a ratification of the maker's promise being left to the jury. Harrington *v.* Brown, 77 N. Y. 72. But see *contra*, where the promise was not known to the new signer (Sawyer *v.* Fernald, 59 Me. 500), whether he signs as co-maker (Messenger *v.* Vaughan, 45 Mo. App. 15) or indorser (Howard *v.* Jones, 10 Mo. App. 81). On the other hand the subsequent signing by a surety may be supported by his own promise to that effect made to the payee before he took the note but unknown to the maker. Hawkes *v.* Phillips, 7 Gray (Mass.) 284.

8. Byers *v.* Harris, 9 Heisk. (Tenn.) 652.

note which is itself for a valid consideration may be indorsed by the payee as a gift to another person.[9]

3. CONFLICT OF LAWS. What consideration is necessary to the validity of the obligation is determined by the law of the place of contract.[10]

B. Sufficiency of Consideration — 1. IN GENERAL — a. Adequacy. It is not in general necessary that a valid consideration should be adequate in value to the face of the bill, either for the original instrument[11] or for its transfer,[12] although a money consideration for an original promise to pay money must be commensurate with the promise.[13] Thus a note may be in part supported by a sufficient valuable consideration and to that extent valid, but void as to any excessive amount for which it was drawn by fraud or mistake.[14] Respect may be had, however, to the enhanced or diminished value of the actual money or currency which formed the consideration for the original transaction represented by the note,[15] and a note may be made in consideration of advances of money to be made, which are less than the face of the note when it matures.[16]

9. But if a guaranty be transferred in consideration of love and affection the assignee does not come under a statute authorizing a "holder for value" to sue in his own name. Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547.

10. Evans *v.* Anderson, 78 Ill. 558; Hyde *v.* Goodnow, 3 N. Y. 266.

11. Austell *v.* Rice, 5 Ga. 472; Miller *v.* McKenzie, 95 N. Y. 575, 47 Am. Rep. 85; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Earl *v.* Peck, 64 N. Y. 596; Boggs *v.* Wann, 58 Fed. 681; Tye *v.* Gwynne, 2 Campb. 346; Morgan *v.* Richardson, 1 Campb. 40 note, 7 East 482, 3 Smith K. B. 487, 10 Rev. Rep. 624 note; Trickey *v.* Larne, 8 Dowl. P. C. 174, 9 L. J. Exch. 141, 6 M. & W. 278; Obbard *v.* Betham, 8 L. J. K. B. O. S. 254, M. & M. 483, 22 E. C. L. 569. Whether it be for services (Rightor *v.* Aleman, 4 Rob. (La.) 45; Root *v.* Strang, 77 Hun (N. Y.) 14, 28 N. Y. Suppl. 273, 59 N. Y. St. 258; Velie *v.* Titus, 60 Hun (N. Y.) 405, 15 N. Y. Suppl. 467, 39 N. Y. St. 897), for goods sold (Wheelock *v.* Barney, 27 Ind. 462; Abel *v.* Burgett, 3 Blackf. (Ind.) 502), or for labor and material (Dieringer *v.* Klekamp, 11 Cinc. L. Bul. 123, 9 Ohio Dec. (Reprint) 164).

12. Roark *v.* Turner, 29 Ga. 455; Lane *v.* Steward, 20 Me. 98; French *v.* Grindle, 15 Me. 163; Maas *v.* Chatfield, 90 N. Y. 303; Brown *v.* Penfield, 36 N. Y. 473; New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332. Unless the good faith of the transaction is impeached inadequacy of consideration for the transfer is immaterial. Kitchen *v.* Loundenback, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540; Rooker *v.* Rooker, 29 Ohio St. 1; Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146.

To buy paper below its face value is not a taking out of "usual course." Tod *v.* Wick, 36 Ohio St. 370. See also *infra*, IX, A, 2, a, (II).

13. A distinction is to be observed in this respect between a money consideration and such a consideration as services, agreements, or property sold. Sawyer *v.* McLouth, 46 Barb. (N. Y.) 350.

14. If a note is given and credited on an account which is less than the note the excess is without consideration. Robson *v.* McKoin, 18 La. Ann. 544; Dickson *v.* Tunstall, 3 C. Pl. Rep. (Pa.) 128.

If a note for money paid to the maker is too large by reason of false representations as to the amount paid it is still good for the amount actually paid. Griffiths *v.* Parry, 16 Wis. 18.

A note given for goods fraudulently overcharged is valid for the actual value of the goods (Haycock *v.* Rand, 5 Cush. (Mass.) 26), the excess being set up as a partial failure of consideration (Coburn *v.* Ware, 30 Me. 202; Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598). In Brown *v.* North, 21 Mo. 528, the fraud covered almost all of the consideration and the entire note was held void.

A note given for principal due upon a contract, and interest, the contract providing for no interest, is without consideration as to the interest. Jennison *v.* Stone, 33 Mich. 99.

15. Thus a note for the currency value of a loan in gold is supported by a sufficient consideration, although for a much larger amount than the nominal value of the gold (Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476), and if a note is payable in coin worth at maturity a premium of fifteen per cent, the release of such note after maturity is a sufficient consideration for a new promise to pay the larger amount (Smith *v.* McKinney, 22 Ohio St. 200). So where depreciated bank-notes were the consideration for a note for the nominal amount of dollars the maker will be relieved, whether the note was drawn by mistake or not. Roby *v.* Sharp, 6 T. B. Mon. (Ky.) 375. On the other hand, in Williams *v.* Boozeman, 18 La. Ann. 532, the maker was held liable on a note payable in Confederate currency, although for a larger sum than the amount of the debt. So if a party voluntarily receives bank-bills which are depreciated, and executes his notes payable in money therefor, it is no defense that the amount borrowed was not specie or its equivalent. Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

16. Lanata *v.* Bayhi, 31 La. Ann. 229.

b. Worthless Consideration. Where the consideration of a bill or note is the purchase of property, defects in the value or title of the property or in the mode of transfer generally take the form of a failure or partial failure of consideration. There is, however, an entire absence of consideration, if the property is without any actual value [17] or without legal value,[18] or if the seller has no title

17. *Arkansas.*—Clemshire *v.* Boone County Bank, 53 Ark. 512, 14 S. W. 901, where the property was a machine which could be used only as an infringement of a valid patent.

Indiana.— Arnold *v.* Wilt, 86 Ind. 367.

Kansas.— Snyder *v.* Hargus, 26 Kan. 416.

Massachusetts.— Aldrich *v.* Stockwell, 9 Allen (Mass.) 45, where the property was sold with a false warranty.

Michigan.— Keller *v.* Holderman, 11 Mich. 248, 83 Am. Dec. 737, a check given in a frolic for a watch worth a twentieth part of the face of the check was held without consideration, an offer being made at the trial to return the watch.

Minnesota.—Slater *v.* Foster, 62 Minn. 150, 64 N. W. 160, where the property was sold with a false warranty.

New York.— Sherman *v.* Barnard, 19 Barb. (N. Y.) 291 (a chose in action which was absolutely void although salable in the market); Sill *v.* Rood, 15 Johns. (N. Y.) 230; Hand *v.* Fielding, Anth. N. P. (N. Y.) 117 (where the want of value was fraudulently concealed).

Vermont.— Smith *v.* Smith, 30 Vt. 139.

Wisconsin.— Townsends *v.* Racine Bank, 7 Wis. 185, where two persons gave their draft for bills of a certain bank, which they afterward discovered was insolvent at the time of such payment, and offered to return the bills within reasonable time after discovering such fact.

See 7 Cent. Dig. tit. "Bills and Notes," § 178.

Necessity for return of property.— It need not be shown that the goods were returned, where they were of no value (Shepherd *v.* Temple, 3 N. H. 455), although there should be an offer to return if the goods have any value (Perley *v.* Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; Fenwick *v.* Bowling, 50 Mo. App. 516). See also Gifford *v.* Carvill, 29 Cal. 589, holding that it is no defense to an action on a promissory note given for mining stock that fraudulent misrepresentations were made as to value, where the maker has not rescinded the contract of sale and returned the stock before suit brought, unless the property was absolutely of no value to anyone.

Necessity for express warranty of property.— It has been held that the fact that goods given as the consideration of a promissory note turn out to be wholly worthless is no bar to an action on the note between the original parties to it, unless plaintiff expressly warranted the goods, knowing them to be of no value, or made false and fraudulent misrepresentations as to them. O'Neal *v.* Bacon, 1 Houst. (Del.) 215; Reed *v.* Prentiss, 1 N. H. 174, 8 Am. Dec. 50; Bryant *v.* Pember, 45 Vt. 487.

A note is not without consideration if given for trees which by reason of decay, are without market value, but are still not absolutely valueless (Johnson *v.* Titus, 2 Hill (N. Y.) 606 [*citing* with approval Perley *v.* Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56]), for an interest in a patented device which is capable of being applied to some practical or beneficial use (Ohio Forging Co. *v.* Lamb, 9 Ohio Dec. (Reprint) 199, 11 Cinc. L. Bul. 190), or for a policy of insurance in an insolvent company, not at the time known to be insolvent (Lester *v.* Webb, 5 Allen (Mass.) 569). So in Barnum *v.* Barnum, 8 Conn. 469, 21 Am. Dec. 689, a recovery was allowed on a note given for a lottery ticket which was rumored to have drawn a prize, but which had actually drawn a blank. Here the drawing had not yet been published and the lottery was legal. In Welsh *v.* Carter, 1 Wend. (N. Y.) 185, 19 Am. Dec. 473, the rule of *caveat emptor* was applied as between maker and payee to a note given for barilla which proved to be spurious and of no value for the purpose, although believed by the seller to be genuine.

18. A note given for a lease which was illegal. Kinzie *v.* Chicago, 3 Ill. 187, 33 Am. Dec. 443.

A note given for a void patent right.— *District of Columbia.*— Hodge *v.* Mason, 21 D. C. 181.

Iowa.— Snyder *v.* Kurtz, 61 Iowa 593, 16 N. W. 722.

Kansas.— Sturgis First Nat. Bank *v.* Peck, 8 Kan. 660.

Massachusetts.— Bierce *v.* Stocking, 11 Gray (Mass.) 174 (although the assignment was accompanied by delivery of samples of the articles patented of no separate value); Dickinson *v.* Hall, 14 Pick. (Mass.) 217, 25 Am. Dec. 390 (although the vendor believed at the time of the sale that the patent was valid); Bliss *v.* Nagus, 8 Mass. 46 (although the vendor warranted "all the right and privilege so conveyed" and certain materials useful only for work under the patent were included in the sale). But notes for an assignment of an interest in three patents, one of which had been reissued, will not be rendered void because the reissue was void. Gilmore *v.* Aiken, 118 Mass. 94.

Minnesota.— So a note for a license to sell an article manufactured under a void patent is void. Wilson *v.* Hentges, 26 Minn. 288, 3 N. W. 338.

Missouri.— Keith *v.* Hobbs, 69 Mo. 84; Jolliffe *v.* Collins, 21 Mo. 338.

New Hampshire.— Dunbar *v.* Marden, 13 N. H. 311; Earl *v.* Page, 6 N. H. 477, 26 Am. Dec. 711.

New York.— Saxton *v.* Dodge, 57 Barb. (N. Y.) 84; Reed *v.* Van Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529.

to it,[19] or no legal ability to transfer it;[20] but a valid patent for a worthless invention may be a sufficient consideration for a note or bill.[21]

2. Valuable Consideration — a. Money — (i) *Advances and Loans.* A good and sufficient consideration for all obligations created by a negotiable instrument is money advanced or loaned to the contracting party at the time.[22] In like

See 7 Cent. Dig. tit. "Bills and Notes," § 180.

If the assignment of a patent be not recorded, as required by act of congress, it has been held that the assignment and the note therefor are both void. Louden *v.* Birt, 4 Ind. 566; Mullikin *v.* Latchem, 7 Blackf. (Ind.) 136; McFall *v.* Wilson, 6 Blackf. (Ind.) 260; Higgins *v.* Strong, 4 Blackf. (Ind.) 182. *Contra,* McKernan *v.* Hite, 6 Ind. 428. So too if the assignment does not comply with a local statute which requires vendors of patent rights to file an affidavit that they have authority to sell and that the letters patent are genuine, to file copies of the letters patent, and to insert in promissory notes executed in payment of rights thereunder, "given for a patent right." New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40.

19. Frisbie *v.* Hoffnagle, 11 Johns. (N. Y.) 50 (the court denied the right to recover on a note for the purchase-price of lands the title to which totally failed by reason of a subsequent sale under an earlier judgment); Scudder *v.* Andrews, 2 McLean (U. S.) 464, 21 Fed. Cas. No. 12,564. See also Knapp *v.* Lee, 3 Pick. (Mass.) 452, where the purchaser was evicted, the deed contained a covenant of warranty, but the vendor died insolvent.

Sale and possession of land.— It is held by some courts, however, that sale and possession of land to which the payee has no title is, in the absence of fraud, a sufficient consideration for a note for the purchase-money (Perkins *v.* Bumford, 3 N. H. 522), especially if the purchaser be in possession without an eviction (Hoy *v.* Taliaferro, 8 Sm. & M. (Miss.) 727), if there be a covenant of warranty and no fraud (Young *v.* Triplett, 5 Litt. (Ky.) 247; Lloyd *v.* Jewell, 1 Me. 352, 10 Am. Dec. 73), or if there be a covenant of warranty and no eviction (Vining *v.* Leeman, 45 Ill. 246 [*overruling* Slack *v.* McLagan, 15 Ill. 242]); and the maker of a note cannot dispute the consideration for want of title while he retains possession of the property (Linton *v.* Porter, 31 Ill. 107).

20. By selling land as administrator without the required order of the court (Stark *v.* Henderson, 30 Ala. 438), by acting as agent after revocation of his authority (Stewart *v.* Insall, 9 Tex. 397), or by exceeding his authority as agent (Earnest *v.* Moline Plow Co., 8 Tex. Civ. App. 159, 27 S. W. 734); and where the vendor of a chattel acting as agent under a restricted express power had no authority to sell, the maker of a note given for the property purchased may set up this want of authority, without returning the bill of sale, and even if he afterward sells for a valuable consideration whatever title he obtained by the transaction (Bliss *v.* Clark, 16 Gray (Mass.) 60).

A deed which was void by reason of the grantor's coverture has been held to be no consideration for a note, although the maker took possession under it and cut wood in large quantities. Warner *v.* Crouch, 14 Allen (Mass.) 163; Fowler *v.* Shearer, 7 Mass. 14.

21. Hildreth *v.* Turner, 17 Ill. 184; Myers *v.* Turner, 17 Ill. 179; Kernodle *v.* Hunt, 4 Blackf. (Ind.) 57; Howe *v.* Richards, 102 Mass. 64 note; Nash *v.* Lull, 102 Mass. 60, 3 Am. Rep. 435 (which hold that a valid patent, or any interest in or license under it, without regard to its pecuniary value or the degree of its utility, is a good consideration for a promissory note or other contract); Harmon *v.* Bird, 22 Wend. (N. Y.) 113 (especially if at the time of sale it was useful and valuable, and subsequent improvements of the original machine had rendered the original improvement valueless).

Contra, if the thing patented has no value whatever.

Arkansas.— Tilson *v.* Gatling, 60 Ark. 114, 29 S. W. 35.

Indiana.— Mooklar *v.* Lewis, 40 Ind. 1.

Massachusetts.— Lester *v.* Palmer, 4 Allen (Mass.) 145 (although the parties acted in good faith, and both then believed the patent to be valuable); Bierce *v.* Stocking, 11 Gray (Mass.) 174.

Missouri.— Jolliffe *v.* Collins, 21 Mo. 338.

New Hampshire.— Green *v.* Bickford, 60 N. H. 159; Dunbar *v.* Marden, 13 N. H. 311.

Pennsylvania.— Geiger *v.* Cook, 3 Watts & S. (Pa.) 266.

Vermont.— Clough *v.* Patrick, 37 Vt. 421.

Wisconsin.— Rowe *v.* Blanchard, 18 Wis. 441, 86 Am. Dec. 783.

22. Placer County Bank *v.* Freeman, 126 Cal. 90, 58 Pac. 388; Barton *v.* Farmers,' etc., Nat. Bank, 122 Ill. 352, 13 N. E. 503. Or a pledge of one note as collateral for an advance by way of discount at the same time of another note. State Bank *v.* Vanderhorst, 32 N. Y. 553. So a valid note may be given by a creditor and stock-holder of a corporation to one who has made, signed, and afterward paid an accommodation note for the company (Abbott *v.* Doane, 163 Mass. 433, 40 N. E. 197, 47 Am. St. Rep. 465, 34 L. R. A. 33); but a pretended loan by the president of a corporation which is in reality an advance made to relieve a third party from his subscription to the company's stock, and in effect a payment of the subscription, is no consideration for the company's note (Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971).

There is no valuable consideration where a note is given merely as evidence of the receipt of money to be expended and accounted for as provided by special agreement between the parties (McKee *v.* Miller, 4 Blackf. (Ind.)

manner the advance or loan of money to a third party at the maker's request is a sufficient consideration.[23]

(II) *Future Liability.* The bill or note may be given in contemplation of a debt or liability then incurred but payable in the future.[24] Or it may be given to secure fluctuating balances of account,[25] in anticipation of an estimated balance to be settled,[26] or to an arbitrator for the amount that may be awarded to be due from the maker.[27]

(III) *Existing Debt*—(A) *In General.* A debt already incurred, for which there is money due by the contracting party, is an equally good and sufficient consideration for his bill or note.[28] The bill may be given as security only for

222); where the note was given as a memorandum of payment made to the maker on an earlier debt of the payee to him (Rice *v.* Howland, 147 Mass. 407, 18 N. E. 229); or where a note is given by an heir as a memorandum or evidence of an advancement made to him by the payee (Hardin *v.* Wright, 32 Mo. 452).

23. Frazier *v.* Park, 56 Ala. 363 (thereby relieving the new maker from an existing liability as surety); White *v.* Yarbrough, 16 Ala. 109.

A husband may give his note for money borrowed in his wife's name by him (Ambler *v.* Ames, 1 App. Cas. (D. C.) 191), but if A and B are equitable owners of a mining claim and the proceeds are deposited by B in his wife's name and then used by him without her knowledge in settlement of A's claim against him, they cannot be treated afterward as a loan by her to A in support of a note afterward made by A to the wife (Bonesteel *v.* Bonesteel, 30 Wis. 516).

The note and the money may both be deposited in escrow with a third person, subject to the maker's option to use the money if needed by him. Melvin *v.* Fellows, 33 N. H. 401.

24. Miller *v.* Pollock, 99 Pa. St. 202; Chattanooga First Nat. Bank *v.* Stockell, 92 Tenn. 252, 21 S. W. 523; Griswold *v.* Davis, 31 Vt. 390.

Money deposited for use of A to be paid him in instalments as work is done is sufficient consideration for a note by him. Melvin *v.* Fellows, 33 N. H. 401.

Funds to be received by the accepter and chargeable in his hands will support an acceptance (Herter *v.* Goss, etc., Co., 57 N. J. L. 42, 30 Atl. 252), and such consideration moving from the drawer will bind the accepter as against the payee, although he does not receive the fund unless he makes his acceptance conditionally (Hollister *v.* Hopkins, 13 Hun (N. Y.) 210).

25. Pease *v.* Hirst, 10 B. & C. 122, 8 L. J. K. B. O. S. 94, 5 M. & R. 88, 21 E. C. L. 61; Richards *v.* Macey, 14 L. J. Exch. 359, 14 M. & W. 484; Collenridge *v.* Farquharson, 1 Stark. 259, 2 E. C. L. 105.

In such a case the holder may recover the amount due at any time on such balances (Metropolis Bank *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115), but if the account has been already transferred, and is afterward paid to another, the note is without consideration (Johnson *v.* Mitchell, 14 Colo. 227, 23 Pac. 452).

26. If the surety of a deceased guardian give his note to the newly appointed guardian, the balance afterward found due on the settlement will support the note *pro tanto*. Blankenship *v.* Nimmo, 50 Ala. 506. So one partner may give a note to the other in anticipation of their accounting and the balance when ascertained will support the note to that extent. Rockwell *v.* Wilder, 4 Metc. (Mass.) 556. But it has been held that before settlement one's liability to account to his partner on dissolution is no legal consideration for an express promise to pay the other a balance alleged to be due (Martin *v.* Stubbings, 20 Ill. App. 381), especially where the indebtedness is subject to the result of a liquidation of partnership affairs, yet to take place, in a mode agreed on (Bird *v.* Faulkner, 55 N. Y. Super. Ct. 529).

27. See Arbitration and Award, 3 Cyc. 617, note 46.

An agreement by a married woman for arbitration not being binding on her, a note given by her to abide the issue is without consideration. Rumsey *v.* Leek, 5 Wend. (N. Y.) 20.

28. Hillis *v.* Templeton, 7 Can. L. J. 301; Upper Canada Bank *v.* Bartlett, 12 U. C. C. P. 238; Gooderham *v.* Hutchins, 5 U. C. C. P. 241.

Note by agent.— An agent's note for his principal's money received and invested by him in his own name is good (Estis *v.* Simpson, 13 Nev. 472), and so where an agent who has funds of his principal in his hands gives his check to a third party at the principal's request (Fish *v.* Jacobsohn, 2 Abb. Dec. (N. Y.) 132, 1 Keyes (N. Y.) 539 [*affirming* 5 Bosw. (N. Y.) 514]). On the other hand one who fraudulently collected and embezzled money cannot, without the owner's assent, constitute himself an agent and liable only civilly as such, by inducing the owner to receive the forged note of A indorsed by himself and falsely represented by him to be a settlement of A's misappropriation guaranteed by himself. Talbot *v.* Wilkins, 52 Ark. 437, 12 S. W. 1071.

Note by executor.— The note of an executor, given for money belonging to the estate and used by him, is valid. Faulkner *v.* Faulkner, 73 Mo. 327.

Note by partner.— The liability of a new firm to pay the debt of the old is sufficient

the payment of such debt.[29] But where a debtor gives his own note to a creditor, neither in payment of his debt nor as collateral for it, but as a means of obtaining payment from a third person, to whom it is made payable, by means of a discount by him, it cannot be delivered to him on his refusal to discount it for collection from the maker for the creditor's account.[30] In like manner the transfer of a bill as security for an existing debt is supported by a sufficient consideration.[31] Or it may be used in payment as a credit on account[32] or to be discounted and credited and in the meantime to be drawn against as needed.[33]

(B) *Payment or Security of Other Note.* The existing debt may be already represented by the maker's own bill or note, and the surrender of such instrument will be a good consideration for the new obligation[34] or for the transfer of

consideration for new notes executed by the new firm. Silverman *v.* Chase, 90 Ill. 37. So a note after dissolution by the liquidating partner who had assumed the firm debts (Averill *v.* Lyman, 18 Pick. (Mass.) 346) or a note by one partner to the other for the balance found due on an accounting, especially where it was further supported by an agreement on such note and security for continuance of the partnership (Martin *v.* Stubbings, 27 Ill. App. 121 [*affirmed* in 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620]).

Note by party benefited.— Advances made for the maker by his father for legal expenses is sufficient. Glanton *v.* Whitaker, 75 Ga. 523.

Note by principal.—Advances by an agent on purchases for his principal will support a note by the principal. Powell *v.* McCord, 121 Ill. 330, 12 N. E. 262. See also Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281.

Note by surety.— A new note by a surety for his existing liability as such is valid. Harrell *v.* Tenant, 30 Ark. 684.

Subject to set-off.—The amount due on one contract is a sufficient consideration, although the payee may have owed the maker at the time more than the face of the note on other contracts. Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28.

Mistaken liability.— There is no consideration for a promissory note given to discharge a supposed liability, where none existed. Merrill *v.* Randall, 22 Ill. 227; Haynes *v.* Thom, 28 N. H. 386. So a municipal treasurer cannot take a note to himself for a debt due to the city, although he has charged himself with the amount (Crowell *v.* Osborne, 43 N. J. L. 335); although where the agent of a tax-collector received in payment of taxes a draft upon the collector and, on the collector refusing to accept or allow the same, paid over the amount of the tax himself, he is entitled to collect the amount from his indorser and from the drawer (Elliott *v.* Miller, 8 Mich. 132).

Arbitrator's award.— A note given to an arbitrator subject to his award and transferred on the award to the plaintiff is valid. Shephard *v.* Watrous, 3 Cai. (N. Y.) 166.

Accrued interest after debt transferred.— One who has transferred his debt to a third party cannot afterward receive from the debtor a note for accrued interest on the debt transferred. Gillett *v.* Campbell, 1 Den. (N. Y.) 520.

Compound interest.— Where contracts for the payment of compound interest are not usurious a note given for the amount of unpaid compound interest is valid. Wilcox *v.* Howland, 23 Pick. (Mass.) 167.

29. Austin *v.* Curtis, 31 Vt. 64. But a second note by the same maker given as collateral for interest on an outstanding note has been held to be without consideration, as it constituted only a conditional payment and effected no release or discharge of the original note (Taylor *v.* Slater, 16 R. I. 86, 12 Atl. 727), and a note given to the original creditor after he had assigned the debt without notice to the debtor is without consideration in the hands of the payee (Johnson *v.* Mitchell, 14 Colo. 227, 23 Pac. 452).

30. Winkelman *v.* Choteau, 78 Ill. 107.

31. Rowe *v.* Haines, 15 Ind. 445, 77 Am. Dec. 101; Bostwick *v.* Dodge, 1 Dougl. (Mich.) 413, 41 Am. Dec. 584. And will defeat a subsequent attachment against the assignor. Mayberry *v.* Morris, 62 Ala. 113; Davis *v.* Carson, 69 Mo. 609. See also Levy, etc., Mule Co. *v.* Kauffman, 114 Fed. 170, 52 C. C. A. 126.

Such transfer is valid without new consideration if stipulated for when the debt was incurred, although the delivery was not until afterward. Fenby *v.* Pritchard, 2 Sandf. (N. Y.) 151.

32. Davenport *v.* Elliott, 10 Kan. 597.

33. In such a case it is held for a valuable consideration, so far as drawn against, to the exclusion of all equities. Platt *v.* Beebe, 57 N. Y. 339.

34. *Idaho.*— Smith *v.* Smith, (Ida. 1894) 35 Pac. 697.

Indiana.— Brewster *v.* Baker, 97 Ind. 260.

Iowa.— Miller *v.* Gardner, 49 Iowa 234, with incidental extension of debt.

Kentucky.— Adams *v.* Johnson, 11 Ky. L. Rep. 137, even without further time for payment.

Louisiana.—O'Keefe *v.* Handy, 31 La. Ann. 832, where the original note was secured by collateral.

Maine.— Dunn *v.* Weston, 71 Me. 270, 36 Am. Rep. 310.

Massachusetts.—Wooley *v.* Cobb, 165 Mass. 503, 43 N. E. 497. So too where the original note had been conditioned on receipt of certain assets which proved insufficient. Adams *v.* Wilson, 12 Metc. (Mass.) 138, 45 Am. Dec. 240.

another obligation.[35] This is true of a note given in renewal of the maker's note;[36] and in such case the consideration for the original paper supports the renewal,[37]

Missouri.— Meyers *v.* Van Wagoner, 56 Mo. 115.

Montana.— Stanford *v.* Coram, (Mont. 1902) 67 Pac. 1005, the new note also including arrears of interest.

New Hampshire.— Willoughby *v.* Holderness, 62 N. H. 661.

New York.— Nickerson *v.* Ruger, 84 N. Y. 675; Whitehall First Nat. Bank *v.* Tisdale, 84 N. Y. 655; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 5 Hun (N. Y.) 556]; Mechanics,' etc., Nat. Bank *v.* Crow, 60 N. Y. 85; Clothier *v.* Adriance, 51 N. Y. 322; Brown *v.* Leavitt, 31 N. Y. 113; Montross *v.* Clark, 2 Sandf. (N. Y.) 115; Canda *v.* Zeller, 3 N. Y. Suppl. 128.

Vermont.— Bromley *v.* Hawley, 60 Vt. 46, 12 Atl. 220.

See 7 Cent. Dig. tit. "Bills and Notes," § 352.

Without amendment.— The new note is valid, although the old note is not surrendered (Woodbridge *v.* Skinner, 15 Conn. 306; Silverman *v.* Chase, 90 Ill. 37; Perrin *v.* Royal, 42 Ind. 132; French *v.* French, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300), where there was no agreement to return it (Murphy *v.* Carey, 89 Hun (N. Y.) 106, 34 N. Y. Suppl. 1038, 68 N. Y. St. 864; Low *v.* Learned, 13 Misc. (N. Y.) 150, 34 N. Y. Suppl. 68, 68 N. Y. St. 23), unless the old note had been transferred without the maker's knowledge and the new note delivered to the old payee, but drawn by him without the maker's knowledge payable to the new holder (Towle *v.* Greenberg, 6 N. D. 37, 68 N. W. 82). But it must appear that the old note has been satisfied (Pittsburgh Bessemer Steel Co. *v.* Buckley, 51 N. Y. Super. Ct. 342), although a promise by the payee to surrender the old note and the mortgage securing it on payment of the new note is a sufficient consideration for the latter (Langley *v.* Bartlett, 33 Me. 477), and the failure to surrender the old note under an agreement to do so is a good defense to an action on the new note (Heeg *v.* Weigand, 33 Ind. 289; Pittsburgh Bessemer Steel Co. *v.* Buckley, 51 N. Y. Super. Ct. 342; Miller *v.* Ritz, 3 E. D. Smith (N. Y.) 253), especially where the new note is, by the agreement, to be void if the former be not surrendered (Gilbert *v.* Cooper, 4 Rob. (La.) 161). Where the old note was not surrendered and it is shown that it was not transferred before maturity, there may be a recovery on the renewal without an indemnity bond. Mackey *v.* Mackey, 16 Colo. 134, 26 Pac. 554.

35. Clary *v.* Surrency, 58 Ga. 83; Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537. So where A indorses B's note on surrender of his own indorsement of other notes. Melancon *v.* Melancon, 4 Rob. (La.) 33.

36. *Colorado.*— Merchants' Bank *v.* McClelland, 9 Colo. 608, 13 Pac. 723, although the old note was past due and protested.

Idaho.— Smith *v.* Smith, (Ida. 1894) 35 Pac. 697, even though there was fraud in obtaining the original note.

Maine.— Mathias *v.* Kirsch, 87 Me. 523, 33 Atl. 19, where the original note had been executed by the maker A for B's accommodation and indorsed by B to C as collateral for a loan and was surrendered by C and the renewal made by A to B and transferred by B to C without B's indorsement.

Ohio.— Marietta Bank *v.* Haynes, 23 Ohio St. 637, where the renewal was made to an indorsee, who was not then in possession of the original, but who afterward procured it from a *bona fide* holder, to whom his collecting agent had fraudulently transferred it without the knowledge of himself or of the maker, and tendered it for surrender to the maker.

Pennsylvania.— Gatzmer *v.* Pierce, 13 Phila. (Pa.) 88, 36 Leg. Int. (Pa.) 16, although the original note was without consideration but was surrendered and an indorser on it thereby discharged.

Vermont.— Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563, although the surety who joined in the renewal had been discharged by laches, both parties knowing the facts but mistaking the law.

Necessity for surrender.— The renewal is valid, whether the old note be surrendered (Wooley *v.* Cobb, 165 Mass. 503, 45 N. E. 497) or not (Murphy *v.* Carey, 89 Hun (N. Y.) 106, 34 N. Y. Suppl. 1038, 68 N. Y. St. 864; Low *v.* Learned, 13 Misc. (N. Y.) 150, 34 N. Y. Suppl. 68, 68 N. Y. St. 23).

37. Lott *v.* Dysart, 45 Ga. 355 (holding that this applies to a note given to the subsequent holder of the original note, with its original payee as surety); Howard *v.* Hinckley, etc., Iron Co., 64 Me. 93; Magee *v.* Badger, 30 Barb. (N. Y.) 246; Gates *v.* Union Bank, 12 Heisk. (Tenn.) 325. So also McCormick Harvesting Mach. Co. *v.* Watson, 5 S. D. 9, 57 N. W. 945, holding that the consideration of a note made in renewal of one given for the purchase-price of a machine is the value of the machine at the time of the purchase, and not at the time of renewal. So a former indorsement supports the indorsement of the renewal note (Dykman *v.* Northridge, 1 N. Y. App. Div. 26, 36 N. Y. Suppl. 962, 72 N. Y. St. 64) or a former liability as surety the renewal as surety (Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563, although the surety had been discharged by the conduct of the principal, both parties being ignorant of its legal effect).

Gold and legal tender under value.—Where the original note had been renewed for an amount in legal tender corresponding at the time to value in legal tender if the original were then paid in gold as the holder demanded, it was held good after acquiescence and renewals at that rate for twenty years. Proctor *v.* Heaton, 114 Ind. 250, 15 N. E. 21. On the other hand where the contract is radically changed and the maker of a promissory

and, as between the original parties,[38] the renewal fails with the original consideration.[39] The consideration is equally good where the maker's liability on the

note payable in United States treasury notes, not being able to meet the same at maturity, gives another note to his creditor, payable in gold, in order to secure the latter against any loss by reason of the depreciation of treasury notes after the maturity of the original note, and before its payment, the second note is without consideration. Gates *v.* Hackethal, 57 Ill. 534, 11 Am. Rep. 45.

Alien enemies.— Where the renewal note was made between alien enemies in renewal of a valid note made before the outbreak of war, it was held to be good in McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785.

38. Renewal to indorsee.— But if the renewal is given to an indorsee of the original paper it will not be vitiated by defects in the original consideration (Estep *v.* Burke, 19 Ind. 87), especially where the maker, who originally had no consideration, received security from a co-maker for his renewal (Judd *v.* Martin, 97 Ind. 173). Where an indorsee of a note which was illegal in its inception has a right of action against the indorser, a surrender of such note by the indorsee to the maker, thereby releasing the indorser, is a sufficient consideration for a renewal note made by the maker; but the rule does not apply where the transfer to the indorsee was part of the illegal execution of the original note, so as to give the indorsee no right against the indorser. Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522. And a renewal made to an indorsee is not vitiated by the fact that the original and valid note was transferred by the payee to the indorsee in settlement of an illegal transaction. Gee *v.* Alabama L. Ins., etc., Co., 16 Ala. 637. If, however, the indorsee has rescinded the indorsement he cannot afterward take a valid renewal to himself. Beckner *v.* Willson, 68 Ind. 533.

39. Original want of consideration follows the renewal.

Indiana.—Beckner *v.* Willson, 68 Ind. 533; Wilson *v.* Tucker, 64 Ind. 41.

Maine.— Nutter *v.* Stover, 48 Me. 163, accommodation note diverted.

New Hampshire.— Willoughby *v.* Holderness, 62 N. H. 661.

Pennsylvania.— Paxson *v.* Nields, 137 Pa. St. 385, 20 Atl. 1016, 21 Am. St. Rep. 888.

Rhode Island.— Mason *v.* Jordan, 13 R. I. 193.

But see Smith *v.* Smith, (Ida. 1894) 35 Pac. 697, where it was held that where a note is surrendered at maturity, and a new note given for the same amount, want of consideration of the original note is no defense to the second.

Failure of consideration.— Where a consideration of a note is the warranty of the soundness of a horse, and the warranty is broken, a renewal note, although given with knowledge of the breach, is invalid, the consideration thereof being the same as that of the original note. Wheelock *v.* Berkeley, 138 Ill. 153, 27 N. E. 942. So where the original consideration was the sale of a slave which was rendered null by emancipation law. Campbell *v.* Waters, 21 La. Ann. 325. But a sealed note with a surety, given in lieu of another note signed by the maker alone, is a new contract, which is not affected by any insufficiency in the consideration of the original note. Grier *v.* Wallace, 7 S. C. 182. So too where the old note is surrendered and a new note made by one of the old makers with a new surety. Gresham *v.* Morrow, 40 Ga. 487.

Original illegality in like manner defeats the renewal.

Alabama.— Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522 (illegal stock subscription); Pearson *v.* Bailey, 23 Ala. 537 (usury); Bragg *v.* Channell, 3 Ala. 275 (unlicensed peddling renewal to other payee).

Illinois.— Safford *v.* Vail, 22 Ill. 327 (the surety in the original becoming principal maker in the renewal); International Bank *v.* Van Kirk, 39 Ill. App. 23 (gambling).

Kentucky.— Rash *v.* Farley, 91 Ky. 344, 15 S. W. 862, 34 Am. St. Rep. 233, original unlicensed peddling and fraud in renewal.

Massachusetts.— Holden *v.* Cosgrove, 12 Gray (Mass.) 216; Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21; Hill *v.* Buckminster, 5 Pick. (Mass.) 391.

Michigan.—Hunt *v.* Rumsey, 83 Mich. 136, 47 N. W. 105, 9 L. R. A. 674 ("Red wheat" note — fraud and failure); Comstock *v.* Draper, 1 Mich. 481, 53 Am. Dec. 78 (illegal banking — renewal to receiver of indorsee).

Missouri.— Comings *v.* Leedy, 114 Mo. 454, 21 S. W. 804 (sale of patent); Louisville Bank *v.* Young, 37 Mo. 398 (foreign corporation without license).

Nebraska.— Exeter Nat. Bank *v.* Orchard, 39 Nebr. 485, 58 N. W. 144, usury.

New Hampshire.— Gammon *v.* Plaisted, 51 N. H. 444 (unlicensed sale of liquor); Kidder *v.* Blake, 45 N. H. 530 (liquor sold without license — makers changed in renewal); Cutler *v.* Welsh, 43 N. H. 497 (gambling).

United States.—Scudder *v.* Thomas, 21 Fed. Cas. No. 12,567, 35 Ga. 364.

But see Garvin *v.* Linton, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569 (holding that a new note given in place of a usurious note for principal and legal interest is valid, so far as the original usury is purged out in the renewal); Powell *v.* Smith, 66 N. C. 401 (holding where a new note was given by a principal to his surety to reimburse him for having paid a former note, given to obtain a Confederate substitute, that the illegality of consideration of the old note did not extend to the new note); Scott *v.* Davidson, 33 Tex. 807 (holding where a note secured by mortgage was paid in Confederate money by a third person who took a new note and mortgage to himself from the original maker, that the consideration of the note was virtually

original paper was in a different capacity,[40] or where the new transaction is a transfer of other paper as collateral for the original paper which is left outstanding[41] or already dishonored.[42]

(c) *Maker's Debt to Decedent.* Where the consideration is the maker's debt to the decedent, it will not support a note made to his widow[43] or even to his personal representative, if the debt did not pass to such representative;[44] but a note for a debt due to the decedent is not without consideration if made to one who proposes to become, and afterward does become, his administrator.[45]

the land, and not the Confederate money); Buchanan *v.* Drovers' Nat. Bank, 55 Fed. 223, 6 U. S. App. 566, 5 C. C. A. 83 (holding that a new note given for money borrowed to pay off a prior note, which had been given to obtain means to prosecute an unlawful business, is not affected by the illegality of the first note).

See 7 Cent. Dig. tit. "Bills and Notes," § 354.

Payment already made.— A note given in renewal of another note which has been paid is without consideration. Smith *v.* Taylor, 39 Me. 242.

An original debt in Confederate currency is a valid consideration for a new note (McLaughlin *v.* Beard, 5 W. Va. 538 [*following* Beard *v.* Livesay, 4 W. Va. 637]), but where the parties to a note given for a loan of Confederate money ascertained the actual value thereof in gold and United States currency, a new note given by the maker for the amount thus ascertained was held to be void on the ground that the original note was for the purpose of aiding the Confederacy, and also by express provision of the Alabama constitution (Wilson *v.* Bozeman, 48 Ala. 71; Lawson *v.* Miller, 44 Ala. 616, 4 Am. Rep. 147).

New consideration.— The renewal may be supported by a new consideration which will purge it of the original illegality. This is so where a guarantor gives a new note and is released from his guaranty and receives an assignment of the judgment recovered against the principal. Gee *v.* Bacon, 9 Ala. 699. And original want of consideration will not defeat the renewal if in addition to the extension there is a new consideration, such as the release of an indorser. Gatzmer *v.* Pierce, 13 Phila. (Pa.) 88, 36 Leg. Int. (Pa.) 16.

40. Original indorser as maker (Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; Breckenridge *v.* Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353; Pollard *v.* Huff, 44 Nebr. 892, 63 N. W. 58; Wyckoff *v.* De Graaf, 98 N. Y. 134; Hayes *v.* Mestaniz, 2 N. Y. App. Div. 135, 37 N. Y. Suppl. 748, 73 N. Y. St. 425; Bacon *v.* Heywood, 11 Misc. (N. Y.) 7, 31 N. Y. Suppl. 840, 63 N. Y. St. 439; Albany County Bank *v.* Scott, 4 N. Y. St. 768), or as co-maker with the original maker (Judd *v.* Martin, 97 Ind. 173) of renewal. So where one who indorsed the original note before delivery and was in legal effect a maker makes a new note to the indorsee. Wilkie *v.* Chandon, 1 Wash. 355, 25 Pac. 464.

Original surety as maker of renewal (Pauly *v.* Murray, 110 Cal. 13, 42 Pac. 313; Capital City State Bank *v.* Des Moines Cotton-Mill Co., 84 Iowa 561, 51 N. W. 33), although the surety had attempted to recall the original note by notice not to discount it because of the insolvency of the principal (Wheeler *v.* Slocumb, 16 Pick. (Mass.) 52), and even though the surety's name had been forged on the original note without the payee's knowledge, the original debt being extended by the original note and renewal (Egan *v.* Fuller, 35 Minn. 515, 29 N. W. 313).

Original surety and co-maker as indorser of renewal executed by the principal maker alone. Galesburg First Nat. Bank *v.* Davis, 108 Ill. 633.

Original sureties on bond as indorsers of principal's note given on surrender of the bond. New York L. Ins. Co. *v.* McKellar, 68 N. H. 326, 44 Atl. 516.

Original accepter of bill as maker of new note. Hodge *v.* Richmond First Nat. Bank, 22 Gratt. (Va.) 51.

41. Spencer *v.* Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35; Red River Valley Nat. Bank *v.* Barnes Co., 8 N. D. 432, 79 N. W. 880.

42. Where the dishonored note was surrendered by the holder, one of the makers being released and forbearance being given to the other, and new paper transferred in payment or as security. Muirhead *v.* Kirkpatrick, 21 Pa. St. 237.

43. Bryan *v.* Philpot, 25 N. C. 467. But a note given the guardian of an orphan child in renewal of a matured note formerly given her father is a new transaction, with a new subject-matter, and the consideration is the surrender of the original notes (Keyes *v.* Mann, 63 Iowa 560, 19 N. W. 666), and where the original notes have been surrendered to the maker he cannot question the right of the new payee (Riley *v.* Loughrey, 22 Ill. 97).

44. Quinlan *v.* Fairchild, 76 Hun (N. Y.) 312, 27 N. Y. Suppl. 689, 59 N. Y. St. 84 (administrator *de son tort*); Sowles *v.* Sowles, 10 Vt. 181 (note to guardian's administrator debt to deceased ward). But a new consideration, such as the release by the widow and administratrix of property conveyed by a person to the husband, is a sufficient consideration for a note given by such person to the widow in payment of an alleged indebtedness to the husband. Fitzgerald *v.* Fleming, 58 Mo. App. 185.

45. Although he agreed to receipt for the debt on becoming administrator and afterward refused so to do. Nelson *v.* Lovejoy, 14 Ala. 568.

(D) *Debt of Another* — (1) IN GENERAL — (a) RULE STATED. A bill or note may be given by one person in discharge or extinguishment of the debt of another,[46] although the mere debt of another, without discharge, forbearance, or other new consideration, will not support the note of a stranger to the debt.[47] A person might, however, give a binding note for a joint debt of himself and another,[48] or both may give their joint note for the debt of one with forbearance to that one,[49] and such indulgence forms a valid consideration for the note.[50] In like manner a note for another's debt may be supported by other consideration

46. *Alabama.*— Hughes *v.* Young, 25 Ala. 483.

Connecticut.— Smith *v.* Richards, 29 Conn. 232, the liability of another for damages in a civil suit.

Indiana.— Henry *v.* Ritenour, 31 Ind. 136.

Maine.— Seymour *v.* Prescott, 69 Me. 376; Thompson *v.* Gray, 63 Me. 228.

Massachusetts.— Whitney *v.* Clary, 145 Mass. 156, 13 N. E. 393, especially where the maker of the note was the only heir and administrator of the original debtor.

Minnesota.— Holm *v.* Sandberg, 32 Minn. 427, 21 N. W. 416.

Missouri.— Brainard *v.* Capelle, 31 Mo. 428.

New York.— Housatonic Nat. Bank *v.* Foster, 85 Hun (N. Y.) 376, 32 N. Y. Suppl. 1031, 66 N. Y. St. 435 (the discharge of a disputed claim); Stack *v.* Weatherwax, 52 Hun (N. Y.) 615, 5 N. Y. Suppl. 510, 24 N. Y. St. 90 (the satisfaction of a judgment); Fairbanks *v.* Sargent, 39 Hun (N. Y.) 588.

Canada.— See Dickenson *v.* Clernow, 7 U. C. Q. B. 421.

See 7 Cent. Dig. tit. "Bills and Notes," § 196.

The mere liability of one person for another is, before payment, a good consideration for a promissory note (Swift *v.* Crocker, 21 Pick. (Mass.) 241), and a check given for the debt of another has a valid consideration, although by reason of the non-payment of the check, the debt of the other was not extinguished (Fish *v.* Jacobsohn, 5 Bosw. (N. Y.) 514 [*affirmed* in 2 Abb. Dec. (N. Y.) 132, 1 Keyes (N. Y.) 539]).

47. *Alabama.*— Stoudenmire *v.* Ware, 48 Ala. 589 (although credited on the debtor's account); Bullock *v.* Ogburn, 13 Ala. 346 (the debt itself having no real existence in this case).

Indiana.— Tousey *v.* Taw, 19 Ind. 212; Bingham *v.* Kimball, 17 Ind. 396.

Maine.— Plummer *v.* Lyman, 49 Me. 229.

Minnesota.— Turle *v.* Sargent, 63 Minn. 211, 65 N. W. 349, 56 Am. St. Rep. 475.

Mississippi.— Wren *v.* Hoffman, 41 Miss. 616, in the hands of the payee.

Illustrations.—Thus a corporation officer is not liable on his individual note given for a debt of the corporation (Ward *v.* Barrows, 86 Me. 147, 29 Atl. 922; Sumwalt *v.* Ridgely, 20 Md. 107 ["Value received" not being sufficient in such case to satisfy the statute of frauds]; Rogers *v.* Waters, 2 Gill & J. (Md.) 64); a new partner for a note by the new firm given for a debt of the old firm without other consideration and without his consent (Friedman *v.* Engel, 93 Mo. App. 464, 67 S. W. 725); a married woman for her husband's debt (Alger *v.* Scott, 54 N. Y. 14; Williams *v.* Walker, 18 S. C. 577), although he had died insolvent and she had joined him in a note in his lifetime which created no legal liability (Coward *v.* Hughes, 1 Kay & J. 443); but it is otherwise if his liability was incurred as her agent and for her benefit (Morse *v.* Mason, 103 Mass. 560), and a note given by a wife not under disability to renew a note given by her husband while his estate is solvent is supported by a good consideration (Reily *v.* Dean, 36 Leg. Int. (Pa.) 304). So a husband cannot give his note for expenses incurred for his wife before her marriage by her guardian and during her minority. Eastwood *v.* Kenyon, 11 A. & E. 438, 4 Jur. 1081, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245. Nor a father for the expenses of his children while unlawfully kept away from him (Dodge *v.* Adams, 19 Pick. (Mass.) 429) or for his son's liability for money stolen, with no release by the payee (Conmey *v.* Macfarlane, 97 Pa. St. 361). Nor a volunteer for the debt of a deceased person who had no legal personal representatives. Nelson *v.* Searle, 1 H. & H. 456, 3 Jur. 290, 8 L. J. Exch. 305, 4 M. & W. 795 [*reversing* 6 Dowl. P. C. 684, 2 Jur. 745, 7 L. J. Exch. 202, 4 M. & W. 9].

Other debt satisfied.— Such a note is, however, binding, taken in satisfaction of the debt of another or if credit was originally given to the debtor at the request of the maker of the note. Crofts *v.* Beale, 11 C. B. 172, 15 Jur. 709, 20 L. J. C. P. 186, 73 E. C. L. 172. So moral obligation of B. a married woman, will support the sealed note of A, if B's debt be extinguished thereby (Leonard *v.* Duffin, 94 Pa. St. 218), especially if the note be expressed to be for "value received" (Lines *v.* Smith, 4 Fla. 47).

48. McIntire *v.* Yates, 104 Ill. 491 (partnership debt); Heywood *v.* Watson, 4 Bing. 496, 6 L. J. C. P. O. S. 72, 1 M. & P. 268, 13 E. C. L. 605.

49. Westphal *v.* Nevills, 92 Cal. 545, 28 Pac. 678.

50. Ridout *v.* Bristow, 1 Cr. & J. 231, 9 L. J. Exch. O. S. 48, 1 Tyrw. 84; Sowerby *v.* Butcher, 2 Cr. & M. 368, 3 L. J. Exch. 80, 4 Tyrw. 320; Baker *v.* Walker, 3 D. & L. 152, 14 L. J. Exch. 363, 14 M. & W. 465; Coombs *v.* Ingram, 4 D. & R. 211, 16 E. C. L. 194; Wilders *v.* Stevens, 15 L. J. Exch. 108, 15

moving from such other or from a third person to the maker,[51] but in the absence of such new consideration, the maker may take advantage of an agreement that he should not be held liable on his note given jointly with another for the other's debt.[52]

(b) With Forbearance. Forbearance to another debtor is a sufficient consideration for a bill or note to the creditor,[53] for an acceptance,[54] for an undertaking by indorsement or otherwise as surety,[55] or for a contract of guaranty.[56]

(c) With Novation. Where the new debtor is substituted by way of novation for the original debtor, there is a sufficient consideration for the new debtor's bill or note as for his own debt.[57]

M. & W. 208; Garnet *v.* Clarke, 11 Mod. 226; Poplewell *v.* Wilson, 1 Str. 264.

51. Thus A's note to C for B's debt to C and B's note to A. Gillett *v.* Ballou, 29 Vt. 296. So for A's debt to B and B's debt to C and in extinguishment of both debts. Harrod *v.* Black, 1 Duv. (Ky.) 180 (although the note given be greater than A's debt to B, and less than B's debt to C); South Boston Iron Co. *v.* Brown, 63 Me. 139 (although A's debt to B is contingent on the performance of B's agreement with him); Outhwite *v.* Porter, 13 Mich. 533 (irrespective of the adequacy of the consideration); Marsh *v.* Lisle, 34 Miss. 173 (although A had a good defense to the debt he owed to B); Cadens *v.* Teasdale, 53 Vt. 469, 38 Am. Rep. 697 (although A was insolvent at the time and C lost his debt by the substitution). Or the note may be made to D as C's appointee. Champlain First Nat. Bank *v.* Wood, 128 N. Y. 35, 27 N. E. 1020.

52. McCulloch *v.* Hoffman, 10 Hun (N. Y.) 133.

53. *Connecticut.*— Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170.

Iowa.— Atherton *v.* Marcy, 59 Iowa 650, 13 N. W. 759, even though it was not granted at the instance of the original debtor.

Maine.— Bradbury *v.* Blake, 25 Me. 397.

Massachusetts.— Robinson *v.* Gould, 11 Cush. (Mass.) 55; Jennison *v.* Stafford, 1 Cush. (Mass.) 168, 48 Am. Dec. 594. And even the individual note of the assignee in bankruptcy is supported by the forbearance of a suit against his co-assignee for misapplication of assets. Abbott *v.* Fisher, 124 Mass. 414.

Michigan.— Union Banking Co. *v.* Martin, 113 Mich. 521, 71 N. W. 867; Rood *v.* Jones, 1 Dougl. (Mich.) 188.

Minnesota.— Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70, 54 Am. St. Rep. 653, 30 L. R. A. 286; Nichols, etc., Co. *v.* Dedrick, 61 Minn. 513, 61 N. W. 1110 (new note executed as collateral).

Missouri.— Bell *v.* Simpson, 75 Mo. 485; Webster *v.* Switzer, 15 Mo. App. 346 (the individual note of a trustee for forbearance to the trust estate).

Nebraska.— Peoria Mfg. Co. *v.* Huff, 45 Nebr. 7, 63 N. W. 121; Smith *v.* Spaulding, 40 Nebr. 339, 58 N. W. 952.

New York.— Meltzer *v.* Doll, 91 N. Y. 365; Mechanics', etc., Bank *v.* Wixson, 42 N. Y. 438 (coupled with an agreement not to withdraw certain business); Paul *v.* Stevens, 57 Hun (N. Y.) 171, 10 N. Y. Suppl. 442, 32 N. Y. St. 851; Mechanics' Bank *v.* Nixon, 2 Alb. L. J. 50 (for collateral security).

North Carolina.— New Hanover Bank *v.* Bridges, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317.

Pennsylvania.— Silvis *v.* Ely, 3 Watts & S. (Pa.) 420.

Wisconsin.— Dolph *v.* Rice, 21 Wis. 590, holding that forbearance to principal will support the note of the agent.

England.— Ridout *v.* Bristow, 1 Cr. & J. 231, 9 L. J. Exch. O. S. 48, 1 Tyrw. 84, forbearance to the personal representative of a deceased debtor.

Forbearance of a partnership debt will support a note by the individual partners after dissolution of the firm (Randolph *v.* Peck, 1 Hun (N. Y.) 138), as will forbearance of a partner's individual debt (Bolln *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898). Forbearance to a corporation will support the individual note of its officers. Fulton *v.* Loughlin, 118 Ind. 286, 20 N. E. 796; Mechanics', etc., Bank *v.* Wixson, 42 N. Y. 438 [*affirming* 46 Barb. (N. Y.) 218]; Struthers *v.* Smith, 85 Hun (N. Y.) 261, 32 N. Y. Suppl. 905, 66 N. Y. St. 299; Sickles *v.* Herold, 15 Misc. (N. Y.) 116, 36 N. Y. Suppl. 488, 71 N. Y. St. 503.

54. Pierce *v.* Kittredge, 115 Mass. 374; Walker *v.* Sherman, 11 Metc. (Mass.) 170; Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458; Flanagan *v.* Mitchell, 16 Daly (N. Y.) 223, 10 N. Y. Suppl. 234, 32 N. Y. St. 303; Esling *v.* Zantsinger, 13 Pa. St. 50.

55. Hooper *v.* Pike, 70 Minn. 84, 72 N. W. 829, 68 Am. St. Rep. 512; Hall *v.* Clopton, 56 Miss. 555; Chaddock *v.* Vanness, 35 N. J. L. 517, 10 Am. Rep. 256; Meyers *v.* Hockenbury, 34 N. J. L. 346.

56. Worcester Mechanics' Sav. Bank *v.* Hill, 113 Mass. 25; Howard *v.* Jones, 13 Mo. App. 596 (where there was also an indemnity to the guarantor).

57. *Missouri.*— Brainard *v.* Capelle, 31 Mo. 428.

New Hampshire.— Horn *v.* Fuller, 6 N. H. 511.

New York.— Brewster *v.* Silence, 8 N. Y. 207 (the maker having originally indorsed a guaranty on the original note); Eleventh Ward Bank *v.* New York, etc., Fireproofing Co., 53 N. Y. App. Div. 631, 65 N. Y. Suppl. 770.

Tennessee.— Stainback *v.* Junk Bros. Lum-

(d) WITH RELEASE. Such debt becomes a sufficient consideration for the new note, if the original debtor is discharged by it,[58] if a lien upon his property is released,[59] or if the note of the original debtor is surrendered.[60] This does not, however, prevent a subsequent return to the original debtor on new consideration.[61]

(2) OF DECEDENT. A debt of the deceased is not of itself a sufficient consideration to support the personal liability of an executor or administrator on his note for it,[62] except so far as it is supplemented by assets of the decedent in the

ber, etc., Co., 98 Tenn. 306, 39 S. W. 530, a former indorser being also released.

England.— Crofts *v.* Beale, 11 C. B. 172, 15 Jur. 709, 20 L. J. C. P. 186, 73 E. C. L. 172, the credit having been given to him originally.

But it is not a valid novation if the new note is given without the assent of the original debtor, notwithstanding the note is made payable some time after the transaction, and the claim against the debtor is receipted and delivered to the maker. Stoudenmire *v.* Ware, 48 Ala. 589; Wilson *v.* Tucker, 64 Ind. 41.

58. *Alabama.*— Carpenter *v.* Murphree, 49 Ala. 84.

Indiana.— Crowder *v.* Reed, 80 Ind. 1; Harvey *v.* Laflin, 2 Ind. 477.

Kentucky.— Harrod *v.* Black, 1 Duv. (Ky.) 180, A's debt to the payee being set off against a smaller debt of the maker to A and the note being larger than the latter and less than the former.

Maine.— Seymour *v.* Prescott, 69 Me. 376 (a father's note, for discharge of his son's debt); Maine Mut. Mar. Ins. Co. *v.* Blunt, 64 Me. 95 (note of new firm in renewal of note of former firm).

Massachusetts.— Popple *v.* Day, 123 Mass. 520 (note of father for release of son from liability for a defalcation); Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61 (where a note was given by the guardian of a lunatic, the lunatic being discharged).

Minnesota.— Holm *v.* Sandberg, 32 Minn. 427, 21 N. W. 416, such new note constituting an original contract and not falling within the statute of frauds as to statement of consideration.

Missouri.— Meyers *v.* Van Wagoner, 56 Mo. 115.

New Hampshire.— Peterborough, etc., R. Co. *v.* Chamberlin, 44 N. H. 494; Horn *v.* Fuller, 6 N. H. 511.

New York.— Becker *v.* Fischer, 13 N. Y. App. Div. 555, 43 N. Y. Suppl. 685; Nickerson *v.* Howard, 19 Johns. (N. Y.) 113.

Vermont.— Bacon *v.* Bates, 53 Vt. 30, an acceptance, taken in discharge of the drawer's debt to the payee.

West Virginia.— Dages *v.* Lee, 20 W. Va. 584, the note of one partner and his wife for the debt of the firm, notwithstanding the creditor's failure to surrender the evidence of the partnership debt as agreed.

Question of fact.— The release of the original debt, for which a receipt is given at the time, is a question of fact for the jury. Russell *v.* Smith, 97 Ga. 287, 23 S. E. 5.

59. Magee *v.* Sand Creek Turnpike Co., 45 Ind. 366 [*following* Knarr *v.* Sand Creek Turnpike Co., 45 Ind. 278, the discharge of an assessment lien, although the payment of the lien was chargeable by agreement against a former owner]; Bradbury *v.* Blake, 25 Me. 397; Rust *v.* Hauselt, 46 N. Y. Super. Ct. 22 (the indorsement by a firm for the debt of one partner secured by a chattel mortgage on property held by, and released to, the firm).

60. *California.*— Scribner *v.* Hanke, 116 Cal. 613, 48 Pac. 714; Hobson *v.* Hassett, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193 (surrender being presumed from part payment of old note).

Indiana.— Wright *v.* Hughes, 13 Ind. 109.

Kansas.—Wright *v.* McKitrick, 2 Kan. App. 508, 43 Pac. 977.

Minnesota.— Osborne *v.* Doherty, 38 Minn. 430, 38 N. W. 111.

New York.— Queens County Bank *v.* Leavitt, 56 Hun (N. Y.) 647, 10 N. Y. Suppl. 194; Rome Sav. Bank *v.* Kramer, 19 N. Y. Wkly. Dig. 337. Although defendant who had indorsed the old note was not liable on it. Hayes *v.* Mestaniz, 9 Misc. (N. Y.) 705, 29 N. Y. Suppl. 1114, 61 N. Y. St. 729.

Tennessee.—Lookout Bank *v.* Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934, with other sureties. Notwithstanding that the notes were given in consideration of Confederate treasury notes, the surrender of the notes and the consequent release of the liability of the assignor "with recourse," was a valid consideration for new notes. Torbett *v.* Worthy, 1 Heisk. (Tenn.) 107.

United States.— Pauly *v.* O'Brien, 69 Fed. 460, notwithstanding a probable purpose on the payee's part to evade or defraud the bank examiner by taking the new note.

61. As by a new note in release of his substitute. Compton *v.* Blair, 27 Mich. 397.

62. *Kentucky.*— Rucker *v.* Wadlington, 5 J. J. Marsh. (Ky.) 238.

Massachusetts.— Hill *v.* Buckminster, 5 Pick. (Mass.) 391.

Michigan.— Teed *v.* Marvin, 41 Mich. 216, 2 N. W. 20, and payee not entitled to receive payment.

New York.— Troy Bank *v.* Topping, 9 Wend. (N. Y.) 273; Schoonmaker *v.* Roosa, 17 Johns. (N. Y.) 301; Ten Eyck *v.* Vanderpoel, 8 Johns. (N. Y.) 120.

Pennsylvania.— Paxson *v.* Nields, 137 Pa. St. 385, 27 Wkly. Notes Cas. (Pa.) 508, 20 Atl. 1016, 21 Am. St. Rep. 888.

Vermont.— Sowles *v.* Sowles, 10 Vt. 181.

See 7 Cent. Dig. tit. "Bills and Notes," § 197.

hands of his representative,[63] or forbearance[64] or release obtained from the creditor.[65] The same rule applies to a note given by the widow or by a distributee of the estate for a debt of the deceased husband or ancestor. If no assets are received from the estate such note is without consideration, whether executed by widow[66] or heir;[67] but a valuable interest in the estate or assets actually received from it will support such a note by the heir,[68] by the widow,[69] by a

63. Stevenson *v.* Edwards, 27 La. Ann. 302; Byrd *v.* Holloway, 6 Sm. & M. (Miss.) 199; McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687. And to that extent. Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70, 54 Am. St. Rep. 653, 30 L. R. A. 286; Boyd *v.* Johnston, 89 Tenn. 284, 14 S. W. 804. And the administrator may show that the note was given under a mistaken impression as to the extent of means in his hands, and that in fact there were no true assets to which the plaintiff had a right to look for payment. Smith *v.* Paris, 53 Mo. 274.

Administrator de son tort.—So as to assets in the hands of an administrator *de son tort*. French *v.* French, 91 Iowa 140, 59 N. W. 21.

64. Thompson *v.* Maugh, 3 Greene (Iowa) 342; Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215.

Forbearance may be implied from the surrender of intestate's note (Harrison *v.* McClelland, 57 Ga. 531), whether enforceable at law or not (Whitney *v.* Clary, 145 Mass. 156, 13 N. E. 393; Wilton *v.* Eaton, 127 Mass. 174), or from a promise to pay interest (Childs *v.* Monins, 2 B. & B. 460, 5 Moore C. P. 282, 23 Rev. Rep. 513).

65. Harrison *v.* McClelland, 57 Ga. 531; Wilton *v.* Eaton, 127 Mass. 174.

66. *Alabama.*— Hetherington *v.* Hixon, 46 Ala. 297, where the widow had signed husband's note as surety. *A fortiori* this is so where the note was obtained from the widow by false representations as to her liability. Maull *v.* Vaughn, 45 Ala. 134. On the other hand the surrender to a widow of a claim against her deceased husband, and the release of the husband's estate from all liability thereon has been held to be a sufficient consideration to uphold a note given by the widow in payment of the claim, although the husband's estate may have been absolutely insolvent at the time. Nowlin *v.* Wesson, 93 Ala. 509, 8 So. 800.

Massachusetts.— Williams *v.* Nichols, 10 Gray (Mass.) 83.

Mississippi.— Robertshaw *v.* Hanway, 52 Miss. 713, holding that where a firm debt has survived against the surviving partner, a note given for it by the deceased partner's widow is without valid consideration.

Nebraska.— Fellers *v.* Penrod, 57 Nebr. 463, 77 N. W. 1085, although widow had made partial payment.

New York.— Turner *v.* Sheridan, 32 Misc. (N. Y.) 233, 65 N. Y. Suppl. 791, although she had in the husband's lifetime given an invalid note as his surety.

Pennsylvania.— Kircher *v.* Sprenger, 4 Pa. Dist. 144. Notwithstanding forbearance by reason thereof to husband's insolvent estate. Paxson *v.* Nields, 137 Pa. St. 385, 20 Atl. 1016, 21 Am. St. Rep. 888.

See 7 Cent. Dig. tit. "Bills and Notes," § 197.

67. McElven *v.* Sloan, 56 Ga. 208; Schroeder *v.* Fink, 60 Md. 436; Peck *v.* Burwell, 48 Hun (N. Y.) 471, 1 N. Y. Suppl. 33, 16 N. Y. St. 471. Especially if the debt of the ancestor was barred by limitation at his death. Didlake *v.* Robb, 1 Woods (U. S.) 680, 7 Fed. Cas. No. 3,899.

But the distributee's note will bind him where the decedent's estate is thereby discharged (Bissinger *v.* Lawson, 57 Miss. 36), where the decedent's note is surrendered (Union, etc., Bank *v.* Jefferson, 101 Wis. 452, 77 N. W. 889), or if forbearance is thereby obtained for the estate on a mortgage given by the deceased (Blackwood *v.* Bowen, 43 Ill. App. 320).

68. Coldron *v.* Rhode, 7 Ind. 151; Whitney *v.* Clary, 145 Mass. 156, 13 N. E. 393 (sole heir and administrator; and original note surrendered); Nye *v.* Chace, 139 Mass. 379, 31 N. E. 736 (administrator and sole distributee). And where an executor, entitled to certain commissions, and having two years to close up an estate, delivered up certain assets to an heir, under an arrangement with the other heirs, before the expiration of such time, on receiving the heir's note for such commissions, there was a sufficient consideration for the note. Rickey *v.* Morrison, 69 Mich. 139, 37 N. W. 56.

69. French *v.* French, 91 Iowa 140, 59 N. W. 21. Especially if the estate is released (Hixon *v.* Hetherington, 57 Ala. 165 [*overruling* 46 Ala. 297]; Taylor *v.* Clark, (Tenn. Ch. 1895) 35 S. W. 442) and if she is also entitled to administer on it, and the creditor also relinquished his right to administration (Carpenter *v.* Page, 144 Mass. 315, 10 N. E. 853). So too where there was community property which came to the widow (Mull *v.* Van Trees, 50 Cal. 547), and where the widow elects to take under her husband's will as sole beneficiary and without administering on the estate proceeds to sell the assets and pay debts, a note given by her for a debt of testator, by which the time of payment is extended, has a sufficient consideration, although her election is afterward set aside and letters granted to an administrator *cum testamento annexo* to whom she is required to turn over the assets in her hands (Kayser *v.* Hodopp, 116 Ind. 428, 19 N. E. 297).

On the other hand mere temporary possession of her husband's estate, not derived in any way from the creditor, will not support

devisee of land which is liable by statute[70] or by the terms of the will[71] for the decedent's debts, by distributees under their agreement among themselves after decedent's death,[72] or by a devisee who has made himself liable by his promise to the decedent in his lifetime.[73]

(3) Of Near Relative or Ward. Even the debt of the maker's son, without release or forbearance, is not a sufficient consideration for the father's note.[74] So of the debt of the father, for the son's note,[75] or the debt of a ward, for the note of his guardian.[76]

(iv) *Indemnity.* Indemnity to a surety is sufficient consideration for a note made to him by his principal,[77] as is an indemnity to the creditors of a corporation which is made payee of the note.[78] But the maker cannot be interested as a

a note by her to him. Watson *v.* Reynolds, 54 Ala. 191.

70. Kayser *v.* Hodopp, 116 Ind. 428, 19 N. E. 297.

71. By special testamentary charge of the debt for which the note was given (Reynolds *v.* Reynolds, 92 Ky. 556, 13 Ky. L. Rep. 793, 18 S. W. 517) or of debts generally (McCormal *v.* Redden, 46 Nebr. 776, 65 N. W. 881, and estate released by creditor).

72. Egan *v.* Egan, 55 Hun (N. Y.) 610, 8 N. Y. Suppl. 899, 30 N. Y. St. 157, where the note was given by one distributee to another for her share of payments made by another under this agreement in excess of the assets of the estate. So a note for executor's commissions given under such an agreement and in his surrender of available assets in his hands. Rickey *v.* Morrison, 69 Mich. 139, 37 N. W. 56.

73. Buckingham *v.* Clark, 61 Conn. 204, 23 Atl. 1085.

74. Potter *v.* Earnest, 45 Ind. 416 (son liable for bastardy case but not released); Mansfield *v.* Corbin, 2 Cush. (Mass.) 151 (the son being then of age); Security Bank *v.* Bell, 32 Minn. 409, 21 N. W. 470 (son being insolvent); Conmey *v.* Macfarlane, 97 Pa. St. 361 (money stolen by the son but no threat or promise as to prosecution by the payee).

75. Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79 (for necessaries previously furnished to the father); McElven *v.* Sloan, 56 Ga. 208 (where the father had died bankrupt); Murphy *v.* Keyes, 39 N. Y. Super. Ct. 18 (where the note was for the payee's accommodation only).

76. Wright *v.* Byrne, 129 Cal. 614, 62 Pac. 176; Wren *v.* Hoffman, 41 Miss. 616 (guardian having no assets).

77. Filly *v.* Brace, 1 Root (Conn.) 507; Simmons Hardware Co. *v.* Thomas, 147 Ind. 313, 46 N. E. 645; Swift *v.* Crocker, 21 Pick. (Mass.) 241; Little *v.* Little, 13 Pick. (Mass.) 426. And the note may be given by the principal to the surety after the surety has incurred the liability and on his demand for a discharge. Mercer *v.* Lancaster, 5 Pa. St. 160.

It is also sufficient consideration for a note made to indemnify an indorser (Hapgood *v.* Wellington, 136 Mass. 217; Gardner *v.* Webber, 17 Pick. (Mass.) 407; Merchants', etc., Nat. Bank *v.* Cumings, 149 N. Y. 360, 44 N. E. 173), a note to an agent for liability incurred by him in his principal's business (Powell *v.* McCord, 121 Ill. 330, 12 N. E. 262), or a note made by one surety to his cosurety for his indemnity (Ayer *v.* Tilton, 42 N. H. 407).

Where such a note is given to two sureties to secure them against various joint liabilities and several liabilities as surety, their implied agreement to apply the proceeds of the note to such debts is sufficient consideration for the note. Hapgood *v.* Polley, 35 Vt. 649.

Conversely, the agreement to indemnify him is itself sufficient consideration to support the liability assumed by an accommodation joint maker (Rutledge *v.* Townsend, 38 Ala. 706), by a co-maker who signs the note after its delivery to the payee (Sargent *v.* Robbins, 19 N. H. 572), or by a third person who indorses a note for the maker before its delivery to the payee (Stone *v.* White, 8 Gray (Mass.) 589); but a note by the indorser to the accepter of a bill, after its payment by the accepter, is without consideration unless the indorsement was made for the purpose of saving the accepter harmless from his acceptance, and the note was given in pursuance of that understanding (Sowerwein *v.* Jones, 7 Gill & J. (Md.) 335).

Not conditional on payment.— The object of such indemnity being to secure against present liability as well as eventual damage, the right of recovery is said to be complete when the liability of the indorser or surety has become fixed. Filly *v.* Brace, 1 Root (Conn.) 507; Hapgood *v.* Wellington, 136 Mass. 217; Merchants', etc., Nat. Bank *v.* Cumings, 149 N. Y. 360, 44 N. E. 173 [*affirming* 79 Hun (N. Y.) 397, 29 N. Y. Suppl. 782, 61 N. Y. St. 345]; Belloni *v.* Freeborn, 63 N. Y. 383; Branch *v.* Howard, 4 Tex. Civ. App. 271, 23 S. W. 478. *Contra,* Borum *v.* Reed, 73 Mo. 461.

78. Thus a premium note given to a mutual insurance company under the statute to secure policy-holders in the company is upon sufficient consideration, although in anticipation of a policy to be issued (Maine Mut. Mar. Ins. Co. *v.* Farrar, 66 Me. 133; Maine Mut. Mar. Ins. Co. *v.* Blunt, 64 Me. 95; Howland *v.* Myer, 3 N. Y. 290; Hope Mut. L. Ins. Co. *v.* Perkins, 4 Rob. (N. Y.) 182 [*affirmed* in 38 N. Y. 404, 2 Abb. Dec. (N. Y.) 383]; Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158)

mere volunteer, without other interest or consideration, in furnishing indemnity against losses;[79] and in general if a note is given merely as indemnity against a loss which may ensue to the payee from a contemplated act of the maker, and the act is not done and the liability of loss not incurred, there will be no consideration for the note.[80]

b. Property — (I) *Property Purchased* — (A) *In General.* Property purchased is a sufficient consideration for commercial paper;[81] and an assignment of property will support an acceptance or note by the assignee for the assignor's debt.[82]

and although the company becomes insolvent before the issue of the policy (Howard *v.* Palmer, 64 Me. 86).

79. Dexter Sav. Bank *v.* Copeland, 77 Me. 263 (a note by the treasurer of a company given to secure it against losses for which he is in no way responsible); Agricultural Bank *v.* Robinson, 24 Me. 274, 41 Am. Dec. 385 (holding that where a note is made to a corporation to create apparent assets, a valid consideration is necessary at the time of making the contract; and that no injurious consequences to the parties or to others which may afterward happen from its use can constitute a legal consideration for it).

80. Iowa College *v.* Hill, 12 Iowa 462.

81. The consideration was sufficient where the paper was given for a certificate of stock in an incorporated company (Magee *v.* Sand Creek Turnpike Co., 45 Ind. 366; Knarr *v.* Sand Creek Turnpike Co., 45 Ind. 278), although of doubtful value (Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998), and although it was kept in the possession of the seller and on non-payment of the note was sold and the proceeds applied on the note (Wyatt *v.* Jackson, 55 Minn. 87, 56 N. W. 578); for a conveyance of land, to which the title was partly legal and partly equitable (Ervin *v.* Morris, 26 Kan. 664); for a license and royalties under a verbal assignment of a patent right, which vested in the assignee an equitable right to grant licenses and collect royalties (Burke *v.* Partridge, 58 N. H. 349); for an equity of redemption in land subject to a mortgage (Hoyt *v.* Bradley, 27 Me. 242; Fletcher *v.* Chase, 16 N. H. 38) and where the mortgage was assumed in the transfer but not yet delivered (Fitzgerald *v.* Barker, 13 Mo. App. 192), but the mortgagee's right to redeem from a sheriff's sale will not support a note to the mortgagor payable if he redeems (Jessup *v.* Trout, 77 Ind. 194); for bonds placed in the hands of the drawee with liberty to him to use them meanwhile, and to sell them on non-payment (Moore *v.* Ward, 1 Hilt. (N. Y.) 337); for goods sold with a condition that the title was not to pass until full payment (Fleetwood *v.* Dorsey Mach. Co., 95 Ind. 491); or for the beneficial interest in goods sold to a third person (McMorris *v.* Herndon, 2 Bailey (S. C.) 56, 21 Am. Dec. 515). So a note may be made to a wife for a deed from her husband (Rutland *v.* Brister, 53 Miss. 683), and the joinder of a wife in her husband's deed is sufficient consideration for a note to her (Friermood *v.* Pierce, 17 Ind. 461 [another note being surrendered which was given for a conveyance of the land without her signature]; Musselman *v.* Hays, 28 Ind. App. 360, 62 N. E. 1022; Graves *v.* Davenport, 50 Fed. 881 [property purchased with her money in his name]); a note may be made to the agent of the seller in consideration of his receipt for the amount of his commission, to operate as part payment of the purchase-money (Barcus *v.* Elliott, 95 Ind. 601), or in consideration of his share of the purchase-money reserved to him by agreement as a *del credere* agent (Eastman *v.* Brown, 32 Ill. 53), or by a lessee, after lease executed, and possession taken under it for a bonus for the lease and fixtures, in pursuance of a previous agreement (Austin *v.* Boyd, 24 Pick. (Mass.) 64).

The consideration was insufficient where the paper was given for possession of the maker's own goods which were wrongfully withheld (White *v.* Heylman, 34 Pa. St. 142), or for the delivery of a valuable paper, to which the person in possession had no claim, but which belonged to another, although the note was made payable to a third person (McCaleb *v.* Price, 12 Ala. 753); and the mere delivery of goods to one person upon the order of another will not furnish a consideration for a due-bill obtained by artifice from the person to whom the goods were delivered (Thayer *v.* Gallup, 13 Wis. 539). So of an agreement to sell land, the title to which was in another under option to the seller, the agreement reciting that the seller was "possessed and seized in fee" (Coburn *v.* Haley, 57 Me. 346), of the release of her homestead right by the wife where she subsequently acquires a new right of homestead in another estate (Nims *v.* Bigelow, 45 N. H. 343), or of a grant of the sole and exclusive right to sell and dispose of all goods manufactured by the patentee, under certain letters patent, in a certain county, the patentee being under no obligation to furnish the article for sale (Cool *v.* Cuningham, 25 S. C. 136).

82. Whether the assignee signs as original maker (Parsons *v.* Clark, 132 Mass. 569), as accepter (Olds Wagon-Works *v.* Coombs, 124 Ind. 62, 24 N. E. 589), or as an additional maker after delivery of the note (Arlington First Nat. Bank *v.* Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393).

A transfer of the assets of an old firm to the new firm will support a note given by the new partner to the retiring partner for his interest. Richardson *v.* Hinck, 48 N. Y. App. Div. 531, 62 N. Y. Suppl. 1073.

The assent of an insurance company to a transfer of a policy of insurance as security for A's indorsement will support A's indorsement of the policy-holder's note. Equitable Mar. Ins. Co. *v.* Adams, 173 Mass. 436, 53 N. E. 883.

The assignment of a contract with a rail-

So the mere quitclaim of an interest in land is sufficient,[83] and a note may be given as collateral for the payment for goods purchased;[84] but if the note is intended to be a mere receipt or memorandum of property transferred to the maker for a special purpose it may be without consideration in the payee's hands.[85] The note may be given for the sale of an improvement erected by permission on the lands of another,[86] or even, by way of estoppel, for an improvement erected on public lands,[87] or it may be for a right of entry on public

road company for the right to transfer freight and passengers across a river is a good consideration (Early *v.* Reed, 60 Mo. 528), as is the assignment of a contract wherein the payee had really no assignable interest, the maker having derived therefrom all the advantages of an operative assignment (Hudson *v.* Busby, 48 Mo. 35).

83. Bonney *v.* Smith, 17 Ill. 531; Monson *v.* Tripp, 81 Me. 24, 16 Atl. 327, 10 Am. St. Rep. 235; Billingsley *v.* Niblett, 56 Miss. 537.

A deed for the payee's "right, title, and interest" is sufficient (Doyle *v.* Knapp, 4 Ill. 334; Abbott *v.* Chase, 75 Me. 83), in the absence of fraud (Perkins *v.* Bumford, 3 N. H. 522), although such interest turns out to be valueless (Clark *v.* Sigourney, 17 Conn. 511; Mullen *v.* Hawkins, 141 Ind. 363, 40 N. E. 797). So a note to A by B who claimed under his warranty deed will be supported by a subsequent quitclaim obtained by A from a judgment creditor, the quitclaim title inuring to B only by way of estoppel under the warranty to him (Bachelder *v.* Lovely, 69 Me. 33), and where the note was given for the purpose and the outstanding title purchased by the grantor, it is a sufficient consideration for the note, notwithstanding that under the covenants in his deed any subsequently acquired title would inure to the grantee's benefit; and the latter will not be allowed to set up ignorance of the law in that respect (Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270).

The assignment of a sheriff's certificate of sale of real property to the purchaser is a sufficient consideration for a promissory note (Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656), although subject to an unexpired right of redemption (Ward *v.* Packard, 18 Cal. 391).

A release of dower is a sufficient consideration for a note, although the dower was afterward forfeited by a divorce for adultery (Nichols *v.* Nichols, 136 Mass. 256), notwithstanding the fact that it may be defeated by an earlier trust deed in which she had joined with her husband (Sykes *v.* Chadwick, 18 Wall. (U. S.) 141, 21 L. ed. 824), and even if made after divorce in compliance with a previous agreement (Chapin *v.* Chapin, 135 Mass. 393), or released before it has been assigned (Todd *v.* Beatty, Wright (Ohio) 460).

Claim to homestead.— It is sufficient if a claim to homestead as a settler on public lands is released (Moore *v.* McIntosh, 6 Kan. 39; Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852), relinquished to the government so as to enable the maker to locate the land (McCabe *v.* Caner, 68 Mich. 182, 35 N. W. 901), or transferred to the maker (Savoy *v.* Brewton, 3 Tex. Civ. App. 336, 22 S. W. 585). This is not a valid consideration, however, after the entry has been abandoned. McCollum *v.* Edmonds, 109 Ala. 322, 19 So. 501.

The release of a tax-title which was afterward held by the courts to be void is sufficient. Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115.

The ultra vires sale of a ferry franchise by a municipal corporation has been held to be sufficient consideration for a note. Carpenter *v.* Minturn, 6 Lans. (N. Y.) 56.

The surrender of possession of lands by one in possession under a *bona fide* claim of some interest therein is a sufficient consideration (Harms *v.* Aufield, 79 Ill. 257), although the maker of the note had already obtained an arbitrator's award entitling him to possession (Hall *v.* Brown, 15 Johns. (N. Y.) 194). It has been held, however, that a sale and conveyance of real estate in the adverse possession of a third person, made by commissioners under an order of court in a suit for partition, is not a valid consideration for a note given for the purchase-money. Martin *v.* Pace, 6 Blackf. (Ind.) 99.

84. Fenby *v.* Pritchard, 2 Sandf. (N. Y.) 151. So the assignment of a bill of lading, although the cargo covered by it proved to be of very little value. Kelly *v.* Lynch, 22 Cal. 661.

85. Flowers *v.* Flowers, 17 Ky. L. Rep. 1374, 34 S. W. 1071 (a note given for claims assigned by the payee to the maker for collection and never collected); Doan *v.* Moss, 20 Mo. 297 (a note intended as a mere receipt for goods deposited with the maker to indemnify him as security for a debt of the payee).

86. Washband *v.* Washband, 24 Conn. 500; Freeman *v.* Holliday, Morr. (Iowa) 80.

87. The maker of the note taking the land warrant in his name. Sherrer *v.* Bullock, 23 Ark. 729; Lapham *v.* Head, 21 Kan. 332; Brooks *v.* Hiatt, 13 Nebr. 503, 14 N. W. 480. So even for an improvement located on the section which, by act of congress, was vested in townships for school purposes, since the sale is operative only as to the improvement, and has no effect on the title to the land (Hughes *v.* Sloan, 8 Ark. 146), and the act of congress giving the president power to direct the settler's removal does not invalidate a sealed note given for improvements made by him on public lands (Hill *v.* Smith, Morr. (Iowa) 70). Other cases have held

lands.[88] The sale of the property may even be in violation of a condition in the title deed, not yet forfeited by reëntry,[89] or subject to a statutory penalty under a license.[90] The property may have been sold with a repugnant condition in the transfer instrument itself, inserted by mistake or fraud,[91] with a taint of fraud in the original contract, afterward made valid by transfer to a *bona fide* holder,[92] or after breach by the seller of another contract of sale which was more favorable to the maker of the note.[93] Or the note may have been given to a selling agent who had no authority to give credit.[94]

(B) *Title and Value.* There must be a real or supposed value to the right or thing transferred at the time of transfer,[95] as well as a transferable right or interest in the transferrer[96] and a valid transfer.[97] If, however, the property sold is a valid object of ownership it is sufficient. It may be an intangible right, such as an expected profit released;[98] it may be a contingent and future interest in land;[99] or the note may be given for a subscription to stock of an incorporated

a note for such sale to be valid, if coupled with the sale of an inchoate homestead or other possessory right (Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852) or of a right of preëmption (Bryan *v.* Glass, 6 La. Ann. 740, 54 Am. Dec. 576; Norman *v.* Ellis, 5 La. Ann. 693).

In some of the earlier cases it was held that the sale of an improvement made by a settler on public lands could not be treated as a valid consideration for a note (Duncan *v.* Hall, 9 Ala. 128; Merrell *v.* Legrand, 1 How. (Miss.) 150), especially where there was no right of preëmption (Lindsey *v.* Sellers, 26 Miss. 169) and where the improvements were trifling, and were not made by the payee and the note was in fact made to induce him not to bid on the land (Messenger *v.* Miller, 2 Pinn. (Wis.) 60). So too where the pretended vendor is a mere trespasser. Stafford *v.* Anders, 8 Fla. 34.

88. Thompson *v.* Hanson, 28 Minn. 484, 11 N. W. 86. But not where it has been already abandoned. McCollum *v.* Edmonds, 109 Ala. 322, 19 So. 501. So too a mining claim. Smith *v.* Gillen, 52 Ark. 442, 12 S. W. 1073, although coupled with a subscription to a proposed corporation which was never organized.

89. Spear *v.* Fuller, 8 N. H. 174, 28 Am. Dec. 391, where a note was assigned notwithstanding a covenant against assignment.

90. Rahter *v.* Lancaster First Nat. Bank, 92 Pa. St. 393, where whisky was sold by a distiller under a broker's license.

91. As where the condition avoided the deed if the note were paid at the time mentioned. Hodsdon *v.* Smith, 14 N. H. 41.

92. Payson *v.* Whitcomb, 15 Pick. (Mass.) 212.

93. Goebel *v.* Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723.

94. Andover *v.* Kendrick, 42 N. H. 324.

95. Thus where C gave his note to B for B's share of the claim of B and C against A, it is sufficient, although it was given on receipt by C of A's note for the entire claim, which proved to be worthless. Harvey *v.* Laflin, 2 Ind. 477.

96. The agreement to convey a public land patent is sufficient in spite of an outstanding receipt held by another for a payment made on the land many years before. Long *v.* Allen, 2 Fla. 403, 50 Am. Dec. 281.

97. **To a party capable at law** and not therefore at common law, a sale to a married woman (Little *v.* Shee, 2 B. & Ad. 811, 1 L. J. K. B. 12, 22 E. C. L. 341), although this is now in general sufficient (Williams *v.* Wishard, 1 Colo. App. 212, 28 Pac. 20). So too a married woman's note as surety for her husband, obtained by threat of litigating her title to the land mortgaged by her as security for the note (Warey *v.* Forst, 102 Ind. 205, 26 N. E. 87), notwithstanding desertion by her husband and ratification by her after divorce (Hayward *v.* Barker, 52 Vt. 429, 36 Am. Rep. 762); but in general the renewal of a married woman's note after the removal of the disability of coverture is for a sufficient consideration (Goulding *v.* Davidson, 26 N. Y. 604; Barton *v.* Beer, 35 Barb. (N. Y.) 78; Spitz *v.* Fourth Nat. Bank, 8 Lea (Tenn.) 641; Hubbard *v.* Bugbee, 55 Vt. 506, 45 Am. Rep. 637).

By due authority.— Where the agreement was by an unauthorized agent, but it was afterward ratified by the principal, it is sufficient. Saco Mfg. Co. *v.* Whitney, 7 Me. 256.

98. Smock *v.* Pierson, 68 Ind. 405, 34 Am. Rep. 269; Corkery *v.* Boyle, 8 Mart. N. S. (La.) 130 (coupled with a surrender by the salesman to his principal, who made the note, of the goods out of which the contemplated profit was to be made); Searing *v.* Tye, 4 E. D. Smith (N. Y.) 197.

99. Brooks *v.* Wage, 85 Wis. 12, 54 N. W. 997. This is true of an expectancy in the estate of the payee's deceased father, although the estate proves to be insolvent on settlement in court (Jackson *v.* Carnell, 2 Pa. Co. Ct. 488; Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682); but it is doubtful whether this is true of a release of the expectancy in the estate of a living person, without his knowledge and assent (Poor *v.* Hazleton, 15 N. H. 564), and it has been held that a note given by the father to a son, on condition of the son's relinquishing his interest in the father's estate, is without sufficient consideration (Loring *v.* Sumner, 23 Pick. (Mass.) 98).

company[1] or to the capital of the maker's firm,[2] or in payment of initiation or membership fees in a society.[3] But the property sold cannot be wholly without legal title or value,[4] such as a supposed interest or right of the payee which has no existence;[5] the privilege of selling an article which is open to public sale by everyone;[6] the transfer of an untransferable license;[7] or a transfer which is prohibited by law.[8]

1. *Illinois.*— Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

Iowa.— Des Moines Valley R. Co. *v.* Graff, 27 Iowa 99, 1 Am. Rep. 256, where the consideration was the completion of the railroad for which it was given.

Massachusetts.— Farmers', etc., Bank *v.* Jenks, 7 Metc. (Mass.) 592.

Missouri.— And a note given for stock is not deprived of its negotiable character by the fact that it is held as part of a trust fund representing the capital of the corporation. Alexander *v.* Rollins, 84 Mo. 657 [*affirming* 14 Mo. App. 109].

Pennsylvania.— Penn Safe Deposit, etc., Co. *v.* Kennedy, 175 Pa. St. 160, 34 Atl. 659, 660.

West Virginia.— Kimmins *v.* Wilson, 8 W. Va. 584.

Contra, if payment of subscription by note is prohibited by statute (Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522; Boyer *v.* Fenn, 19 Misc. (N. Y.) 128, 43 N. Y. Suppl. 533) or if the stock is issued illegally (Jefferson *v.* Hewitt, 103 Cal. 624, 37 Pac. 638), although a fictitious increase of stock in violation of the statute which doubled the capital will support a note for half of its face value by a subscribing stockholder with knowledge of the character of the issue (Beitman *v.* Steiner, 98 Ala. 241, 13 So. 87).

Note discounted to enable cash payment.— A note which is discounted by the corporation for the maker and credited to his account to enable him to pay his stock subscription in cash, and so charged to him, is valid, although discounted under agreement that it and similar notes of other stockholders should not be binding on them, unless they elected to take the stock. Cowles *v.* Gridley, 24 Barb. (N. Y.) 301.

The renewal of a note given for stock subscription to a banking corporation is valid, although by statute the bank is allowed to invest in United States securities only. Little *v.* Obrien, 9 Mass. 423.

2. Kimmins *v.* Wilson, 8 W. Va. 584. On the other hand a note given by a partner to his copartner, as collateral security for the capital advanced by the latter, is without consideration to support it (Stafford *v.* Fargo, 35 Ill. 481), although he might give a valid note for the money advanced by the other partner to pay his own, the maker's, share (Talmadge *v.* Stretch, (Cal. 1884) 4 Pac. 15). Or partnership notes may be given to the wife of one partner for advances made by her and used in the business, although made on account of her husband's share. Spalding *v.* Cargill, 53 N. Y. Super. Ct. 453.

3. Middlesex Husbandmen, etc., Soc. *v.* Davis, 3 Metc. (Mass.) 133; Goree *v.* Wilson, 1 Bailey (S. C.) 597. But a note has been held invalid when given for an initiation fee to an officer of a benevolent society (Nash *v.* Russell, 5 Barb. (N. Y.) 556) or of an unincorporated masonic lodge (Nightingale *v.* Barney, 4 Greene (Iowa) 106).

4. See *supra*, III, B, 1, b.

If the deed is void it is not a sufficient consideration. Monson *v.* Tripp, 81 Me. 24, 16 Atl. 327, 10 Am. St. Rep. 235. So too where a debtor conveyed land in fraud of his creditors and afterward to give color to the transaction made his note for the reconveyance which had been originally agreed on (Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498) and the payee must prove his title if the maker shows a *prima facie* adverse title (Benson *v.* Files, 70 Ark. 423, 68 S. W. 493).

5. Russell *v.* Wright, 98 Ala. 652, 13 So. 594. As where the note was given for the payee's "legal right to cut timber," he having no such right (Swanger *v.* Mayberry, 59 Cal. 91; Long *v.* Hopkins, 50 Me. 318), or where the note was given for payee's "equitable title" to certain real estate in which he had no title, either legal or equitable (Jones *v.* Shaver, 6 Mo. 642); and a note given as the consideration for the sale of land held adversely at the time of sale is a violation of the law of Kentucky against champerty (Breckinridge *v.* Moore, 3 B. Mon. (Ky.) 629), and formerly of the New York statute against buying and selling a pretended title (Whitaker *v.* Cone, 2 Johns. Cas. (N. Y.) 58), although this is not now the case (Vallett *v.* Parker, 6 Wend. (N. Y.) 615). On the other hand it is no defense to a note given for the price of stones delivered that the vendor, although in possession, had no title to the land from which they were taken, since the true owner has no action against the purchaser. Rhoades *v.* Patrick, 27 Pa. St. 323.

6. Schroeder *v.* Nielson, 39 Nebr. 335, 57 N. W. 993.

7. Strahn *v.* Hamilton, 38 Ind. 57.

8. As the sale of Indian lands to a citizen of the United States (Jarvis *v.* Campbell, 23 Kan. 370; Vickroy *v.* Pratt, 7 Kan. 238; Chaffee *v.* Garrett, 6 Ohio 421) or a note for lands covered by the act of April, 1795, prohibiting intrusions on certain funds under the Connecticut title (Mitchell *v.* Smith, 4 Dall. (Pa.) 269, 1 L. ed. 828). So a conveyance by a married woman which is void at law and gives no remedy on the covenants therein will not support a note. Fowler *v.* Shearer, 7 Mass. 14.

Mere possession under a void contract is

(II) *Paper Exchanged.* Notes exchanged form a sufficient consideration for one another,[9] and this is true also of an exchange of checks or bills[10] or of a note for a letter of credit.[11] The notes exchanged need not be for the same amount,[12] and such contract of exchange may be between a firm and one of its partners.[13] In such exchange each note or bill is an independent obligation, not conditioned on the payment of the other,[14] unless such condition is expressed in it;[15] but non-payment of the other obligation may be available as a set-off between

not sufficient. Sorrels *v.* McHenry, 38 Ark. 127.

9. *California.*— Sinkler *v.* Siljan, 136 Cal. 356, 68 Pac. 1024, partly maker's debt, partly payee's note.

Indiana.— Farber *v.* National Forge, etc., Co., 140 Ind. 54, 39 N. E. 249; Brant *v.* Barnett, 10 Ind. App. 653, 38 N. E. 421.

Kentucky.— Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199.

Maryland.— Williams *v.* Banks, 11 Md. 198, if such affirmatively appears to have been the intention of the parties, and that will depend on the particular circumstances of each case.

Massachusetts.— Backus *v.* Spaulding, 116 Mass. 418; Whittier *v.* Eager, 1 Allen (Mass.) 499; Higginson *v.* Gray, 6 Metc. (Mass.) 212; Eaton *v.* Carey, 10 Pick. (Mass.) 211.

New Jersey.— Savage *v.* Ball, 17 N. J. Eq. 142. But if the note given by the payee was given to a married woman as a mere cover with an understanding that it should not be used, it will not support her note which was given in fact as accommodation for a third party without benefit to her. Vliet *v.* Eastburn, 63 N. J. L. 450, 43 Atl. 741.

New York.— Lock Haven State Bank *v.* Smith, 155 N. Y. 185, 49 N. E. 680; Rice *v.* Grange, 131 N. Y. 149, 30 N. E. 46, 42 N. Y. St. 707; Cohu *v.* Husson, 113 N. Y. 662, 21 N. E. 703, 23 N. Y. St. 504 [*affirming* 57 N. Y. Super. Ct. 238, 6 N. Y. Suppl. 897]; Newman *v.* Frost, 52 N. Y. 422; Cobb *v.* Titus, 10 N. Y. 198; McSpedon *v.* Troy City Bank, 3 Abb. Dec. (N. Y.) 133, 2 Keyes (N. Y.) 35 [*affirming* 33 Barb. (N. Y.) 81]; Bassett *v.* Bassett, 55 Barb. (N. Y.) 505; Mickles *v.* Colvin, 4 Barb. (N. Y.) 304; Odell *v.* Greenly, 4 Duer (N. Y.) 358; Wooster *v.* Jenkins, 3 Den. (N. Y.) 187. But a note given in consideration of the sale of another note void for usury is without consideration. Sweet *v.* Spence, 35 Barb. (N. Y.) 44.

Pennsylvania.— Kern's Estate, 171 Pa. St. 55, 33 Atl. 129; Newbold *v.* Bernard, 15 Pa. Co. Ct. 118.

England.— Rose *v.* Sims, 1 B. & Ad. 521, 9 L. J. K. B. O. S. 85, 20 E. C. L. 583; Hornblower *v.* Proud, 2 B. & Ald. 327, 20 Rev. Rep. 456; Kent *v.* Lowen, 1 Campb. 179 note; Buckler *v.* Buttivant, 3 East 72; Rolfe *v.* Caslon, 2 H. Bl. 570; Spooner *v.* Gardiner, R. & M. 84, 21 E. C. L. 707; Cowley *v.* Dunlop, 7 T. R. 565.

See 7 Cent. Dig. tit. "Bills and Notes," § 174.

It is immaterial that one note was returned unused, unless it was intended as a mere receipt for the other. Iowa College *v.* Hill, 12 Iowa 462.

Neither maker is surety for the other in any exchange of notes. Stickney *v.* Mohler, 19 Md. 490.

Neither note is an accommodation note (Dockray *v.* Dunn, 37 Me. 442), although made for the mutual accommodation of the parties (Farber *v.* National Forge, etc., Co., 140 Ind. 54, 39 N. E. 249), and therefore it may be proved as a debt in bankruptcy (*In re* London, etc., Bank, L. R. 9 Ch. 686, 43 L. J. Bankr. 683, 31 L. T. Rep. N. S. 234, 22 Wkly. Rep. 809).

The note of one party is a good consideration for an acceptance by the other. Seymour *v.* Malcolm McDonald Lumber Co., 58 Fed. 957, 16 U. S. App. 245, 7 C. C. A. 593.

A certificate of deposit is a good consideration for a note discounted in bank. Mississippi R. Co. *v.* Scott, 7 How. (Miss.) 79. So too a bank certificate of deposit given for worthless paper fraudulently foisted upon it by an interested director. Murray *v.* Pauly, 56 Fed. 962.

10. Checks exchanged.—Shannon *v.* Horley, 32 Misc. (N. Y.) 623, 66 N. Y. Suppl. 471; Rankin *v.* Knight, 1 Cinc. Super. Ct. (Ohio) 515.

Bill exchanged for note.— Where, in exchange for a promissory note, the payee draws and delivers to the maker a bill of exchange for the same amount, such bill is a good consideration for the note. Newman *v.* Frost, 52 N. Y. 422.

11. Without proof of any payment on the letter. Duncan *v.* Gilbert, 29 N. J. L. 521.

12. Higginson *v.* Gray, 6 Metc. (Mass.) 212.

13. Leonard *v.* Robbins, 13 Allen (Mass.) 217.

14. Notes exchanged by makers. Cohu *v.* Husson, 113 N. Y. 662, 21 N. E. 703, 23 N. Y. St. 504 [*affirming* 14 Daly (N. Y.) 200, 6 N. Y. St. 292]; Wooster *v.* Jenkins, 3 Den. (N. Y.) 187. So of a note by A exchanged for the note of a third party transferred by B (Padfield *v.* Padfield, 68 Ill. 210; Rice *v.* Grange, 131 N. Y. 149, 30 N. E. 46, 42 N. Y. St. 707 [*affirming* 14 N. Y. Suppl. 911, 39 N. Y. St. 163], or transferred and indorsed by B (Luke *v.* Fisher, 10 Cush. (Mass.) 271; Rice *v.* Grange, 14 N. Y. Suppl. 911, 39 N. Y. St. 163) or a note of A exchanged for an acceptance by B (Stoney *v.* Joseph, 1 Rich. Eq. (S. C.) 352).

15. Hall *v.* Henderson, 84 Ill. 611.

the original parties.[16] So too the transfer by one of a note or draft held by him is sufficient consideration for a note by the purchaser to him.[17]

c. Services — (1) *In General.* Services are in like manner a sufficient consideration, if rendered in expectation of payment,[18] but not if they were rendered gratuitously[19] or have been already paid for,[20] and the service must be a valuable one.[21] A bill or note may be given for services as counsel,[22] as legal instructor,[23]

16. Backus *v.* Spaulding, 116 Mass. 418. And see *infra*, XIV, B [8 Cyc.].

17. White *v.* Springfield Bank, 3 Sandf. (N. Y.) 222; Wilson *v.* Denton, 82 Tex. 531, 18 S. W. 620, 27 Am. St. Rep. 908. Notwithstanding a contemporaneous written agreement between the parties to the transfer that the transferred note should not be enforced until demand made for payment of the new note (Morton *v.* Noble, 15 Ind. 508), or a contemporaneous promise by the payee of the new note that it should not be demanded until the notes transferred by him to the maker of the new note should be collected (Taggart *v.* Rice, 37 Vt. 47). So the transfer by A to C of notes made by B at B's request and at a reduced price will support B's note to A for the balance (Howell *v.* Wright, 41 Hun (N. Y.) 167), and even the transfer of a voidable note given by an infant is a sufficient consideration to uphold another note given for its purchase (Baldwin *v.* Van Deusen, 37 N. Y. 487); but if the note transferred is itself void for usury it will not make a valid consideration nor become valid by being transferred at a legal rate (Sweet *v.* Chapman, 7 Hun (N. Y.) 576).

18. *Connecticut.*—Clark's Appeal, 57 Conn. 565, 19 Atl. 332, board and nursing.

Illinois.— Forbes *v.* Williams, 13 Ill. App. 280, a note to a niece for "sundry services and acts of kindness."

Indiana.— Price *v.* Jones, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303. So for a wife's service as clerk in husband's store under Indiana statute. Roche *v.* Union Trust Co., (Ind. 1899) 52 N. E. 612.

New Jersey.— Petty *v.* Young, 43 N. J. Eq. 654, 12 Atl. 392, domestic service by a member of the family.

Oregon.— Baines *v.* Coos Bay, etc., R., etc., Co., (Oreg. 1902) 68 Pac. 397.

Time of giving note.— The note is for valuable consideration, although given before the time fixed for such payment. Ould *v.* Myers, 23 Gratt. (Va.) 383.

Necessity of previous express promise to pay.— The validity of a note given for services is not affected by the fact that the services were rendered without an express promise to pay. Root *v.* Strang, 77 Hun (N. Y.) 14, 28 N. Y. Suppl. 273, 59 N. Y. St. 258. An understanding for compensation will be implied in such case from the giving of the note (Petty *v.* Young, 43 N. J. Eq. 654, 12 Atl. 392), and after the termination of the legal obligation arising out of the relation of the parties, e. g., services rendered by a daughter to her father, after she came of age (Gamwell *v.* Mosely, 11 Gray (Mass.) 173; Petty *v.* Young, 43 N. J. Eq. 654, 12 Atl. 392; *In re* Sutch, 201 Pa. St. 305, 50 Atl. 943). So a note for the maintenance of the maker's minor child, supported by a preliminary agreement, although the child had been legally adopted by the payee and surrendered to his father when the note was given. Clayton *v.* Whitaker, 68 Iowa 412, 27 N. W. 296.

19. Forbes *v.* Williams, 15 Ill. App. 305 (the services being slight and the note in effect a gift); Fuller *v.* Lambert, 78 Me. 325, 5 Atl. 183; Hulse *v.* Hulse, 17 C. B. 711, 25 L. J. C. P. 177, 4 Wkly. Rep. 239, 84 E. C. L. 711. So a note given by a married woman to a builder for a barn already built on her land has no sufficient consideration if the building was erected by the order, and on the account and credit of, the husband, although it would be otherwise if the credit was given to her and he acted only as her agent (Morse *v.* Mason, 103 Mass. 560); but a note in favor of an employee, payable at the maker's death, although said sum be not legally due, will not be a mere gift, if it appear that the note has for its consideration the natural obligation in favor of the employee arising out of his long services to the maker (Barthe *v.* Lacroix, 29 La. Ann. 326, 29 Am. Rep. 330).

20. Whether given as a gratuity for services already rendered paid for as agreed (Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595) or extorted by an agent to secure possession of papers withheld after completion of services and payment (White *v.* Heylman, 34 Pa. St. 142).

21. Thus "conjuring" a sick man to cure him is not a valid consideration for a promissory note. Cooper *v.* Livingston, 19 Fla. 684.

The value of services to a corporation may be fixed by the directors under an agreement for "reasonable compensation." National Loan, etc., Co. *v.* Rockland Co., 94 Fed. 335, 36 C. C. A. 370.

22. Barton *v.* Farmers', etc., Nat. Bank, 122 Ill. 352, 13 N. E. 503. Although an action would not lie for the fees (Mowat *v.* Brown, 19 Fed. 87), and although given before decision of the case and in disregard of the terms of their agreement for a contingent fee when the suit is decided and after employing another lawyer for the case (Kelly *v.* Ledoux, 11 La. Ann. 689); but not for services to the maker while acting as adverse counsel for the maker's wife in regard to the divorce suit pending between them (MacDonald *v.* Wagner, 5 Mo. App. 56).

23. Knowles *v.* Parker, 7 Metc. (Mass.) 30, although the instructor was a member of the bar of another state and not of the state where the studying was done and certified to.

as promoter,[24] as a broker in selling goods,[25] for the resignation of office in a private corporation,[26] for the procurement of information for the maker,[27] or for obtaining a pardon for one convicted of crime, although this has been questioned on grounds of public policy.[28]

(II) *Against Public Policy.* On the other hand some services are plainly against public policy and insufficient to form a good consideration. Of this character are lobby services in procuring legislation.[29] But where valuable services have been actually rendered to the maker by slaves and the maker gave his note for their hire, courts have enforced it, although emancipation had already taken effect in law,[30] and took effect in fact during the term of hiring.[31]

d. Executory Agreements. Any valid executory agreement is a sufficient consideration for commercial paper.[32] The agreement forming the consideration

24. Smith *v.* New Hartford Water Co., 73 Conn. 626, 48 Atl. 754, services and expenses in organizing and procuring the incorporation of a company.

25. Eastman *v.* Brown, 32 Ill. 53; Barcus *v.* Elliott, 95 Ind. 601 (holding that the buyer may give a note to the seller's agent, given as part of the purchase-money and received and credited by the agent on account of commissions from the seller); Burrill *v.* Parsons, 71 Me. 282.

26. Peck *v.* Requa, 13 Gray (Mass.) 407.

27. Lucas *v.* Pico, 55 Cal. 126; Chandler *v.* Mason, 2 Vt. 193.

28. Meadow *v.* Bird, 22 Ga. 246; McGill *v.* Burnett, 7 J. J. Marsh. (Ky.) 640. So *a fortiori* where the sentence is a nullity because pronounced by an unlawful court. Thompson *v.* Wharton, 7 Bush (Ky.) 563, 3 Am. Rep. 306.

29. Rose *v.* Truax, 21 Barb. (N. Y.) 361; Harris *v.* Roof, 10 Barb. (N. Y.) 489; Clippinger *v.* Hepbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; Burke *v.* Child, 21 Wall. (U. S.) 441, 22 L. ed. 623; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 334, 14 L. ed. 953.

30. Upshaw *v.* Booth, 37 Tex. 125; Tobler *v.* Stubblefield, 32 Tex. 188.

31. Leslie *v.* Langham, 40 Ala. 524. But this case turned on the point that partial failure was no defense, and the contrary was held where the negro died before service rendered and the amendment to the United States constitution was already adopted. Pitts *v.* Allen, 72 Ga. 69.

32. *California.*—Baldwin *v.* Hart, 136 Cal. 222, 68 Pac. 698, executory agreement and loan.

Connecticut.— A contract for land which was in terms to be void on default in payment of the note. Bacon *v.* Pettibone, 2 Root (Conn.) 284; Bacon *v.* Porter, 1 Root (Conn.) 370.

Georgia.— Booty *v.* Brazier, 22 Ga. 20, for maintenance of third person.

Illinois.— Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620, a promise by a wife to pay the husband's debt to his partner on the partner's extension of the partnership for a new term.

Indiana.— Davis *v.* Meisner, 127 Ind. 343, 26 N. E. 829, signing an appeal-bond for maker.

Kentucky.— Smith *v.* Meek, 85 Ky. 46, 8 Ky. L. Rep. 647, 2 S. W. 650, a verbal agreement to purchase the payee's life-estate at the public sale.

Massachusetts.— Turner *v.* Rogers, 121 Mass. 12 (the payee's assumption of another note of the maker); Myers *v.* Phillips, 7 Gray (Mass.) 508 (an agreement by one for a conveyance of land then held by himself and another); Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387.

Michigan.— Marskey *v.* Turner, 81 Mich. 62, 45 N. W. 644, a contract of insurance conditioned to be void on non-payment of the note.

Minnesota.— Wyatt *v.* Jackson, 55 Minn. 87, 56 N. W. 578, contract to transfer stock.

Missouri.— Wislizenus *v.* O'Fallon, 91 Mo. 184, 3 S. W. 837 (promise to pay a debt that has been discharged); Russell *v.* Barcroft, 1 Mo. 514 (the assignment of an agreement to convey); Bent *v.* Brainard, 1 Mo. 283 (the agreement of the payee of a note to produce an order from the maker's creditor for the amount thereof).

New Hampshire.— Crawford *v.* Robie, 42 N. H. 162.

New York.— Carman *v.* Pultz, 21 N. Y. 547 (contract for land); Purchase *v.* Mattison, 6 Duer (N. Y.) 587; Weill *v.* Close, 18 N. Y. Suppl. 328, 44 N. Y. St. 662 (a conveyance made in execution of a parol assignment of the contract).

Pennsylvania.— Smith *v.* Hogeland, 78 Pa. St. 252, a contract for land which the accommodation indorser agreed to purchase if the maker did not.

Texas.— Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735, contract for land and possession under it.

United States.— Lane *v.* Dyer, 2 Cranch C. C. (U. S.) 349, 14 Fed. Cas. No. 8,050, contract for land.

But in Drury *v.* Macaulay, 16 L. J. Exch. 31, 16 M. & W. 146, it was held that an executory contract was an insufficient consideration where the note was expressly conditioned on its performance.

The paper will be supported by an agreement to deliver a deed (Carman *v.* Pultz, 21 N. Y. 547), although the payee does not own the land as he supposed (Trask *v.* Vinson, 20 Pick. (Mass.) 105), although the title is not to pass until final payment of the price (Daniels *v.* Stone, 6 Blackf. (Ind.) 450; Mc-

therefor may be for future services to be rendered[33] or it may relate to things having no pecuniary value, such as a pledge to abstain from intoxicating drink[34] or from injurious remarks,[35] a promise of marriage,[36] a promise not to leave home,[37] or a promise to name a child after the maker of the note[38] or to

Math *v.* Johnson, 41 Miss. 439), or even though the note was delivered to the payee in violation of an agreement between the maker and his depositary that it should not be delivered until the payee had performed the agreement on his part which was part of the consideration for the note (Stewart *v.* Anderson, 59 Ind. 375); to transfer an interest in other notes (Seymour *v.* Malcolm McDonald Lumber Co., 58 Fed. 957, 16 U. S. App. 245, 7 C. C. A. 593); to sell goods (Hawley *v.* Bingham, 6 Oreg. 76) with an indorsement on the note that the payee should pay it, if the goods were not delivered before its maturity (Maas *v.* Chatfield, 90 N. Y. 303); to do certain work (Waterhouse *v.* Kendall, 11 Cush. (Mass.) 128; Walker *v.* Millard, 29 N. Y. 375); or by a policy of insurance which is to be void by its terms on non-payment of the note (Robinson *v.* American Ins. Co., 51 Ark. 441, 11 S. W. 686, 4 L. R. A. 251) or is to take effect only on payment of the note (Marskey *v.* Turner, 81 Mich. 62, 45 N. W. 644), although the agreement may have become inoperative without the fault of the payee (Booty *v.* Brazier, 22 Ga. 20) or the maker afterward pays for the performance of the agreement by the payee (Phile's Estate, 14 Phila. (Pa.) 330, 38 Leg. Int. (Pa.) 478), but it is a failure of consideration, if the policy is to be of no effect unless the premium is paid in cash (Dunham *v.* Morse, 158 Mass. 132, 32 N. E. 1116, 35 Am. St. Rep. 473).

For benefit of third party.— The agreement may be for the benefit of a third party. Horton Bank *v.* Brooks, 64 Kan. 285, 67 Pac. 860; Bender *v.* Pryor, 31 Tex. 341 (holding that an agreement by a mortgagee not to oppose the confirmation of an administrator's sale of land is a sufficient consideration for the execution of a promissory note by the purchaser). *Contra*, an agreement to purchase the worthless stock of the maker and discontinue a proceeding against the company in which he held the stock. Benner *v.* Van Norden, 27 La. Ann. 473.

Valid between parties, invalid against creditors.— The transfer of a note may be supported by an executory agreement and be valid between the parties but invalid as a fraud upon the creditors of the indorser. Cross *v.* Brown, 51 N. H. 486.

For performance of duty.— A note given after marriage to induce the wife to live with her husband is not for valid consideration (Roberts *v.* Frisby, 38 Tex. 219), and in general a nugatory agreement to perform one's existing legal obligation will not be a valid consideration for a new note (Gates *v.* Renfroe, 7 La. Ann. 569; Manhattan Brass Co. *v.* Gilman, 20 Misc. (N. Y.) 690, 46 N. Y. Suppl. 685; Kenigsberger *v.* Wingate, 31 Tex. 42, 98 Am. Dec. 512) or on a note to a surety to induce him to satisfy a lien on the maker's building, against which the surety has signed a bond for his indemnity (Blyth *v.* Robinson, 104 Cal. 239, 37 Pac. 904). So the payee's unconditional agreement to accept the maker's note and his subsequent refusal to do so without an indorser is no consideration for the indorsement of the note at the time of delivery by a third person. Harvey *v.* Ayres, 37 Misc. (N. Y.) 164, 74 N. Y. Suppl. 883. On the other hand an agreement of the payee to live with his wife, if he is entitled to put her away, and also to support the maker's putative child, whose mother the payee has married, is a valid consideration. Brannum *v.* O'Connor, 77 Iowa 632, 42 N. W. 504. A note given by a husband to secure his wife's return to him and to settle a divorce suit brought by her is valid. Phillips *v.* Meyers, 82 Ill. 67, 25 Am. Rep. 295; Adams *v.* Adams, 24 Hun (N. Y.) 401.

33. Although rendered without any prior obligation to render them. Miller *v.* McKenzie, 95 N. Y. 575, 47 Am. Rep. 85. But not where the services are to be rendered gratuitously (Fuller *v.* Lumbert, 78 Me. 325, 5 Atl. 183; Hulse *v.* Hulse, 17 C. B. 711, 25 L. J. C. P. 177, 4 Wkly. Rep. 239, 84 E. C. L. 711) or to a third person (Hathaway *v.* Roll, 81 Ind. 567).

34. Lindell *v.* Rokes, 60 Mo. 249, 21 Am. Rep. 395.

35. As from speaking of the maker's criminal intimacy with the payee's wife. Wells *v.* Sutton, 85 Ind. 70.

36. It must be made before and in consideration of marriage. Wright *v.* Wright, 54 N. Y. 437 [*affirming* 59 Barb. (N. Y.) 505]; Banfield *v.* Rumsey, 2 Hun (N. Y.) 112, 4 Thomps. & C. (N. Y.) 322; Arms *v.* Arms, 13 N. Y. St. 196. So delay by a man to fulfil a promise to marry, and services rendered to him by the woman during the engagement in purchasing and taking care of his clothing, are a sufficient consideration for a promissory note given by him to her (Prescott *v.* Ward, 10 Allen (Mass.) 203), but a mere expectation, on the part of the payee, that the maker would marry her is not a sufficient consideration for a promissory note (Raymond *v.* Sellick, 10 Conn. 480).

37. Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428, notwithstanding a memorandum that it was to make the amount the same as that of another of the grandsons. But an indefinite verbal promise by a father to give his son some land if he would remain at home will not support a note given in satisfaction thereof. Head *v.* Baldwin, 83 Ala. 132, 3 So. 293.

38. Wolford *v.* Powers, 85 Ind. 294, 44 Am. Rep. 16 (where it was coupled with the promisor's agreement that, if the child were so named, he would provide for its education and support); Diffenderfer *v.* Scott, 5 Ind. App. 243, 32 N. E. 87; Eaton *v.* Libbey, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep.

emancipate a slave.[39] It may be an agreement to support the maker's child[40] or wife,[41] to pay his debts,[42] to assume as principal a debt of the maker for which he was then liable secondarily as an accommodation indorser,[43] to join the maker in contesting a will,[44] or to furnish a life-insurance policy.[45] It may be an agreement to secure a certain location for a public institution[46] or a railroad,[47] or the note may be given by a municipality in aid of the construction of a local railroad,[48] or by a stock-holder to enable his corporation to certify that its stock is paid up.[49] But the agreement must be made to one who has a substantial interest in the subject-matter, which is capable of enforcement.[50] It has even been held that a verbal agreement, not enforceable under the statute of frauds, is voidable only and is therefore a sufficient consideration for the note.[51] As in the case of an exchange of notes, the instrument given is not conditioned on the performance of the agreement for which it was given,[52] and an agreement

511 (a note given to the child in pursuance of a promise to the parents to pay the child a certain sum for the privilege of naming him).

39. Although the payee making the promise was not the sole owner of the slave. Thompson *v.* Thompson, 4 B. Mon. (Ky.) 502.

The emancipation of a slave will support a note given by the slave after such emancipation. Smith *v.* Parker, 3 Cranch C. C. (U. S.) 654, 22 Fed. Cas. No. 13,087.

40. Allyn *v.* Allyn, 108 Ind. 327, 9 N. E. 279 (a note to the mother for the support of their bastard child); Brannum *v.* O'Connor, 77 Iowa 632, 42 N. W. 504 (the maker's putative child, the payee having married its mother).

41. Day *v.* Cutler, 22 Conn. 625, although this was the case of a note given to a trustee for the support of the maker's wife to satisfy the statute and enable the maker to obtain a legislative divorce.

42. Turner *v.* Rogers, 121 Mass. 12; Huhon *v.* Park, 116 Mass. 541.

43. Cushing *v.* Gore, 15 Mass. 69.

44. Austell *v.* Rice, 5 Ga. 472, with an agreement to release a legacy and to compromise a claim against the estate.

45. Franklin L. Ins. Co. *v.* Cardwell, 65 Ind. 138. So where the note was for a balance found due between partners with a policy of insurance as collateral and an agreement for continuing the partnership. Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620 [*affirming* 27 Ill. App. 121].

46. Wisner *v.* McBride, 49 Iowa 220. Especially where it is shown that the payee was at expense and trouble in effecting such location (Bryan *v.* Dyer, 28 Ill. 188), but not to accomplish such object by influencing a public election (Herman *v.* Edson, 9 Nebr. 152, 2 N. W. 368).

47. Cedar Rapids First Nat. Bank *v.* Hendrie, 49 Iowa 402, 31 Am. Rep. 153, if not against public interest. So a note promising to pay to a railroad company a certain sum when the company shall have constructed and kept in operation for one year its railroad between two towns named. Rose *v.* San Antonio, etc., R. Co., 31 Tex. 49.

48. Wright *v.* Irwin, 35 Mich. 347. So for work in construction of a canal in agreed instalments payable on completion of sections, although the whole work was never finished or serviceable. Perkins County *v.* Graff, 114 Fed. 441, 52 C. C. A. 243.

49. So a valid note may be given by a stock-holder for the use of the company (Reed *v.* Pueblo First Nat. Bank, 23 Colo. 380, 48 Pac. 507) or to reinforce its assets (Dykman *v.* Keeney, 16 N. Y. App. Div. 131, 45 N. Y. Suppl. 137); but a bank cannot recover against the maker on a note which was given merely to make a colorable and fraudulent appearance of larger assets than the bank really had (Tagg *v.* Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479), although its receiver may recover on a note given by a corporation officer to the bank to take up the note of a stranger, for the purpose as stated by the officers, of getting the old note "out of the past-due notes," whether the transaction was real or merely a trick to deceive the government, creditors, and stock-holders (Pauly *v.* O'Brien, 69 Fed. 460).

50. Thus a promise by a lot owner to build a hotel on it made to one interested only as an inhabitant of the town will not support an extension by him of a note of the promisor. Hogan *v.* Crawford, 31 Tex. 633.

51. Gillespie *v.* Battle, 15 Ala. 276 (especially where the maker takes possession under the agreement); Schierman *v.* Beckett, 88 Ind. 52; Kratz *v.* Stocke, 42 Mo. 351; Raubitschek *v.* Blank, 80 N. Y. 478. So it has been held that a binding note may be given as indemnity against the maker's nonperformance of such parol agreement (Schnecko *v.* Meier, 4 Mo. App. 566), but this has been denied as to the maker's own contract (Weatherley *v.* Choate, 21 Tex. 272) and as to the contract of one who indorses over the note of a third person for such security (Rice *v.* Peet, 15 Johns. (N. Y.) 503. *Contra*, Cameron *v.* Tompkins, 72 Hun (N. Y.) 113, 25 N. Y. Suppl. 305, 55 N. Y. St. 537).

52. *Louisiana.*— Sadler *v.* White, 14 La. Ann. 177.

Massachusetts.— Jackman *v.* Doland, 116 Mass. 550; Traver *v.* Stevens, 11 Cush. (Mass.) 167; Waterhouse *v.* Kendall, 11 Cush. (Mass.) 128; Pitkin *v.* Frink, 8 Metc. (Mass.) 12.

Michigan.— English *v.* Yore, 119 Mich. 444, 78 N. W. 476.

New York.— McSpedon *v.* Troy City Bank,

to convey land, unlike the conveyance of land, forms a sufficient consideration, irrespective of the validity of the title which the grantor has.[53]

e. Release — (i) *In General.* A note or bill may be given in consideration of a release from a liability already incurred[54] or to be incurred.[55] It may be the release or rescission of a contract[56] or the release or rescission of some stipulation

3 Abb. Dec. (N. Y.) 133, 2 Keyes (N. Y.) 35 [*affirming* 33 Barb. (N. Y.) 81]; Purchase *v.* Mattison, 6 Duer (N. Y.) 587.

Ohio.— Keen *v.* Hall, 31 Ohio St. 107, especially where there was a further consideration in a release of mortgage executed by the payee.

Pennsylvania.— Bockoven *v.* National Mechanics', etc., Bank, 11 Wkly. Notes Cas. (Pa.) 570.

Vermont.— Chapman *v.* Eddy, 13 Vt. 205.

England.— Watson *v.* Russell, 3 B. & S. 34, 113 E. C. L. 34.

But where the note is non-negotiable and the action is brought after default in the agreement, the payee must at least show his willingness to perform his agreement. Madison First Nat. Bank *v.* Spear, 12 S. D. 108, 80 N. W. 166.

53. Dyer *v.* Burnham, 25 Me. 9 (holding that if one makes a written contract, as agent of another, for the conveyance of an interest in lands on the payment of a promissory note which is given as the consideration therefor, and the contract does not bind the principal to make the conveyance, but the agent is personally responsible for damages for the breach of the contract, the payment of the note cannot, for that cause, be avoided for want of consideration); Trask *v.* Vinson, 20 Pick. (Mass.) 105 (although at the date of the contract the land belongs to another, it being afterward conveyed to the payee); Guthrie *v.* Jones, Rice (S. C.) 444; Lane *v.* Dyer, 2 Cranch C. C. (U. S.) 349, 14 Fed. Cas. No. 8,050.

54. *Arkansas.*— Sykes *v.* Lafferry, 27 Ark. 407, holding that where a party has a valid, subsisting claim of legal right, and waives it at the instance or request of another, such waiver is a sufficient consideration to sustain a promissory note made by such other.

Georgia.— Lyons *v.* Stephens, 45 Ga. 141, a note given to settle an action for breach of warranty, where the breach of warranty was in the sale of a slave, and the note was distinguished from one for the price of the slave.

Massachusetts.— Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314 (waiver of a breach of contract); Dean *v.* Skiff, 128 Mass. 174 (waiver of the maker's breach of promise of marriage); Prescott *v.* Ward, 10 Allen (Mass.) 203 (waiver of unreasonable delay in performing a promise of marriage); Jenkins *v.* Williams, 16 Gray (Mass.) 158.

New Hampshire.—Moody *v.* Leavitt, 2 N. H. 171, for breach of covenants.

New York.— Hauxhurst *v.* Ritch, 53 Hun (N. Y.) 632, 6 N. Y. Suppl. 134, 24 N. Y. St. 729, holding that a note may be given in settlement of a casual injury to a tenant and part owner by reason of an unexpected early sale of the property by the maker of the note.

Ohio.— Keen *v.* Hall, 31 Ohio St. 107, the release of a mortgage assumed by the maker, although coupled with an unperformed contract of sale by the payee.

Tennessee.— Tradesmen's Nat. Bank *v.* Looney, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830, the release of a right of action for overdrawing the maker's account.

Wyoming.— Barrett *v.* Mahnken, 6 Wyo. 541, 48 Pac. 202, 71 Am. Rep. 953, although made under threats which do not amount to legal duress.

The note must in all cases be made to someone who legally represents the liability. Thus it may be to a partner who on dissolution of the firm has taken an assignment of claims in its favor (Leonard *v.* Robbins, 13 Allen (Mass.) 217); but a note could not be made to the road superintendent for fines and tolls due by the maker (Hunter *v.* Field, 20 Ohio 340).

55. Moody *v.* Leavitt, 2 N. H. 171, holding that a note given contemporaneously with an agreement as security for its performance, and to be canceled on its performance, is a bar to a suit on the agreement and is supported by a valid consideration.

56. *Alabama.*— Lea *v.* Cassen, 61 Ala. 312, holding that the rescission of an illegal contract on which money has been paid will support a note given for a return of the money.

Louisiana.— Trisconi *v.* Dumas, 26 La. Ann. 477, a waiver of payee's contract right to prohibit the establishment of a mercantile business in a room adjoining his.

Massachusetts.— Crombie *v.* McGrath, 139 Mass. 550, 2 N. E. 100, the release of articles of apprenticeship which were good at common law but not in compliance with the statute.

Ohio.— Smith *v.* McKinney, 22 Ohio St. 200, holding that the release of the maker's obligation, after maturity, to pay the note in coin is a sufficient consideration for a new promise to pay the face in legal tender, plus fifty per cent, which was less than the market premium on coin.

Pennsylvania.— Nesbit *v.* Bendheim, 15 N. Y. Suppl. 300, the release of the maker's acceptance payable out of instalments maturing on a binding contract, coupled with a withdrawal of objections to the work of the payee of the acceptance.

Effect of fraud.— A note is invalid if given for the surrender of a contract obtained by fraud (Montgomery *v.* Morris, 32 Ga. 173), in settlement of a compromise induced by fraud and already executed in fact (Dodge *v.* Manchester, 58 Ind. 429), or to take up a former fraudulent note in the hands of a *bona fide* holder, although the making of the new note was induced by fraudulent repre-

therein,[57] the settlement of mutual accounts,[58] the waiver of a fraud,[59] the release from liability for a tort,[60] the discontinuance or withdrawal of legal proceedings[61]

sentations as to the amount paid for the former note (Murphy *v.* Lucas, 58 Ind. 360).

57. As of the insurance clause in a mortgage. Farmer *v.* Perry, 70 Iowa 358, 30 N. W. 752. And a recovery may be had on a note given in settlement of a contract and for the amount due on it, although the contract was subsequently broken and failed as an entirety. Thorpe *v.* White, 13 Johns. (N. Y.) 53.

58. Phelps *v.* Younger, 4 Ind. 450, without fraud.

59. Harwood *v.* Johnson, 20 Ill. 367 (fraudulent representations by purchaser and steps taken by vendor to reclaim); Doherty *v.* Bell, 55 Ind. 205 (note originally induced by fraud ratified by the indorsee by an extension). So the release of a right to avoid a compromise obtained by false representations will support a note for the balance due on the debt. Crans *v.* Hunter, 28 N. Y. 389.

60. As for a conversion of personal property by the maker (Massie *v.* Byrd, 87 Ala. 672, 6 So. 145) or an assault committed (Mathison *v.* Hanks, 2 Hill (S. C.) 625) or instigated (Walbridge *v.* Arnold, 21 Conn. 424) by him.

A note given by the father to the mother of a bastard child for its support is valid (Hook *v.* Pratt, 78 N. Y. 371, 34 Am. Rep. 539 [*affirming* 14 Hun (N. Y.) 396]), but it cannot be given for the damages to the mother by the seduction, for which the mother has no right of action (Heaps *v.* Dunham, 95 Ill. 583; Cline *v.* Templeton, 78 Ky. 550). On the other hand it has been held that a note given in settlement of a civil suit for seduction pending against the maker is supported by a consideration, although the action for which it was given in settlement could not have been sustained; as the compensation of the payee for her injury is a valid consideration, independent of the suit compromised. Smith *v.* Richards, 29 Conn. 232.

Although they exceed the probable amount of injury inflicted, promissory notes given in satisfaction of a personal injury inflicted on the payee have a sufficient consideration to support them in law, and will not be set aside unless a compromise of the public offense was included as a part of the consideration (Whitenack *v.* Ten Eyck, 3 N. J. Eq. 249), and it is no defense to a suit on a promissory note that defendant gave the note in ignorance of the law, believing himself to be liable for an injury done by his runaway team, when he was not so liable (Bennett *v.* Ford, 47 Ind. 264) or that the payee's right to recover interest was doubtful (Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588).

Tort of third person.— In general A's note for a tort by B is not of itself sufficiently supported (Conmey *v.* Macfarlane, 97 Pa. St. 361), but a father may give a valid note for the son's release from arrest on a charge of assault on the payee's son (Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170). Under the New Jersey statute as to suretyship by a married woman a wife cannot give her note for an assault committed by her husband, even to prevent publicity and prosecution and to secure his release (Mawhinney *v.* Cassio, 63 N. J. L. 412, 43 Atl. 676), but a wife may in general give her note for a debt of her husband with threatened prosecution for fraud (Waters *v.* White, (Conn. 1902) 52 Atl. 401; Whelpley *v.* Stoughton, 119 Mich. 314, 78 N. W. 137).

The note for release of a tort must be made to the party injured and not, for instance, to the mother of a child in consideration of her not prosecuting the maker for assault and battery of her child. Heast *v.* Sybert, Cheves (S. C.) 177. So a note given by a master, and payable to the treasurer of the town, in discharge of a claim for ill-treating his apprentice, is without consideration. Vinalhaven *v.* Ames, 32 Me. 299. But a note may be made to a father as trustee for his married daughter on her discontinuance of proceedings. Adams *v.* Adams, 91 N. Y. 381, 43 Am. Rep. 675 [*affirming* 24 Hun (N. Y.) 401].

61. **The discontinuance of a pending action** is sufficient consideration (Jones *v.* Rittenhouse, 87 Ind. 348; Commercial Bank *v.* Bonner, 13 Sm. & M. (Miss.) 649), the note being for what was supposed to be the amount for which defendant was liable (Rains *v.* Lee, 18 Ky. L. Rep. 285, 36 S. W. 176), and even the withdrawal of a suit upon a note for fifteen hundred dollars alleged by defendants to be forged is a sufficient consideration for a note for ten hundred dollars (Grant *v.* Chambers, 30 N. J. L. 323). So too is a valid consideration for notes given by one who had misappropriated moneys received by him as assignee in bankruptcy that the payee refrained from pressing to a result proceedings against him instituted to protect the interests of the creditors (Abbott *v.* Fisher, 124 Mass. 414) and the stay of an ejectment suit and writ of restitution (Davis *v.* Rice, 88 Ala. 388, 6 So. 751) or the settlement of a suit on a note given for a stock subscription (Magee *v.* Badger, 30 Barb. (N. Y.) 246) is sufficient. Discontinuance of a pending action is sufficient, although the original action might have failed, provided it was brought in good faith (Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201), but it is not sufficient, after the matter in controversy has been released and the action dismissed to give a note in consideration of the previous release (Pendleton *v.* Pendleton, 1 Thomps. & C. (N. Y.) 95).

The withdrawal of a caveat to a will is sufficient (Seaman *v.* Seaman, 12 Wend. (N. Y.) 381), but a note given for the withdrawal of a caveat filed to an application for a public road, the matter being one of public interest, is against public policy and invalid (Smith *v.* Applegate, 23 N. J. L. 352).

Attachment or lien released.— The release

or the prevention of threatened proceedings,[62] or the discharge of a judgment in whole[63] or in part.[64]

(11) *Claim Barred by Limitation.* Claims barred by limitation may constitute a valid consideration for a bill or note,[65] although this may not be true

of an attachment is sufficient. Bozeman *v.* Rushing, 51 Ala. 529; Gage *v.* Pike, Smith (Ind.) 145; Haynes *v.* Thom, 28 N. H. 386; Hackett *v.* Pickering, 5 N. H. 19. So if the payee parted with a right which he had under an attachment of land by omitting to levy thereon in consequence of the note (Bradbury *v.* Blake, 25 Me. 397) or with his possession held under a claim of lien adversely to a pending chattel mortgage foreclosure, which was thereupon dismissed (McMahon *v.* Plummer, 6 Dak. 42, 50 N. W. 480); and of the release of a possible defense to a pending attachment (New York First Nat. Bank *v.* Morris, 1 Hun (N. Y.) 680), the return of an execution (about to be levied) satisfied (Sanders *v.* Atkinson, 1 Tex. App. Civ. Cas. § 1325), or even, it has been held, the satisfaction of an execution levy which was void because the property did not belong to the judgment debtor (Randall *v.* Farnham, 36 Me. 86). *Contra*, as to the discharge of an execution which was void (Lackay *v.* Curtis, 41 N. C. 199) or the release of property seized for tolls under an unconstitutional law (Carson River Lumbering Co. *v.* Patterson, 33 Cal. 334).

Discharge from arrest.— A release from arrest (Waterman *v.* Barratt, 4 Harr. (Del.) 311), the release of the maker's son from arrest on a capias and discontinuance of suit (Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170), or the release of the maker's husband from arrest, and an agreement to discontinue a pending suit against him, and consent of discontinuance filed with the clerk (Van Campen *v.* Ford, 53 Hun (N. Y.) 636, 6 N. Y. Suppl. 139, 25 N. Y. St. 464) is sufficient.

The discontinuance of a divorce proceeding is a sufficient consideration. Adams *v.* Adams, 91 N. Y. 381, 43 Am. Rep. 675 [*affirming* 24 Hun (N. Y.) 401].

The compromise of bastardy proceedings is sufficient (Merritt *v.* Flemming 42 Ala. 234 [although the child was afterward stillborn]; Robinson *v.* Crenshaw, 2 Stew. & P. (Ala.) 276; Taylor *v.* Dansby, 42 Mich. 82, 3 N. W. 267 [an indemnity being given against further trouble]; Haven *v.* Hobbs, 1 Vt. 238, 18 Am. Dec. 678; Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812); and it has been held will support a note by the putative father of the child to the father of the girl (Cutter *v.* Collins, 12 Cush. (Mass.) 233), but not to a public officer without her consent (Wheelwright *v.* Sylvester, 4 Allen (Mass.) 59. But in New Hampshire a note and mortgage given by a person prosecuted by a town as the father of illegitimate children to one of the selectmen of said town, in compromise and settlement of said prosecution, are valid and binding as against his subsequent attaching creditor. Hoit *v.* Cooper, 41 N. H. 111).

62. This is true of a promise not to institute legal proceedings against the maker for a past-due debt (Lewis *v.* Rogers, 34 N. Y. Super. Ct. 64), defendant being then a voluntary bankrupt (Meltzer *v.* Doll, 91 N. Y. 365); or of an agreement not to file a lien on an owner's lot (Lavell *v.* Frost, 16 Mont. 93, 40 Pac. 146), not to take proceedings against a defaulting principal's interest in a partnership for moneys embezzled by the defaulter (Bolln *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898), not to contest an administrator's sale (Bender *v.* Pryor, 31 Tex. 341), or not to commence bastardy proceedings (Medcalf *v.* Brown, 77 Ind. 476), especially where there is also the consideration of the child's support (Jackson *v.* Finney, 33 Ga. 512; Hays *v.* McFarlan, 32 Ga. 699, 79 Am. Dec. 317; Burgen *v.* Straughan, 7 J. J. Marsh. (Ky.) 583); and both maker and surety are bound by a note given in consideration of the payee's agreement as cosurety with the maker on a guardianship bond that he would take no proceeding against the maker's property, he being about to remove from the state, the note being for the maker's estimated share of the liability on the bond (Blankenship *v.* Nimmo, 50 Ala. 506).

63. Brown *v.* Ladd, 144 Mass. 310, 10 N. E. 839 (where a judgment was discharged and consent given to the entry of judgment in another state and that a party summoned as trustee should be allowed to pay the funds in his hands to a claimant); Boyd *v.* Cummings, 17 N. Y. 101 (judgment paid and supplementary proceedings discontinued); Sternbergh *v.* Provoost, 13 Barb. (N. Y.) 365 (where the note was made to the sheriff who, to relieve himself from laches, had paid the judgment and taken a transfer of it). So the satisfaction of a judgment, and the extinguishment of its statutory lien, together with the loss of the liability of the sureties on the appeal-bond, are ample consideration for a promissory note (Smith *v.* Price, 2 Heisk. (Tenn.) 293), and a judgment recovered by the United States is a sufficient consideration for a note given by the judgment debtor to the district attorney in satisfaction of the judgment, although the satisfaction was not entered upon the record (Livingston *v.* Hastie, 2 Cai. (N. Y.) 246).

64. McClees *v.* Burt, 5 Metc. (Mass.) 198, holding that a note given for half the amount of the judgment, half being receipted for, is valid.

65. *California.*—Mull *v.* Van Trees, 50 Cal. 547, holding that where the widow is executrix of the estate of the deceased husband and the estate is community property, so that she has an interest in the same, and she gives her own note for a debt of the deceased husband, which is outlawed, under the mistaken opinion that it is not outlawed,

as to the guaranty by a stranger of a third person's note that is already barred.[66]

(III) *Claim Already Discharged.* A claim which has been discharged by act of law may be the consideration for a new note or bill. This is true as to an insolvent or bankrupt discharge,[67] although not as to an execution against the body, which operates as a payment,[68] and in general where a claim has been voluntarily discharged or paid it cannot be made the basis of a new obligation,[69] and

there is a sufficient consideration to support the note.

Illinois.— Whittaker *v.* Crow, 132 Ill. 627 24 N. E. 57, holding that a note that is barred will support a promise indorsed on it for a less amount.

Kentucky.— Buckner *v.* Clark, 6 Bush (Ky.) 168, although when the note was given the maker did not know that the debt was barred.

Louisiana.— Matthews *v.* Williams, 25 La. Ann. 585, holding that a debt barred by the statute will support a note of the debtor's son. *Contra,* Clement *v.* Sigur, 29 La. Ann. 798 (a note given by a guardian to his ward and formally approved by the court); Brierly *v.* Johns, 28 La. Ann. 245.

Massachusetts.— Miles *v.* Linnell, 97 Mass. 298 (holding that the liability of a surety on a note barred by the statute will support a fresh guaranty); Way *v.* Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779.

Vermont.— Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682.

England.—Eastwood *v.* Kenyon, 11 A. & E. 438, 4 Jur. 1081, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245; Wennall *v.* Adney, 3 B. & P. 247, 6 Rev. Rep. 780; La Touche *v.* La Touche, 3 H. & C. 576, 11 Jur. N. S. 271, 34 L. J. Exch. 85, 11 L. T. Rep. N. S. 773, 13 Wkly. Rep. 563; Hyleing *v.* Hastings, 1 Ld. Raym. 389; Dean *v.* Crane, 6 Mod. 309.

But the note will be avoided if the debt was brought within the statute by fraudulent receipts indorsed on the original note. Cross *v.* Herr, 96 Ind. 96. So too of a note in settlement of a tort by the payee which was barred (Peterson *v.* Breitag, 88 Iowa 418, 55 N. W. 86, crim. con.), and an agreement on the part of an apprentice to refrain from filing a claim against the estate of his deceased master will not support a note given to him by the widow, if the claim is barred by the statute of limitations and apparently unfounded (Taylor *v.* Weeks, (Mich. 1901) 88 N. W. 466).

A debt of a decedent, barred by the statute, will support the note of an administrator (Wheaton *v.* Wilmarth, 13 Metc. (Mass.) 422), executor (McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687), or trustee (McKelvey *v.* Tate, 3 Rich. (S. C.) 339). But it was held in Didlake *v.* Robb, 1 Woods (U. S.) 680, 7 Fed. Cas. No. 3,899, that a note by the heir for the debt of an ancestor, barred by the statute, was held invalid.

66. Clark *v.* Hampton, 1 Hun (N. Y.) 612.

67. *Indiana.*— Hockett *v.* Jones, 70 Ind. 227; Wiggins *v.* Keizer, 6 Ind. 252.

Louisiana.— Andrieu's Succession, 44 La. Ann. 103, 10 So. 388.

New Jersey.— Briggs *v.* Sutton, 20 N. J. L. 581.

New York.— McNair *v.* Gilbert, 3 Wend. (N. Y.) 344; Erwin *v.* Saunders, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520; Scouten *v.* Eislord, 7 Johns. (N. Y.) 36.

Vermont.— Walbridge *v.* Harroon, 18 Vt. 448.

England.— Trueman *v.* Fenton, Cowp. 544. The English bankruptcy act of 1861 (24 & 25 Vict. c. 134, § 164), making void a promise to pay a debt barred by a discharge in bankruptcy, was repealed by 32 & 33 Vict. c. 83, § 20, but governs in the case of instruments made while it was in force. Rimini *v.* Van Praagh, L. R. 8 Q. B. 1, 42 L. J. Q. B. 1, 27 L. T. Rep. N. S. 540, 21 Wkly. Rep. 107.

The new promise must be unequivocal (Merriam *v.* Bayley, 1 Cush. (Mass.) 77, 48 Am. Dec. 591; Moore *v.* Viele, 4 Wend. (N. Y.) 420; Depuy *v.* Swart, 3 Wend. (N. Y.) 135, 20 Am. Dec. 673) and the debt will not be revived by mere payment of interest on a note so discharged (Cambridge Sav. Inst. *v.* Littlefield, 6 Cush. (Mass.) 210).

A debt discharged in bankruptcy will not support a promise induced by a previous corrupt agreement on the payee's part. Rasmussen *v.* State Nat. Bank, 11 Colo. 301, 18 Pac. 28; Rice *v.* Maxwell, 13 Sm. & M. (Miss.) 289, 53 Am. Dec. 85; Trumball *v.* Hilton, 21 N. H. 128; Cocksbott *v.* Bennett, 2 T. R. 763, 1 Rev. Rep. 617.

68. Rollins *v.* Lashus, 74 Me. 218; Snevily *v.* Read, 9 Watts (Pa.) 396.

69. *Alabama.*— Holt *v.* Robinson, 21 Ala. 106, 56 Am. Dec. 240, holding that if a sheriff accepts a third person's note in settlement of an execution which is satisfied of record and defendant pays the maker of the note, a new note given by defendant's executor to the sheriff to prevent him from setting aside the satisfaction for non-payment of the first note is based on a mistake and is invalid.

Colorado.— Rasmussen *v.* State Nat. Bank, 11 Colo. 301, 18 Pac. 28, the case of an insolvent discharge of the debtor and a release executed by creditors.

Georgia.— Pettyjohn *v.* Liebscher, 92 Ga. 149, 17 S. E. 1007, holding that a new note by a surety given in discharge of the obligation which has already been paid by the principal debtor unknown to the surety is without consideration.

Indiana.— Smith *v.* Boruff, 75 Ind. 412, holding that a new note cannot be given to secure the cancellation of a note and mortgage that have been paid.

Kentucky.— Montgomery *v.* Lampton, 3 Metc. (Ky.) 519; Hancock *v.* Twyman, 19

it makes no difference that the payment was made in a depreciated currency of inferior value.[70] So where it has been discharged by laches of the claimant[71] or by his own act,[72] especially where the new security has been obtained by false representations as to the fact of the discharge.[73] If, however, the release was itself procured by fraud the claim may still support a note given for it.[74]

(iv) *Doubtful or Disputed Claim.* Doubtful or disputed claims may be compromised and furnish a sufficient consideration for a bill or note.[75] Such

Ky. L. Rep. 2006, 45 S. W. 68 (holding that a note to an administrator is invalid if given for a debt released by the deceased for a valuable consideration).

Maine.— Phelps *v.* Dennett, 57 Me. 491 (where the debt had been compromised and the balance released); Warren *v.* Whitney, 24 Me. 561, 41 Am. Dec. 406.

Maryland.— Ingersoll *v.* Martin, 58 Md. 67, 42 Am. Rep. 322.

Massachusetts.— Brigham *v.* Holden, 146 Mass. 259, 15 N. E. 633 (holding that if the debt has been already paid it cannot be the consideration for a new bill or note); Hale *v.* Rice, 124 Mass. 292.

Michigan.—Thorp *v.* Deming, 78 Mich. 124, 43 N. W. 1097; Campbell *v.* Skinner, 30 Mich. 32, the latter case holding that if the original debt has been compromised and discharged for the debtor by his friends it cannot support a note afterward made by him for a balance or deficit.

Minnesota.— Mason *v.* Campbell, 27 Minn. 54, 6 N. W. 405.

New Hampshire.— Grant *v.* Porter, 63 N. H. 229, holding that where a debtor compromised with his creditors and took an assignment of their claims, and gave one of them a note for the balance, there was no consideration for the note.

New York.— Stewart *v.* Ahrenfeldt, 4 Den. (N. Y.) 189 (holding that a note given to settle a suit against the maker on a previous indorsement is invalid if the payee has in hand enough of the maker's money to pay the amount due); Stafford *v.* Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366.

South Dakota.—So where the original debt has been satisfied by a deed accepted in full satisfaction. Rudolph *v.* Hewitt, 11 S. D. 646, 80 N. W. 133.

Contra, in the case of a voluntary compromise and release by creditors without corrupt agreement. Glober *v.* Bradley, 1 Tex. App. Civ. Cas. § 212.

Although the object of the release was merely to render the creditor competent as a witness this is so. Valentine *v.* Foster, 1 Metc. (Mass.) 520, 35 Am. Dec. 377. *Contra,* Willing *v.* Peters, 12 Serg. & R. (Pa.) 177.

70. Beazley *v.* Gignilliat, 61 Ga. 187; Turner *v.* Young, 27 Ind. 373, 89 Am. Dec. 508.

71. As where an indorser is discharged by failure to give notice of protest (Farmers, etc., Bank *v.* Small, 2 T. B. Mon. (Ky.) 88; Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547) and makes the new note without knowledge of his discharge (Warder *v.* Tucker, 7 Mass. 449, 5 Am. Dec. 62). So where a debt has been discharged by non-presentment to the administrator mere forbearance to sue will not support a promise to reinstate the claim. Von Brandenstein *v.* Ebensberger, 71 Tex. 267, 9 S. W. 153.

72. Fraker *v.* Cullum, 21 Kan. 555, by an alteration. So if the payee has taken a judgment against one of two partners and thereby discharged the other, he cannot hold the latter on a new note which he gave, being ignorant of such judgment and relying on the truth of the representations of the creditor. Nicklaus *v.* Roach, 3 Ind. 78. But, although the tenant's liability for rent is discharged by his eviction from a part of the premises, his note for rent of another part is valid. Anderson *v.* Chicago M. & F. Ins. Co., 21 Ill. 601.

73. Fraker *v.* Cullum, 21 Kan. 555 (where an alteration in the former note had discharged the maker); Stephens *v.* Spiers, 25 Mo. 386 (where the original note had been really settled and released, but was represented as still due).

74. Crans *v.* Hunter, 28 N. Y. 389.

75. *Alabama.*— Booth *v.* Dexter Steam Fire Engine Co., 118 Ala. 369, 24 So. 405; Wyatt *v.* Evins, 52 Ala. 285; Curry *v.* Davis, 44 Ala. 281 (note for purchase of slave after emancipation compromised at reduced amount).

Arkansas.— Richardson *v.* Comstock, 21 Ark. 69.

District of Columbia.— Northern Liberty Market Co. *v.* Steubner, 4 Mackey (D. C.) 301.

Georgia.— Austell *v.* Rice, 5 Ga. 472, holding that the compromise of a doubtful claim against an estate and forbearance on the part of the claimant will support a note by a legatee.

Iowa.— Rowe *v.* Barnes, 101 Iowa 302, 70 N. W. 197 (by contestant of will); French *v.* French, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300; Keyes *v.* Mann, 63 Iowa 560, 19 N. W. 666 (holding that although a note be based on a disputed claim its surrender is a good consideration for the making of another note); Keefe *v.* Vogle, 36 Iowa 87.

Kentucky.— Rains *v.* Lee, 18 Ky. L. Rep. 285, 36 S. W. 176.

Massachusetts.—Bent *v.* Weston, 167 Mass. 529, 46 N. E. 386 (overcharge for keep of horse, which was retained until note given); Easton *v.* Easton, 112 Mass. 438; Cobb *v.* Arnold, 8 Metc. (Mass.) 403 (note for rent of land which the maker had held adversely for more than twenty years).

Mississippi.—Boone *v.* Boone, 58 Miss. 820; Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504.

Missouri.— Pickel *v.* St. Louis Chamber of Commerce Assoc., 80 Mo. 65 (a note given

paper will be good, although the claim itself might have proved to be bad,[76] or although it was a moral and not a legal obligation,[77] was supported merely by a verbal agreement, which was ineffectual under the statute of frauds,[78] or was founded on a usurious contract;[79] but the claim is insufficient, if entirely unfounded[80]

upon a settlement by the maker, neither under the influence of mistake or fraud, nor in ignorance of his rights); Stephens *v.* Spiers, 25 Mo. 386.

New York.— Housatonic Nat. Bank *v.* Foster, 85 Hun (N. Y.) 376, 32 N. Y. Suppl. 1031, 66 N. Y. St. 435; Carney *v.* Downey, 2 N. Y. St. 707 (holding that it may be the compromise of a claim against the maker's wife); Russell *v.* Cook, 3 Hill (N. Y.) 504; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. (N. Y.) 1.

Virginia.— Zane *v.* Zane, 6 Munf. (Va.) 406.

United States.— Northern Liberty Market Co. *v.* Kelly, 113 U. S. 199, 5 S. Ct. 422, 28 L. ed. 948, although the compromise was conditioned on the payment of the note.

England.— Longridge *v.* Dorville, 5 B. & Ald. 117, 7 E. C. L. 74; Cook *v.* Wright, 1 B. & S. 559, 7 Jur. N. S. 121, 30 L. J. Q. B. 321, 4 L. T. Rep. N. S. 704, 101 E. C. L. 559.

But the facts must be known to the maker (Buno *v.* Gabriel, 2 Colo. App. 295, 30 Pac. 260; Morey *v.* Laird, 108 Iowa 670, 77 N. W. 835), and a surety will not be bound by a note given by him for services rendered to his principal without knowledge that the amount had been fixed by arbitration and that the principal had given his note therefor, secured by a mortgage (Edwards *v.* Logan, 66 Ala. 506).

Any part included in the note but reserved as unsettled is not a valid consideration, and the note fails *pro tanto*, as where it is given for the balance due, with interest, on an understanding that the question of the liability to pay interest should nevertheless remain open. Jennison *v.* Stone, 33 Mich. 99.

Compromise of note procured by fraud.— It may be voluntarily given in renewal and compromise of a note which was procured by fraud (Clough *v.* Holden, (Mo. 1892) 20 S. W. 695) and damages for the fraud are thereby waived (Reid *v.* Huston, 55 Ind. 173).

76. *Iowa.*— Keefe *v.* Vogle, 36 Iowa 87.

Kentucky.— Taylor *v.* Patrick, 1 Bibb (Ky.) 168.

Missouri.— Dailey *v.* Jessup, 72 Mo. 144.

New York.— Feeter *v.* Weber, 44 N. Y. Super. Ct. 255 [*affirmed* in 78 N. Y. 334]; Russell *v.* Cook, 3 Hill (N. Y.) 504; Raymond *v.* Lent, 14 Johns. (N. Y.) 401 (where the statutory bond, which constituted the original liability, lacked a seal).

Vermont.— Holcomb *v.* Stimpson, 8 Vt. 141.

United States.— Northern Liberty Market Co. *v.* Kelly, 113 U. S. 199, 5 S. Ct. 422, 28 L. ed. 948, notes given to take up notes for a twenty-year market lease, where the power of the corporation to grant such a lease was doubtful.

But it is a good defense that the maker was in no way liable for a disputed injury to land for which the note was given (Gunning *v.* Royal, 59 Miss. 45, 42 Am. Rep. 350) or that the new note was obtained by fraud (Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115).

77. Hawkes *v.* Saunders, Cowp. 289; Lee *v.* Muggeridge, 5 Taunt. 36, 1 E. C. L. 32; Gibbs *v.* Merrill, 3 Taunt. 307. This is true of a note given by a widow after she became a widow, as a renewal of a former note made during coverture (New Hanover Bank *v.* Bridgers, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317) or given by a wife after the enabling statute went into effect (Barton *v.* Beer, 35 Barb. (N. Y.) 78; Brooks *v.* Merchants' Nat. Bank, 125 Pa. St. 394, 23 Wkly. Notes Cas. (Pa.) 502, 17 Atl. 418), but such a note requires some new consideration or previous moral obligation (Vance *v.* Wells, 6 Ala. 737).

78. Rogers *v.* Stevenson, 16 Minn. 68; Schnecko *v.* Meier, 4 Mo. App. 566; Hooker *v.* Knab, 26 Wis. 511; Jones *v.* Jones, 9 L. J. Exch. 178, 6 M. & W. 84. *Contra*, Richardson *v.* Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305, a note given in settlement of a verbal antenuptial agreement.

79. If a usurious note be not void under the statute a good note may be given for the balance due (Elizabeth State Bank *v.* Ayers, 7 N. J. L. 130, 11 Am. Dec. 535) and a valid note may be given to settle accounts in which are included usurious notes (Morris *v.* Taylor, 22 N. J. Eq. 438 [*affirmed* in 22 N. J. Eq. 606]. See also De Wolf *v.* Johnson, 10 Wheat. (U. S.) 367, 6 L. ed. 343).

In England a debt void under the old usury laws will support a note given therefor since the repeal of such laws (Flight *v.* Reed, 1 H. & C. 703, 9 Jur. N. S. 1016, 32 L. J. Exch. 265, 8 L. T. Rep. N. S. 638, 12 Wkly. Rep. 53), and while such laws were in force if the maker of a usurious note was arrested in a suit upon it a note for the amount given by a third person to secure his release was valid (Turner *v.* Hulme, 4 Esp. 11).

80. *Alabama.*— Bullock *v.* Ogburn, 13 Ala. 346.

California.— Bell *v.* Bean, 75 Cal. 86, 16 Pac. 521.

Indiana.— Smith *v.* Boruff, 75 Ind. 412, holding that there can be no recovery on a note given for the surrender of a note and cancellation of a mortgage where the debt had been satisfied, although the payee claimed otherwise.

Iowa.— Tucker *v.* Ronk, 43 Iowa 80; Sullivan *v.* Collins, 18 Iowa 228, the latter case holding that if the purchaser of a horse unnecessarily gives it up in a replevin suit, relying on false representations as to its having been stolen, this will not support a note by the seller to him.

or illegal,[81] as in the case of forgery[82] or where the payee was not the party entitled.[83]

f. Forbearance.[84] The extension of time for payment of a debt is a sufficient consideration for a bill or note[85] and for a promise to pay fees or costs of collec-

Kentucky.— Owsley *v.* Philips, 78 Ky. 517, 39 Am. Rep. 258, holding that a subsequent promise to pay a note to which the maker's name was signed without his authority is without consideration.

Mississippi.— Gunning *v.* Royal, 59 Miss. 45, 42 Am. Rep. 350.

New Jersey.— Conover *v.* Stillwell, 34 N. J. L. 54, for a claim of warranty, without actual breach, and without release.

New York.— Smith *v.* Ware, 13 Johns. (N. Y.) 257 (for a deficiency in quantity of land conveyed, where there was no covenant as to quantity); Pearson *v.* Pearson, 7 Johns. (N. Y.) 26 (a note given in settlement of an unfounded charge of arson).

Oklahoma.— Duck *v.* Antle, 5 Okla. 152, 47 Pac. 1056.

Pennsylvania.— Geiger *v.* Cook, 3 Watts & S. (Pa.) 266, holding that even a sealed note given for a balance due on a former note which was without consideration is invalid.

Vermont.— Ormsbee *v.* Howe, 54 Vt. 182, 41 Am. Rep. 841.

Wisconsin.— Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600, holding that a promissory note, the consideration of which is the compromise of a fraudulent claim, where the drawer had not waived his rights, is void in the hands of the original payee or any other person not a *bona fide* purchaser for value before due.

England.— Southall *v.* Rigg, 11 C. B. 481, 15 Jur. 706, 20 L. J. C. P. 145, 73 E. C. L. 481, obtained by false representations.

If it is partly invalid the note will be void *pro tanto* (Briscoe *v.* Kincaly, 8 Mo. App. 76), as where an account stated included a fraudulent overcharge (Dickinson *v.* Lewis, 34 Ala. 638).

If the claim be valid it is sufficient, although the note representing it is *ultra vires* as to the payee corporation. Rome Sav. Bank *v.* Kramer, 32 Hun (N. Y.) 270 [*affirmed* in 102 N. Y. 331, 6 N. E. 682].

81. A surety cannot recover from his principal the amount of a note given by the former for a debt of the latter which was illegal and void by statute (Perkins *v.* Cummings, 2 Gray (Mass.) 258), as where one gives a note for an illegal assessment without knowledge of the illegality, there being in such case an estoppel (Parsons *v.* Pendleton, etc., Turnpike Co., 59 Ind. 36); but the maker would be estopped where with such knowledge he joined in a note with others in order to procure the building of the road (Williams *v.* Pendleton, etc., Turnpike Co., 76 Ind. 87).

82. There can be no recovery on a promise to pay a forged note without some new consideration or an estoppel on the maker's part (Workman *v.* Wright, 33 Ohio St. 405, 31 Am. Rep. 546), but a compromise of a suit on a note claimed to have been forged will support a new note (Grant *v.* Chambers, 30 N. J. L. 323).

83. As where a note is given to a mother for an injury to her child, she having no right of action. Heast *v.* Sybert, Cheves (S. C.) 177. So the right of action for the seduction of a minor being only in her parent entitled to her services, a note or promise to pay money on her own agreement to forbear in respect to a threatened prosecution for her alleged seduction is without consideration. Heaps *v.* Dunham, 95 Ill. 583.

84. Forbearance to contest a will is a good consideration; and a note given after the statutory period for contesting wills is good if in pursuance of an agreement for settlement made within such period. Hindert *v.* Schneider, 4 Ill. App. 203.

If the banking department refrains from closing a bank at the request of stock-holders this will support the stock-holders' notes to the bank to make good its impaired capital. Sickles *v.* Herold, 11 Misc. (N. Y.) 583, 32 N. Y. Suppl. 1083, 66 N. Y. St. 337.

85. *Alabama.*— Decatur First Nat. Bank *v.* Johnston, 97 Ala. 655, 11 So. 690.

Illinois.— Armour *v.* Eichelberger, 65 Ill. 355; Hancock *v.* Hodgson, 4 Ill. 329.

Iowa.— Atherton *v.* Marcy, 59 Iowa 650, 13 N. W. 759.

Louisiana.— Foster *v.* Wise, 27 La. Ann. 538.

Minnesota.— Lundberg *v.* Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

Mississippi.— Sanders *v.* Smith, (Miss. 1888) 5 So. 514.

Missouri.— Janis *v.* Roentgen, 59 Mo. App. 75.

New York.— Meltzer *v.* Doll, 91 N. Y. 365.

North Dakota.— Red River Valley Nat. Bank *v.* Barnes, 8 N. D. 432, 79 N. W. 880.

Pennsylvania.— Horner *v.* Jones, 6 Phila. (Pa.) 258, 24 Leg. Int. (Pa.) 396.

Wisconsin.— Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

Such extension is sufficient consideration for a new note for the balance left unpaid after part payment (Langley *v.* Bartlett, 33 Me. 477); for a new promise to pay an existing note (Tuttle *v.* Bigelow, 1 Root (Conn.) 108, 1 Am. Dec. 35; Ford *v.* Rehman, Wright (Ohio) 434); for a new note for a larger sum (Taylor *v.* Meek, 4 Blackf. (Ind.) 388, with additional consideration of a surety released); or for a collateral note furnished by another party (Mechanics', etc., Bank *v.* Wixon, 46 Barb. (N. Y.) 218 [other executory agreement as additional consideration]; Hastings First Nat. Bank *v.* Lamont, 5 N. D. 393, 67 N. W. 145; Van Gorder *v.* Freehold Bank, (Pa. 1886) 7 Atl. 144).

tion,[86] accrued interest;[87] but not for compound interest[88] or interest at an increased rate.[89] There should be a distinct agreement for forbearance,[90] but if the debt is due such agreement may be implied from the taking of a note or bill payable at a future time, since this suspends action on the original debt.[91] The

Forbearance as to some parties and release of others will support a new note given as collateral security. Mnirhead *v.* Kirkpatrick, 21 Pa. St. 237. So if the maker be given an extension and the surety be released this will support a new note with a new surety. Jackson *v.* Cooper, 19 Ky. L. Rep. 9, 39 S. W. 39; Gatzmer *v.* Pierce, 13 Phila. (Pa.) 88, 36 Leg. Int. (Pa.) 16.

An agreement for delay on an execution already issued will support a new note (Robinson *v.* Gould, 11 Cush. (Mass.) 55) and so of delay on an execution against another person (Giles *v.* Ackles, 9 Pa. St. 147, 49 Am. Dec. 551).

Accommodation and suretyship.— The extension or forbearance of a debt will support the transfer by the payee of an accommodation note (Grocers' Bank *v.* Penfield, 69 N. Y. 502, 25 Am. Rep. 231 [*affirming* 7 Hun (N. Y.) 279]; Callahan *v.* Bancroft, 28 Hun (N. Y.) 584) or bill (Fellows *v.* Harris, 12 Sm. & M. (Miss.) 462), an accommodation indorsement (Gloversville Nat. Bank *v.* Place, 86 N. Y. 444), a new note by the accommodation maker with the payee originally accommodated as surety (Judd *v.* Martin, 97 Ind. 173), or the execution of the existing note by a new surety (Stone *v.* White, 8 Gray (Mass.) 589) or by a new co-maker (Frech *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123). So too it will suffice for the guaranty of a note (Fuller *v.* Scott, 8 Kan. 25; King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266) or for its assumption by another person (Mazelin *v.* Martin, Wils. (Ind.) 423).

Original consideration.— An extension to the purchaser of land under a contract will support his note for the deferred payment without regard to alleged defects in the vendor's title. Horner *v.* Jones, 6 Phila. (Pa.) 258, 24 Leg. Int. (Pa.) 396. So an agreement to forbear to sue on a note and mortgage payable in treasury notes, and under the legal tender act, is a sufficient consideration for a promise by the debtor to pay the debt in specie or gold coin (Belloc *v.* Davis, 38 Cal. 242), and the granting of an extension of time is a sufficient consideration to uphold a note which has been obtained and negotiated in fraud of the maker (Wormer *v.* Waterloo Agricultural Works, 50 Iowa 262); but forbearance to sue for what one has no legal right to recover is not a sufficient consideration for a note (Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504), and if the cause of action forborne is clearly illegal and void, a note given in consideration of forbearance to sue thereon is tainted with the nature of that cause of action (Slack *v.* Moss, Dudley (Ga.) 161).

86. Brainard *v.* Harris, 14 Ohio 107, 45 Am. Dec. 525, holding that an extension of the time allowed for the payment of a judgment is a sufficient consideration for a note, given by the party liable under the judgment to the attorney of the other party for his fees in the suit.

87. Hubbard *v.* Fletcher, 61 Minn. 148, 63 N. W. 612 (holding that an agreement to extend the time for payment of a mortgage note is a sufficient consideration for a note for payment of interest during the time of extension); Maples *v.* Hicks, 3 Pa. L. J. 244 (holding that the including of interest on an overdue bill in a note given by the accepter of a bill to the holder is a sufficient consideration for such note); Hutton *v.* Edgerton, 6 S. C. 485 (where the extension was held to support a promise to pay interest for which the maker was not liable which had accrued during the war).

88. Wilcox *v.* Howland, 23 Pick. (Mass.) 167 (holding that a promise to pay compound interest is valid where such interest has already accrued and the creditor forbears to proceed on an execution issued for principal and simple interest); Jasper County *v.* Tavis, 76 Mo. 13 (where the maker of a note, being sued thereon, in consideration of forbearance to sue, agreed to pay compound interest on the note for the remainder of its term); Hathaway *v.* Meads, 11 Oreg. 66, 4 Pac. 519.

89. Beckner *v.* Carey, 44 Ind. 89; Knapp *v.* Mills, 20 Tex. 123. *Contra*, where the increase is usurious. Simpson *v.* Evans, 44 Minn. 419, 46 N. W. 908. And in general a promise to pay interest for the renewal of a note means bank interest. Boismarre *v.* Jourdan, 1 Mart. N. S. (La.) 304.

90. Vann *v.* Marbury, 100 Ala. 438, 14 So. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325; Lambert *v.* Clewley, 80 Me. 480, 15 Atl. 61 (and without an agreement forbearance will not support a new indorsement after delivery). But it will be sufficient if the purchaser definitely extends the paper and takes a new note as collateral. Atlanta Guano Co. *v.* Hunt, 100 Tenn. 89, 42 S. W. 482.

Forbearance at the maker's request is equivalent to such an agreement. Strong *v.* Sheffield, 144 N. Y. 392, 39 N. E. 330, 63 N. Y. St. 701 [*affirming* 66 Hun (N. Y.) 349, 21 N. Y. Suppl. 505, 50 N. Y. St. 665]; Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; Crears *v.* Hunter, 19 Q. B. D. 341, 56 L. J. Q. B. 518, 57 L. T. Rep. N. S. 554, 35 Wkly. Rep. 821.

91. *Maine.*— York *v.* Pearson, 63 Me. 587; Thompson *v.* Gray, 63 Me. 228.

Massachusetts.— Where a note is given followed by actual forbearance. Boyd *v.* Freize, 5 Gray (Mass.) 553; Wheeler *v.* Slocumb, 16 Pick. (Mass.) 52.

Minnesota.— Lundberg *v.* Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

New York.— Grocers' Bank *v.* Penfield, 7 Hun (N. Y.) 279 [*affirmed* in 69 N. Y. 502, 25 Am. Rep. 231]; Lewis *v.* Rogers, 34 N. Y. Super. Ct. 64 (especially where the debt for which the paper is given is already due); Hart *v.* Hudson, 6 Duer (N. Y.) 294; Eisner

agreement for forbearance should be for a definite time,[92] but a "reasonable time" has been held to be sufficiently definite.[93] The agreement may be accompanied with surrender of a former note,[94] an agreement for an additional surety,[95] or with an agreement not to transfer the note.[96] Sometimes the forbearance is a forbearance to sue the maker or a third person,[97] but such forbearance is no consideration if it is clear that no action would lie.[98]

3. Accommodation Paper — a. In General. Accommodation paper is a loan of the maker's credit, without restriction as to the manner of its use.[99] This may be done by a note as accommodation maker or co-maker or by acceptance or indorsement.[1] The beneficial consideration moving to the party accommodated

v. Keller, 3 Daly (N. Y.) 485; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484.

Ohio.— Holzworth *v.* Koch, 26 Ohio St. 33.

Oregon.— Arlington First Nat. Bank *v.* Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393.

Wisconsin.— Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; American Button-Hole, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49; Weed Sewing Mach. Co. *v.* Oberreich, 38 Wis. 325.

England.— Kendrick *v.* Lomax, 2 Cr. & J. 405, 1 L. J. Exch. 145, 2 Tyrw. 438; Baker *v.* Walker, 3 D. & L. 46, 14 L. J. Exch. 371, 14 M. & W. 465. *Contra,* Shaw *v.* First Associated Reformed Presb. Church, 39 Pa. St. 226, interposed as a defense to a suit on the original debt, for which the note had been taken.

Where the new note is taken as collateral merely for the original debt it is not enough. Taylor *v.* Allen, 36 Barb. (N. Y.) 294; Pring *v.* Clarkson, 1 B. & C. 14, 2 D. & R. 78, 1 L. J. K. B. O. S. 24, 8 E. C. L. 7. *Contra,* Andrews *v.* Marrett, 58 Me. 539. But in Maine, where the note was taken as collateral for the original debt, a new consideration consisting of more than an implied agreement for extension was held to be necessary to constitute the holder a holder "for value." Smith *v.* Bibber, 82 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464.

What amounts to extension.—A check postdated six days and made by additional parties has been held to imply an extension of the debt for such time (Okie *v.* Spencer, 2 Whart. (Pa.) 253, 30 Am. Dec. 251), but agreeing to hold a demand note till the holder needs the money will not do (Strong *v.* Sheffield, 144 N. Y. 392, 39 N. E. 330, 63 N. Y. St. 701 [*affirming* 66 Hun (N. Y.) 349, 21 N. Y. Suppl. 505, 50 N. Y. St. 665]) and where there was in fact no agreement for extension the receipt of a note for which the creditor gives his receipt will not make him a *bona fide* holder to the exclusion of the defense of fraudulent diversion of the paper (Moore *v.* Ryder, 65 N. Y. 438).

92. Gates *v.* Hackethal, 57 Ill. 534, 11 Am. Rep. 45.

An agreement for indefinite forbearance, with actual forbearance, will support the promise of a co-maker signing after delivery (Howe *v.* Taggart, 133 Mass. 284; Finch *v.* Skilton, 79 Hun (N. Y.) 531, 29 N. Y. Suppl. 925, 61 N. Y. St. 544) and will be construed to mean a reasonable time (Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506).

93. Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; Lonsdale *v.* Brown, 4 Wash. (U. S.) 148, 15 Fed. Cas. No. 8,494.

What is a reasonable time is for the jury to determine. McCelvy *v.* Noble, 13 Rich. (S. C.) 330. It has been held sufficiently definite if the extension be till action is necessary to save the statute of limitations (Aiken *v.* Posey, 13 Tex. Civ. App. 607, 35 S. W. 732), and one accepting a demand note may be shown by parol to have intended forbearance for a reasonable time (Kelly *v.* Theiss, 21 Misc. (N. Y.) 311, 47 N. Y. Suppl. 145).

94. Wheeler *v.* Slocumb, 16 Pick. (Mass.) 52.

95. Coffin *v.* Indiana Asbury University, 92 Ind. 337 (the agreement being a sufficient consideration for the new surety); North Atchison Bank *v.* Gay, 114 Mo. 203, 21 S. W. 479 (the new note being indorsed as a payment on the former note).

96. And this will support the obligation of other parties signing as co-makers after the maturity of the note. Frech *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123.

97. As a forbearance, after threats, to prosecute a third person for false representations. Waters *v.* White, (Conn. 1902) 52 Atl. 401.

98. Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

99. Lord *v.* Ocean Bank, 20 Pa. St. 384, 386, 59 Am. Dec. 728 [*quoted* in Dunn *v.* Weston, 71 Me. 270, 273, 36 Am. Rep. 310]. See also Bouton *v.* Cameron, 99 Ill. App. 600; Lenheim *v.* Wilmarding, 55 Pa. St. 73.

1. Jefferson County *v.* Burlington, etc., R. Co., 66 Iowa 385, 16 N. W. 561, 23 N. W. 899; Peoria Mfg. Co. *v.* Huff, 45 Nebr. 7, 63 N. W. 121; Pollard *v.* Huff, 44 Nebr. 892, 63 N. W. 58; Cleveland Second Nat. Bank *v.* Morrison, 3 Ohio Dec. (Reprint) 534; Lenheim *v.* Wilmarding, 55 Pa. St. 73.

Accommodation for whom.— The accommodation may be for several parties, as payee and indorser for maker and indorsee (Farrar *v.* Gregg, 1 Rich. (S. C.) 378), but where one signed a note for the accommodation of the other maker, without the solicitation of or for the benefit of the payee, the mere fact that there was no consideration as to him does not make him an accommodation maker for the payee (Capital City State Bank *v.* Des Moines Cotton-Mill Co., 84 Iowa 561, 51 N. W. 33).

from the payee or holder is a sufficient consideration to bind the accommodation party,[2] and the liability of one as an accommodation indorser for another will support his joint note with such other which was made to take up the accommodation indorsement.[3] Even an accommodation indorsement by a third party made at the time of the delivery of the bill or note to the payee is supported by the indorser's loan of credit to the maker, and creates a liability on the part of the indorser to subsequent holders.[4] A check, like a note, may be indorsed by a third party at the time of its delivery to the payee for the drawer's accommodation.[5] In general, however, one partner cannot execute accommodation paper in the name of his firm,[6] nor can a corporation properly execute bills or notes for the accommodation of other parties;[7] and in many of the United States a married woman is expressly prohibited from executing such paper for her husband.[8] The consideration for an accommodation signature may be in part value received and only in part accommodation,[9] or it may be changed by subsequent transactions from an accommodation to a contract for valuable consideration;[10] it may be in

2. *Alabama.*— Dunbar *v.* Smith, 66 Ala. 490.

Georgia.— Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761.

Maine.— Emery *v.* Hobson, 62 Me. 578, 16 Am. Rep. 513.

Massachusetts.— Black River Sav. Bank *v.* Edwards, 10 Gray (Mass.) 387.

Michigan.— Steers *v.* Holmes, 79 Mich. 430, 44 N. W. 922.

Mississippi.— Meggett *v.* Baum, 57 Miss. 22.

New York.— Palmer *v.* Field, 76 Hun (N. Y.) 229, 27 N. Y. Suppl. 736, 59 N. Y. St. 123.

Tennessee.— Marr *v.* Johnson, 9 Yerg. (Tenn.) 1.

Vermont.— Arnold *v.* Sprague, 34 Vt. 402.

United States.—Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61; Yeaton *v.* Alexandria Bank, 5 Cranch (U. S.) 49, 3 L. ed. 33.

3. Spencer *v.* Ballou, 18 N. Y. 327, where the new note took up the other notes on which the accommodation indorser was not liable, as well as the accommodation note.

4. Hawkins *v.* Neal, 60 Miss. 256; Harris *v.* Bradley, 7 Yerg. (Tenn.) 310; Cady *v.* Shepard, 12 Wis. 639. But not to a holder with notice and not for value (Powers *v.* French, 1 Hun (N. Y.) 582), whether the indorsement is made at the request of the maker (Hoffman *v.* Butler, 105 Ind. 371, 4 N. E. 681) or at the payee's request and under his indorsement (Perry *v.* Friend, 57 Ark. 437, 21 S. W. 1065).

As to the general character of such indorsements and the indorser's liability to the payee where the paper is payable to the payee's order and not indorsed or is indorsed by him below the accommodation indorser see *supra*, II, B, 6.

5. Emery *v.* Hobson, 62 Me. 578, 16 Am. Rep. 513; Colburn *v.* Averill, 30 Me. 310, 50 Am. Dec. 630; Bickford *v.* Gibbs, 8 Cush. (Mass.) 154; Gough *v.* Staats, 13 Wend. (N. Y.) 549.

6. *Colorado.*— King *v.* Mecklenburg, (Colo. 1902) 68 Pac. 984.

Louisiana.— Vredenburgh *v.* Lagan, 28 La. Ann. 941.

Maine.— Rollins *v.* Stevens, 31 Me. 454.

Massachusetts.— Sweetser *v.* French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Chazournes *v.* Edwards, 3 Pick. (Mass.) 5.

Michigan.— Heffron *v.* Hanaford, 40 Mich. 305.

New York.— Stall *v.* Catskill Bank, 18 Wend. (N. Y.) 466; Wilson *v.* Williams, 14 Wend. (N. Y.) 146, 28 Am. Dec. 518; Rochester Bank *v.* Bowen, 7 Wend. (N. Y.) 158; Foot *v.* Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208.

United States.— Ft. Madison Bank *v.* Alden, 129 U. S. 372, 9 S. Ct. 332, 32 L. ed. 725.

As to disabilities of partners in this respect see, generally, PARTNERS.

As to availability of such defense see *infra*, XIV, B [8 Cyc.].

7. National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488; Fox *v.* Rural Home Co., 90 Hun (N. Y.) 365, 35 N. Y. Suppl. 896, 70 N. Y. St. 55 [*affirmed* in 157 N. Y. 684, 51 N. E. 1090]; Carney *v.* Duniway, 35 Oreg. 131, 57 Pac. 192, 58 Pac. 105; Lyon *v.* Sioux City First Nat. Bank, 85 Fed. 120, 55 U. S. App. 747, 29 C. C. A. 45; National Park Bank *v.* Remsen, 43 Fed. 226; *In re* Wrentham Mfg. Co., 2 Lowell (U. S.) 119, 30 Fed. Cas. No. 18,063. See also BANKS AND BANKING, 5 Cyc. 523, note 98.

If the proceeds of the paper are to be applied to the debts of the corporation it is not an accommodation. Beecher *v.* Dacey, 45 Mich. 92, 7 N. W. 689; Lyon *v.* Sioux City First Nat. Bank, 85 Fed. 120, 29 C. C. A. 45.

As to the disabilities of corporations in this respect see, generally, CORPORATIONS.

8. As to the disabilities of married women see, generally, MARRIED WOMEN.

9. And the liability to the payee is limited to the value received. Darnell *v.* Williams, 2 Stark. 166, 19 Rev. Rep. 694, 3 E. C. L. 361.

10. Leeke *v.* Hancock, 76 Cal. 127, 17 Pac. 937; Norton *v.* Downer, 33 Vt. 26. Thus the accommodation indorser may for valuable consideration assume the payment of the note as principal (Rhea *v.* Preston, 75 Va. 757), but where two accommodation indorsers assume the payment of all paper of a particular person indorsed by them it will not include

reality for value, although the purpose was to accommodate another party,[11] or it may be accommodation paper although induced by a nominal, or even an actual, consideration.[12]

b. Liability of Accommodation Party. As between himself and the party accommodated the accommodation party is in effect a surety,[13] and his right to

notes of such person indorsed by only one of them (Bickford *v.* Biddlecum, 52 Barb. (N. Y.) 245). On the other hand, if a note is given by A to B for property which B really sold to A in payment of a debt, and is indorsed by B and delivered by him to A, it is an accommodation indorsement by B. Platt *v.* Snipes, 43 Ark. 21.

11. Exchange of notes or checks is not accommodation paper but business paper. McCandless *v.* Hadden, 9 B. Mon. (Ky.) 186; Stickney *v.* Mohler, 19 Md. 490. See also *supra*, III, B, 2, h, (II).

Object to aid corporation.— It is not an accommodation where corporation stock is purchased by stock-holders who give their notes for it in order to raise money for the company (Reed *v.* Pueblo First Nat. Bank, 23 Colo. 380, 48 Pac. 507; Penn Safe Deposit, etc., Co. *v.* Kennedy, 175 Pa. St. 160, 34 Atl. 659, 660), or where a bank stock-holder buys stock in his own name and gives his own notes with intent to conceal a purchase really made for the bank (Tillinghast *v.* Carr, 82 Fed. 298).

For other agreement.— So where the indorsement is given in consideration of a valuable business agreement then made (Purchase *v.* Mattison, 6 Duer (N. Y.) 587), in consideration of the transferee accepting a transfer of the note with such indorsement in payment of the indorser's debt to him (McGuire *v.* Union Bank, 9 Humphr. (Tenn.) 438), for the surrender of a former note of the party accommodated (Mosser *v.* Criswell, 150 Pa. St. 409, 24 Atl. 618), in consideration of an agreement that the payee should furnish to the maker a certain amount weekly of the notes of a certain bank, and that the maker of the indorsed notes should take them up at maturity (McSpedon *v.* Troy City Bank, 3 Abb. Dec. (N. Y.) 133, 2 Keyes (N. Y.) 35 [*affirming* 33 Barb. (N. Y.) 81]), where defendant gave the payee his draft on his broker for wheat, shipped by the payee to the broker in defendant's name and by his consent, and sold by the broker and credited by him to defendant (Singer *v.* Dickneite, 51 Mo. App. 245). So where one accommodation indorser has indorsed the note in consideration of another's agreement so to do, such agreement is a sufficient consideration for the latter's subsequent indorsement, although the agreement was originally made by his agent without his authority (Jones *v.* Berryhill, 25 Iowa 289); and where an accommodation indorser receives a bonus for his signature it is not an accommodation indorsement (Vliet *v.* Eastburn, 64 N. J. L. 627, 46 Atl. 735, 1061 [*reversing* 63 N. J. L. 450, 43 Atl. 741, under Married Woman's Act of 1895]).

Other liability — Advances.— So where A and B indorse for C's accommodation and A pays the note and takes a new note from C indorsed by B for half of the amount paid (Hatcher *v.* McMorine, 14 N. C. 228), or where one gives his note in advance of payments called for on a building contract (Ould *v.* Myers, 23 Gratt. (Va.) 383) or by way of advances on goods consigned (*In re* Many, 16 Fed. Cas. No. 9,054, 17 Nat. Bankr. Reg. 514).

12. As in the case of a nominal sale of A's land, held in trust by B and a transfer by B to C and notes given by C to B and indorsed by B to A (Miller *v.* Larned, 103 Ill. 562), or where the indorsement of a draft was obtained by the drawer by representing that he had funds in the hands of the indorser's firm on which the draft was drawn, whether or not the firm had funds of the drawer in its hands (Jones *v.* Swan, 6 Wend. (N. Y.) 589). So where an indorsee agrees to purchase a note "without recourse" to the indorser but induces the indorser to indorse it in blank without those words in order to aid in procuring its discount (Dale *v.* Gear, 39 Conn. 89) or where the discount is obtained by the indorser for a customer and the proceeds received by the indorser are credited and paid out to the customer (National Bank of Commerce *v.* Atkinson, 55 Fed. 465). *Contra*, where the indorser procures the paper to be discounted and pays over the proceeds as a loan to the maker. Holmes *v.* Willard, 53 Hun (N. Y.) 629, 5 N. Y. Suppl. 610, 24 N. Y. St. 260. So notes made by a purchaser in excess of the value of the goods sold, and before the goods have been delivered, for the convenience of the vendor, are accommodation notes. *In re* Sterling, 1 Fed. 167.

13. *Alabama.*— Moody *v.* Findley, 43 Ala. 167.

Louisiana.— Adle *v.* Metoyer, 1 La. Ann. 254; Jacobs *v.* Williams, 12 Rob. (La.) 183.

Maine.— Cummings *v.* Little, 45 Me. 183.

Massachusetts.— Byers *v.* Franklin Coal Co., 106 Mass. 131.

Michigan.— Barron *v.* Cady, 40 Mich. 259.

Mississippi.— Meggett *v.* Baum, 57 Miss. 22.

New Hampshire.— Child *v.* Eureka Powder Works, 44 N. H. 354.

New York.— Lock Haven State Bank *v.* Smith, 85 Hun (N. Y.) 200, 32 N. Y. Suppl. 999, 66 N. Y. St. 483; Ross *v.* Whitefield, 36 N. Y. Super. Ct. 50.

Pennsylvania.— Gunnis *v.* Weigley, 114 Pa. St. 191, 6 Atl. 465.

South Carolina.—Chester Nat. Bank *v.* Gunhouse, 17 S. C. 489.

Tennessee.— American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492.

United States.— Swarts *v.* Siegel, 114 Fed.

recourse against the party accommodated is that of a surety against the principal debtor.[14] As to other holders of the paper his liability is in general that of a

1001; Latimer *v.* Wood, 73 Fed. 1001, 36 U. S. App. 581, 20 C. C. A. 251.

Not liable to party accommodated.— It follows that the party for whose accommodation the paper was made cannot sue the accommodation party whatever their relative positions may be on the paper as payee (Hood *v.* Robbins, 98 Ala. 484, 13 So. 574; Coghlin *v.* May, 17 Cal. 515; Williams *v.* Banks, 11 Md. 198; Moore *v.* Maddock, 33 Mo. 575; Messmore *v.* Meyer, 56 N. J. L. 31, 27 Atl. 938; Peck *v.* Burwell, 48 Hun (N. Y.) 471, 1 N. Y. Suppl. 33, 16 N. Y. St. 471; Powers *v.* French, 1 Hun (N. Y.) 582, 4 Thomps. & C. (N. Y.) 65 [where the payee acted for the benefit of another party]; Murphy *v.* Keyes, 39 N. Y. Super. Ct. 18), receiver of payee (Chicago Title, etc., Co. *v.* Brady, 165 Mo. 197, 65 S. W. 303), or indorsee against maker (Corlies *v.* Howe, 11 Gray (Mass.) 125, 71 Am. Dec. 693); indorsee (Thompson *v.* Clubley, 5 L. J. Exch. 114, 1 M. & W. 212), drawer (Canadian Bank *v.* Coumbe, 47 Mich. 358, 11 N. W. 196; Toronto Bank *v.* Hunter, 4 Bosw. (N. Y.) 646; Darnell *v.* Williams, 2 Stark. 166, 19 Rev. Rep. 694, 3 E. C. L. 361), or payee against accepter (Parker *v.* Lewis, 39 Tex. 394); or indorsee against indorser (Patten *v.* Pearson, 55 Me. 39; Grabbe *v.* Bosse, 10 Mo. App. 492; Peale *v.* Addicks, 174 Pa. St. 543, 34 Atl. 201); and if the note is afterward transferred to the firm of the party accommodated the accommodation party will not be liable to it (Quinn *v.* Fuller, 7 Cush. (Mass.) 224; Sparrow *v.* Chisman, 9 B. & C. 241, 7 L. J. K. B. O. S. 173, 4 M. & R. 206, 17 E. C. L. 241). He is not liable to the party accommodated, although he also signed for the accommodation of another party (Farrar *v.* Gregg, 1 Rich. (S. C.) 378), although his co-maker received value from the party whom he accommodated (Weeks *v.* Bussell, 8 Wash. 440, 36 Pac. 265), although he signed for the accommodation of two other parties and valuable consideration passed between the parties accommodated (Messmore *v.* Meyer, 56 N. J. L. 31, 27 Atl. 938), although the note was given to him to enable him to secure a debt of his to another party, which he afterward paid (Peale *v.* Addicks, 174 Pa. St. 543, 38 Wkly. Notes Cas. (Pa.) 101, 34 Atl. 201; Sargeant *v.* Sargeant, 18 Vt. 371), although he had made a partial payment to the holder which with the amount of judgment recovered by the holder against the accommodation maker would overpay the note (Wernse *v.* Garesché, 13 Mo. App. 575), or although another indorser had been released without his knowledge on obtaining his indorsement (Larned *v.* Ogilby, 20 Iowa 410); but his signature being for the accommodation of his co-maker does not exonerate him from liability to a payee who took the note for value from the other maker, although the payee had suggested his name as acceptable to him for security (Carter *v.* Goff, 141 Mass. 123, 5 N. E. 471), or although the payee had requested him to sign the note for the accommodation of the other maker (Altman *v.* Anton, 91 Iowa 612, 60 N. W. 191; Lockwood *v.* Twitchell, 146 Mass. 623, 16 N. E. 728). Where the payee is obliged to take up a bill, which had been accepted for the drawer's accommodation, and takes a renewal with similar acceptance, the accepter becomes as to him an accepter for value and principal debtor (Israel *v.* Ayer, 2 S. C. 344), and where a bill is accepted and indorsed for the drawer's accommodation and paid by the indorser, he may sue the accepter, although the drawer had used the proceeds of the bill to pay other paper on which the plaintiff was liable as indorser (Gillespie *v.* Campbell, 39 Fed. 724, 5 L. R. A. 698).

Revocable until negotiated.—It follows that such paper is revocable until it has passed into the hands of a third party for value.

Maine.— Tufts *v.* Shepherd, 49 Me. 312.

Minnesota.— St. Paul Second Nat. Bank *v.* Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744.

Missouri.— Macy *v.* Kendall, 33 Mo. 164.

New York.— Skilding *v.* Warren, 15 Johns. (N. Y.) 270; Smith *v.* Wyckoff, 3 Sandf. Ch. (N. Y.) 77.

South Carolina.— Dogan *v.* Dubois, 2 Rich. Eq. (S. C.) 85.

Virginia.— Berkeley *v.* Tinsley, 88 Va. 1001, 14 S. E. 842; May *v.* Boisseau, 8 Leigh (Va.) 164.

England.— Mills *v.* Barber, 5 Dowl. P. C. 77, 2 Gale 5, 5 L. J. Exch. 204, 1 M. & W. 425.

Revocation by death.— Such a note cannot be negotiated after the death of the accommodation maker (Smith *v.* Wyckoff, 3 Sandf. Ch. (N. Y.) 77. *Contra*, Williams *v.* Bosson, 11 Ohio 62), as against a *bona fide* holder for value (Clark *v.* Thayer, 105 Mass. 216, 7 Am. Rep. 511).

14. *District of Columbia.*— Cochran *v.* Hume, 19 D. C. 517.

Indiana.— Lacy *v.* Lofton, 26 Ind. 324.

Louisiana.— Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640.

Massachusetts.— Wheeler *v.* Young, 143 Mass. 143, 9 N. E. 531.

Pennsylvania.— Meyran *v.* Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. Rep. 806; Kern's Estate, 171 Pa. St. 55, 33 Atl. 129 (although the note is paid out of the proceeds of property received as a gift from the party accommodated); De Barry *v.* Withers, 44 Pa. St. 356.

Virginia.— Burton *v.* Slaughter, 26 Gratt. (Va.) 914.

Such right accrues only after payment by him, and not on the mere recovery of judgment against him (Moseley *v.* Armstrong, 3 T. B. Mon. (Ky.) 287) and an accepter for the accommodation of one drawer cannot look to a co-drawer who signed his name as "surety" for the first (Griffith *v.* Reed, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267).

similar party (maker, accepter, or indorser) who receives value,[15] but he is so far a surety as to holders with notice of his accommodation character that he will be discharged by arrangements made to his prejudice with the principal debtor without his knowledge.[16] As to the immediate lender, however, the party accommodated may be liable as a borrower and not entitled to the defenses incident in general to his position on the paper negotiated for his benefit.[17] On

Order of recourse not controlled by form.— The accommodation party's recourse is not controlled by the form of the paper. Thus he may bring suit as drawer against accepter and payee (Lewis *v.* Williams, 4 Bush (Ky.) 678), as accepter against drawer (Pomeroy *v.* Tanner, 70 N. Y. 547), as maker against payee (Owens *v.* Miller, 29 Md. 144), or as indorser against two joint makers on his accommodation procured by one of them (Hoffman *v.* Butler, 105 Ind. 371, 4 N. E. 681).

Subrogation.— As surety he is entitled in general to be subrogated to any securities given by the party accommodated to the holder for his security (Toronto Bank *v.* Hunter, 4 Bosw. (N. Y.) 646. See also, generally, PRINCIPAL AND SURETY), but if the security was furnished by the accommodated payee to the indorsee under an agreement with the accommodation maker, both agreement and accommodation being unknown to the indorsee, the indorsee may afterward change the collateral by arrangement with the payee and hold it as security for another debt against the accommodation maker's claim (Tyler *v.* Busey, 3 MacArthur (D. C.) 344).

15. *California.*— Chafoin *v.* Rich, 92 Cal. 471, 28 Pac. 488.

Georgia.— Carlton *v.* White, 99 Ga. 384, 27 S. E. 704; Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761.

Illinois.— Diversy *v.* Loeb, 22 Ill. 393; De Land *v.* Dixon Nat. Bank, 14 Ill. App. 219.

Louisiana.— Crane *v.* Trudeau, 19 La. Ann. 307; Connely *v.* Bourg, 16 La. Ann. 108, 79 Am. Dec. 568; Jacobs *v.* Williams, 12 Rob. (La.) 183; Dupré *v.* Richard, 11 Rob. (La.) 497; Olivier *v.* Andry, 7 La. 496; Harrod *v.* Lafarge, 12 Mart. (La.) 21.

Massachusetts.— Cole *v.* Cushing, 8 Pick. (Mass.) 48.

Minnesota.— Tourtelot *v.* Paulson, 62 Minn. 384, 64 N. W. 928.

New Jersey.— Laubach *v.* Pursell, 35 N. J. L. 434.

New York.— Chittenango First Nat. Bank *v.* Morgan, 6 Hun (N. Y.) 346; Zellweger *v.* Caffe, 5 Duer (N. Y.) 87; Suydam *v.* Westfall, 2 Den. (N. Y.) 205 [*reversing* 4 Hill (N. Y.) 211]; Commercial Bank *v.* Norton, 1 Hill (N. Y.) 501; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Brown *v.* Mott, 7 Johns. (N. Y.) 361.

Pennsylvania.— Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438; Lewis *v.* Hanchman, 2 Pa. St. 416; Walker *v.* Montgomery County Bank, 12 Serg. & R. (Pa.) 382.

Utah.—Wallace *v.* Richards, 16 Utah 52, 50 Pac. 804.

United States.— Yeaton *v.* Alexandria Bank, 5 Cranch (U. S.) 49, 3 L. ed. 33.

England.— Nichols *v.* Norris, 3 B. & Ad. 41, 23 E. C. L. 28 (even as against a holder with notice); Smith *v.* Knox, 3 Esp. 46; Carstairs *v.* Rolleston, 1 Marsh. 207, 5 Taunt. 551, 1 E. C. L. 283; Fentum *v.* Pecock, 1 Marsh. 14, 5 Taunt. 192, 1 E. C. L. 105.

He is not discharged by mere want of diligence against the principal (Lock Haven State Bank *v.* Smith, 85 Hun (N. Y.) 200, 32 N. Y. Suppl. 999, 66 N. Y. St. 483; Converse *v.* Cook, 31 Hun (N. Y.) 417; Hansbrough *v.* Gray, 3 Gratt. (Va.) 356) or against his collateral (Allentown Nat. Bank *v.* Trexler, 174 Pa. St. 497, 34 Atl. 195, delay being contemplated by the agreement for the collateral); by previous entry of judgment, with his knowledge, against the principal on the original note, of which the note in suit was a renewal (Cutler *v.* Parsons, 13 N. Y. App. Div. 376, 43 N. Y. Suppl. 187), or by an extension given to the party accommodated although the holder has notice of his accommodation character (White *v.* Hopkins, 3 Watts & S. (Pa.) 99, 37 Am. Dec. 542); and an accommodation indorser cannot discharge himself from liability on the note by requesting the holder to enforce payment from the maker, and by showing the neglect of the holder so to do, the solvency of the maker at the time, and his insolvency afterward (Converse *v.* Cook, 25 Hun (N. Y.) 44).

After the liability of an accommodation indorser has been fixed by notice and judgment has been recovered against him he becomes a principal debtor and is not entitled to the aid of a court of equity as surety. McNutt *v.* Wilcox, Freem. (Miss.) 116.

16. *Massachusetts.*— Guild *v.* Butler, 127 Mass. 386, surrender of collateral.

Michigan.— Canadian Bank *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

New York.— Flour City Nat. Bank *v.* McKay, 86 Hun (N. Y.) 15, 33 N. Y. Suppl. 365, 67 N. Y. St. 114 (agreement for surrender of the note, itself held as collateral, and for substitution of other security); Dunn *v.* Parsons, 40 Hun (N. Y.) 77 (release of principal's land from lien of judgment).

Wisconsin.—Price County Bank *v.* McKenzie, 91 Wis. 658, 65 N. W. 507, diversion of collateral.

United States.— *In re* Goodwin, 5 Dill. (U. S.) 140, 10 Fed. Cas. No. 5,549, 17 Nat. Bankr. Reg. 257, extension.

17. Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550.

Or a defense may be available which would not be available to a mere indorser, as in the case of a usurious loan to the payee on his

the other hand the amount of the accommodation party's liability may be restricted to the amount paid by such holder.[18] Accommodation parties *inter se* are liable to one another in general in the order shown by their signatures,[19] but they may be liable to one another as joint indorsers on an agreement to that effect,[20] especially where the indorsements were all made for a common purpose before the note was put into circulation.[21]

4. Love and Affection — a. In General — (i) *Gifts*[22] — (A) *Generally.* Love and affection are not a sufficient consideration for a bill or note as between the immediate parties,[23] and the surrender of a note which was made originally

indorsement of the accommodation note. Strickland *v.* Henry, 66 N. Y. App. Div. 23, 73 N. Y. Suppl. 12.

18. Rule *v.* Williams, 8 Ky. L. Rep. 152; Cook *v.* Clark, 4 E. D. Smith (N. Y.) 213.

19. Accepter to drawer.— Turner *v.* Browder, 5 Bush (Ky.) 216; Griffith *v.* Reed, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267; Barnet *v.* Young, 29 Ohio St. 7.

Accepter to indorser.— Williams *v.* Bosson, 11 Ohio 62; Gillespie *v.* Campbell, 39 Fed. 724, 5 L. R. A. 698; Robinson *v.* Kilbreth, 1 Bond (U. S.) 592, 20 Fed. Cas. No. 11,957.

Drawer to indorser.— Sherrod *v.* Rhodes, 5 Ala. 683; Dunn *v.* Sparks, 7 Ind. 490; McCune *v.* Belt, 45 Mo. 174.

Maker's surety to irregular indorser before payee.— Hanish *v.* Kennedy, 106 Mich. 455, 64 N. W. 459.

Maker to indorser.— Post *v.* Tradesmen's Bank, 28 Conn. 420; Moynihan *v.* McKeon, 16 Misc. (N. Y.) 343, 38 N. Y. Suppl. 61, 74 N. Y. St. 316.

Successive indorsers.—*Alabama.*—Montgomery First Nat. Bank *v.* Dawson, 78 Ala. 67; Moody *v.* Findley, 43 Ala. 167; Abercromhie *v.* Conner, 10 Ala. 293; Spence *v.* Barclay, 8 Ala. 581; Brahan *v.* Ragland, 3 Stew. (Ala.) 247.

Connecticut.— Kirschner *v.* Conklin, 40 Conn. 77.

District of Columbia.— Buscher *v.* Murray, 21 D. C. 612.

Georgia.— Stiles *v.* Eastman, 1 Ga. 205.

Maine.— Wescott *v.* Stevens, 85 Me. 325, 27 Atl. 146 (indorser below payee for accommodation of maker); Coolidge *v.* Wiggin, 62 Me. 568.

Massachusetts.— Shaw *v.* Knox, 98 Mass. 214.

Michigan.— McGurk *v.* Huggett, 56 Mich. 187, 22 N. W. 308.

Missouri.— Stillwell *v.* How, 46 Mo. 589; McNeilly *v.* Patchin, 23 Mo. 40, 66 Am. Dec. 651; Druhe *v.* Christy, 10 Mo. App. 566.

New York.— Kelly *v.* Burroughs, 102 N. Y. 93, 6 N. E. 109.

Ohio.— Williams *v.* Bosson, 11 Ohio 62 [*explaining* Douglas *v.* Waddle, 1 Ohio 413, 13 Am. Dec. 630].

Pennsylvania.— Steckel *v.* Steckel, 28 Pa. St. 233.

South Carolina.— Aiken *v.* Barkley, 2 Speers (S. C.) 747, 42 Am. Dec. 397.

Virginia.— Hogue *v.* Davis, 8 Gratt. (Va.) 4; Farmers' Bank *v.* Vanmeter, 4 Rand. (Va.) 553.

United States.—McDonald *v.* Magruder, 3 Pet. (U. S.) 470, 7 L. ed. 744 [*reversing* 3 Cranch C. C. (U. S.) 299, 16 Fed. Cas. No. 8,965], no other intention being indicated by the words "credit the drawer" in the corner of the note.

Contra, Richards *v.* Simms, 18 N. C. 48 [*following* Daniel *v.* McRae, 9 N. C. 590, 11 Am. Dec. 787].

20. *California.*— Brady *v.* Reynolds, 13 Cal. 31.

Connecticut.— Talcott *v.* Cogswell, 3 Day (Conn.) 512, such intention shown by each paying one half in taking the note up.

North Carolina.—Atwater *v.* Farthing, 118 N. C. 388, 24 S. E. 736.

Virginia.— U. S. Bank *v.* Beirne, 1 Gratt. (Va.) 234, 42 Am. Dec. 551, intention shown by joint power of attorney and note executed under it.

United States.— Phillips *v.* Preston, 5 How. (U. S.) 278, 12 L. ed. 152.

England.— Macdonald *v.* Whitfield, 8 App. Cas. 733, 52 L. J. P. C. 70, 49 L. T. Rep. N. S. 466.

But it has been held that even *inter se* an earlier cannot set up against a later accommodation indorser an agreement for a joint liability, as it conflicts with the contract made by their indorsements (Johnson *v.* Ramsey, 43 N. J. L. 279, 39 Am. Rep. 580 [*overruling* Johnson *v.* Martinus, 9 N. J. L. 144, 17 Am. Dec. 464]), although, where all the indorsements were conditioned on the others, they have been held to be joint, although nothing was said about order of indorsement or precedence (Hagerthy *v.* Phillips, 83 Me. 336, 22 Atl. 223).

A change of order of the indorsements on the renewal note raises no presumption of a joint obligation. Palmer *v.* Field, 76 Hun (N. Y.) 229, 27 N. Y. Suppl. 736, 59 N. Y. St. 123.

21. Pitkin *v.* Flanagan, 23 Vt. 160, 56 Am. Dec. 61.

22. See, generally, Gifts.

23. *Alabama.*— Rice *v.* Rice, 68 Ala. 216.

California.— Tracy *v.* Alvord, 118 Cal. 654, 50 Pac. 757.

Illinois.— Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608; Richardson *v.* Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; Williams *v.* Forbes, 114 Ill. 167, 28 N. E. 463; Kirkpatrick *v.* Taylor, 43 Ill. 207; Graves *v.* Safford, 41 Ill. App. 659; Arnold *v.* Franklin, 3 Ill. App. 141.

Indiana.— Johnston *v.* Griest, 85 Ind. 503; West *v.* Cavins, 74 Ind. 265.

Kentucky.— Cotton *v.* Graham, 84 Ky.

for such consideration will not be sufficient in whole or part for a subsequent note.[24]

(B) *Causa Mortis.* The testamentary purpose of such a gift to take effect on the donor's death is a sufficient consideration for the transfer by the donor of the bill or note of a third party held by the donor,[25] especially if payable to bearer,[26] although even a bill or note payable to order will pass by *donatio causa mortis*,[27] by delivery without indorsement;[28] but such purpose is not sufficient for the gift of the donor's own bill or note.[29]

672, 8 Ky. L. Rep. 658, 2 S. W. 647, although preceded by the maker's voluntary agreement.

Maryland.— Selby *v.* Case, 87 Md. 459, 39 Atl. 1041; Linthicum *v.* Linthicum, 2 Md. Ch. 21.

Massachusetts.— Nye *v.* Chace, 139 Mass. 379, 31 N. E. 736, although the payee may have had an unsettled claim against the maker.

Nebraska.— Ricketts *v.* Scothorn, 57 Nebr. 51, 77 N. W. 365, 73 Am. St. Rep. 491, 42 L. R. A. 794.

New York.— Fink *v.* Cox, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191.

Pennsylvania.— Kern's Estate, 171 Pa. St. 55, 33 Atl. 129.

Texas.— Hatchett *v.* Hatchett, (Tex. Civ. App. 1902) 67 S. W. 163.

Vermont.— Mullen *v.* Rutland, 55 Vt. 77.

England.— Hill *v.* Wilson, L. R. 8 Ch. 888, 42 L. J. Ch. 817, 29 L. T. Rep. N. S. 238, 21 Wkly. Rep. 757; Milnes *v.* Dawson, 5 Exch. 948, 20 L. J. Exch. 81.

Canada.—McCarroll *v.* Reardon, 9 N. Brunsw. 261; Baker *v.* Read, 7 Nova Scotia 199.

The fact that the donee relied on it as assets does not alter the case. Foust *v.* Cumberland Presb. Church, 8 Lea (Tenn.) 552.

Sealed note.— On the other hand a sealed note payable after the maker's death may be enforced against his estate, although intended by the maker as a gift (Brown's Estate, 4 Pa. Dist. 587, 26 Pittsb. Leg. J. N. S. 20) or an advancement (Carter *v.* King, 11 Rich. (S. C.) 125). *Contra*, as to a note not under seal intended by the maker to equalize children's portions. Hadley *v.* Reed, 58 Hun (N. Y.) 608, 12 N. Y. Suppl. 163, 34 N. Y. St. 949.

Transfer.— So it is not sufficient consideration for an indorsement (Easton *v.* Pratchett, 1 C. M. & R. 798, 3 Dowl. P. C. 472 [*affirmed* in 2 C. M. & R. 542, 4 Dowl. P. C. 549, 1 Gale 250, 5 Tyrw. 1129]), and one who takes the transfer of a guaranty for love and affection is not a holder for value who could sue in his own name as such under the statute (Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547).

24. Copp *v.* Sawyer, 6 N. H. 386. *Compare* Dawson *v.* Kearton, 2 Jur. N. S. 113, 25 L. J. Ch. 166, 3 Smale & G. 186, 4 Wkly. Rep. 222, holding that a renewal note given on the surrender of a note made to a friend's child was valid and binding on the maker's estate prior to legacies contained in the will.

A note given by the donor for the proceeds of a gift of land borrowed back from the donee is valid (Rice *v.* Rice, 106 Ala. 636, 17 So. 628), but a note which is merely given to the donor as a memorandum of the gift received is without consideration (Burk *v.* Kerr, 12 Wkly. Notes Cas. (Pa.) 191).

25. *Alabama.*— Jones *v.* Deyer, 16 Ala. 221.

Kentucky.— Stephenson *v.* King, 81 Ky. 425, 50 Am. Rep. 173; Turpin *v.* Thompson, 2 Metc. (Ky.) 420.

Massachusetts.— Bates *v.* Kempton, 7 Gray (Mass.) 382.

North Carolina.— Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

Pennsylvania.— Wells *v.* Tucker, 3 Binn. (Pa.) 366.

England.— Rankin *v.* Weguelin, 27 Beav. 309, 29 L. J. Ch. 323 note; Veal *v.* Veal, 27 Beav. 303, 6 Jur. N. S. 527, 29 L. J. Ch. 321, 2 L. T. Rep. N. S. 228, 8 Wkly. Rep. 2.

26. Weston *v.* Hight, 17 Me. 287, 35 Am. Dec. 250; House *v.* Grant, 4 Lans. (N. Y.) 296; Miller *v.* Miller, 3 P. Wms. 356; Lawson *v.* Lawson, 1 P. Wms. 441; Drury *v.* Smith, 1 P. Wms. 404.

27. *Kentucky.*— Turpin *v.* Thompson, 2 Metc. (Ky.) 420.

Maine.— Parker *v.* Marston, 27 Me. 196.

Massachusetts.— Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319.

New Hampshire.— Kenistons *v.* Sceva, 54 N. H. 24.

New York.— Stevens *v.* Stevens, 2 Hun (N. Y.) 470.

Vermont.— McConnell *v.* McConnell, 11 Vt. 290.

28. Brown *v.* Brown, 18 Conn. 410, 46 Am. Dec. 328; Borneman *v.* Sidlinger, 15 Me. 429, 33 Am. Dec. 626; Bates *v.* Kempton, 7 Gray (Mass.) 382; Veal *v.* Veal, 27 Beav. 303, 6 Jur. N. S. 527, 29 L. J. Ch. 321, 2 L. T. Rep. N. S. 228, 8 Wkly. Rep. 2; Clement *v.* Cheesman, 27 Ch. D. 631, 54 L. J. Ch. 158, 33 Wkly. Rep. 40 (a check payable to the donor's order and not indorsed).

29. *California.*— Tracy *v.* Alvord, 118 Cal. 654, 50 Pac. 757.

Connecticut.—Raymond *v.* Sellick, 10 Conn. 480.

Illinois.— Shaw *v.* Camp, 160 Ill. 425, 43 N. E. 608 (payable after donor's death, but intended to take effect in his lifetime); Blanchard *v.* Williamson, 70 Ill. 647.

Louisiana.— De Pouilly's Succession, 22 La. Ann. 97; Barriere *v.* Gladding, 17 La. 144.

Massachusetts.— Warren *v.* Durfee, 126 Mass. 338; Carr *v.* Silloway, 111 Mass. 24; Loring *v.* Sumner, 23 Pick. (Mass.) 98;

(II) *Subscriptions.* Where promissory notes are given by way of subscription to an educational, benevolent, or charitable object, they may be supported by the similar obligations of other subscribers[30] or by expenses incurred by the payee on the strength of such subscription;[31] but in the absence of such support

Parish *v.* Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378.

New Hampshire.— Flint *v.* Pattee, 33 N. H. 520, 66 Am. Dec. 742; Copp *v.* Sawyer, 6 N. H. 386.

New Jersey.— Voorhees *v.* Woodhull, 33 N. J. L. 494; Smith *v.* Smith, 30 N. J. Eq. 564.

New York.— Whitaker *v.* Whitaker, 52 N. Y. 368, 11 Am. Rep. 711; Dodge *v.* Pond, 23 N. Y. 69; Sheldon *v.* Button, 5 Hun (N. Y.) 110; Irish *v.* Nutting, 47 Barb. (N. Y.) 370; Phelps *v.* Phelps, 28 Barb. (N. Y.) 121; Fink *v.* Cox, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191; Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76. So a donor cannot make a *donatio causa mortis* of his own draft. Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352 [*overruling* Wright *v.* Wright, 1 Cow. (N. Y.) 598].

Pennsylvania.— Luebbe's Estate, 179 Pa. St. 447, 36 Atl. 322, sealed bill.

South Carolina.— Hall *v.* Howard, 1 Rice (S. C.) 310, 33 Am. Dec. 115.

Vermont.— Smith *v.* Kittridge, 21 Vt. 238; Holley *v.* Adams, 16 Vt. 206, 42 Am. Dec. 508.

England.— Tate *v.* Hilbert, 4 Bro. Ch. 286, 2 Ves. Jr. 111, 2 Rev. 175, I O U.

Where given for services gratuitously rendered.— It has been held that a note which failed as a *donatio causa mortis* might be sustained as a note for value, where it was given for services gratuitously rendered. Bowers *v.* Hurd, 10 Mass. 427. *Contra,* Holliday *v.* Atkinson, 5 B. & C. 501, 8 D. & R. 163, 29 Rev. Rep. 299, 11 E. C. L. 558.

The donor's check intended as a gift is not available as a *donatio causa mortis* and is revoked by his death (Detroit Second Nat. Bank *v.* Williams, 13 Mich. 282; Curry *v.* Powers, 70 N. Y. 212, 26 Am. Rep. 577; *In re* Smither, 30 Hun (N. Y.) 632; Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457, 27 Am. Rep. 521; Kern's Estate, 171 Pa. St. 55, 33 Atl. 129; Hewitt *v.* Kaye, L. R. 6 Eq. 198, 37 L. J. Ch. 633, 16 Wkly. Rep. 835. And see Banks and Banking, 5 Cyc. 540, note 9), especially if not delivered before donor's death (McKenzie *v.* Downing, 25 Ga. 669). If there be a valuable consideration for the donor's check left in trust for delivery at the drawer's death it is not a gift *causa mortis.* Whitehouse *v.* Whitehouse, 90 Me. 468, 38 Atl. 374, 60 Am. St. Rep. 278.

30. *Indiana.*— Cook *v.* McNaughton, 128 Ind. 410, 24 N. E. 361, 28 N. E. 74; Roche *v.* Roanoke Classical Seminary, 56 Ind. 198 (although the entire "endowment" proposed is not subscribed); Johnson *v.* Wabash College, 2 Ind. 555; Garrigus *v.* Home, Frontier, etc., Missionary Soc., 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262 (holding that a note payable to a missionary society, which recites that the maker is "desiring to advance the cause of missions, and to induce others to contribute to that purpose," shows that it is given upon sufficient consideration).

Kentucky.— Graves *v.* Graves, 7 B. Mon. (Ky.) 213. *Contra,* as to a joint note for a private subscription, not performed by either maker. Cotton *v.* Graham, 84 Ky. 672, 8 Ky. L. Rep. 658, 2 S. W. 647.

Massachusetts.— Gamwell *v.* Mosely, 11 Gray (Mass.) 173.

Michigan.— Wesleyan Seminary *v.* Fisher, 4 Mich. 515.

New Hampshire.— George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446.

New York.— Roberts *v.* Cobb, 103 N. Y. 600, 9 N. E. 500 [*affirming* 31 Hun (N. Y.) 150].

Wisconsin.—Seventh Day Baptist Memorial Fund *v.* Saunders, 84 Wis. 570, 54 N. W. 1094; La Fayette County Monument Corp. *v.* Magoon, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761.

See 7 Cent. Dig. tit. "Bills and Notes," § 208.

Note to pay subscription.— A note given to pay off a subscription already made (Henderson, etc., R. Co. *v.* Moss, 2 Duv. (Ky.) 242; Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387) or in consideration of the maker's liability on a bond given by him and others by voluntary subscription to indemnify taxable citizens against expense in the erection of public buildings (Sterner *v.* Palmer, 34 Pa. St. 131) is supported by sufficient consideration.

31. Simpson Centenary College *v.* Bryan, 50 Iowa 293; Warren Academy *v.* Starrett, 15 Me. 443; Wheeler *v.* Toof, 2 Mich. N. P. 44; Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576; Koch *v.* Lay, 38 Mo. 147. So a gift to trustees of an orphan asylum who are authorized to receive funds and are required by law to apply them to the charitable uses contemplated is good (Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234; Collier *v.* Baptist Education Soc., 8 B. Mon. (Ky.) 68); but where the donor delivers a note to a third party for aid to a college on a condition, and the duties which are made a condition by the donor are not assumed by the designated trustee until after the donor's death, the gift fails (*In re* Helfenstein, 77 Pa. St. 328, 18 Am. Rep. 449).

The performance of the work contemplated by the subscriber is sufficient, irrespective of other subscription or of a specific expenditure on the strength of any particular subscription. Roche *v.* Roanoke Classical Seminary, 56 Ind. 198; Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; Wesleyan Seminary *v.* Fisher, 4 Mich. 515 (where "stock" was issued to the donor); Irwin *v.*

they cannot be enforced against the maker,[32] unless he has received some benefit thereby.[33]

b. Past Kindness. A note or bill is without sufficient consideration, if given for past kindness, which was rendered gratuitously to the maker[34] or to his family.[35] Advancements by a parent to his child are probably acts of this class, and if a note is taken as evidence to be used in equalizing the distribution of the parent's estate it is not generally enforceable as a note or debt against the maker.[36]

5. Consideration For Extension — a. Necessity For. A valid consideration is necessary to support a contract for the extension of a bill or note or for forbearance upon it.[37]

Lombard University, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239.

32. Simpson Centenary College *v.* Tuttle, 71 Iowa 596, 33 N. W. 74; *In re* Bartlett, 163 Mass. 509, 40 N. E. 899; Montpelier Seminary *v.* Smith, 69 Vt. 382, 38 Atl. 66. See also Pratt *v.* Elgin Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187, where the note was given toward the purchase of a church bell, and the bell was purchased, but it did not appear that liability was incurred on account of the note.

33. As where a subscriber receives back the amount of his subscription as a loan, and gives his note for principal and interest. Fisher *v.* Ellis, 3 Pick. (Mass.) 322.

34. Hamor *v.* Moore, 8 Ohio St. 239. But on the other hand if a sufferer by fire receives from a relief committee money raised by voluntary subscription to benefit him and others, and gives his note for it, he cannot deny that the note has a sufficient consideration. Bayou Sara *v.* Harper, 15 La. Ann. 233.

35. Edwards *v.* Davis, 16 Johns. (N. Y.) 281.

36. *Indiana.*— Harris *v.* Harris, 69 Ind. 181; Peabody *v.* Peabody, 59 Ind. 556.

Iowa.— Marsh *v.* Chown, 104 Iowa 556, 73 N. W. 1046, for advancement already made.

Kentucky.— Hedges *v.* Hedges, (Ky. 1902) 67 S. W. 835.

Missouri.— Hardin *v.* Wright, 32 Mo. 452.

Ohio.— Wright *v.* Merchant, 2 Ohio Dec. (Reprint) 742, 5 West. L. Month. 194.

37. *Alabama.*— Mobile Branch Bank *v.* James, 9 Ala. 949.

Arkansas.— Hazard *v.* White, 26 Ark. 155.

California.— McCann *v.* Lewis, 9 Cal. 246.

District of Columbia.— Gross *v.* Steinle, 20 D. C. 339.

Florida.— Bowen *v.* Darby, 14 Fla. 202; Fridenberg *v.* Robinson, 14 Fla. 130.

Georgia.— Clark *v.* Bryce, 64 Ga. 486; Bonner *v.* Nelson, 57 Ga. 433; Goodwyn *v.* Hightower, 30 Ga. 249.

Illinois.— Weaver *v.* Fries, 85 Ill. 356; Gardner *v.* Watson, 13 Ill. 347; Henderson *v.* Dodgson, 9 Ill. App. 80; Hurd *v.* Marple, 2 Ill. App. 402.

Indiana.— Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; Halstead *v.* Brown, 17 Ind. 202; Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Harter *v.* Moore, 5 Blackf. (Ind.) 367.

Iowa.— Marshall Field Co. *v.* Oren Ruffcom Co., (Iowa 1902) 90 N. W. 618; Roberts *v.* Richardson, 39 Iowa 290.

Kansas.— Costello *v.* Wilhelm, 13 Kan. 229.

Louisiana.— Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

Maine.— Howe *v.* Klein, 89 Me. 376, 36 Atl. 620; Chute *v.* Pattee, 37 Me. 102; Mariner's Bank *v.* Abbott, 28 Me. 280.

Maryland.— Planters' Bank *v.* Sellman, 2 Gill & J. (Md.) 230.

Massachusetts.— Wilson *v.* Powers, 130 Mass. 127; Jennings *v.* Chase, 10 Allen (Mass.) 526.

Minnesota.— Huey *v.* Pinney, 5 Minn. 310; Michaud *v.* Lagarde, 4 Minn. 43.

Mississippi.— Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24.

Missouri.— Marks *v.* State Bank, 8 Mo. 316; Nichols *v.* Douglass, 8 Mo. 49.

Nebraska.— Dillon *v.* Russell, 5 Nebr. 484.

New Hampshire.— Bailey *v.* Adams, 10 N. H. 162.

New York.— Van Allen *v.* Jones, 10 Bosw. (N. Y.) 369; Manchester *v.* Van Brunt, 2 Misc. (N. Y.) 228, 22 N. Y. Suppl. 362, 50 N. Y. St. 588 [*affirming* 19 N. Y. Suppl. 685, 46 N. Y. St. 566]; Huffman *v.* Hulbert, 13 Wend. (N. Y.) 375; Miller *v.* Holbrook, 1 Wend. (N. Y.) 317; Holmes *v.* Dole, Clarke (N. Y.) 71.

North Carolina.— Charlotte First Nat. Bank *v.* Lineberger, 83 N. C. 454, 35 Am. Rep. 582.

Ohio.— Ward *v.* Wick, 17 Ohio St. 159; Blazer *v.* Bundy, 15 Ohio St. 57; Farmers' Bank *v.* Raynolds, 13 Ohio 84.

Pennsylvania.— Rumberger *v.* Golden, 99 Pa. St. 34; Miller *v.* Stem, 12 Pa. St. 383.

Texas.—Austin Real Estate, etc., Co. *v.* Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430.

Vermont.— Joslyn *v.* Smith, 13 Vt. 353.

United States.— McLemore *v.* Powell, 12 Wheat. (U. S.) 554, 6 L. ed. 726; Vary *v.* Norton, 6 Fed. 808.

See also *infra*, VIII, A, 5, c, (I); and 7 Cent. Dig. tit. "Bills and Notes," § 341.

An agreement for renewal by the payee requires a valid consideration (Arend *v.* Smith, 151 N. Y. 502, 45 N. E. 872), but it seems to have been formerly held that an extension did not require an independent consideration (Gould *v.* Robson, 8 East 576, 9 Rev. Rep. 498).

There must be legal validity in the con-

b. Sufficiency of Consideration—(i) *Payment of Money.* A sum of money paid as a bonus, even after the maturity of the paper,[38] a part payment made on the bill before it matures,[39] a payment of interest made in advance,[40] even

sideration for an extension in order to effect the discharge of secondary parties.

Alabama.— Buckalew *v.* Smith, 44 Ala. 638.

Illinois.— Gardner *v.* Watson, 13 Ill. 347.

Indiana.— Dare *v.* Hall, 70 Ind. 545; Harter *v.* Moore, 5 Blackf. (Ind.) 367.

Iowa.—Roberts *v.* Richardson, 39 Iowa 290; Hunt *v.* Postlewait, 28 Iowa 427.

Mississippi.— Hunt *v.* Knox, 34 Miss. 655; Roberts *v.* Stewart, 31 Miss. 664; Clarke County *v.* Covington, 26 Miss. 470.

Missouri.— Nichols *v.* Douglass, 8 Mo. 49.

Nebraska.— Burr *v.* Boyer, 2 Nebr. 265.

New Jersey.— Grover *v.* Hoppock, 26 N. J. L. 191.

Ohio.—Farmers' Bank *v.* Raynolds, 13 Ohio 84.

Texas.— Hunter *v.* Clark, 28 Tex. 159.

See also *infra*, VIII, A, 5, c, (I).

38. Lemmon *v.* Whitman, 75 Ind. 318, 39 Am. Rep. 150; Veazie *v.* Carr, 3 Allen (Mass.) 14; McComb *v.* Kittridge, 14 Ohio 348 (payment of a specific sum originally agreed on at the making of the note); Washington *v.* Tait, 3 Humphr. (Tenn.) 543 (holding that if the bank-notes in which the note was payable were greatly depreciated and the debtor gave his note for the amount of depreciation it is sufficient). See also *infra*, VIII, A, 5, c, (II), note 87.

Commissions paid to the holder for his trouble in attending to the matter are not sufficient. Prather *v.* Gammon, 25 Kan. 379.

The payment of a nominal sum and back interest is not sufficient. Meginnis *v.* Nightingale, 34 N. J. L. 461.

Payment of the money for an extension must be actually made and not merely credited (Edmonds *v.* Thomas, 41 Ill. App. 505), and it is not enough merely to give a note for such payment (Schroeppel *v.* Shaw, 5 Barb. (N. Y.) 580 [*affirmed* in 3 N. Y. 446]). So a due-bill for the payment of usurious interest as a bonus is not sufficient, although the payment was afterward actually made before the extension expired. Howell *v.* Sevier, 1 Lea (Tenn.) 360, 27 Am. Rep. 771. *Compare infra*, VIII, A, 5, c, (II), note 88.

39. Rigsbee *v.* Bowler, 17 Ind. 167; Greely *v.* Dow, 2 Metc. (Mass.) 176; Newsam *v.* Finch, 25 Barb. (N. Y.) 175; Austin *v.* Dorwin, 21 Vt. 38. See also *infra*, VIII, A, 5, c, (II), note 82.

Payment of usury before maturity, which does not, under the statute, vitiate the contract, has been held to be sufficient, although the excess above legal interest may be applied, under the statute, to the principal. Peck *v.* Beckwith, 10 Ohio St. 497.

40. *Arkansas.*— Vestal *v.* Knight, 54 Ark. 97, 15 S. W. 17.

California.— Smith *v.* Pearson, 52 Cal. 339.

Illinois.— Maher *v.* Lanfrom, 86 Ill. 513; Flynn *v.* Mudd, 27 Ill. 323; Warner *v.* Campbell, 26 Ill. 282.

Indiana.— Starret *v.* Burkhalter, 86 Ind. 439; Williams *v.* Scott, 83 Ind. 405; Kaler *v.* Hise, 79 Ind. 301; Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270; Hamilton *v.* Winterrowd, 43 Ind. 401; Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373.

Kentucky.—Armendt *v.* Perkins, 17 Ky. L. Rep. 1327, 32 S. W. 270.

Louisiana.— Calliham *v.* Tanner, 3 Rob. (La.) 299.

Maine.— Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673, 42 Me. 349; Mariner's Bank *v.* Abbott, 28 Me. 280.

Mississippi.— Dubuisson *v.* Folkes, 30 Miss. 432.

Missouri.— Merchants' Ins. Co. *v.* Hauck, 83 Mo. 21; St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517.

New Hampshire.— New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

Ohio.— Gard *v.* Neff, 39 Ohio St. 607; Atkinson *v.* Talbott, 1 Disn. (Ohio) 111, 12 Ohio Dec. (Reprint) 518.

Pennsylvania.— Siebeneck *v.* Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; Grayson's Appeal, 108 Pa. St. 581; Calvert *v.* Good, 95 Pa. St. 65.

Vermont.— Dunham *v.* Downer, 31 Vt. 249.

Washington.— Binnian *v.* Jennings, 14 Wash. 677, 45 Pac. 302.

Wisconsin.— Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751.

See also *infra*, VIII, A, 5, c, (II), note 86; and 7 Cent. Dig. tit. "Bills and Notes," § 348.

Payment of future interest at a higher rate than that originally stipulated is sufficient. White *v.* Whitney, 51 Ind. 124; Seattle First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

Extent to which extension supported.—The payment of interest in advance will not support an extension beyond the time paid for (Armendt *v.* Perkins, 17 Ky. L. Rep. 1327, 32 S. W. 270), and it has been held that payment of interest to accrue is not in itself a binding agreement for an extension (Hosea *v.* Rowley, 57 Mo. 357 [said in Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517, to "have been misunderstood by the court below"]; Nevada First Nat. Bank *v.* Gardner, 57 Mo. App. 268), but that there must be independent proof of the agreement (American Nat. Bank *v.* Love, 62 Mo. App. 378). On the other hand a receipt for interest in advance indorsed on the note has been held to be sufficient evidence of an extension (Mennet *v.* Grisard, 79 Ind. 222), at least *prima facie* (Batavian Bank *v.* McDonald, 77 Wis. 486, 46 N. W. 902), and this is so *a fortiori* where a receipt is given for the interest in advance and a renewal note is taken (Springfield First Nat. Bank *v.* Leavitt, 65 Mo. 562).

though usurious,[41] or a payment made on account of another debt which is not yet due[42] is sufficient; but part payment of the whole amount due, after it has already become due,[43] or the payment of matured interest[44] is not. Where a pay-

41. *Illinois.*— Warner *v.* Campbell, 26 Ill. 282.

Indiana.— White *v.* Whitney, 51 Ind. 124; Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270; Hamilton *v.* Winterrowd, 43 Ind. 393; Charlton *v.* Tardy, 28 Ind. 452; Calvin *v.* Wiggam, 27 Ind. 489; Redman *v.* Deputy, 26 Ind. 338.

Kentucky.— Kenningham *v.* Bedford, 1 B. Mon. (Ky.) 325.

Missouri.—Wild *v.* Howe, 74 Mo. 551; Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517 [*overruling* in effect Farmers', etc., Bank *v.* Harrison, 57 Mo. 503; Ritenour *v.* Harrison, 57 Mo. 502].

Ohio.— Osborn *v.* Low, 40 Ohio St. 347.

Pennsylvania.— Grayson's Appeal, 108 Pa. St. 581.

South Dakota.— Niblack *v.* Champeny, 10 S. D. 165, 72 N. W. 402.

Texas.— Mann *v.* Brown, 71 Tex. 241, 9 S. W. 111, the statute making usurious contracts only void as to interest and that only if specially pleaded.

Vermont.—Austin *v.* Dowin, 21 Vt. 38.

West Virginia.— Glenn *v.* Morgan, 23 W. Va. 467.

See also *infra*, VIII, A, 5, c, (IV), (B).

If made in consideration of the maker's note for usurious interest in advance an agreement for extension is valid (Scott *v.* Harris, 76 N. C. 205), but not so if the statute makes such interest recoverable by action (Cross *v.* Wood, 30 Ind. 378; Shaw *v.* Binkard, 10 Ind. 227; Charlotte First Nat. Bank *v.* Lineberger, 83 N. C. 454, 35 Am. Rep. 582).

42. Rigsbee *v.* Bowler, 17 Ind. 167.

Payment of other matured debt is not a sufficient consideration for an extension (Wolz *v.* Parker, 134 Mo. 458, 35 S. W. 1149), although the maker was induced by promise of an extension to borrow the money for the payment (Pomeroy *v.* Slade, 16 Vt. 220). See also *infra*, VIII, A, 5, c, (II), note 79.

43. *Arkansas.*— Stone *v.* State Bank, 8 Ark. 141.

California.— Liening *v.* Gould, 13 Cal. 598.

Georgia.— Bennett *v.* Williams, 54 Ga. 525. *Compare* Stallings *v.* Johnson, 27 Ga. 564.

Illinois.— Stuber *v.* Schack, 83 Ill. 191; Edmonds *v.* Thomas, 41 Ill. App. 505.

Indiana.— Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; Berry *v.* Bates, 2 Blackf. (Ind.) 118.

Kansas.— Ingels *v.* Sutliff, 36 Kan. 444, 13 Pac. 828; Prather *v.* Gammon, 25 Kan. 379; Royal *v.* Lindsay, 15 Kan. 591; Pemberton *v.* Hoosier, 1 Kan. 108.

Massachusetts.— Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 129.

Michigan.— Briggs *v.* Norris, 67 Mich. 325, 34 N. W. 582.

Mississippi.— Hunt *v.* Knox, 34 Miss. 655; Roberts *v.* Stewart, 31 Miss. 664.

Missouri.— Wolz *v.* Parker, 134 Mo. 458, 35 S. W. 1149; Petty *v.* Douglass, 76 Mo. 70.

New Hampshire.— Bailey *v.* Adams, 10 N. H. 162.

New York.— Halliday *v.* Hart, 30 N. Y. 474; Manchester *v.* Van Brunt, 2 Misc. (N. Y.) 228, 22 N. Y. Suppl. 362, 50 N. Y. St. 588; Manchester *v.* Van Brunt, 19 N. Y. Suppl. 685; Miller *v.* Holbrook, 1 Wend. (N. Y.) 317 (and a note given for the balance); Pabodie *v.* King, 12 Johns. (N. Y.) 426.

Ohio.— Turnbull *v.* Brock, 31 Ohio St. 649; Jenkins *v.* Clarkson, 7 Ohio 72.

Pennsylvania.— Hartman *v.* Danner, 74 Pa. St. 36. *Contra*, Robertson *v.* Vogle, 1 Dall. (Pa.) 252, 1 L. ed. 123.

Tennessee.— Sully *v.* Childress, 106 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875; McKamy *v.* McNabb, 97 Tenn. 236, 36 S. W. 1091; White *v.* Summers, 1 Baxt. (Tenn.) 154.

Texas.—Andrews *v.* Hagadon, 54 Tex. 571.

Vermont.— Wheeler *v.* Washburn, 24 Vt. 293; Mason *v.* Peters, 4 Vt. 101.

United States.— Low *v.* Underhill, 3 McLean (U. S.) 376, 15 Fed. Cas. No. 8,561, 2 West. L. J. 360, unless accompanied by some other act.

See 7 Cent. Dig. tit. "Bills and Notes," § 349.

The extension is not supported by payment of costs which have been adjudged against the maker (Parmelee *v.* Thompson, 45 N. Y. 58, 6 Am. Rep. 33); payment of usurious interest, which is in legal effect a part payment of the principal due (Meginnis *v.* Nightingale, 34 N. J. L. 461); or by a promise to part with the maker's note with forged sureties for the balance (Albright *v.* Griffin, 78 Ind. 182), to pay out of certain property when sold (Grover *v.* Hoppock, 26 N. J. L. 191), to pay the proceeds of execution sale under a judgment held by the maker (Wadlington *v.* Gary, 7 Sm. & M. (Miss.) 522), or to pay weekly instalments (Van Rensselaer *v.* Kirkpatrick, 46 Barb. (N. Y.) 194). On the other hand a composition with creditors of the insolvent maker and a partial payment under the composition is sufficient. Freeman *v.* Profilet, 11 Rob. (La.) 33. And it has been held that it is sufficient if the holder of a bill receives part payment of the amount due under an agreement to extend a bill. Robertson *v.* Vogle, 1 Dall. (Pa.) 252, 1 L. ed. 123.

44. *Illinois.*— Booth *v.* Wiley, 102 Ill. 84; Crossman *v.* Wohlleben, 90 Ill. 537; Stuber *v.* Schack, 83 Ill. 191; Waters *v.* Simpson, 7 Ill. 570; Edmonds *v.* Thomas, 41 Ill. App. 505; Dennis *v.* Piper, 21 Ill. App. 169.

Indiana.— Holmes *v.* Boyd, 90 Ind. 332; Dare *v.* Hall, 70 Ind. 545; Starret *v.* Burkhal-

ment is otherwise available as a consideration it will be in general available if actually made, although it amounts to usury.[45]

(II) *Giving Additional Security.* The giving of new security is a sufficient consideration for a valid extension or forbearance.[46]

ter, 70 Ind. 285 (even to support an agreement for extension as long as the interest is paid); Halstead *v.* Brown, 17 Ind. 202.

Iowa.— Van Dusen *v.* Parley, 40 Iowa 70.

Massachusetts.— Wilson *v.* Powers, 130 Mass. 127, even with an agreement that part of the future interest charged at the former rate shall be applied to the reduction of the principal.

New Hampshire.— Russ *v.* Hobbs, 61 N. H. 93; Howard *v.* Fletcher, 59 N. H. 151.

New York.— Kellogg *v.* Olmsted, 28 Barb. (N. Y.) 96.

Texas.—Andrews *v.* Hagadon, 54 Tex. 571; Helms *v.* Crane, 4 Tex. Civ. App. 89, 23 S. W. 392.

See 7 Cent. Dig. tit. "Bills and Notes," § 346.

Giving a new note for the accrued interest is not sufficient (Bugh *v.* Crum, 26 Ind. App. 465, 59 N. E. 1076, 84 Am. St. Rep. 307), even though the new note has an additional maker (Russ *v.* Hobbs, 61 N. H. 93) or an additional sum is paid (Meginnis *v.* Nightingale, 34 N. J. L. 461), although it would be otherwise if the back interest was compounded in the new note (Bugh *v.* Crum, 26 Ind. App. 465, 59 N. E. 1076, 84 Am. St. Rep. 307).

Payment amounting to compounding of interest.— On the other hand an actual payment of interest on an overdue note every ninety days, amounting in effect to compounding interest several times a year, is sufficient, although the statute prohibits compounding of interest more than once a year. Commercial Bank *v.* Wood, 56 Mo. App. 214.

45. *Georgia.*— Scott *v.* Saffold, 37 Ga. 384; Camp *v.* Howell, 37 Ga. 312.

Illinois.— Myers *v.* Fairbury First Nat. Bank, 78 Ill. 257; Danforth *v.* Semple, 73 Ill. 170.

Indiana.— Lemmon *v.* Whitman, 75 Ind. 318, 39 Am. Rep. 150 [*criticizing* Chrisman *v.* Perrin, 67 Ind. 586; and *following* Harbert *v.* Dumont, 3 Ind. 346, which held the usurious payment, which was not then recoverable by statute, beneficial to the holder]; Cross *v.* Wood, 30 Ind. 378; Harbert *v.* Dumont, 3 Ind. 346.

Iowa.— Kelly *v.* Gillespie, 12 Iowa 55, 79 Am. Dec. 516.

Kentucky.— Robinson *v.* Miller, 2 Bush (Ky.) 179; Kenningham *v.* Bedford, 1 B. Mon. (Ky.) 325.

Missouri.— Wild *v.* Howe, 74 Mo. 551; Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517.

New Hampshire.— Wright *v.* Bartlett, 43 N. H. 548.

New York.— Froude *v.* Bishop, 25 N. Y. App. Div. 514, 49 N. Y. Suppl. 955.

North Carolina.— Scott *v.* Harris, 76 N. C. 205.

Ohio.— Blazer *v.* Bundy, 15 Ohio St. 57.

Wisconsin.— Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621; Hamilton *v.* Prouty, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866.

United States.— Vary *v.* Norton, 6 Fed. 808.

See also *infra*, VIII, A, 5, c, (IV), (B).

Even payment of usury by a new usurious note is sufficient (Kelly *v.* Gillespie, 12 Iowa 55, 79 Am. Dec. 516; McComb *v.* Kittridge, 14 Ohio 348 [where the greater part of it was afterward paid]; Fay *v.* Tower, 58 Wis. 286, 16 N. W. 558), especially where the note is secured by additional security (Camp *v.* Howell, 37 Ga. 312).

46. *Alabama.*— Mobile Branch Bank *v.* James, 9 Ala. 949, the conveyance of property which is apparently sufficient to satisfy the debt.

Georgia.— Burnap *v.* Robertson, 75 Ga. 689, the giving of a mortgage, even though the holder could have avoided it at his option for false representation made by the maker.

Indiana.— Underwood *v.* Sample, 70 Ind. 446 (a real estate mortgage, although the mortgaged property proves to be of insufficient value to satisfy the note); Kester *v.* Hulman, 65 Ind. 100 (holding it sufficient if promise to assume the debt is made by a new party).

Kansas.— Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63, the giving of a real estate mortgage.

Louisiana.— Nott *v.* State Nat. Bank, 51 La. Ann. 871, 25 So. 475, part payment and new collateral.

Missouri.—Semple *v.* Atkinson, 64 Mo. 504, a deed of trust of property of the maker not otherwise liable to execution.

Nebraska.— Lee *v.* Brugmann, 37 Nebr. 232, 55 N. W. 1053, a chattel mortgage.

Tennessee.— Lee *v.* Dozier, 10 Humphr. (Tenn.) 447, a deed in trust to sell for the payment of the note.

Texas.— Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118, the giving of new priority to an existing mortgage.

Vermont.— Paddock *v.* Jones, 40 Vt. 474, even after the note is overdue.

See also *infra*, VIII, A, 5, c, (II), note 85; and 7 Cent. Dig. tit. "Bills and Notes," § 342.

New signatures, furnished as additional security, are sufficient.

Indiana.— Trayser *v.* Indiana Asbury University, 39 Ind. 556.

Iowa.— Gates *v.* Hamilton, 12 Iowa 50.

Kansas.— Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63.

Missouri.— Williams *v.* Jensen, 75 Mo. 681, even though the signature is invalid, as that of a married woman.

Texas.—Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861.

(III) *EXECUTORY AGREEMENT.* An executory agreement is sufficient as an agreement on the part of the promisor to pay to the holder another debt for which the promisor is not himself liable,[47] or an agreement to pay the debt of a third person.[48] In like manner an agreement to pay interest to accrue in future is a sufficient consideration;[49] but this is not so of an agreement to pay in future compound interest[50] or usury.[51] An agreement to pay a note which is already

Washington.— Merchants' Bank *v.* Bussell, 16 Wash. 546, 48 Pac. 242.

The giving of a new note is sufficient (Place *v.* McIlvain, 1 Daly (N. Y.) 266 [a postdated check]; Canton Chemical Co. *v.* Pegram, 112 N. C. 614, 17 S. E. 298 [a renewal note]), but the debtor's own note is not available as a security for an indefinite extension (Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235). Nor is the mere promise to transfer another note if the amount was not otherwise realized, such promise not being enforceable (Wadlington *v.* Gary, 7 Sm. & M. (Miss.) 522), or the giving of a new note on which one maker's name is forged (Carter *v.* Columbia Bank, 12 Ky. L. Rep. 968, 16 S. W. 79).

An agreement to improve the existing collateral, for instance, to perfect the title to mortgaged land is sufficient. McKinnon *v.* Palen, 62 Minn. 188, 64 N. W. 387.

47. Kester *v.* Hulman, 65 Ind. 100; Buck *v.* Smiley, 64 Ind. 431 (promise to pay before maturity another note made by him to the maker); Menifee *v.* Clark, 35 Ind. 304 (an agreement to apply funds in hands to another debt); Rigsbee *v.* Bowler, 17 Ind. 167 (the payment of another debt of the maker to the payee, which is not then due); Ducker *v.* Rapp, 67 N. Y. 464 (an agreement to apply rents to be collected to such debt); Thrall *v.* Mead, 40 Vt. 540 (an agreement to pay from time to time in services to be rendered by the maker when requested). But not a promise to pay such other debt which was already due (Beasley *v.* Boothe, 3 Tex. Civ. App. 98, 22 S. W. 255) or to pay such other debt when it becomes due (Juchter *v.* Boehm, 63 Ga. 71).

The unperformed promise of an insolvent maker to pay another debt is not, however, sufficient. Bunker *v.* Taylor, 10 S. D. 526, 74 N. W. 450.

48. Kester *v.* Hulman, 65 Ind. 100 (the assumption of a mortgage by the purchaser of the land); Clarke *v.* House, 16 N. Y. Suppl. 777, 40 N. Y. St. 956 (the assumption by a partner of the liabilities of his firm as represented by the note).

49. *Illinois.*— Dodgson *v.* Henderson, 113 Ill. 360; Reynolds *v.* Barnard, 36 Ill. App. 218.

Kansas.— Royal *v.* Lindsay, 15 Kan. 591 (at a higher rate); Eaton *v.* Whitmore, 3 Kan. App. 760, 45 Pac. 450 (at a lower rate).

Kentucky.—Alley *v.* Hopkins, 98 Ky. 668, 17 Ky. L. Rep. 1227, 34 S. W. 13, 56 Am. St. Rep. 382; Robinson *v.* Miller, 2 Bush (Ky.) 179.

Louisiana.— Shaw *v.* Nolan, 8 La. Ann. 25, at a higher rate.

Maine.— Chute *v.* Pattee, 37 Me. 102.

Massachusetts.— Wilson *v.* Powers, 130 Mass. 127, an agreement to pay future interest at the old rate with a stipulation that part of it, when paid, would be applied to the principal.

Mississippi.— Keirn *v.* Andrews, 59 Miss. 39.

Montana.— Hale *v.* Forbis, 3 Mont. 395.

Nebraska.— Kittle *v.* Wilson, 7 Nebr. 76, at a higher rate.

New Hampshire.— Fowler *v.* Brooks, 13 N. H. 240; Bailey *v.* Adams, 10 N. H. 162.

Ohio.— Fawcett *v.* Freshwater, 31 Ohio St. 637.

Texas.— Benson *v.* Phipps, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128; Aiken *v.* Posey, 13 Tex. Civ. App. 607, 35 S. W. 732.

Washington.— Nelson *v.* Flagg, 18 Wash. 39, 50 Pac. 571.

Contra, Holmes *v.* Boyd, 90 Ind. 332; Hume *v.* Mazelin, 84 Ind. 574; Dare *v.* Hall, 70 Ind. 545; Starret *v.* Burkhalter, 70 Ind. 285; Miller *v.* Arnold, 65 Ind. 488; Chrisman *v.* Tuttle, 59 Ind. 155; Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270 [*overruling* Pierce *v.* Goldsberry, 31 Ind. 52]; Harter *v.* Moore, 5 Blackf. (Ind.) 367; Kellogg *v.* Olmsted, 28 Barb. (N. Y.) 96; Reynolds *v.* Ward, 5 Wend. (N. Y.) 501; Rumberger *v.* Golden, 99 Pa. St. 34; Dow *v.* Chambers, 37 Leg. Int. (Pa.) 399; Campbell *v.* Daly, 25 Leg. Int. (Pa.) 124. More especially where the extension is to be given indefinitely so long as the interest is paid. Van Allen *v.* Jones, 10 Bosw. (N. Y.) 369.

See also *infra,* VIII, A, 5, c, (II), notes 90, 91.

50. Leeper *v.* McGuire, 57 Mo. 360.

51. *Alabama.*— Cox *v.* Mobile, etc., R. Co., 37 Ala. 320; Kyle *v.* Bostick, 10 Ala. 589.

District of Columbia.— Green *v.* Lake, 2 Mackey (D. C.) 162, although actually paid at the expiration of the time agreed.

Illinois.— Galbraith *v.* Fullerton, 53 Ill. 126.

Indiana.— Williams *v.* Boyd, 75 Ind. 286; Halstead *v.* Brown, 17 Ind. 202; Braman *v.* Howk, 1 Blackf. (Ind.) 392.

Kentucky.—Anderson *v.* Mannon, 7 B. Mon. (Ky.) 217; Scott *v.* Hall, 6 B. Mon. (Ky.) 285; Lewis *v.* Harbin, 5 B. Mon. (Ky.) 564; Tudor *v.* Goodloe, 1 B. Mon. (Ky.) 322.

Maine.— Berry *v.* Pullen, 69 Me. 101, 31 Am. Rep. 248.

Maryland.— Ives *v.* Bosley, 35 Md. 262, 6 Am. Rep. 411.

Mississippi.— Brown *v.* Prophit, 53 Miss. 649; Roberts *v.* Stewart, 31 Miss. 664.

New York.—Billington *v.* Wagoner, 33 N. Y. 31; Fernan *v.* Doubleday, 3 Lans. (N. Y.) 216.

overdue creates no new liability on the promisor's part and is not a sufficient consideration [52] unless the new promise takes it out of the statute of limitation; [53] but it has been held to be sufficient for an accommodation party to consent to remain liable if the creditor agrees to the maker's composition in bankruptcy and to accept a partial payment under it,[54] and it is said that a relinquishment by the maker of his right to make payment of the note is sufficient.[55] The release of a third party from imprisonment under execution [56] or the giving of a new note by the maker and his agreement to purchase certain property from the holder [57] is sufficient, and an extension granted by the maker is a sufficient consideration for an extension by the indorser.[58] On the other hand an unperformed agreement on his part to give a confession of judgment,[59] a request by the surety on a note that the holder should not issue execution on it,[60] or a release on the maker's part of a defense which had no foundation [61] is not sufficient. So a promise to pay off a cloud on the holder's title, with no actual payment made by him, is not a sufficient consideration for an agreement to credit such payment on the note and to extend the note until the cloud is removed.[62]

Ohio.— Jones *v.* Brown, 11 Ohio St. 601.

Pennsylvania.— Calvert *v.* Good, 95 Pa. St. 65.

South Carolina.— Cornwell *v.* Holly, 5 Rich. (S. C.) 47.

Tennessee.—Wilson *v.* Langford, 5 Humphr. (Tenn.) 320.

Texas.— Payne *v.* Powell, 14 Tex. 600.

Vermont.— Smith *v.* Hyde, 36 Vt. 303; Burgess *v.* Dewey, 33 Vt. 618.

Wisconsin.— Irvine *v.* Adams, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817; St. Maries *v.* Polleys, 47 Wis. 67, 1 N. W. 389; Meiswinkle *v.* Jung, 30 Wis. 361, 11 Am. Rep. 572.

See also *infra*, VIII, A, 5, c, (IV), (A).

An unenforceable verbal agreement to pay usurious interest is not a sufficient consideration (Turner *v.* Williams, 73 Me. 466) and would not prevent the indorsee bringing suit, even in a court of equity (Wiley *v.* Hight, 39 Mo. 130); but an agreement to pay usurious interest is sufficient if the interest is actually paid (Smith *v.* Pearson, 52 Cal. 339; Armistead *v.* Ward, 2 Patt. & H. (Va.) 504. And see *supra*, III, B, 5, b, (I), note 41. The payment of it by a new note (McComb *v.* Kittridge, 14 Ohio 348 [afterward paid in part]; Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621) or after the extension has expired (Smith *v.* Hyde, 36 Vt. 303) is not sufficient. If, however, the agreement is otherwise sufficient, and is rendered void only as to the usurious excess, it will not be defeated or made void by usury. Parmelee *v.* Williams, 72 Ga. 42; Stallings *v.* Johnson, 27 Ga. 564; Wheat *v.* Kendall, 6 N. H. 504; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

52. Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360 (the promise of a maker to pay the balance already due as soon as he can collect certain debts due him); Halstead *v.* Brown, 17 Ind. 202 (a promise to pay the interest already due); Jennings *v.* Chase, 10 Allen (Mass.) 526 (a promise to make monthly payments on the overdue principal); Findley *v.* Hill, 8 Oreg. 247, 34 Am. Rep. 578 (an agreement to pay it "in wheat after harvest"); McManus *v.* Bark, L. R. 5 Exch. 65, 39 L. J. Exch. 65, 21 L. T. Rep. N. S. 676 (an agreement to pay in instalments a principal that is already overdue); Philpot *v.* Briant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754, 29 Rev. Rep. 710 (the individual promise of an executor to pay the principal due from his estate). See also *infra*, VIII, A, 5, c, (II), note 77.

If an agreement is for an extension to take effect when a payment is made the actual payment will constitute a good consideration (Low *v.* Underhill, 3 McLean (U. S.) 376, 15 Fed. Cas. No. 8,561, 2 West. L. J. 360), although payment of one note that is due will not support an agreement to extend another note not yet due (Wolz *v.* Parker, 134 Mo. 458, 35 S. W. 1149).

53. Stallings *v.* Johnson, 27 Ga. 564.

54. McCracken *v.* Covington City Nat. Bank, 4 Ky. L. Rep. 264.

55. Simpson *v.* Evans, 44 Minn. 419, 46 N. W. 908.

An agreement for indefinite forbearance is not sufficient without a corresponding agreement on the debtor's part for indefinite continuance of the debt. Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855.

The mere dropping of an offer to pay in Confederate money without any definite waiver of his right so to do is no consideration for the holder's agreement to extend the note if the maker would desist from his offer to pay it in that way. Bonner *v.* Nelson, 57 Ga. 433.

56. U. S. Bank *v.* Hatch, 6 Pet. (U. S.) 250, 8 L. ed. 387.

57. Dunham *v.* Downer, 31 Vt. 249.

58. Buffalo Third Nat. Bank *v.* Blake, 73 N. Y. 260.

59. Hunt *v.* Knox, 34 Miss. 655.

60. Hogshead *v.* Williams, 55 Ind. 145.

61. Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565.

62. O'Hara *v.* Robinson, 63 Hun (N. Y.) 569, 18 N. Y. Suppl. 541, 45 N. Y. St. 460.

6. Consideration For Modification. Every modification of the original contract requires a fresh consideration.[63] The legal sufficiency of such consideration is in general the same as in other commercial contracts[64] and a very common consideration for a change of the contract is an extension or forbearance by the holder.[65] On the other hand a mere part payment of the amount already due is not sufficient to support a modification of the contract.[66]

7. Consideration For Release. In like manner a fresh consideration is necessary to a release of the contract[67] or of the collateral securing it.[68] The sufficiency of the consideration is substantially the same as in other cases.[69]

8. Consideration For Waiver. In case of an implied waiver, resulting from the

63. *Alabama.*— Johnson *v.* Washburn, 98 Ala. 258, 13 So. 48, an agreement not to transfer the note.

Illinois.— Gross *v.* Weary, 90 Ill. 256 (an agreement to allow a set-off which had been duly waived); Weaver *v.* Fries, 85 Ill. 356 (an agreement not to collect); Reid *v.* Degener, 82 Ill. 508 (providing for payment by assignment of a claim of the maker's against a third person); Heckenkemper *v.* Dingwehrs, 32 Ill. 538 (an agreement to allow a set-off, subject to its allowance by the court on accounting); Gimmeson *v.* Butler, 12 Ill. App. 399 (providing for acceptance of payment in work).

Minnesota.—Colter *v.* Greenhagen, 3 Minn. 126, a change made in the terms of payment making it payable at a particular place.

Pennsylvania.— Dickson *v.* Tunstall, 3 C. Pl. Rep. (Pa.) 128, providing for payment of larger sum as principal.

South Carolina.— Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770 [*affirming* 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743], increasing the rate of interest.

64. **New note with additional indorsement** is sufficient consideration for reducing the amount. Jenness *v.* Lane, 26 Me. 475.

Performance of condition is sufficient, as in an agreement for a set-off if it should be allowed by the court on accounting. Heckenkemper *v.* Dingwehrs, 32 Ill. 538.

Release of obligation to pay in coin is sufficient for the maker's agreement to pay in legal tender with the addition of a sum then fixed as premium below the market premium at that time. Smith *v.* McKinney, 22 Ohio St. 200.

65. **Forbearance** is sufficient consideration for an agreement to pay an increased rate of interest (Beckner *v.* Carey, 44 Ind. 89; Knapp *v.* Mills, 20 Tex. 123), to pay compound interest (Jasper County *v.* Tavis, 76 Mo. 13), to pay the note in coin instead of in legal tender currency (Belloc *v.* Davis, 38 Cal. 242), or for a new and direct promise of payment, made by the maker to an indorsee (Ford *v.* Rehman, Wright (Ohio) 434).

66. Pemberton *v.* Hoosier, 1 Kan. 108 (to look primarily to the assets in another state); Colter *v.* Greenhagen, 3 Minn. 126 (fixing a new place of payment).

67. Weaver *v.* Fries, 85 Ill. 356; Smith *v.* Smith, 80 Ind. 267; Kidder *v.* Kidder, 33 Pa. St. 268; Parker *v.* Leigh, 2 Stark. 228, 3 E. C. L. 388. Or to an agreement for release at a future time (Carrier *v.* Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707), or on a future contingency (Herndon *v.* Henderson, 41 Miss. 584).

68. Richardson *v.* Noble, 77 Me. 390.

69. *Alabama.*— Carpenter *v.* Murphree, 49 Ala. 84, the substitution of another party's note.

Illinois.— Roberts *v.* Carter, 31 Ill. App. 142, holding that a waiver of accrued interest may be supported by the giving of new notes for the principal with attorney's fees.

Massachusetts.— First Nat. Bank *v.* Watkins, 154 Mass. 385, 28 N. E. 275, the maker's reliance on the holder's promise to look to a collateral mortgage only and damage sustained by extension and depreciation of the property.

Missouri.—Lowrey *v.* Danforth, (Mo. 1902) 69 S. W. 39, services.

New Jersey.— Lodge *v.* Hulings, 63 N. J. Eq. 159, 51 Atl. 1015, holding that an agreement by the maker's heir to pay the interest for payee's lifetime will support a release of the principal and a surrender of the note.

New York.— Ludington *v.* Bell, 77 N. Y. 138, 33 Am. Rep. 601 [*reversing* 43 N. Y. Super. Ct. 557], substitution of the note of one partner for his proportionate share of a partnership debt. So if the drawer gives security for the payment of the bill at maturity, it will be a sufficient consideration for release of his liability for statutory damages on non-acceptance. Pesant *v.* Pickersgill, 56 N. Y. 650.

Vermont.— Ridlon *v.* Davis, 51 Vt. 457, an executory agreement by the maker to pay certain expenses for the holder, although they amount to less than the debt released.

Assumption of existing obligation.— The maker's promise to pay and his payment of another note of his, on which he was already liable, is not sufficient. Bragg *v.* Danielson, 141 Mass. 195, 4 N. E. 622. Nor is the assumption by one joint maker of an existing joint obligation. Amend *v.* Becker, 37 Misc. (N. Y.) 496, 75 N. Y. Suppl. 1095.

Part payment is not sufficient for a release, whether made by a sole maker (Smith *v.* Bartholomew, 1 Metc. (Mass.) 276, 25 Am. Dec. 365) or by one of several joint makers (Potter *v.* Green, 6 Allen (Mass.) 442; Ruggles *v.* Patten, 8 Mass. 480; Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 37), and being ineffectual as to the payer it will not effect

acts of the parties, no new consideration is necessary,[70] but it is otherwise in the case of a waiver by express promise.[71] An extension is, however, sufficient to support such a promise.[72]

9. Consideration For Guaranty and Suretyship — a. In General — (I) *Guaranty.* A consideration is necessary for every contract of guaranty.[73] This is true alike of a guaranty on the paper by a third party [74] and of the guaranty by a separate and collateral instrument.[75] If the guaranty is made after the original contract it requires a fresh consideration,[76] but if it is contemporaneous with the original contract the original consideration is sufficient,[77] and if it is contained in a transfer of the paper the consideration for the transfer is sufficient for the guaranty.[78] It is not necessary for the guaranty, any more than for the original contract, that the consideration should be adequate in amount,[79] and the consideration

a discharge of his co-maker (Smith *v.* Bartholomew, 1 Metc. (Mass.) 276, 25 Am. Dec. 365; Line *v.* Nelson, 38 N. J. L. 358). So payment of the principal of a note is not a good consideration for a promise to release the interest. Willis *v.* Gammill, 67 Mo. 730.

70. As a waiver of protest at or before maturity (Robinson *v.* Barnett, 19 Fla. 670, 45 Am. Rep. 24) or of a discharge in bankruptcy (Way *v.* Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Hobough *v.* Murphy, 114 Pa. St. 358, 7 Atl. 139); the indorser's consent to an extension of the note (Sheldon *v.* Horton, 43 N. Y. 93, 3 Am. Rep. 669); a surety's waiver by assent to the discharge of another party (Smith *v.* Winter, 8 L. J. Exch. 34, 4 M. & W. 454; Mayhew *v.* Crickett, 2 Swanst. 185, Wils. Ch. 418, 19 Rev. Rep. 57) or his consent to an alteration (Pelton *v.* Prescott, 13 Iowa 567); the confirmation of a note originally obtained by fraud (Lyon *v.* Phillips, 106 Pa. St. 57) or the surety's waiver of his discharge by his making a new promise (Hooper *v.* Pike, 70 Minn. 84, 72 N. W. 829, 68 Am. St. Rep. 512; Bramble *v.* Ward, 40 Ohio St. 267).

71. Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360; Ray *v.* McMurtry, 20 Ind. 307, 83 Am. Dec. 322; Gilmore *v.* Green, 14 Bush (Ky.) 772; Porter *v.* Hodenpuyl, 9 Mich. 11.

72. Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 18 N. E. 56.

The forbearance on a former note which was nearly barred by the statute of limitations is sufficient. Parsons *v.* Frost, 55 Mich. 230, 21 N. W. 303.

73. See *supra*, III, A, 1.

74. *Connecticut.*— Colburn *v.* Tolles, 14 Conn. 341.

Illinois.— Blanchard *v.* McCuller, 7 Ill. App. 431.

Kansas.— Briggs *v.* Latham, 36 Kan. 205, 13 Pac. 129.

Maryland.— Aldridge *v.* Turner, 1 Gill & J. (Md.) 427.

Massachusetts.— Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347.

75. But where the guarantors are in effect the borrowers, guaranteeing as individuals loans made to themselves as a corporation, the original loan is a sufficient consideration for both note and guaranty. National Exch. Bank *v.* Gay, 57 Conn. 224, 17 Atl. 555, 4 L. R. A. 343.

76. *Illinois.*— Joslyn *v.* Collinson, 26 Ill. 61.

Indiana.— Crossan *v.* May, 68 Ind. 242.

Massachusetts.— Courtney *v.* Doyle, 10 Allen (Mass.) 122.

Missouri.— Howard *v.* Jones, 10 Mo. App. 81, 13 Mo. App. 596.

New York.—Weed *v.* Clark, 4 Sandf. (N. Y.) 31.

North Carolina.— Greer *v.* Jones, 52 N. C. 581.

Vermont.— White *v.* White, 30 Vt. 338.

Wisconsin.— Bank of Commerce *v.* Ross, 91 Wis. 320, 64 N. W. 993.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

Guaranty made at time of transfer.— This is so of a formal transfer with guaranty by a nominal payee (Ware *v.* Adams, 24 Me. 177; Nichols *v.* Allen, 23 Minn. 542) and of a guaranty by blank indorsement after delivery to the payee (Joslyn *v.* Collinson, 26 Ill. 61).

77. *California.*— Kennedy, etc., Lumber Co. *v.* S. S. Construction Co., 123 Cal. 584, 56 Pac. 457.

Illinois.— Rich *v.* Hathaway, 18 Ill. 548.

Iowa.— Star Wagon Co. *v.* Swezy, 63 Iowa 520, 19 N. W. 298.

Massachusetts.— Bickford *v.* Gibbs, 8 Cush. (Mass.) 154.

Minnesota.—Osborne *v.* Gullikson, 64 Minn. 218, 66 N. W. 965.

New Jersey.— Laing *v.* Lee, 20 N. J. L. 337.

New York.— Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280 (for a letter of credit for acceptance of bills of exchange to be drawn); Colston *v.* Pemberton, 21 Misc. (N. Y.) 619, 47 N. Y. Suppl. 1110; Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317.

Ohio.— Leonard *v.* Sweetzer, 16 Ohio 1.

Oregon.— Delsman *v.* Friedlander, 40 Oreg. 33, 66 Pac. 297.

Pennsylvania.— Snevily *v.* Johnston, 1 Watts & S. (Pa.) 307.

See also *supra*, III, A, 2, a, note 93.

78. Gillighan *v.* Boardman, 29 Me. 79; Fowler *v.* Clearwater, 35 Barb. (N. Y.) 143; Nelson *v.* Dubois, 13 Johns. (N. Y.) 175; Wyman *v.* Goodrich, 26 Wis. 21.

79. *Connecticut.*— **Williams *v.* Granger,** 4 Day (Conn.) 444.

may be an indirect one, not coming to the guarantor himself,[80] as in the case of forbearance granted to the principal debtor[81] or to the estate of a decedent in which the guarantor is interested;[82] but the consideration must in all cases be a valid one.[83] The guarantor's[84] existing liability in a different capacity is sufficient, even though it is barred by the statute of limitations,[85] and it is sufficient to support a guaranty that indemnity is given to him for his indorsement before it is made,[86] that a loss is suffered by the party guaranteed,[87] or that commissions are paid to the guarantor for his service.[88]

(II) *SURETYSHIP.* The contract of a surety requires a consideration, and if it is subsequent to the original contract a fresh consideration;[89] but it is not necessary that the surety should himself receive the benefit thereof.[90] His contract would be supported by the existing debt of the principal debtor[91] or by forbearance to the principal debtor,[92] and an original agreement between the principal and his creditor for a surety[93] or the furnishing of additional security to the payee and his relinquishment of a right to rescind[94] is sufficient. The surety's original liability as such will support his renewal,[95] unless that liability has already been

Georgia.— Gammell *v.* Parramore, 58 Ga. 54.

Illinois.— Hance *v.* Miller, 21 Ill. 636.

Maine.— Cobb *v.* Little, 2 Me. 261, 11 Am. Dec. 72.

New Hampshire.— March *v.* Putney, 56 N. H. 34.

Vermont.— Noyes *v.* Nichols, 28 Vt. 159; Peck *v.* Varney, 13 Vt. 93.

England.— Hitchcock *v.* Humfrey, 12 L. J. C. P. 235, 5 M. & G. 559, 6 Scott N. R. 540, 44 E. C. L. 296.

80. Maggs *v.* Ames, 4 Bing. 470, 6 L. J. C. P. O. S. 75, 1 M. & P. 294, 13 E. C. L. 593, the discharge of the principal debtor.

81. *Connecticut.*— Breed *v.* Hillhouse, 7 Conn. 523.

Kansas.— Fuller *v.* Scott, 8 Kan. 25.

New York.—Greene *v.* Odell, 43 N. Y. App. Div. 494, 60 N. Y. Suppl. 78; Watson *v.* Randall, 20 Wend. (N. Y.) 201.

Pennsylvania.— Hopkinson *v.* Davis, 5 Phila. (Pa.) 147, 20 Leg. Int. (Pa.) 76, where the forbearance was obtained at the indorser's request and left indefinitely by his own action.

England.— Emmott *v.* Kearns, 5 Bing. N. Cas. 559, 7 Dowl. P. C. 630, 3 Jur. 436, 8 L. J. C. P. 329, 7 Scott 687, 35 E. C. L. 301; Morris *v.* Stacey, Holt N. P. 153, 3 E. C. L. 68.

Mere forbearance without an agreement to forbear is not sufficient. Lambert *v.* Clewley, 80 Me. 480, 15 Atl. 61; Mecorney *v.* Stanley, 8 Cush. (Mass.) 85. So where the guaranty is conditioned on forbearance for a certain time. Russell *v.* Buck, 11 Vt. 166, 14 Vt. 147.

82. Johnson *v.* Wilmarth, 13 Metc. (Mass.) 416.

83. Heidenheimer *v.* Mayer, 42 N. Y. Super. Ct. 506 [*affirmed* in 74 N. Y. 607]; Swift *v.* Beers, 3 Den. (N. Y.) 70, under the usury and banking laws respectively.

84. The mere liability of another person without forbearance or release is not sufficient as against the guarantor. Farnsworth *v.* Clark, 44 Barb. (N. Y.) 601.

85. Miles *v.* Linnell, 97 Mass. 298; Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61 (to make good the maker's original liability as indorser).

86. Staats *v.* Howlett, 4 Den. (N. Y.) 559.

87. As in selling goods on credit (Church *v.* Brown, 21 N. Y. 315; Chapin *v.* Merrill, 4 Wend. (N. Y.) 657) or delivering finished work without payment (Darlington *v.* McCunn, 2 E. D. Smith (N. Y.) 411).

88. Barber *v.* Ketchum, 7 Hill (N. Y.) 444. So commissions to an agent on sale of goods are a sufficient consideration for his guaranty by blank indorsement of the note taken in payment. Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 4 N. W. 995.

89. *Alabama.*— Savage *v.* Rome First Nat. Bank, 112 Ala. 508, 20 So. 398.

Connecticut.—Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

Illinois.— Anderson *v.* Norvill, 10 Ill. App. 240.

Indiana.—Favorite *v.* Stidham, 84 Ind. 423.

Iowa.— Briggs *v.* Downing, 48 Iowa 550.

Massachusetts.— Green *v.* Shepherd, 5 Allen (Mass.) 589.

England.—Britten *v.* Webb, 2 B. & C. 483, 3 D. & R. 650, 2 L. J. K. B. O. S. 118, 9 E. C. L. 214.

90. Gay *v.* Mott, 43 Ga. 252; Brewster *v.* Baker, 97 Ind. 260; Sprigg *v.* Mt. Pleasant Bank, 10 Pet. (U. S.) 257, 9 L. ed. 416.

91. Harrell *v.* Tenant, 30 Ark. 684.

92. Pulliam *v.* Withers, 8 Dana (Ky.) 98, 33 Am. Dec. 479; Pratt *v.* Hedden, 121 Mass. 116 (if known to the surety at the time); Meyers *v.* Hockenbury, 34 N. J. L. 346.

An earlier liability of the surety on a smaller note coupled with an extension given to the principal is sufficient. Jaycox *v.* Trembly, 42 N. Y. App. Div. 416, 59 N. Y. Suppl. 245.

93. Williams *v.* Perkins, 21 Ark. 18; Pauly *v.* Murray, 110 Cal. 13, 42 Pac. 313.

94. Harwood *v.* Kiersted, 20 Ill. 367.

95. Lackey *v.* Boruff, 152 Ind. 371, 53 N. E. 412, holding that even where the original contract was voidable under the statute

discharged,[96] and it is not sufficient where he was mistaken as to its legal existence and where it has been induced by fraud.[97]

b. Anomalous or Irregular Indorser. The indorsement of a party other than the payee requires a valid consideration.[98] If it is contemporaneous with the making of the note a fresh consideration is not necessary;[99] but the original consideration to the principal debtor is sufficient,[1] even though the indorser did not known the nature of that consideration.[2] So a prior agreement between the maker and his creditor for such an indorsement,[3] forbearance to the principal[4] or extension given to him,[5] or the release of collateral by the holder is sufficient.[6]

C. Validity of Consideration — 1. What Contracts Are Invalid — a. As Against Public Safety — (i) *Alien Enemy.* A contract made with an enemy in time of war is illegal as against the public safety.[7] This applied to the American Civil war,[8] and has also been applied to contracts made for, or payable in, Confederate currency.[9]

when made a renewal after the statute is changed is valid.

96. Evans *v.* Williams, 1 Cr. & M. 30, 3 Tyrw. 226. But it is sufficient although barred by the statute of limitations, the surety being misinformed as to this without fraud. Langston *v.* Aderhold, 60 Ga. 376.

97. Maull *v.* Vaughn, 45 Ala. 134.

98. Fear *v.* Dunlap, 1 Greene (Iowa) 331. Whether indorsed after (Davidson *v.* King, 51 Ind. 224; Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 4 N. W. 995) or before (Barkhead *v.* Williams, 1 Mich. N. P. 38; Fitzhugh *v.* Love, 6 Call (Va.) 5, 3 Am. Dec. 568). See also Gieseker *v.* Vollmer, 88 Mo. App. 462.

99. Nabb *v.* Koontz, 17 Md. 283; Austin *v.* Boyd, 24 Pick. (Mass.) 64; Bailey *v.* Freeman, 11 Johns. (N. Y.) 221, 6 Am. Dec. 371.

1. *Colorado.*— Good *v.* Martin, 2 Colo. 218.

Illinois.— Carroll *v.* Weld, 13 Ill. 682, 56 Am. Dec. 481.

Iowa.— Brenner *v.* Gundershiemer, 14 Iowa 82.

Kentucky.— Krachts *v.* Obst, 14 Bush (Ky.) 34.

Minnesota.—Priedman *v.* Johnson, 21 Minn. 12; Dunning *v.* Pond, 5 Minn. 296.

Washington.— Wilkie *v.* Chandon, 1 Wash. 355, 25 Pac. 464.

2. Robertson *v.* Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466. And it is immaterial that he indorsed the note without consideration at the request of the maker, for the accommodation of the payee, if the payee did not authorize such a request or know of its being made. Spaulding *v.* Putnam, 128 Mass. 363.

3. Allen *v.* Pryor, 3 A. K. Marsh. (Ky.) 305; Sulphur Deposit Bank *v.* Peak, 23 Ky. L. Rep. 19, 62 S. W. 268; Mitchell *v.* Planters' Bank, 8 Humphr. (Tenn.) 216 (although the money was obtained thereon before he indorsed); Hoover *v.* McCormick, 84 Wis. 215, 54 N. W. 505 (where the indorser was the agent of the indorsee and indorsed under a prior agreement with his principal).

4. As forbearance to bring an action which was contemplated. Jaffray *v.* Brown, 74 N. Y. 393. *Contra,* if such action could not have been brought. Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

5. Colver *v.* Wheeler, 11 Ohio Cir. Ct. 604, 5 Ohio Cir. Dec. 278. It is not sufficient, however, where the creditor merely agrees to extend payment till he wants the money. Strong *v.* Sheffield, 144 N. Y. 392, 39 N. E. 330, 63 N. Y. St. 701 [*affirming* 66 Hun (N. Y.) 349, 21 N. Y. Suppl. 505, 50 N. Y. St. 665].

6. Rust *v.* Hauselt, 46 N. Y. Super. Ct. 22.

7. Ketchum *v.* Scribner, 1 Root (Conn.) 95; Scholefield *v.* Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793.

8. As in the case of a note given to procure a substitute in the Confederate army (Chancely *v.* Bailey, 37 Ga. 532, 95 Am. Dec. 350; Heidenreich *v.* Leonard, 21 La. Ann. 628; Wright *v.* Stacey, 19 La. Ann. 449; Stewart *v.* Bosley, 19 La. Ann. 439; Pickens *v.* Eskridge, 42 Miss. 114; Critcher *v.* Holloway, 64 N. C. 526), a note to secure a loan for that purpose, although the money was applied to another purpose (Kingsbury *v.* Flemming, 66 N. C. 524; Kingsbury *v.* Gooch, 64 N. C. 528), or a note for money borrowed to pay off such a note (Kingsbury *v.* Suit, 66 N. C. 601), or a note given for the purchase-price of horses for the Confederate service (Booker *v.* Robbins, 26 Ark. 660; McMurtry *v.* Ramsey, 25 Ark. 349; Martin *v.* McMillan, 63 N. C. 486. *Contra,* Murphy *v.* Weems, 69 Ga. 687, a note given after the close of the war on a new valuation for a horse previously bought and used for the purpose).

9. *Alabama.*— Tarleton *v.* Southern Bank, 49 Ala. 229; Askew *v.* Torbert, 49 Ala. 101; Hale *v.* Huston, 44 Ala. 134, 4 Am. Rep. 124.

Arkansas.— George *v.* Terry, 26 Ark. 160; King *v.* Carnall, 26 Ark. 36; Ford *v.* Ragland, 25 Ark. 612.

Louisiana.— New Orleans Bank *v.* Frantom, 22 La. Ann. 462; Durbin *v.* McMichael, 22 La. Ann. 132; Seuzeneau *v.* Saloy, 21 La. Ann. 305; Pickens *v.* Preston, 20 La. Ann. 138; Huck *v.* Haller, 19 La. Ann. 257; Reeve *v.* Doughty, 19 La. Ann. 164.

Missouri.— Peltz *v.* Long, 40 Mo. 532.

Tennessee.— Robertson *v.* Shores, 7 Coldw. (Tenn.) 164; Potts *v.* Gray, 3 Coldw. (Tenn.) 468, 91 Am. Dec. 294.

Texas.— Willis *v.* Johnson, 38 Tex. 303; Cundiff *v.* Herron, 33 Tex. 622; Goodman *v.* McGehee, 31 Tex. 252; Smith *v.* Smith, 30 Tex. 754 note; McCartney *v.* Greenway, 30 Tex. 754 note.

(II) *Corruption in Public Contracts.* In like manner a bill or note for the corrupt procurement of a public contract is illegal.[10]

(III) *Influence of Official Conduct.* A bill or note given to influence the conduct of a public officer is illegal.[11]

(IV) *Lobby Services.* A bill or note for services as a legislative lobbyist is illegal.[12]

(V) *Sale of Public Office.* Another ground of consideration affecting public safety, and illegal on that account, is a contract for the sale of public office, and a bill or note given for such a consideration is void.[13]

b. As Against Public Justice — (I) *Compounding Offenses.* Other illegal acts are offenses against public justice and illegal as such. On this ground a bill or note given to compound a felony or misdemeanor is illegal[14] and it is immaterial

United States.— Scudder *v.* Thomas, 21 Fed. Cas. No. 12,567, 35 Ga. 364.

Later cases have held such paper to be valid where it was made for a loan of Confederate currency during the existence of the Confederacy and within its lines (Simpson *v.* Lauderdale County, 56 Ala. 64; Wyatt *v.* Evins, 52 Ala. 285; Gist *v.* Gans, 30 Ark. 285 [*overruling* Latham *v.* Clark, 25 Ark. 574]; Rivers *v.* Moss, 6 Bush (Ky.) 600; Rodes *v.* Patillo, 5 Bush (Ky.) 271; McMath *v.* Johnson, 41 Miss. 439), and a note given in settlement of an attachment suit which was founded on such a loan is not, properly speaking, a note for such a loan and is valid (Bozeman *v.* Rushing, 51 Ala. 529); but a note given for Confederate currency can only be held valid where it was not given for the purpose of aiding the Confederacy (Kingsbury *v.* Lyon, 64 N. C. 128).

10. Kennedy *v.* Murdick, 5 Harr. (Del.) 458; Gulick *v.* Ward, 10 N. J. L. 87, 18 Am. Dec. 389.

Pauper laws.— Forbearance to bid at public auction for the sale of the support of the paupers of a town has been held to be a valuable consideration for a note given for such forbearance. Noyes *v.* Day, 14 Vt. 384.

Public roads.— A note given in consideration of the laying out of a highway by a petitioner on intimation of the court that securing the sum might induce the court to regard the petition more favorably is void. Dudley *v.* Butler, 10 N. H. 281; Dudley *v.* Cilley, 5 N. H. 558. So a promissory note given by the applicant for a public road to a caveator against such road, in consideration of his withdrawing his opposition to the road and permitting the return to be recorded, is void. Smith *v.* Applegate, 23 N. J. L. 352.

11. Cook *v.* Shipman, 51 Ill. 316; Bills *v.* Comstock, 12 Metc. (Mass.) 468 (to release a prisoner held on a mittimus); Doe *v.* Fletcher, 8 B. & C. 25, 15 E. C. L. 22; Alston *v.* Atlay, 2 Hurl. & W. 166, 5 L. J. K. B. 242, 6 N. & M. 686, 36 E. C. L. 652.

There can be no recovery on a note where made to a constable for forbearing to levy under an execution in his hands (Ashby *v.* Dillon, 19 Mo. 619), where given to a sheriff or other executive officer for ease and favor (Samuel *v.* Evans, 2 T. R. 569; Rogers *v.* Reeves, 1 T. R. 418), where made to induce a public officer to pay money on a public contract before it is due, contrary to a corporation ordinance (Devlin *v.* Brady, 36 N. Y. 531), or where made to induce any public officer to neglect his duty (Denny *v.* Lincoln, 5 Mass. 385); and if the statute prohibits such dealing, the transfer to a sheriff of a note bought by him at an execution sale is illegal (Sproule *v.* Merrill, 29 Me. 260).

12. Rose *v.* Truax, 21 Barb. (N. Y.) 361; Harris *v.* Roof, 10 Barb. (N. Y.) 489; Clippinger *v.* Hapbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; Burke *v.* Child, 21 Wall. (U. S.) 441, 22 L. ed. 623; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953.

13. Johnson County *v.* Millikin, 7 Blackf. (Ind.) 301; Ferris *v.* Adams, 23 Vt. 136; Harrington *v.* Kloprogge, 2 B. & B. 678, 2 Chit. 475, 4 Dougl. 5, 6 Moore C. P. 38 note, 23 Rev. Rep. 539 note, 18 E. C. L. 744; Palmer *v.* Bate, 2 B. & B. 673, 6 Moore C. P. 28, 23 Rev. Rep. 525; Richardson *v.* Mellish, 2 Bing. 229, 9 E. C. L. 557, 1 C. & P. 241, 12 E. C. L. 145, 3 L. J. C. P. O. S. 265, 9 Moore C. P. 435, R. & M. 66, 21 E. C. L. 703, 27 Rev. Rep. 603; Parsons *v.* Thompson, 1 H. Bl. 322, 2 Rev. Rep. 773; Blachford *v.* Preston, 8 T. R. 89; Layng *v.* Paine, Willes 571; Stackpole *v.* Earle, 2 Wils. C. P. 131. But by a Vermont statute which provided for a public sale of the office of constable a note given for the price was formerly legal. Thetford *v.* Hubbard, 22 Vt. 440.

A note given by a candidate for election for services which were not rendered at his request is void. Dearborn *v.* Bowman, 3 Metc. (Mass.) 155.

A note given as subscription to an election fund is void. Dansereau *v.* St. Louis, 18 Can. Supreme Ct. 587; Dion *v.* Boulanger, 4 Quebec 358.

14. *Alabama.*— Folmar *v.* Siler, 132 Ala. 297, 31 So. 719 (for concealment of a crime); U. S. Fidelity, etc., Co. *v.* Charles, 131 Ala. 658, 31 So. 558, 57 L. R. A. 212; Wynne *v.* Whisenant, 37 Ala. 46.

Arkansas.— Rogers *v.* Blythe, 51 Ark. 519, 11 S. W. 822; Breathwit *v.* Rogers, 32 Ark. 758.

Georgia.— Small *v.* Williams, 87 Ga. 681, 13 S. E. 589; Chandler *v.* Johnson, 39 Ga. 85.

Indiana.— Stout *v.* Turner, 102 Ind. 418, 26 N. E. 85; Collier *v.* Waugh, 64 Ind. 456.

whether the maker was actually indebted to the payee in the matter.[15] A note[16] may, however, be given in settlement of a private misdemeanor.[17]

(II) *Divorce.* A bill or note cannot be given to procure or facilitate a divorce[18] or to procure the withdrawal of a defense in a divorce suit.[19]

Iowa.—Rosenbaum *v.* Levitt, 109 Iowa 292, 80 N. W. 393; Moeckly *v.* Gorton, 78 Iowa 202, 42 N. W. 648.

Kentucky.— Kimbrough *v.* Lane, 11 Bush (Ky.) 556; Gardner *v.* Maxey, 9 B. Mon. (Ky.) 90 (whether proceedings are pending or not); Swan *v.* Chandler, 8 B. Mon. (Ky.) 97.

Massachusetts.— Clark *v.* Pomeroy, 4 Allen (Mass.) 534; Com. *v.* Johnson, 3 Cush. (Mass.) 454 (to procure a prisoner's discharge from arrest on a criminal recognizance); Com. *v.* Pease, 16 Mass. 91.

Michigan.— Wisner *v.* Bardwell, 38 Mich. 278.

Minnesota.— Turle *v.* Sargent, 63 Minn. 211, 65 N. W. 349, 56 Am. St. Rep. 475, holding that a note cannot be given for a debt due from A to B, a third party, in consideration of the creditor's refraining from a criminal prosecution of the debtor without a binding extension of the debt.

Missouri.— Sumner *v.* Summers, 54 Mo. 340; Murphy *v.* Bottomer, 40 Mo. 67.

New Hampshire.—Clark *v.* Ricker, 14 N. H. 44; Hinds *v.* Chamberlin, 6 N. H. 225.

New York.— Porter *v.* Havens, 37 Barb. (N. Y.) 343; Steuben County Bank *v.* Mathewson, 5 Hill (N. Y.) 249.

Ohio.— Roll *v.* Raguet, 4 Ohio 400, 22 Am. Dec. 759.

South Carolina.— Sylvester-Bleckley Co. *v.* Goodwin, 51 S. C. 362, 29 S. E. 3; Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743.

Tennessee.— Cain *v.* Southern Express Co., 1 Baxt. (Tenn.) 315; Vincent *v.* Groom, 1 Yerg. (Tenn.) 430.

Vermont.— Bates *v.* Cain, 70 Vt. 144, 40 Atl. 36 (to establish a false defense to a criminal prosecution); Farrar *v.* Davis, 53 Vt. 597; Bowen *v.* Buck, 28 Vt. 308; Hinesburgh *v.* Sumner, 9 Vt. 23, 31 Am. Dec. 599.

England.— Kirk *v.* Strickwood, 4 B. & Ad. 421, 2 L. J. M. C. 43, 1 N. & M. 275, 24 E. C. L. 188; Elworthy *v.* Bird, 2 Bing. 258, 3 L. J. C. P. O. S. 260, 9 Moore C. P. 430, 13 Price 222, 2 Sim. & St. 372, 9 E. C. L. 569; Wallace *v.* Hardacre, 1 Camph. 45, 10 Rev. Rep. 629; Clubb *v.* Hutson, 18 C. B. N. S. 414, 114 E. C. L. 414; Brett *v.* Tomlinson, 16 East 293; Edgcombe *v.* Rodd, 5 East 294, 1 Smith K. B. 515, 7 Rev. Rep. 700; Coppock *v.* Bower, 8 L. J. Exch. 9, 4 M. & W. 361 (given to procure the withdrawal of a petition to unseat a member of parliament for bribery); Johnson *v.* Ogilby, 3 P. Wms. 279; Harding *v.* Cooper, 1 Stark. 467, 2 E. C. L. 179; Collins *v.* Blantern, 2 Wils. C. P. 347.

Canada.—Bell *v.* Riddell, 10 Ont. App. 544; Macfarlane *v.* Dewey, 2 Rev. Leg. 622; Doyle *v.* Carroll, 28 U. C. C. P. 218; Dwight *v.* Ellsworth, 9 U. C. Q. B. 539.

No criminal offense involved.— On the other hand a note to suppress a proceeding criminal in form, but involving no criminal offense, is good. Soule *v.* Bonney, 37 Me. 128. So a suppression of impossible crime, such as embezzlement by a partner of partnership funds, is not an illegal consideration and cannot of itself be treated as a sufficient legal one. Turle *v.* Sargent, 63 Minn. 211, 65 N. W. 349, 56 Am. St. Rep. 475. And a note may be given in payment of a fine imposed as a criminal sentence. Blain *v.* Hitch, 70 Ga. 275; Strafford County *v.* Jackson, 14 N. H. 16.

15. *Arkansas.*— Kirkland *v.* Benjamin, 67 Ark. 480, 55 S. W. 840.

Georgia.— Godwin *v.* Crowell, 56 Ga. 566.

Indiana.— Crowder *v.* Reed, 80 Ind. 1.

Massachusetts.— Gorham *v.* Keyes, 137 Mass. 583 (where a note was given for the value of property stolen and suppression of a pending prosecution); Taylor *v.* Jaques, 106 Mass. 291.

Michigan.— Buck *v.* Paw Paw First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189, where given for the debt of a defaulter and the payee's promise of clemency.

Missouri.— Sumner *v.* Summers, 54 Mo. 340.

A valid note may be given for a debt to a public school fund, arising out of defalcation of a public officer (Bremer County *v.* Barrick, 18 Iowa 390), but even where money is lawfully due from the maker to the payee the note will be invalid if given in consideration of the payee's promise to do an unlawful act or to neglect to do a legal duty (Wegner *v.* Biering, 73 Tex. 89, 11 S. W. 155, 76 Tex. 506, 13 S. W. 537).

16. **So of a bond** in satisfaction of damages for assault and battery and to prevent a prosecution. Price *v.* Summers, 5 N. J. L. 578.

17. Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170 (holding that it is a valid consideration if the note is given at the maker's request for the release of his son from imprisonment on process in a private action); Clark *v.* Ricker, 14 N. H. 44; Drage *v.* Ibberson, 2 Esp. 643; Coppock *v.* Bower, 8 L. J. Exch. 9, 4 M. & W. 361; Kneeshaw *v.* Collier, 30 U. C. C. P. 265. See also Morgan *v.* Knox, 15 La. Ann. 176, where recovery was allowed on a note given to settle a charge on suspicion against the maker's slave for setting fire to the payee's property, there being no agreement to compound the felony, if any.

18. Adams *v.* Adams, 25 Minn. 72.

A note may be given, however, pending a divorce suit in settlement of an unadjudicated claim for alimony. Burnett *v.* Paine, 62 Me. 122.

19. Sayles *v.* Sayles, 21 N. H. 312, 55 Am. Dec. 208; Stoutenburg *v.* Lyhrand, 13 Ohio St. 228.

c. As Against Public Policy and Morality — (I) *Fraud.* On the ground of immorality, a bill or note made in fraud of creditors, or for other fraudulent purposes, is illegal.[20]

(II) *Immoral Consideration.* A valid bill or note cannot be based on a consideration which involves any immoral action, prejudicial to the public,[21] but a

So of a note for an agreement not to defend such a suit. Beard *v.* Beard, 65 Cal. 354, 4 Pac. 229; Everhart *v.* Puckett, 73 Ind. 409; Muckenburg *v.* Holler, 29 Ind. 139, 92 Am. Dec. 345.

20. *Illinois.*— Scott *v.* Magloughlin, 133 Ill. 33, 24 N. E. 1030.

Massachusetts.— Fay *v.* Fay, 121 Mass. 561.

Missouri.— Fenton *v.* Ham, 35 Mo. 409; Hamilton *v.* Scull, 25 Mo. 165, 69 Am. Dec. 460.

New York.— Niver *v.* Best, 10 Barb. (N. Y.) 369, holding that a note is illegal which is given under a fraudulent agreement at a subsequent time.

North Carolina.—Powell *v.* Inman, 52 N. C. 28.

Pennsylvania.— Gibbon *v.* Bellas, 2 Phila. (Pa.) 390, 14 Leg. Int. (Pa.) 327, holding that a note is illegal which is given to one creditor, without the knowledge of other creditors, to induce him to join in a general extension given to an embarrassed debtor.

A note fraudulently given to a creditor for an excessive amount, to enable him to obtain a larger dividend under a composition deed, is illegal (Sternburg *v.* Bowman, 103 Mass. 325), but where a note is given to a creditor in excess of the amount due and the purpose of it, unknown to the creditor, is to work a fraud on other creditors the payee may still recover the amount due him on the note (Murphy *v.* Murphy, 74 Conn. 198, 50 Atl. 394).

A note given in consideration of a transfer of property made to defraud creditors is not binding between the parties. Riedle *v.* Mulhausen, 20 Ill. App. 68; Church *v.* Muir, 33 N. J. L. 318; Niver *v.* Best, 10 Barb. (N. Y.) 369; Johnson *v.* Morley, Lalor (N. Y.) 29.

Bankruptcy or insolvency discharge.— A promise not to oppose a discharge in bankruptcy is illegal and will not support a note given by the bankrupt to induce a creditor to forbear such opposition (Marble *v.* Grant, 73 Me. 423; Wiggin *v.* Bush, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; Fulton *v.* Day, 63 Wis. 112, 23 N. W. 99), and the same is true of the withdrawal of opposition to a discharge under a state insolvent law (Benicia Agricultural Works *v.* Estes, (Cal. 1893) 32 Pac. 938; Sharp *v.* Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Simons *v.* West, 2 Miles (Pa.) 196; Baker *v.* Matlack, 1 Ashm. (Pa.) 68). So a note given to a creditor to induce him to become a party to a general assignment and release (Case *v.* Gerrish, 15 Pick. (Mass.) 49), to induce him to join in a general assignment of claims by all the creditors at a discount to a third party (Bastian *v.* Dreyer, 7 Mo. App. 332), or a note given to him without the knowledge of other creditors to induce him to sign a composition deed (Winn *v.* Thomas, 55 N. H. 294; Lawrence *v.* Clark, 36 N. Y. 128; Williams *v.* Schrieber, 14 Hun (N. Y.) 38; Breck *v.* Cole, 4 Sandf. (N. Y.) 79; Carroll *v.* Shields, 4 E. D. Smith (N. Y.) 466; Ray *v.* Brown, 7 Ohio Dec. (Reprint) 494, 3 Cinc. L. Bul. 545; Glober *v.* Bradley, 1 Tex. App. Civ. Cas. § 212) or given after such agreement was made under inducement of threats of suit by the creditor's attorney (Harvey *v.* Hunt, 119 Mass. 279) is illegal.

Right of maker to set up fraud.— The maker of a note given for a transfer of land by the payee to aid in a fraud against all his creditors cannot set up such fraud in his own defense (Butler *v.* Moore, 73 Me. 151, 40 Am. Rep. 348); nor can he in general set up his own fraud on the creditors as against his own note (Carpenter *v.* McClure, 39 Vt. 9, 91 Am. Dec. 370). He might do so, however, as against the payee who was cognizant of the fraud (Wearse *v.* Pierce, 24 Pick. (Mass.) 141; Nellis *v.* Clark, 4 Hill (N. Y.) 424 [*affirmed* in 20 Wend. (N. Y.) 24]), and an administrator of a deceased maker may show that the note was made to defraud the maker's creditors under an agreement with the payee that it might be canceled at any time (McCausland *v.* Ralston, 12 Nev. 195, 28 Am. Rep. 781).

21. Jackson *v.* Duchaire, 3 T. R. 551.

Bastardy.—The note of the father of an illegitimate child, given to prevent bastardy proceedings, is illegal (Hays *v.* McFarlan, 32 Ga. 699, 79 Am. Dec. 317); but a promise to support the child if such proceedings are dropped may be enforced (Jackson *v.* Finney, 33 Ga. 512), although the child die within a few hours (Maxwell *v.* Campbell, 8 Ohio St. 265), and a note given to the selectmen of a town in compromise of a bastardy proceeding is good (Hoit *v.* Cooper, 41 N. H. 111), although one for a gross sum, given to indemnify the parish, is not (Watkins *v.* Hewlett, 1 B. & B. 1, 3 Moore C. P. 211, 5 E. C. L. 469; Clark *v.* Johnson, 3 Bing. 424, 11 Moore C. P. 319, 11 E. C. L. 209; Cole *v.* Gower, 6 East 110).

Condonation of adultery is not a legal consideration for a note by the offender to his wife. Van Order *v.* Van Order, 8 Hun (N. Y.) 315.

Houses of prostitution.— A note for rent of a house taken for purposes of prostitution is void. Girardy *v.* Richardson, 1 B. & P. 340, 1 Esp. 13; Jennings *v.* Throgmorton, R. & M. 251, 21 E. C. L. 744. On the other hand notes given for the furniture of a house of ill fame are not illegal, where there is no requirement in the contract of sale that the house shall be kept as a disorderly house in order to pay the notes (Schankel *v.* Moffatt, 53 Ill. App. 382); but it is otherwise where

note may be given in consideration of unlawful cohabitation if the illicit act has already taken place,[22] and in case of seduction a note to the girl's father or mother is good.[23]

(III) *Restraint of Marriage.* On the ground of public policy a bill or note cannot be given to restrain or prevent marriage.[24]

(IV) *Restraint of Trade.* On like ground bills and notes given in restraint of trade are illegal.[25]

(V) *Wagers.* At common law wagers are not illegal, and a bill or note may legally be given for money lost in that manner,[26] but in many of the United States and in England wagers and gambling are prohibited or restricted by statute and contracts founded upon them are made void.[27] Stock gambling is essentially of the same character as other gambling, and under statutes prohibiting gambling there can be no recovery on a note given for a loss incurred in that manner,[28] for

it appeared that defendants at plaintiff's instance rented a house to be used for the purpose of prostitution, and that thereafter plaintiff sold furniture to defendants for which the notes in suit were given (Burns *v.* Seep, 6 Ohio Dec. (Reprint) 847, 8 Am. L. Rec. 425; Reed *v.* Brewer, (Tex. Civ. App. 1896) 36 S. W. 99).

Libel.—A promise in consideration of libeling another or for the sale of libelous or immoral books is not enforceable. Stockdale *v.* Onwhyn, 5 B. & C. 173, 11 E. C. L. 416, 2 C. & P. 163, 12 E. C. L. 506, 7 D. & R. 625, 4 L. J. K. B. O. S. 122, 29 Rev. Rep. 207; Fores *v.* Johnes, 4 Esp. 97, 6 Rev. Rep. 840.

22. *Connecticut.*— Smith *v.* Richards, 29 Conn. 232.

Kentucky.— Burgen *v.* Straughan, 7 J. J. Marsh. (Ky.) 583.

New York.— People *v.* Hayes, 70 Hun (N. Y.) 111, 24 N. Y. Suppl. 194, 54 N. Y. St. 184 [*affirmed* in 140 N. Y. 484, 35 N. E. 951, 56 N. Y. St. 456, 37 Am. St. Rep. 572, 23 L. R. A. 830].

North Carolina.—Brown *v.* Kinsey, 81 N. C. 245.

Pennsylvania.— Shenk *v.* Mingle, 13 Serg. & R. (Pa.) 29.

South Carolina.— Massey *v.* Wallace, 32 S. C. 149, 10 S. E. 937. *Contra*, Singleton *v.* Bremar, Harp. (S. C.) 201.

England.— Hill *v.* Spencer, 2 Ambl. 641; Annandale *v.* Harris, 1 Bro. P. C. 250, 2 P. Wms. 432, 1 Eng. Reprint 547; Walker *v.* Perkins, 3 Burr. 1568, 1 W. Bl. 517; *Ex p.* Cottrell, Cowp. 742; Gibson *v.* Dickie, 3 M. & S. 463, 16 Rev. Rep. 333; *Ex p.* Mumford, 15 Ves. Jr. 289; Turner *v.* Vaughan, 2 Wils. C. P. 339.

If given in consideration of both past and future cohabitation it is void. Massey *v.* Wallace, 32 S. C. 149, 10 S. E. 937.

23. Merritt *v.* Flemming, 42 Ala. 234; Harter *v.* Johnson, 16 Ind. 271; Cutter *v.* Collins, 12 Cush. (Mass.) 233.

24. Lowe *v.* Peers, 4 Burr. 2225; Hartley *v.* Rice, 10 East 22, 10 Rev. Rep. 228.

25. **Auction or public sales.**— A promise made in order to procure withdrawal of a bid at an auction or other public sale (Goldman *v.* Oppenheim, 118 Ind. 95, 20 N. E. 635) or to prevent competition at auction (Brisbane *v.* Adams, 3 N. Y. 129; Noyes *v.* Day, 14 Vt. 384; Atlas Nat. Bank *v.* Holm, 71 Fed. 489, 34 U. S. App. 472, 19 C. C. A. 94) is illegal. So too a contract not to bid at an auction obtained by a promise that the one who bids and buys in the property will divide it with the others (Doolin *v.* Ward, 6 Johns. (N. Y.) 194) or will sell it again and satisfy a debt out of the surplus (Thompson *v.* Davies, 13 Johns. (N. Y.) 112).

Bidding on public contracts.— Money paid by the successful competitor to a trade association on a draft drawn on him by the withdrawing competitor for such withdrawal can be recovered by the drawer from the drawee as a stakeholder. Jageman *v.* Necco, (Tex. Civ. App. 1900) 59 S. W. 822.

Pooling contracts.— Stanton *v.* Allen, 5 Den. (N. Y.) 434, 49 Am. Dec. 282 (paper given to further the objects of an association formed to regulate charges on the Erie canal); Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159 (check for a balance due on a combination agreement).

Articles of apprenticeship.— A note given for the assignment of the time of an apprentice, being for an illegal consideration, is void. Walker *v.* Johnson, 2 Cranch C. C. (U. S.) 203, 29 Fed. Cas. No. 17,073.

26. Da Costa *v.* Jones, Cowp. 729; Good *v.* Elliott, 3 T. R. 693, 1 Rev. Rep. 803.

27. Thus one who purchases a wager note which discloses the illegality of its consideration cannot recover against the maker on his admission of its legality and his promise to pay it (Givens *v.* Rogers, 11 Ala. 543), but a note may be legally given to one person in repayment of money advanced by him, at the maker's request, to another person to pay a gambling debt of the maker's to such third person (White *v.* Yarbrough, 16 Ala. 109), and where a maker gives a note, supposing that he has already paid an illegal indebtedness for lottery tickets, and that the note was for a balance due on legal account, the note will not be rendered void by the fact that after payment by him of a sum more than sufficient to cover the illegal items, and intended to cover them, the balance had afterward, through other legal transactions, shifted against him (Greenough *v.* Balch, 7 Me. 461). See, generally, GAMING.

28. Fareira *v.* Gabell, 89 Pa. St. 89; Smith *v.* Bouvier, 70 Pa. St. 325 (distinguishing a

margins in stock operations,[29] or on a note given by a broker to his customer for profits in such operations.[30] Options and futures are wagers at common law, and they generally fall within the statute against wagers. A bill or note given for margins in such a contract[31] or to reimburse advances made in such transaction[32] is illegal.

d. As Against Express Statute — (i) *In General.* Commercial paper cannot be based on any consideration which is a violation of an express statutory provision.[33] In like manner a bill of exchange, promissory note, or other commercial

case where the stock is afterward delivered); Brua's Appeal, 55 Pa. St. 294.

29. Hawley *v.* Bibb, 69 Ala. 52; Raven *v.* Rubino, 20 N. Y. Wkly. Dig. 124; Swartz's Appeal, 3 Brewst. (Pa.) 131. But the contract is valid if actual delivery and full payment on demand are contemplated. Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106.

30. Mechanics' Sav. Bank, etc., Co. *v.* Duncan, (Tenn. Ch. 1896) 36 S. W. 887. Or by a third party who, on the ground of a moral responsibility, assumed the liability of the broker employed by him to his customer in such transaction. Morris *v.* Norton, 75 Fed. 912, 43 U. S. App. 739, 21 C. C. A. 553, although a transfer of the customer's claim against the broker would be a legal consideration. In Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595, notes given for a broker's services in a gambling transaction in grain, which was illegal by statute, were held void as to maker, indorser, and subsequent indorsee.

31. *Georgia.*—Cunningham *v.* Augusta Nat. Bank, 71 Ga. 400, 51 Am. Rep. 266, under Ga. Code (1882), § 2753.

Illinois.— Pope *v.* Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 (under Ill. Crim. Code, § 178); Cothran *v.* Ellis, 125 Ill. 496, 16 N. E. 646 (under statute and also by common law).

Indiana.— Davis *v.* Davis, 119 Ind. 511, 21 N. E. 1112.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Tennessee.—Snoddy *v.* American Nat. Bank, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705, under Tenn. Code, § 2438.

Texas.— Seeligson *v.* Lewis, 65 Tex. 215, 57 Am. Rep. 593.

United States.— Root *v.* Merriam, 27 Fed. 909, Illinois case.

"Bohemian oats" notes, so called, are notes taken by the operator from a farmer for the sale to him of oats at a certain price on the operator's agreement to sell twice the quantity for the maker at the same price before maturity of the note. Such notes partake of the character of notes for the purchase of "futures" and are void at suit of the payee or of a holder with notice (Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; Payne *v.* Raubinek, 82 Iowa 587, 48 N. W. 995; Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Ward *v.* Doane, 77 Mich. 328, 43 N. W. 980) and may be recovered by a bill in equity (Shipley *v.* Reasoner, 80 Iowa 548, 45 N. W. 1077).

32. Waitzfelder *v.* Kahnweiler, 56 Barb. (N. Y.) 300; Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172.

33. Louisville Bank *v.* Young, 37 Mo. 398; Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Hatch *v.* Burroughs, 1 Woods (U. S.) 439, 11 Fed. Cas. No. 6,203; Bensley *v.* Bignold, 5 B. & Ald. 335, 7 E. C. L. 188; Langton *v.* Hughes, 1 M. & S. 593; Hodgson *v.* Temple, 1 Marsh. 5, 5 Taunt. 181, 14 Rev. Rep. 738, 1 E. C. L. 100. And action will not lie on a bill or note made in violation of an express statute or for goods made in violation of a statute as to size of shingles (Wheeler *v.* Russell, 17 Mass. 258), analysis and inspection of fertilizers (Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Johnston *v.* McConnell, 65 Ga. 129; Vanmeter *v.* Spurrier, 94 Ky. 22, 14 Ky. L. Rep. 684, 21 S. W. 337. See also Agriculture, 2 Cyc. 71, note 48), construction of machinery (Wadleigh *v.* Develling, 1 Ill. App. 596), registry of patents (Brechbill *v.* Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695), sale of lottery tickets (Lanahan *v.* Pattison, 1 Flipp. (U. S.) 410, 14 Fed. Cas. No. 8,036; Lanham *v.* Patterson, 14 Fed. Cas. No. 8,069, 3 Chic. Leg. N. 243, 13 Int. Rev. Rec. 142), or prohibition of imports (Ketchum *v.* Scribner, 1 Root (Conn.) 95); but where all of the exceptions of the statute are not negatived the consideration of the note will not be held illegal (Whitman *v.* Freese, 23 Me. 185, sales of unsurveyed lumber).

Penal statutes annexing a penalty to the performance of an act in effect prohibit such act. This is not so, however, if the contrary intention is clear. Thus where a sale of town lots was prohibited under a penalty until a map was recorded, a note for the lots sold contrary to this provision was held good. Pangborn *v.* Westlake, 36 Iowa 546. But if the consideration of a note is prohibited under a penalty the note is void. Griffith *v.* Wells, 3 Den. (N. Y.) 226.

Illegal insurance.— Premium notes taken by a foreign insurance company for insurance effected without having obtained authority to do business within a state as required by statute are void (Cassaday *v.* American Ins. Co., 72 Ind. 95; Roche *v.* Ladd, 1 Allen (Mass.) 436; Russell *v.* De Grand, 15 Mass. 35), but if an insurance policy issued by a foreign company is not invalidated by the want of authority to do business in the state a note given by the assured as the consideration of the policy is valid (Connecticut River Mut. F. Ins. Co. *v.* Whipple, 61 N. H. 61).

Sale of slaves.—Under the constitutions of some of the southern states or the statutes

instrument which is founded on the transfer of a contract based on such consideration is unsupported by a valid consideration.[34]

(II) *Banking Act.* An instrument given for a debt which is prohibited under the banking laws is illegal.[35]

provided to carry out such provisions, a bill or note given for the sale of a slave was made null and void (Cherry *v.* Jones, 41 Ga. 579; Gaulden *v.* Stoddard, 41 Ga. 329; Spires *v.* Walker, 41 Ga. 200; Clark *v.* Jennings, 41 Ga. 182; McLean *v.* Elliot, 26 La. Ann. 385; Nunez *v.* Winston, 21 La. Ann. 666; Lytle *v.* Whicher, 21 La. Ann. 182; Burbridge *v.* Harrison, 20 La. Ann. 357; Lapice *v.* Bowman, 20 La. Ann. 234; Austin *v.* Sandel, 19 La. Ann. 309; Wainwright *v.* Bridges, 19 La. Ann. 234), and in Louisiana even the indorsee of a note given for the purchase of a slave could not recover against his indorser (Duperier *v.* Darby, 25 La. Ann. 477 [*overruling* Weil's Succession, 24 La. Ann. 139, where it was held that the indorsement was a new contract]), but in White *v.* Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685, it was held that the Georgia constitution did not annul existing contracts. A note for slaves hired for removal beyond the federal jurisdiction to prevent their legal emancipation was void. Martin *v.* Bartow Iron Works, 35 Ga. 320, 16 Fed. Cas. No. 9,157. On the other hand the constitution would not enforce itself, and a note for slaves imported in disregard of the constitutional provision was not void under the constitution, in the absence of the passage of an act of the legislature to carry it into effect. Truly *v.* Wanzer, 5 How. (U. S.) 141, 12 L. ed. 88; Rowan *v.* Runnels, 5 How. (U. S.) 134, 12 L. ed. 85 (notwithstanding Mississippi state decisions to the contrary); Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800. *Contra*, Hoover *v.* Pierce, 27 Miss. 13. And a valid note might be given in settlement of a suit for breach of warranty of the soundness of a slave, it not being a note for a "debt, the consideration of which was a slave" within Miss. Const. (1868), art. 5 (Lyons *v.* Stephens, 45 Ga. 141), or, under the United States laws, for the hire of a slave without proof that the hiring was without his consent (Martin *v.* Bartow Iron Works, 35 Ga. 320, 16 Fed. Cas. No. 9,157).

34. Cummings *v.* Saux, 30 La. Ann. 207.

35. *Massachusetts.*— Springfield Bank *v.* Merrick, 14 Mass. 322, a note payable in prohibited currency.

New York.— Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333 (a trust deed given to secure the payment of notes illegally issued by a banking company); Swift *v.* Beers, 3 Den. (N. Y.) 70 (the guaranty of a note); Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296 (a note given upon a loan of checks issued in the shape of bank-notes in violation of the statute). But it is no defense that a note, made and payable in New Jersey and discounted there, was made for small bills intended by the maker for illegal circulation in New York, it not appearing that either maker or payee was aware of the New York law. Merchants' Bank *v.* Spalding, 9 N. Y. 53 [*affirming* 12 Barb. (N. Y.) 302].

Ohio.— Best *v.* Frost, 2 Ohio Dec. (Reprint) 277, 2 West. L. Month. 266, the transfer in Ohio of Tennessee bank-notes for circulation in Ohio in violation of the statute.

Virginia.— Hamtramck *v.* Selden, 12 Gratt. (Va.) 28, a note given for a loan made in prohibited currency.

United States.— Brown *v.* Tarkington, 3 Wall. (U. S.) 377, 18 L. ed. 255 (a note for money lent to enable a party to redeem bank-bills issued and circulated with the assistance of the payee in violation of the statute); Hayden *v.* Davis, 3 McLean (U. S.) 276, 11 Fed. Cas. No. 6,259 (an acceptance by a bank of a draft, where it is forbidden by law to issue any bill or note not payable on demand and without interest, under a penalty).

A note given for the purchase of state bills of credit prohibited by the United States constitution is void (Byrne *v.* Missouri, 8 Pet. (U. S.) 40, 8 L. ed. 859; Craig *v.* Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903), but this does not apply to bills of an incorporated state bank, which is the property of the state (Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257, 9 L. ed. 709, 928).

Notes in form of bank-notes.— A note issued by a private individual in the form of bank-notes and intended for circulation as money is not illegal under the provision of the constitution prohibiting banks and companies from issuing such bills. James *v.* Rogers, 23 Ind. 451. So where a company issues bills in a form resembling bank-notes in payment of its debts, although they were taken by a bank under an agreement with the company to reissue them for circulation, the question of lawful intention in such issue being a question for the jury to determine (Whetstone *v.* Montgomery Bank, 9 Ala. 875; Montgomery Branch Bank *v.* Crocheron, 5 Ala. 250), and where a company issues such bills in violation of the statute a note given by its treasurer for moneys advanced by the payee to take up such bills, at the treasurer's request, will not be invalid (Wright *v.* Hughes, 13 Ind. 109).

That a bank, as payee, had loaned the money to the maker to buy in its stock when offered at public sale, with an agreement that he should sell the stock and pay over the proceeds to the bank, and that the note should be renewed from time to time until the stock was sold, although the maker had bought the stock and had failed to make sale of it, is no defense. St. Paul, etc., Trust Co. *v.* Jenks, 57 Minn. 248, 59 N. W. 299.

That the bank had received funds on deposit in violation of law does not render invalid a note given by a bank for misappropriation of funds by one of its officers.

(III) *License Laws.*[36] A bill or note which is founded on a consideration violating the license law is illegal.[37]

(IV) *Liquor Laws.*[38] Commercial paper founded on contracts made in violation of a liquor law is illegal.[39]

(V) *Sunday Laws.*[40] In like manner a bill or note which is given in violation of a Sunday law is illegal.[41]

2. Rules of Construction — a. In General. A construction which is favorable to the validity of the instrument is in general preferred to one that defeats it.[42]

b. Change of Contract — (I) *Original Illegality* — (A) *In General.* In general the taint of illegality follows the paper through changes of form, the defect remaining as an invalid consideration,[43] and a bill or note is not purged of the taint of illegality by simple renewal.[44] So too it has been held that the giv-

United Protestant Evangelical German Congregation *v.* Stegner, 21 Ohio St. 488.

Under statutes prohibiting business of loans by an insurance company it was held that a single loan made by it, as distinguished from a loaning business, was not within the act so as to make void the note given for its repayment (New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678), but it is otherwise where the company calls in invested capital for the purpose of doing business and uses it in such business (Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296).

36. See, generally, Licenses.

37. For example there can be no recovery on a note given for goods sold by a peddler without the statutory license (Rash *v.* Farley, 91 Ky. 344, 12 Ky. L. Rep. 913, 15 S. W. 862, 34 Am. St. Rep. 233; Rash *v.* Halloway, 82 Ky. 674), for services and commissions of an unlicensed broker (Douthart *v.* Congdon, 197 Ill. 349, 64 N. E. 348), or, under the Mississippi statute, for sales by a merchant whose license-tax is not paid (Deans *v.* Robertson, 64 Miss. 195, 1 So. 159), and an unlicensed physician cannot recover on a note given for his services (Mays *v.* Williams, 27 Ala. 267; Coyle *v.* Campbell, 10 Ga. 570). *Compare* Gunnaldson *v.* Nyhus, 27 Minn. 440, 8 N. W. 147, where a note for an auction bid to an unlicensed auctioneer was held good.

The acceptance of a bill securing the payment of money taken at, or expended for, an unlicensed theater is void in the hands of a payee who knew the theater to be unlicensed. De Begins *v.* Armistead, 10 Bing. 107, 2 L. J. C. P. 214, 3 M. & S. 511, 25 E. C. L. 58; Mitchell *v.* Cockburne, 2 H. Bl. 379; Langton *v.* Hughes, 1 M. & S. 593.

Where there is also a valid consideration, as where goods are bought for unlawful sale and the purchaser assumes and gives his note for a valid debt due by the seller of the goods to the payee, the note is not supported by the illegal consideration but by the valid one, and is therefore a legal instrument. Bower *v.* Webber, 69 Iowa 286, 28 N. W. 600.

38. See, generally, Intoxicating Liquors.

39. Hubbell *v.* Flint, 13 Gray (Mass.) 277. See also Brigham *v.* Potter, 14 Gray (Mass.) 522, a mortgage securing such a note.

A note given for liquor sold in violation of the existing license law is illegal (Carlton *v.* Bailey, 27 N. H. 230; Caldwell *v.* Wentworth, 14 N. H. 431; Turck *v.* Richmond, 13 Barb. (N. Y.) 533; Griffith *v.* Wells, 3 Den. (N. Y.) 226; Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664), although the parties supposed they were within the act (Webster *v.* Sanborn, 47 Me. 471), and if the statute prohibits under penalty a sale exceeding a certain amount a note given for a sale of larger amount is void *in toto* (Covington *v.* Threadgill, 88 N. C. 186); but if several notes are taken and the illegal part is less in amount than one of them, that one only may be rejected and the rest enforced (Carradine *v.* Wilson, 61 Miss. 573), and a note made to the order of a town treasurer in settlement of a fine and costs on a suit for selling liquor contrary to law, and given to a town officer in order to secure liberation, is not void as contrary to public policy (Stonington *v.* Powers, 37 Conn. 439).

40. See, generally, Sunday.

41. Josephs *v.* Pebrer, 3 B. & C. 639, 10 E. C. L. 291, 1 C. & P. 341, 507, 12 E. C. L. 205, 5 D. & R. 542, 3 L. J. K. B. O. S. 102; Simpson *v.* Nicholls, 6 Dowl. P. C. 355, 1 H. & H. 12, 7 L. J. Exch. 117, 3 M. & W. 240; Scarfe *v.* Morgan, 1 H. & H. 292, 2 Jur. 569, 2 L. J. Exch. 324, 4 M. & W. 270; Drury *v.* Defontaine, 1 Taunt. 131.

42. Hanauer *v.* Gray, 25 Ark. 350, 99 Am. Dec. 226.

43. Thus a note given to settle an account which includes a usurious note (Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346) or to take up other usurious notes (Brigham *v.* Marean, 7 Pick. (Mass.) 40) is usurious. So if a note payable in goods or a contract for goods is substituted for the usurious note or given as collateral for it (Dunning *v.* Merrill, Clarke (N. Y.) 252), if given on the maturity of a usurious note for an unpaid balance (Warren *v.* Crabtree, 1 Me. 167, 10 Am. Dec. 51), or if given by one for another's usurious debt to the payee (Goldman *v.* Uhlmann, 16 N. Y. App. Div. 324, 44 N. Y. Suppl. 636).

44. *Georgia.*— Archer *v.* McCray, 59 Ga. 546, holding that a mere renewal of a usurious note is void, although not given till after an intervening note to a third person has been canceled.

Michigan.— Comstock *v.* Draper, 1 Mich. 481, 53 Am. Dec. 78, holding that the renewal of an unconstitutional note, made after judgment on the original note to the receiver of the payee, is itself void.

ing of new paper, between the same parties, in substitution for that which was originally illegal, will not purge the latter.[45]

(B) *Illegality Purged.* A valid bill or note may be made for the principal and legal interest due on a usurious contract which is rescinded,[46] the usurious note may be paid off and a new note given for moneys advanced and used for that purpose,[47] or it may be purged by payment of the old debt and creation of a new instrument and new obligations[48] or by taking up the illegal instrument by a new note or bill to a later holder for value.[49]

Mississippi.— Martin *v.* Terrell, 12 Sm. & M. (Miss.) 571.

New York.— Feldman *v.* McGraw, 1 N. Y. App. Div. 574, 37 N. Y. Suppl. 434, 72 N. Y. St. 489.

North Carolina.— Merchants' Bank *v.* Lutterloh, 81 N. C. 142.

Pennsylvania.— Campbell *v.* Sloan, 62 Pa. St. 481.

Virginia.— Mathews *v.* Traders' Bank, (Va. 1897) 27 S. E. 609.

Wisconsin.— Fulton *v.* Day, 63 Wis. 112, 23 N. W. 99.

England.— Chapman *v.* Black, 2 B. & Ald. 588; Wynne *v.* Callander, 1 Russ. 293, 46 Eng. Ch. 293; Preston *v.* Jackson, 2 Stark. 237, 3 E. C. L. 392.

Other security substituted for usurious paper or given in renewal of it is in general void. Marchant *v.* Dodgin, 2 Moore & S. 632, 28 E. C. L. 519; Preston *v.* Jackson, 2 Stark. 237, 3 E. C. L. 392.

When renewal note good.— But a note given by the purchaser of land at a foreclosure sale to the holder of the illegal mortgage note is not tainted by the illegality of the note that is paid (Gibson *v.* Niblett, Sm. & M. Ch. (Miss.) 278) and the renewal note will be valid if the amount is reduced and the renewal confined to the legal part of the consideration of the old note (Nay *v.* Ayling, 16 Q. B. 423, 15 Jur. 605, 20 L. J. Q. B. 171, 71 E. C. L. 423; Boulton *v.* Coghlan, 1 Bing. N. Cas. 640, 1 Hodges 145, 4 L. J. C. P. 172, 1 Scott 588, 27 E. C. L. 798). A renewal of a note which is merely voidable and not void is good. Witham *v.* Lee, 4 Esp. 264.

45. *Iowa.*— People's Sav. Bank *v.* Gifford, 108 Iowa 277, 79 N. W. 63, although a new surety is added to the note.

Minnesota.— Simpson *v.* Evans, 44 Minn. 419, 46 N. W. 908, although other collateral is furnished.

Missouri.— Bick *v.* Seal, 45 Mo. App. 475, although given in compromise of the original paper.

New York.— Treadwell *v.* Archer, 76 N. Y. 196 [*reversing* Sherwood *v.* Archer, 10 Hun (N. Y.) 73], where it was given to an indorsee of the original payee, but without any agreement to discharge the original debt.

Pennsylvania.— Schutt *v.* Evans, 109 Pa. St. 625, 1 Atl. 76, although other collateral is furnished.

England.— Southall *v.* Rigg, 11 C. B. 481, 15 Jur. 706, 20 L. J. C. P. 145, 73 E. C. L. 481; Flight *v.* Reed, 1 H. & C. 703, 32 L. J. Exch. 265, 9 Jur. N. S. 1016, 8 L. T. Rep. N. S. 638, 12 Wkly. Rep. 53.

46. Garvin *v.* Linton, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; Fisher *v.* Bidwell, 27 Conn. 363 (deducting from the principal the usury paid); Scott *v.* Lewis, 2 Conn. 132; Kilbourn *v.* Bradley, 3 Day (Conn.) 356, 3 Am. Dec. 273; McConkey *v.* Petterson, 15 N. Y. App. Div. 77, 44 N. Y. Suppl. 286 (crediting on the principal the usury paid); Monroe Bank *v.* Strong, Clarke (N. Y.) 76; Wright *v.* Wheeler, 1 Campb. 165 note; Marchant *v.* Dodgin, 2 Moore & S. 632, 28 E. C. L. 519; Preston *v.* Jackson, 2 Stark. 237, 3 E. C. L. 392; Barnes *v.* Hedley, 2 Taunt. 184.

47. Thompson *v.* First State Bank, 99 Ga. 651, 26 S. E. 79; Cottrell *v.* Southwick, 71 Iowa 50, 32 N. W. 22.

If an accommodation indorser pays the note without knowing that it has been discounted at a usurious rate such payment will support a new note given by the party accommodated. Cassebeer *v.* Kalbfleisch, 11 Hun (N. Y.) 119.

48. **Change of liability.**—Thus the original surety may for a consideration assume the debt and give his own note. Tenny *v.* Porter, 61 Ark. 329, 33 S. W. 211. So where the new note is made by the original indorser (Macungie Sav. Bank *v.* Hottenstein, 89 Pa. St. 328; Milwaukee First Nat. Bank *v.* Plankinton, 27 Wis. 177, 9 Am. Rep. 453) or by one of two original joint makers with a new surety (Gresham *v.* Morrow, 40 Ga. 487); and one partner may make a valid note to the other in settlement of a partnership which was engaged in an illegal business (De Leon *v.* Trevino, 49 Tex. 88, 30 Am. Rep. 101).

Novation purges the usury of a note, as in the case of a note given in payment of another's usurious note. Smith *v.* Young, 11 Bush (Ky.) 393; Palmer *v.* Carpenter, 53 Nebr. 394, 73 N. W. 690. And if the maker of a usurious note procures the bond of a third person to be substituted for it, promising to pay the amount to the maker of the bond and afterward paying it, this is a waiver of the statute by him and the bond is valid. Wales *v.* Webb, 5 Conn. 154; Drake *v.* Chandler, 18 Gratt. (Va.) 909, 98 Am. Dec. 762.

49. If the purchaser without notice of the usury in a note makes a new note in payment he may recover on it. Smalley *v.* Doughty, 6 Bosw. (N. Y.) 66; Kent *v.* Walton, 7 Wend. (N. Y.) 256; Calvert *v.* Williams, 64 N. C. 168; George *v.* Stanley, 4 Taunt. 683. So if he takes the maker's bond in payment of the note. Cuthbert *v.* Haley, 8 T. R. 390. But it has been held that even a new bill made with

(c) *Illegality Merged.* The illegality of the consideration will in general be merged in a judgment rendered on the note.[50]

(II) *Subsequent Illegality.* On the other hand a contract originally legal will not be made void by a subsequent usurious contract relating to it;[51] and illegality in the transfer of the note will not affect its original validity.[52] So if the renewal of a valid note be usurious the renewal will be bad, but the original debt will remain.[53]

c. Knowledge of Illegal Intention. A contract is illegal and void if it leads directly to a violation of law or if it furnishes another with means of breaking the

another accepter to a *bona fide* holder of the original bill would not purge the illegality, where it was made after the holder had notice of the defense. Chapman *v.* Black, 2 B. & Ald. 588.

50. George *v.* Stanley, 4 Taunt. 683; Shepherd *v.* Charter, 4 T. R. 275.

51. This is so as to a usurious extension (Hynes *v.* Stevens, 62 Ark. 491, 36 S. W. 689; Morse *v.* Wellcome, 68 Minn. 210, 70 N. W. 978, 64 Am. St. Rep. 471) and as to the subsequent taking of usurious interest (Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Ferrall *v.* Shaen, 1 Saund. 292); and a bond given for the principal will not be avoided by a subsequent agreement to pay illegal interest (Reg. *v.* Sewel, 7 Mod. 118) or a subsequent agreement for usury between holder and principal debtor (Selser *v.* Brock, 3 Ohio St. 302). So a note valid in its origin is not affected by a subsequent criminal compromise (Wilcoxon *v.* Logan, 91 N. C. 449) or by subsequently furnishing illegal collateral (Bowery Bank *v.* Gerety, 91 Hun (N. Y.) 539, 36 N. Y. Suppl. 254, 70 N. Y. St. 829, assignment of sheriff's claim for future public services); and it will not be affected by an accidental defect, such as a detachment of statutory tags on the goods sold, the consideration of the note (Holt *v.* Navassa Guano Co., 114 Ga. 666, 40 S. E. 735).

52. Usurious transfer.— The right of recovery against the maker in such a case is not affected by usury between indorser and indorsee (Importers', etc., Nat. Bank *v.* Littell, 47 N. J. L. 233; Archer *v.* Shea, 14 Hun (N. Y.) 493; Stewart *v.* Bramhall, 11 Hun (N. Y.) 139 [*affirmed* in 74 N. Y. 85]; Parr *v.* Eliason, 1 East 92; Daniel *v.* Cartony, 1 Esp. 274), but usury in the transfer will avoid a note which really has its inception in such transfer, as in the case of a note made for the accommodation of the payee (Nailor *v.* Daniel, 5 Houst. (Del.) 455; Tufts *v.* Shepherd, 49 Me. 312; Eastman *v.* Shaw, 65 N. Y. 522; French *v.* Hoffmire, 19 Misc. (N. Y.) 714, 43 N. Y. Suppl. 496; Bennet *v.* Smith, 15 Johns. (N. Y.) 355; Rodecker *v.* Littauer, 59 Fed. 857, 19 U. S. App. 455, 8 C. C. A. 320), or drawn to the maker's own order (German Bank *v.* De Shon, 41 Ark. 331). So if one makes his note for the purpose of raising money and procures an accommodation indorsement, another who discounts the note at a usurious rate with knowledge of the circumstances is not an innocent holder and cannot sue the indorser either on the original note or on a renewal of it (Clark *v.* Sisson, 22 N. Y. 312 [although the accommodation character of the paper was not known to the buyer]; Powell *v.* Waters, 8 Cow. (N. Y.) 669 [*affirming* 17 Johns. (N. Y.) 176]), and one who makes a usurious loan on paper pledged for its security acquires no title to the paper as against his pledger and cannot recover against him (Bell *v.* Lent, 24 Wend. (N. Y.) 230). But in Brummel *v.* Enders, 18 Gratt. (Va.) 873, where a note with the payee's name blank was intrusted to one for the purpose of borrowing money, and he, having procured the discount at greater than the legal rate, filled in the name, a recovery was allowed.

Defense estopped.— If a *bona fide* purchaser takes accommodation paper at an illegal discount on the representation that it is business paper belonging to the seller, the latter is estopped from pleading usury (Holmes *v.* Duluth State Bank, 53 Minn. 350, 55 N. W. 555; Holmes *v.* Williams, 10 Paige (N. Y.) 326, 40 Am. Dec. 250), and the payee of an accommodation note who gives the maker a bond for the amount cannot defend a suit by the payee of such bond or his personal representative, on the ground of usury in the transfer of the note by him (Moncure *v.* Dermott, 13 Pet. (U. S.) 345, 10 L. ed. 193). So where it is transferred for a gambling debt (Drinkall *v.* Movius State Bank, (N. D. 1901) 88 N. W. 724), and the maker of a negotiable note cannot defend against the indorsee and holder on the ground that the holder acquired the note by a champertous contract (Million *v.* Ohnsorg, 10 Mo. App. 432).

53. Central City Bank *v.* Dana, 32 Barb. (N. Y.) 296; Gray *v.* Fowler, 1 H. Bl. 462. And the collateral securing it will be good (Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863), but the interest on the debt will cease, in Mississippi, from the date of renewal (Warmack *v.* Boyd, 63 Miss. 488).

A renewal at the same rate, a new law having made that rate usurious, will be disregarded if a note is valid when made. Kilgore *v.* Emmitt, 33 Ohio St. 410.

The taint will not be removed by putting the usurious premiums into a separate note (Swartwout *v.* Payne, 19 Johns. (N. Y.) 294, 10 Am. Dec. 228) or by giving the renewal note to a subsequent indorsee, other than a *bona fide* holder for value (Treadwell *v.* Archer, 76 N. Y. 196 [*reversing* 10 Hun (N. Y.) 73]).

law and is entered into for that purpose, but more than the mere knowledge of such intention is necessary to defeat an action on the contract.[54]

d. Partial Illegality. As a general rule if the consideration is in fact illegal the note is wholly void,[55] especially if the illegal part is indefinite[56] or inseparable from the rest.[57] Recovery may be had, however, on the legal part of the consideration,[58] and it has been held that in suit on the note recovery may be had on the legal part if it can be separated from the illegal part.[59]

54. State Bank *v.* Cummings, 9 Heisk. (Tenn.) 465 (where a note for money loaned to be used in the manufacture of saltpeter for the Confederate government was held valid); Puryear *v.* McGavock, 9 Heisk. (Tenn.) 461; Jones *v.* Planters' Bank, 9 Heisk. (Tenn.) 455; McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34 (where recovery was allowed on a note which had been discounted to aid the Confederate service). So *a fortiori* if the seller knows nothing of the illegal intention (Ely *v.* Webster, 102 Mass. 304), and a mere belief that an illegal purpose exists does not amount to such knowledge (Savage *v.* Mallory, 4 Allen (Mass.) 492).

Notes for liquor.— If a note is given in Massachusetts for liquor to be resold in Vermont contrary to a penal statute a *bona fide* holder may nevertheless recover in Vermont (Converse *v.* Foster, 32 Vt. 828), but if a note be made in Massachusetts to a New York dealer for liquor to be sold with his knowledge and aid, in violation of Massachusetts law, it is void (Hubbell *v.* Flint, 13 Gray (Mass.) 277. See also Banchor *v.* Mansel, 47 Me. 58, where a similar ruling was made although the act violated had been repealed), and if an agent from one state illegally sells liquor in another state, to be delivered there contrary to law, a note therefor is void as between the original parties knowing and aiding in the violation of law (Wilson *v.* Stratton, 47 Me. 120). Knowledge will be implied in a company director who took part in the transactions which were illegal. McClure *v.* Wilson, 70 N. Y. App. Div. 149, 75 N. Y. Suppl. 212.

55. *Alabama.*—Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699; Bozeman *v.* Allen, 48 Ala. 512; Wynne *v.* Whisenant, 37 Ala. 46.

Arkansas.— McTighe *v.* McKee, 70 Ark. 293, 67 S. W. 754.

Colorado.— Hoyt *v.* Macon, 2 Colo. 502.

Georgia.— Small *v.* Williams, 87 Ga. 681, 13 S. E. 589.

Indiana.— Everhart *v.* Puckett, 73 Ind. 409; Hynds *v.* Hays, 25 Ind. 31; Gamble *v.* Grimes, 2 Ind. 392.

Iowa.— Quigley *v.* Duffey, 52 Iowa 610, 3 N. W. 659; Taylor *v.* Pickett, 52 Iowa 467, 3 N. W. 514; Craig *v.* Andrews, 7 Iowa 17.

Kentucky.— Averbeck *v.* Hall, 14 Bush (Ky.) 505; Gardner *v.* Maxey, 9 B. Mon. (Ky.) 90; Burgen *v.* Straughan, 7 J. J. Marsh. (Ky.) 583.

Maine.— Deering *v.* Chapman, 22 Me. 488, 39 Am. Dec. 592.

Massachusetts.— Brigham *v.* Potter, 14 Gray (Mass.) 522; Perkins *v.* Cummings, 2 Gray (Mass.) 258.

Michigan.— Wisner *v.* Bardwell, 38 Mich. 278; Snyder *v.* Willey, 33 Mich. 483.

Mississippi.— Cotten *v.* McKenzie, 57 Miss. 418; Wilkins *v.* Riley, 47 Miss. 306.

New Hampshire.— Gammon *v.* Plaisted, 51 N. H. 444; Kidder *v.* Blake, 45 N. H. 530; Coburn *v.* Odell, 30 N. H. 540; Carleton *v.* Woods, 28 N. H. 290; Clark *v.* Ricker, 14 N. H. 44; Hinds *v.* Chamberlin, 6 N. H. 225.

New York.—Saratoga County Bank *v.* King, 44 N. Y. 87.

North Carolina.— Covington *v.* Threadgill, 88 N. C. 186.

Ohio.— Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664.

Texas.— Biering *v.* Wegner, 76 Tex. 506, 13 S. W. 537, 73 Tex. 89, 11 S. W. 155; Seeligson *v.* Lewis, 65 Tex. 215, 57 Am. Rep. 593.

Vermont.— Woodruff *v.* Hinman, 11 Vt. 592, 34 Am. Dec. 712.

Wisconsin.— Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

England.— Chapman *v.* Black, 2 B. & Ald. 588; Robinson *v.* Bland, 2 Burr. 1077; Cruikshank *v.* Rose, 5 C. & P. 19, 1 M. & Rob. 100, 24 E. C. L. 432; Owens *v.* Porter, 4 C. & P. 367, 19 E. C. L. 557; Scott *v.* Gillmore, 3 Taunt. 226, 12 Rev. Rep. 641.

56. Everhart *v.* Puckett, 73 Ind. 409; Carlton *v.* Bailey, 27 N. H. 230.

57. Peltz *v.* Long, 40 Mo. 532 (where part consisted of Confederate money and the balance of merchandise, which was to be paid for in Confederate scrip); Potts *v.* Gray, 3 Coldw. (Tenn.) 468, 91 Am. Dec. 294.

58. On the original contract or on the common counts. Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Pecker *v.* Kennison, 46 N. H. 488; Carleton *v.* Woods, 28 N. H. 290.

59. *Illinois.*— Graves *v.* Safford, 41 Ill. App. 659.

Indiana.— Hynds *v.* Hays, 25 Ind. 31.

Louisiana.— So held when notes given in part for slaves were made void by the constitutional provision. McLean *v.* Elliot, 26 La. Ann. 385; Spyker *v.* Hart, 22 La. Ann. 534; Smith *v.* McWaters, 22 La. Ann. 431; Castille *v.* Offutt, 22 La. Ann. 430; Conrad *v.* Callery, 22 La. Ann. 428; Allen *v.* Tarlton, 22 La. Ann. 427; Merritt *v.* Merle, 22 La. Ann. 257; Walker *v.* Ducros, 22 La. Ann. 214; Hebert *v.* Chastant, 22 La. Ann. 152; Satterfield *v.* Spurlock, 21 La. Ann. 771; Sandidge *v.* Sanderson, 21 La. Ann. 757; Burbridge *v.* Harrison, 20 La. Ann. 357; Brou *v.* Becnel, 20 La. Ann. 254, 22 La. Ann. 189; Wainwright *v.* Bridges, 19 La. Ann. 234.

Massachusetts.— Guild *v.* Belcher, 119 Mass. 257; Loring *v.* Sumner, 23 Pick. (Mass.) 98; Parish *v.* Stone, 14 Pick. (Mass.) 198,

3. CONFLICT OF LAWS. The validity of the consideration is to be determined in general by the law of the place of contract,[60] especially where it is made and payable in the same place.[61] If valid by that law the bill or note is in general valid, unless it is repugnant to, and rendered invalid by, the law of the place where the consideration arose and of the forum.[62] The law of the place of contract will prevail to sustain the validity of a note against the law of the place of consideration;[63] but the latter may prevail against the former to render a note void by force of the statute law.[64] In general the law of the forum will control that of the place of contract to render an instrument void, if the latter is repugnant to that of the forum;[65] and the law of the forum being also that of the place where the landed security lies will prevail over the place of the contract to defeat the instrument.[66] So it may be defeated by the law of the forum and place of contract, as against that of the place where the consideration arose.[67]

25 Am. Dec. 378 (holding that, where there are two distinct considerations not liquidated or defined, an apportionment between that which is legal and that which is not may be made by the jury). So *a fortiori* if the note is given in part payment of an account and the amount of the items for goods lawfully sold exceeds the amount of the note. Warren *v.* Chapman, 105 Mass. 87.

Mississippi.—Carradine *v.* Wilson, 61 Miss. 573 (holding that if there are several notes each exceeding the amount of the illegal consideration the holder may elect to which the defense shall apply and recover on the other); Clopton *v.* Elkin, 49 Miss. 95.

Ohio.— Doty *v.* Knox County Bank, 16 Ohio St. 133.

Pennsylvania.—Lancaster City School Dist. *v.* Lamprecht, 198 Pa. St. 504, 48 Atl. 434, where part of an issue of municipal bonds is made applicable to an illegal debt.

Rhode Island.— McGuinness *v.* Bligh, 11 R. I. 94.

Wisconsin.— Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58.

England.— Crookshank *v.* Rose, 5 C. & P. 19, 1 M. & Rob. 100, 24 E. C. L. 432; Scott *v.* Gillmore, 3 Taunt. 226, 12 Rev. Rep. 641.

60. *Alabama.*— McDougald *v.* Rutherford, 30 Ala. 253.

Arkansas.— Moore *v.* Clopton, 22 Ark. 125, holding that the place of contract will control the forum to render a note void, as a contract for slaves.

Massachusetts.— Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35.

Michigan.— Bissell *v.* Lewis, 4 Mich. 450.

Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.

New Hampshire.— Pecker *v.* Kennison, 46 N. H. 488.

New Jersey.—Armour *v.* Michael, 36 N. J. L. 92; Andrews *v.* Torrey, 14 N. J. Eq. 355; Dolman *v.* Cook, 14 N. J. Eq. 56; Cotheal *v.* Blydenburgh, 5 N. J. Eq. 17, 631.

New York.— Andrews *v.* Herriot, 4 Cow. (N. Y.) 508.

Virginia.— Fant *v.* Miller, 17 Gratt. (Va.) 47.

West Virginia.—Pugh *v.* Cameron, 11 W. Va. 523.

United States.— Fitch *v.* Remer, 1 Biss. (U. S.) 337, 1 Flipp. (U. S.) 15, 9 Fed. Cas. No. 4,836, 8 Am. L. Reg. 654, 5 Quart. L. J. 266.

See also *supra*, I, D, 2, a, (II), (B).

The place of contract and forum will control the place of payment to render a note void under the Banking Act (Hamtramck *v.* Selden, 12 Gratt. (Va.) 28) or Sunday law (Arbuckle *v.* Reaume, 96 Mich. 243, 55 N. W. 808).

61. Collins Iron Co. *v.* Burkam, 10 Mich. 283; Ivey *v.* Lalland, 42 Miss. 444, 97 Am. Dec. 475, 2 Am. Rep. 606; Colston *v.* Pemherton, 20 Misc. (N. Y.) 410, 45 N. Y. Suppl. 1034.

62. Fuller *v.* Bean, 30 N. H. 181.

63. Jameson *v.* Gregory, 4 Metc. (Ky.) 363 (a note given for lottery tickets); Backman *v.* Jenks, 55 Barb. (N. Y.) 468 (where the place of contract was also the forum and place of payment). Conversely, a draft for a consideration which is illegal by the law of the forum and place of contract will not be made valid by the law of the state where the lottery is. Roselle *v.* McAuliffe, (Mo. 1896) 35 S. W. 1135.

64. Wilson *v.* Stratton, 47 Me. 120; Wynne *v.* Callander, 1 Russ. 293, 46 Eng. Ch. 293 (where the consideration arose in the forum and the contract was a renewal in evasion of the original illegality).

65. Pope *v.* Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 [*affirming* 52 Ill. App. 453]; King *v.* Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Quarrier *v.* Colston, 6 Jur. 959, 12 L. J. Ch. 57, 1 Phil. 147. On the other hand a bond for the payment of notes issued in violation of a penal statute of the state where it was made, but which constitutes a legal liability in the state of the forum, may be enforced in the latter state (York County *v.* Small, 1 Watts & S. (Pa.) 315); and even a note discounted in New Jersey in bills under five dollars to be used with the indorser's knowledge in New York, where such bills were prohibited by statute, was held to be legal in New York, the consideration not being *malum in se*, and the parties having no knowledge of the New York statute and no intention to evade it (Merchants' Bank *v.* Spalding, 9 N. Y. 53).

66. Flagg *v.* Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308.

67. Roselle *v.* McAuliffe, (Mo. 1896) 35 S. W. 1135.

IV. PRESENTMENT FOR ACCEPTANCE.

A. Necessity For. As a general rule all bills of exchange payable at a future time should be presented for acceptance,[68] but under ordinary circumstances presentment for acceptance is necessary in those cases only where the bill is payable at or after "sight," in which cases it is only in this way that the time for the maturity of the bill can be fixed.[69] It is not necessary where the bill is payable at a certain time designated or on demand,[70] although such bills may be presented for acceptance before maturity.[71] In like manner it has been held that

68. The Negotiable Instruments Law, section 240, provides as follows: "Presentment for acceptance must be made: 1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or 2. Where the bill expressly stipulates that it shall be presented for acceptance; or 3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable."

The Bills of Exchange Act, section 39, provides as follows: "(1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument. (2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment. (3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill."

69. *Alabama.*— Hart *v.* Smith, 15 Ala. 807, 50 Am. Dec. 161.

Arkansas.— Craig *v.* Price, 23 Ark. 633.

Indiana.—Dumont *v.* Pope, 7 Blackf. (Ind.) 367.

New York.— Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459; Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555 [*reversing* 17 Wend. (N. Y.) 368]; Aymar *v.* Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538.

North Carolina.— Burrus *v.* Virginia L. Ins. Co., 124 N. C. 9, 32 S. E. 323; Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268; Austin *v.* Rodman, 8 N. C. 194, 9 Am. Dec. 630.

South Carolina.— Fernandez *v.* Lewis, 1 McCord (S. C.) 322.

United States.— Cox *v.* New York Nat. Bank, 100 U. S. 704, 25 L. ed. 739; Wallace *v.* Agry, 5 Mason (U. S.) 118, 29 Fed. Cas. No. 17,097, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096.

England.—Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 14 Eng. Reprint 215; Dixon *v.* Nuttall, 1 C. M. & R. 307, 6 C. & P. 320, 3 L. J. Exch. 290, 4 Tyrw. 1013, 25 E. C. L. 453; Muilman *v.* D'Eguino, 2 H. Bl. 565; Thorpe *v.* Booth, R. & M. 388, 21 E. C. L. 776; Holmes *v.* Kerrison, 2 Taunt. 323, 11 Rev. Rep. 594.

See 7 Cent. Dig. tit. "Bills and Notes," § 1055.

Where a bill is presented to the drawee and there is an agreement to again present it a new demand is necessary. Case *v.* Burt, 15 Mich. 82.

70. *Alabama.*— Evans *v.* Bridges, 4 Port. (Ala.) 348.

Georgia.— Davies *v.* Byrne, 10 Ga. 329.

Kentucky.— Landrum *v.* Trowbridge, 2 Metc. (Ky.) 281; Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576.

Louisiana.— Commercial Bank *v.* Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168; Crosby *v.* Morton, 13 La. 357. But see Wolfe *v.* Jewett, 10 La. 383.

Massachusetts.— Fall River Union Bank *v.* Willard, 5 Metc. (Mass.) 216, holding that in such case even an agreement not to present for acceptance before the day fixed for maturity will not discharge the indorser.

Mississippi.— Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408.

Missouri.— Glasgow *v.* Copeland, 8 Mo. 268.

New York.— Plato *v.* Reynolds, 27 N. Y. 586; Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555.

Ohio.— Walker *v.* Stetson, 19 Ohio St. 400, 2 Am. Rep. 405.

Pennsylvania.— House *v.* Adams, 48 Pa. St. 261, 86 Am. Dec. 588.

Vermont.— Bennington Bank *v.* Raymond, 12 Vt. 401.

United States.— Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37.

England.— Philpot *v.* Bryant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 29 Rev. Rep. 710; Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; O'Keefe *v.* Dunn, 1 Marsh. 613, 6 Taunt. 305, 16 Rev. Rep. 323, 1 E. C. L. 626 [*affirmed* in 5 M. & S. 282, 17 Rev. Rep. 326]; Goodal *v.* Dolley, 1 T. R. 712, 1 Rev. Rep. 372.

Canada.— Richardson *v.* Daniels, 5 U. C. Q. B. O. S. 671.

See 7 Cent. Dig. tit. "Bills and Notes," § 1055.

A postdated draft payable at sight is in effect a bill payable at a day certain. New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344, 6 N. W. 823, where Cooley, J., distinguishes as to this point, between a postdated bill of exchange and a bill payable at a certain time after date.

71. Bachellor *v.* Priest, 12 Pick. (Mass.) 399.

a check which is payable on demand need not be presented to the drawee for acceptance.[72]

B. Manner of Presentment. The bill should be exhibited to the drawee when it is presented for acceptance,[73] although this is not absolutely necessary,[74] and the presentment must be absolute and final. It cannot for instance be presented and withdrawn with an offer to call again on the following day.[75] Each part of a set of two or more parts need not be presented.[76]

C. By Whom Made. Presentment should be made by the rightful holder or his agent,[77] but if it is presented by a wrongful holder the acceptance will be for the benefit of the rightful holder.[78] The fact that the holder is a mere agent for the real owner does not dispense with the necessity for presentment,[79] and in the United States, as in foreign countries, presentment is generally made by a notary public as agent for the holder or whom it may concern.[80]

D. To Whom Made. Presentment for acceptance should be made to the drawee or his authorized agent,[81] or to the person named in the bill as drawee in case of need (*au besoin*), if the drawee cannot be found[82] or refuses to accept it.[83] If the bill is drawn on a partnership, presentment to any one of the firm is sufficient,[84] but if there are several drawees who are not partners presentment must be made to each one of them,[85] unless one has authority to accept or to refuse acceptance for all.[86] If the drawee is dead presentment must be made to his personal representative; if bankrupt to him or his trustee.[87] If no drawee is

72. Champion *v.* Gordon, 70 Pa. St. 474, 10 Am. Rep. 681 (a postdated check); Martin *v.* Bailey, 4 Am. L. Reg. 632.

73. Fall River Union Bank *v.* Willard, 5 Metc. (Mass.) 216.

It may be inclosed in a letter to the drawee and acceptance refused by letter. Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408.

The acceptance of a bill or order is proof of a due presentment for acceptance. Edson *v.* Fuller, 22 N. H. 183.

74. Burlington First Nat. Bank *v.* Hatch, 78 Mo. 13 (holding that it is a sufficient presentment if the notary, on demanding acceptance, has the bill ready to produce if called for); Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Dec. 174 (holding that it is enough if the drawee is enabled, by seeing the bill or otherwise, to give an intelligent answer).

75. Case *v.* Burt, 15 Mich. 82.

76. Walsh *v.* Blatchley, 6 Wis. 422, 70 Am. Dec. 469; Downes *v.* Church, 13 Pet. (U. S.) 205, 10 L. ed. 127.

77. It should be "by or on behalf of the holder." Neg. Instr. L. § 242; Cal. Civ. Code, § 8186; Bills Exch. Act, § 41.

78. Chitty Bills 311.

79. Walker *v.* State Bank, 9 N. Y. 582.

Where an agent neglects to make due presentment for acceptance he is liable to his principal in damages. Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Van Wart *v.* Woolley, 3 B. & C. 439, 10 E. C. L. 204, 5 D. & R. 374, 3 L. J. K. B. O. S. 51, M. & M. 520, 22 E. C. L. 578, R. & M. 4, 21 E. C. L. 690. See also BANKS AND BANKING, 5 Cyc. 509, note 90.

Effect of principal's death.—An agent's authority to make presentment for acceptance ends like any other agency with the death of his principal and a presentment after that time will not be good. Gale *v.* Tappan, 12 N. H. 145, 37 Am. Dec. 194.

80. In some states this is provided for by statute and in some presentment by the notary's clerk is sufficient. Lee *v.* Buford, 4 Metc. (Ky.) 7; Schuchardt *v.* Hall, 36 Md. 590, 11 Am. Rep. 514.

81. Sharpe *v.* Drew, 9 Ind. 281; Schuchardt *v.* Hall, 36 Md. 590, 11 Am. Rep. 514; Wiseman *v.* Chiappella, 23 How. (U. S.) 368, 16 L. ed. 466; Cheek *v.* Roper, 5 Esp. 175. See also Neg. Instr. L. § 242; Cal. Civ. Code, § 8186; Bills Exch. Act, § 41.

The agent to whom presentment is made must be shown to be the drawee's agent, but this may be shown by parol. Stainback *v.* State Bank, 11 Gratt. (Va.) 269; Nelson *v.* Fotterall, 7 Leigh (Va.) 179. It is sufficient where defendants were merchants having a counting-room and the notary certified that he had "presented the draft to a clerk of the drawees at their office, said drawees not being in, and demanded acceptance thereof, and was answered that the same would not be accepted." Whaley *v.* Houston, 12 La. Ann. 585; Stainback *v.* State Bank, 11 Gratt. (Va.) 269.

82. Chitty Bills 311; Story Bills, § 229. See also Cal. Civ. Code, § 8188.

83. 1 Edwards Bills & N. § 560; Story Bills, § 229.

84. Mt. Pleasant Branch State Bank *v.* McLeran, 26 Iowa 306; Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207 (although previously dissolved by bankruptcy).

85. Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541.

86. Neg. Instr. L. § 242; Bills Exch. Act, § 41. But see Cal. Civ. Code, § 8187.

87. Neg. Instr. L. § 242; Bills Exch. Act, § 41.

named in the bill presentment may be made to the person addressed by the drawer in his letter of advice.[88]

E. Time For Presentment — 1. Must Be Within Reasonable Time — a. Rule Stated. Presentment for acceptance need not be made immediately on receipt of the bill,[89] but should be made within a reasonable time after its date.[90]

b. What Is Reasonable Time.[91] What is a reasonable time must be determined by all the circumstances of the particular case,[92] among which are the

88. Gray *v.* Milner, 3 Moore C. P. 90, 2 Stark. 336, 3 E. C. L. 434; 8 Taunt. 739, 4 E. C. L. 361, 21 Rev. Rep. 525.

89. Muilman *v.* D'Eguino, 2 H. Bl. 565; Fry *v.* Hill, 7 Taunt. 397, 18 Rev. Rep. 512, 2 E. C. L. 417.

It may even be postponed until the bill matures by an agreement with the drawer unknown to his accommodation indorser, without discharging the indorser. Fall River Union Bank *v.* Willard, 5 Metc. (Mass.) 216. See also Neg. Instr. L. § 244; Bills Exch. Act, § 39.

90. *Alabama.*— Knott *v.* Venable, 42 Ala. 186.

Indiana.— English *v.* Indiana Asbury University, 6 Ind. 437; Dumont *v.* Pope, 7 Blackf. (Ind.) 367.

Louisiana.— Richardson *v.* Fenner, 10 La. Ann. 599; Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306.

Massachusetts.— Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473; Field *v.* Nickerson, 13 Mass. 131.

Michigan.— Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756. But the rule of the law merchant as to reasonable time does not apply to non-negotiable paper. Briggs *v.* Parsons, 39 Mich. 400.

Missouri.— Fugitt *v.* Nixon, 44 Mo. 295.

New York.— Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459; Vantrot *v.* McCulloch, 2 Hilt. (N. Y.) 272; Aymar *v.* Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538; Gowan *v.* Jackson, 20 Johns. (N. Y.) 176; Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

South Carolina.— Fernandez *v.* Lewis, 1 McCord (S. C.) 322.

Texas.—Nichols *v.* Blackmore, 27 Tex. 586; Chambers *v.* Hill, 26 Tex. 472; Jordan *v.* Wheeler, 20 Tex. 698.

West Virginia.— Thornburg *v.* Emmons, 23 W. Va. 325.

United States.— Wallace *v.* Agry, 5 Mason (U. S.) 118, 29 Fed. Cas. No. 17,097, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096.

England.—Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 14 Eng. Reprint 215; Muilman *v.* D'Eguino, 2 H. Bl. 565; Straker *v.* Graham, 4 M. & W. 721; Fry *v.* Hill, 7 Taunt. 397, 18 Rev. Rep. 512, 2 E. C. L. 417.

91. **Whether question of law or fact** see *infra*, XIV, F [8 Cyc.].

92. *Connecticut.*— Lockwood *v.* Crawford, 18 Conn. 361.

Louisiana.— Richardson *v.* Fenner, 10 La. Ann. 599.

Massachusetts.— Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473.

Missouri.— Linville *v.* Welch, 29 Mo. 203.

New York.— Vantrot *v.* McCulloch, 2 Hilt. (N. Y.) 272.

South Carolina.— Fernandez *v.* Lewis, 1 McCord (S. C.) 322.

Texas.— Jordan *v.* Wheeler, 20 Tex. 698.

United States.— Wallace *v.* Agry, 5 Mason (U. S.) 118, 29 Fed. Cas. No. 17,097, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096.

England.— Mellish *v.* Rawdon, 9 Bing. 416, 2 L. J. C. P. 29, 2 Moore & S. 570, 23 E. C. L. 640; Muilman *v.* D'Eguino, 2 H. Bl. 565.

If the drawee is absent from his residence and no one there is authorized to answer for him, the holder may wait a reasonable time for his return before protesting it for non-acceptance, without thereby releasing indorsers. Wiseman *v.* Chiappella, 23 How. (U. S.) 368, 16 L. ed. 466.

The time was held reasonable in the following cases:

Iowa.— Tryon *v.* Oxley, 3 Greene (Iowa) 289, seven days — between parties in same county.

Massachusetts.— Oxford Bank *v.* Davis, 4 Cush. (Mass.) 188 (five months after date — bill payable in six months from date); Bachellor *v.* Priest, 12 Pick. (Mass.) 399 (two months after date and two months before maturity).

New York.—Aymar *v.* Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538 (twenty-nine days — between places three hundred miles apart and holder making the journey in ill health); Gowan *v.* Jackson, 20 Johns. (N. Y.) 176 (six months — bill drawn in Antigua on London, payable ninety days after sight); Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259 (seventy-five days after date — bill drawn in Georgia on New York, payable sixty days after sight).

Texas.— Jordan *v.* Wheeler, 20 Tex. 698, three months after date — bill drawn in Ohio on Louisiana and transferred.

United States.— U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517, three months after date — pending War of 1812.

England.— Mellish *v.* Rawdon, 9 Bing. 416, 2 L. J. C. P. 29, 2 Moore & S. 570, 23 E. C. L. 640 (five months after date — bill drawn at Rio Janeiro on London, payable sixty days after sight); Muilman *v.* D'Eguino, 2 H. Bl. 565 (seven months after date — bill drawn in London on Calcutta); Godfray *v.* Coulman, 13 Moore P. C. 11, 15 Eng. Reprint 5 (thirty-seven days after date — bill drawn in Island of Jersey on London, payable three days after sight).

The delay was held unreasonable in the following cases:

Indiana.— Dumont *v.* Pope, 7 Blackf. (Ind.)

circulation of the bill,[93] the character of the bill,[94] the local usage of the drawee's place of business,[95] fluctuating exchange,[96] means of communication,[97] the sudden illness of the holder,[98] the outbreak of war,[99] or the loss of the bill;[1] but it is not in general affected by the solvency or insolvency of either party.[2]

2. Must Be Within Business or Usual Hours. If presentment for acceptance

367 (thirty days — between places in same state less than thirty miles apart); Angaletos *v.* Meridian Nat. Bank, 4 Ind. App. 573, 31 N. E. 368 (two months — when it could have been done by mail in ten days).

Michigan.— Twenty-one days — to obtain explanation of purpose in making draft payable "in current funds." Phœnix Ins. Co. *v.* Gray, 13 Mich. 191; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756.

Missouri.— Salisbury *v.* Renick, 44 Mo. 554.

Nebraska.—Collingwood *v.* Merchants' Bank, 15 Nebr. 118, 17 N. W. 359, ten weeks — between Nebraska and New York, with condition for return of draft if not used for a specific purpose.

New York.— Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459 (six years); Vantrot *v.* McCulloch, 2 Hilt. (N. Y.) 272 (ten days — draft drawn in Ohio on New York); Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555 [*reversing* 17 Wend. (N. Y.) 368, seventeen days].

South Carolina.— Fernandez *v.* Lewis, 1 McCord (S. C.) 322, seventy-five days — between Charleston and New York.

Texas.— Nichols *v.* Blackmore, 27 Tex. 586 (forty-seven days — between places in same state); Chambers *v.* Hill, 26 Tex. 472 (two and a half years).

West Virginia.— Thornburg *v.* Emmons, 23 W. Va. 325.

Wisconsin.— Allan *v.* Eldred, 50 Wis. 132, 6 N. W. 565 (one year); Walsh *v.* Dart, 23 Wis. 334, 99 Am. Dec. 177 (fourteen days — sight draft on New York drawn in Wisconsin).

United States.— Olshausen *v.* Lewis, 1 Biss. (U. S.) 419, 18 Fed. Cas. No. 10,507, thirty days — draft drawn in St. Louis on Chicago.

93. Thus a delay might be laches, if the bill remained in the hands of the payee, and otherwise if it was circulating. Richardson *v.* Fenner, 10 La. Ann. 599; Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306; Jordan *v.* Wheeler, 20 Tex. 698; Wallace *v.* Agry, 5 Mason (U. S.) 118, 29 Fed. Cas. No. 17,097, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096; Mellish *v.* Rawdon, 9 Bing. 416, 2 L. J. C. P. 29, 2 Moore & S. 570, 23 E. C. L. 640; Muilman *v.* D'Eguino, 2 H. Bl. 565; Straker *v.* Graham, 4 M. & W. 721.

As long as it is kept in circulation its presentment for acceptance may be deferred, whether a foreign (Wallace *v.* Agry, 5 Mason (U. S.) 118, 29 Fed. Cas. No. 17,097, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096; Goupy *v.* Harden, Holt N. P. 342, 3 E. C. L. 139, 2 Marsh. 454, 7 Taunt. 159, 2 E. C. L. 306, 17 Rev. Rep. 478) or inland (Fry *v.* Hill, 7 Taunt. 397, 18 Rev. Rep. 512, 2 E. C. L. 417) bill; and this has been held to be so after a delay of ten weeks (Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306), three months (Boyes *v.* Joseph, 7 U. C. Q. B. 505), or even after six months (Gowan *v.* Jackson, 20 Johns. (N. Y.) 176) in the case of a foreign bill and after a delay of four days (Shute *v.* Robins, 3 C. & P. 80, M. & M. 133, 14 E. C. L. 460), three days (Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473), ten days (Muncy Borough School Dist. *v.* Com., 84 Pa. St. 464), and eleven days (National Newark Banking Co. *v.* Erie Second Nat. Bank, 63 Pa. St. 404) in the case of an inland bill. *Contra*, a delay of thirty-five days in the case of an inland bill (Montelius *v.* Charles, 76 Ill. 303) and three months in disregard of frequent mails in the case of a foreign bill (Straker *v.* Graham, 4 M. & W. 721).

94. Shute *v.* Robins, 3 C. & P. 80, M. & M. 133, 14 E. C. L. 460.

95. Montelius *v.* Charles, 76 Ill. 303; Nichols *v.* Blackmore, 27 Tex. 586; Jordan *v.* Wheeler, 20 Tex. 698; Wallace *v.* Agry, 5 Mason (U. S.) 118, 29 Fed. Cas. No. 17,097, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096; Mellish *v.* Rawdon, 9 Bing. 416, 2 L. J. C. P. 29, 2 Moore & S. 570, 23 E. C. L. 640; Shute *v.* Robins, 3 C. & P. 80, M. & M. 133, 14 E. C. L. 460.

96. Mellish *v.* Rawdon, 9 Bing. 416, 2 L. J. C. P. 29, 2 Moore & S. 570, 23 E. C. L. 640; Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 14 Eng. Reprint 215.

97. Richardson *v.* Fenner, 10 La. Ann. 599; Nichols *v.* Blackmore, 27 Tex. 586.

Delay in the mail may also be considered (Walsh *v.* Blatchley, 6 Wis. 422, 70 Am. Dec. 469), but this does not apply to a case where there was laches before the delay of the mail (Walsh *v.* Dart, 23 Wis. 334, 99 Am. Dec. 177) or where the delay occurs in the return of a bill sent for payment to the wrong place by mistake (Schofield *v.* Bayard, 3 Wend. (N. Y.) 488).

98. Aymar *v.* Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538.

99. Durden *v.* Smith, 44 Miss. 548; Dunbar *v.* Tyler, 44 Miss. 1; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517; Patience *v.* Townley, 2 Smith K. B. 223, 8 Rev. Rep. 711.

1. Aborn *v.* Bosworth, 1 R. I. 401; Browne *v.* Depau, Harp. (S. C.) 251 (the loss of one part and its acceptance and payment on a forged indorsement of the payee's name).

2. Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 28 Eng. L. & Eq. 86, 14 Eng. Reprint 215; Carter *v.* Flower, 4 D. & L. 529, 11 Jur. 313, 16 L. J. Exch. 199, 16 M. & W. 743.

is made at the drawee's place of business it should be made in business hours;[3] if made at his residence it must be within usual hours to be determined by the local custom.[4] It should be made on a business day as well as in a business hour.[5]

F. Place For Presentment. If the drawee's place of business or residence is known presentment for acceptance should be made there,[6] but presentment at either place is sufficient, although they may be in different towns.[7] Where there is no place of business and the residence has been changed, the holder must use due diligence to find his actual residence,[8] but the bill may be treated as dishonored, if the drawee's residence in default of a place of business cannot be ascertained.[9] So if the bill is addressed to a place where he never resided and the residence or place of business cannot be ascertained[10] or has been abandoned[11] and closed up.[12] If the bill designates a place of payment and the drawee's residence or place of business is not known, the bill may be presented for acceptance at the place of payment.[13]

G. Excuse and Waiver. Presentment for acceptance is unnecessary where acceptance is waived,[14] after an unconditional agreement for acceptance which is in effect an acceptance,[15] and in certain cases provided by statute;[16] but present-

3. Nelson *v.* Fotterall, 7 Leigh (Va.) 179; Parker *v.* Gordon, 7 East 385, 6 Esp. 41, 3 Smith K. B. 358, 8 Rev. Rep. 646; Elford *v.* Teed, 1 M. & S. 28; Leftley *v.* Mills, 4 T. R. 170.

4. And not in general at a late hour, after the family has retired for the night (Dana *v.* Sawyer, 22 Me. 244, 39 Am. Dec. 574), unless an answer is then obtained from a duly authorized person (Henry *v.* Lee, 2 Chit. 124, 18 E. C. L. 544; Garnett *v.* Woodcock, 6 M. & S. 44, 1 Stark. 475, 18 Rev. Rep. 298, 2 E. C. L. 182).

5. Neg. Instr. L. §§ 242, 243; Cal. Civ. Code, § 8186; Bills Exch. Act, § 41.

Under the Saturday half-holiday law of New York providing that demand of acceptance of commercial paper not paid before noon of that day may be made on the next succeeding secular day, a sight draft received on Friday and presented to the drawee Saturday forenoon, and at his request again presented on Monday, is duly presented. Sylvester *v.* Crohan, 138 N. Y. 494, 34 N. E. 273, 53 N. Y. St. 113 [*affirming* 63 Hun (N. Y.) 509, 18 N. Y. Suppl. 546, 45 N. Y. St. 320].

6. Although the bill is made payable in another city with no designation of a particular address in that city. Boot *v.* Franklin, 3 Johns. (N. Y.) 207; Mason *v.* Franklin, 3 Johns. (N. Y.) 202.

7. Story Bills, § 236.

8. Hine *v.* Allely, 4 B. & Ad. 624, 2 L. J. K. B. 105, 1 N. & M. 433, 24 E. C. L. 275; Beveridge *v.* Burgis, 3 Campb. 262, 13 Rev. Rep. 798; Bateman *v.* Joseph, 2 Campb. 468, 12 East 433, 11 Rev. Rep. 443; Browning *v.* Kinnear, Gow 81, 5 E. C. L. 879; Collins *v.* Butler, 2 Str. 1087.

9. 1 Daniel Neg. Instr. 429; Story Bills, § 235.

10. Wolfe *v.* Jewett, 10 La. 383.

11. Wolfe *v.* Jewett, 10 La. 383; Ratcliff *v.* Planters' Bank, 2 Sneed (Tenn.) 425; Anonymous, 1 Ld. Raym. 743.

12. Ratcliff *v.* Planters' Bank, 2 Sneed (Tenn.) 425; Hine *v.* Allely, 4 B. & Ad. 624, 2 L. J. K. B. 105, 1 N. & M. 433, 24 E. C. L. 275.

13. Wolfe *v.* Jewett, 10 La. 383.

If a bill is payable at the banking-house of a firm in London presentment at the clearing-house is sufficient. Reynolds *v.* Chettle, 2 Campb. 596.

14. Liggett *v.* Weed, 7 Kan. 273; Denegre *v.* Milne, 10 La. Ann. 324; English *v.* Wall, 12 Rob. (La.) 132; Webb *v.* Mears, 45 Pa. St. 222; Carson *v.* Russell, 26 Tex. 452.

It may be waived by words that imply rather than express such waiver. Bagley *v.* Buzzell, 19 Me. 88 (an indorsement "accountable in eight months from . . . date"); Bean *v.* Arnold, 16 Me. 251 (an indorsement, "William Arnold, Holden").

Waiver of notice of protest is not a waiver of presentment. Burnham *v.* Webster, 17 Me. 50; Drinkwater *v.* Tebbetts, 17 Me. 16.

15. Maas *v.* Montgomery Iron-Works, 88 Ala. 323, 6 So. 701; Whilden *v.* Merchants, etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

A telegram authorizing a draft payable a certain time after sight will not dispense with its presentment for acceptance. Allentown Nat. Bank *v.* Kimes, 4 Wkly. Notes Cas. (Pa.) 401.

16. The Negotiable Instruments Law, section 245, provides that "presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases: 1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill; 2. Where after the exercise of reasonable diligence, presentment cannot be made; 3. Where, although presentment has been irregular, acceptance has been refused on some other ground." See also Cal. Civ. Code, §§ 8218, 8220.

The Bills of Exchange Act, section 41, adds to these "(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment."

ment for acceptance is necessary although the bill is drawn by the drawer on himself;[17] although the drawer has notified the drawee not to accept the bill,[18] and although a particular place of payment is designated.[19]

V. ACCEPTANCE.[20]

A. In General — 1. NATURE OF. Acceptance is an agreement on the part of the drawee of a bill to pay it according to its terms when due.[21] It is an agreement to pay the bill in money [22] and at the place of payment named in the bill.[23] By naming a bank or banker's office as the place of payment the accepter makes the banker his agent with authority to make payment on his behalf.[24] If the acceptance be a general acceptance of a conditional order it binds the accepter to pay according to the conditions and not otherwise.[25]

17. Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

But a bill drawn by one corporation officer on another in its business does not require to be presented for acceptance. Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193.

18. Hill *v.* Heap, D. & R. N. P. 57, 25 Rev. Rep. 791; Prideaux *v.* Collier, 2 Stark. 57, 3 E. C. L. 315. *Contra*, Neederer *v.* Barber, 17 Fed. Cas. No. 10,079.

19. Bachellor *v.* Priest, 12 Pick. (Mass.) 399.

20. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. Neg. Instr. L. § 227; Bills Exch. Act, § 19.

As to qualified or conditional acceptance see *infra*, V, B.

21. *Alabama.*— Capital City Ins. Co. *v.* Quinn, 73 Ala. 558, in effect the accepter's note, where a partner draws in favor of his firm for the accepter's debt to it.

Indiana.— Smith *v.* Muncie Nat. Bank, 29 Ind. 158, including a stipulation therein for the payment of attorney's fees.

Louisiana.— Shreveport *v.* Gooch, 15 La. Ann. 474.

Pennsylvania.— Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567.

South Carolina.— Greene *v.* Duncan, 37 S. C. 239, 15 S. E. 956.

United States.— Cox *v.* New York Nat. Bank, 100 U. S. 704, 25 L. ed. 739; Hoffman *v.* Milwaukee Nat. City Bank, 12 Wall. (U. S.) 181, 20 L. ed. 366; Raborg *v.* Peyton, 2 Wheat. (U. S.) 385, 4 L. ed. 268.

England.— Clarke *v.* Cock, 4 East 57.

See also Neg. Instr. L. §§ 112, 220; Bills Exch. Act, §§ 17, 54.

The acceptance of a bill payable out of a particular fund is a promise to the payee and he can recover under the common money counts (McClellan *v.* Anthony, 1 Edm. Sel. Cas. (N. Y.) 284), but the accepter is not liable to the indorsee of a non-negotiable bill (Gerard *v.* La Coste, 1 Dall. (Pa.) 194, 1 L. ed. 96, 1 Am. Dec. 236).

22. Russell *v.* Phillips, 14 Q. B. 891, 14 Jur. 806, 19 L. J. Q. B. 297, 68 E. C. L. 891. But it may be for half in money and half in bills. Petit *v.* Benson, Comb. 452.

23. Alden *v.* Barbour, 3 Ind. 414.

A bill payable at a designated place may be accepted generally (Todd *v.* State Bank, 3 Bush (Ky.) 626; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396), but it will be payable at the residence of the drawee, if so addressed, and accepted generally (Cox *v.* New York Nat. Bank, 100 U. S. 704, 25 L. ed. 739).

Presumption as to place of acceptance see *infra*, XIV, E [8 Cyc.].

24. Kymer *v.* Laurie, 13 Jur. 426, 18 L. J. Q. B. 218.

Liability of banker.— This does not render the banker liable without his assent to the holder of the bill (Yates *v.* Bell, 3 B. & Ald. 643, 5 E. C. L. 370; Wedlake *v.* Hurley, 1 Cr. & J. 83; Williams *v.* Everett, 14 East 582, 13 Rev. Rep. 315), but such assent may be implied from the fact of his having funds of the drawer (De Bernales *v.* Fuller, 2 Campb. 426, 14 East 590 note, 11 Rev. Rep. 755), and if the banker is in funds he is liable to the accepter for failure to pay the bill (Rolin *v.* Stewart, 14 C. B. 595, 2 C. L. R. 959, 18 Jur. 536, 23 L. J. C. P. 148, 2 Wkly. Rep. 467, 78 E. C. L. 595; Whitaker *v.* Bank of England, 6 C. & P. 700, 1 C. M. & R. 744, 1 Gale 54, 4 L. J. Exch. 57, 5 Tyrw. 268, 25 E. C. L. 646) or for payment to a holder under a forged indorsement (Robarts *v.* Tucker, 16 Q. B. 560, 15 Jur. 987, 20 L. J. Q. B. 270, 71 E. C. L. 560).

25. *Alabama.*— Swansey *v.* Breck, 10 Ala. 533, holding that where one accepts an order payable out of a certain note, when collected, but dies before the money is collected, and it is afterward received by his personal representatives, they are liable in their representative character upon the contract of their testator.

Iowa.— *In re* Mahaska Coal Co., 95 Iowa 456, 64 N. W. 405.

Kentucky.— Crane *v.* Williamson, 23 Ky. L. Rep. 689, 63 S. W. 610, 975, where the order was to pay "out of the first money due us . . . after deducting all moneys you have paid."

Maine.— Head *v.* Sleeper, 20 Me. 314, holding that to recover against the accepters of an order to be paid "when you receive your payments" it must be shown that they had received their payments.

Massachusetts.— Morrison *v.* Lamson, 176

2. Necessity For Acceptance — a. In General. To render the drawee liable upon the bill his acceptance is generally necessary;[26] but this is not so where the

Mass. 536, 57 N. E. 997; Fuller *v.* Wilde, 151 Mass. 412, 24 N. E. 209; Linnehan *v.* Matthews, 149 Mass. 29, 20 N. E. 453; Robbins *v.* Blodgett, 124 Mass. 279 (holding that an acceptance of an order payable on completion of contract will bind the accepter when the house is completed notwithstanding the transfer of the unfinished house to another party by whom it is finished); Somers *v.* Thayer, 115 Mass. 163 (holding that the acceptance of an order for payment on the completion of a house which the drawer has contracted to build for the accepter, with a direction that the same be charged to the drawer "on account of contract," is conditional upon a completion according to the contract); Cook *v.* Wolfendale, 105 Mass. 401 (holding that an acceptance of an order "payable when house is ready for occupancy," will render the drawee liable to pay, although he had to finish the house himself on the contractor's default); Newhall *v.* Clark, 3 Cush. (Mass.) 376, 50 Am. Dec. 741 (an order to pay "out of the amount to be advanced to me, when the houses . . . are so far completed as to have the plastering done"); Bradford *v.* Drew, 5 Metc. (Mass.) 188 (holding that where an order was made payable out of the profits of a contract between drawer and drawee, it made the drawee liable only to the extent of the actual profits, although he might have made enough profit by diligence in selling the goods to pay the entire order); Jackman *v.* Bowker, 4 Metc. (Mass.) 235 (holding that to hold the drawee on an acceptance of an order conditioned on the amount being then due by accepter to drawer and by drawer to payee upon "settlement, out of the last payment . . . on houses which I am now building for you," the payee must aver and prove settlement before action and amounts due drawer and payee); Perry *v.* Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98 (holding that an order to pay "out of the first money belonging to me, which you may receive" binds the accepter to pay from time to time on reasonable request as the money is received by him).

Missouri.— Crowell *v.* Plant, 53 Mo. 145.

Nebraska.— Hoagland *v.* Erck, 11 Nebr. 580, 10 N. W. 498.

New Hampshire.— Burnham *v.* Dunklee, 34 N. H. 334, holding that the acceptance of an order to pay three hundred and seventy dollars out of rents to be collected "after taking out the notes you held against me, amounting to three hundred dollars" binds the accepter to pay any excess of rent, however small, until the payments reach the sum of three hundred and seventy dollars.

New Jersey.— Smith *v.* Wood, 1 N. J. Eq. 74.

New York.— Duffield *v.* Johnson, 96 N. Y. 369 [*affirming* 10 Daly (N. Y.) 360]; Mersereau *v.* Villari, 74 Hun (N. Y.) 59, 26 N. Y. Suppl. 135, 56 N. Y. St. 144; Lawrence *v.* Phipps, 67 Hun (N. Y.) 61, 22 N. Y. Suppl. 16, 51 N. Y. St. 374 (holding that an order to pay "from and out of any money due and to become due me under my contract for building" and "Accepted, payable as the buildings progress or when the same are completed" was conditioned that there would be money in the accepter's hands due the drawer on the building contract, with which to pay, and that his liability on the acceptance extended only to such moneys); Van Wagner *v.* Terrett, 27 Barb. (N. Y.) 181; Gallery *v.* Prindle, 14 Barb. (N. Y.) 186 (where the acceptance of a draft payable "out of the balance that will be due us from the sales of cloths that you now have or may have," referring to a contract which provided for losses and indemnity, was construed to mean a future final balance, and defendant's liability was held to depend on a final balance favorable to the drawer); Studwell *v.* Terrett, 4 Bosw. (N. Y.) 520; Gallagher *v.* Nichols, 16 Abb. Pr. N. S. (N. Y.) 337; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

Pennsylvania.— Bryant *v.* Hagerty, 87 Pa. St. 256 (holding that the acceptance of an order for "all money due or to become due to me . . . under our contract" is subject to the provision in the contract for deducting advances); Gillespie *v.* Mather, 10 Pa. St. 28.

Texas.— Kinney *v.* Lee, 10 Tex. 155, an order to pay "out of proceeds . . . when the same shall be received."

West Virginia.— Gerow *v.* Riffe, 29 W. Va. 462, 2 S. E. 104, holding that acceptance of an order to pay "out of funds, that may be due me as per our contract" binds the accepter only if something is due.

If the condition is contained in an indorsement made before the acceptance the accepter is bound thereby. Robertson *v.* Kensington, 4 Taunt. 30.

An acceptance in general terms of an order to pay "if in funds" admits funds in the accepter. Kemble *v.* Lull, 3 McLean (U. S.) 272, 14 Fed. Cas. No. 7,683.

26. *Alabama.*—Anderson *v.* Jones, 102 Ala. 537, 14 So. 871.

California.— Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522, draft.

Florida.—Bailey *v.* South Western R. Bank, 11 Fla. 266.

Iowa.— Poole *v.* Carhart, 71 Iowa 37, 32 N. W. 16.

Kentucky.— Weinstock *v.* Bellwood, 12 Bush (Ky.) 139, even where the bill is drawn by the holder on the maker of a note.

Michigan.— Finan *v.* Babcock, 58 Mich. 301, 25 N. W. 294, order.

New York.— New York, etc., State Stock Bank *v.* Gibson, 5 Duer (N. Y.) 574; Luff *v.* Pope, 5 Hill (N. Y.) 413.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93: De Liquero *v.* Munson, 11 Heisk. (Tenn.) 15.

drawee is himself the drawer — such bill being in effect the note of the drawer[27] — or where no drawee is named in the bill.[28]

b. Duty of Drawee to Accept. In general the drawee is under no such obligation to accept as will render him liable to the holder of the bill either by reason of his indebtedness to the drawer,[29] by reason of his holding funds of the drawee,[30] or by reason of his possession of the bill before its maturity;[31] but if he has received a check from the drawer to take up the bill on his promise of a renewed acceptance he cannot appropriate the check without renewing the acceptance.[32]

c. Waiver. The acceptance of a bill may be expressly waived by the drawer[33] or the holder may waive an acceptance by protesting the bill.[34]

3. By Whom Made — a. In General. Acceptance of a bill should be made by the drawee named in it.[35] If no drawee is named in the bill a third party may

England.— Wharton *v.* Walker, 4 B. & C. 163, 6 D. & R. 288, 3 L. J. K. B. O. S. 183, 10 E. C. L. 527; Frith *v.* Forbes, 4 De G. F. & J. 409, 8 Jur. N. S. 1115, 31 L. J. Ch. 793, 32 L. J. Ch. 10, 7 L. T. Rep. N. S. 261, 11 Wkly. Rep. 4, 65 Eng. Ch. 317.

See also *supra*, II, B, 2, a, note 42; and 7 Cent. Dig. tit. "Bills and Notes," § 107.

Liability of bank to holder of check see Banks and Banking, 5 Cyc. 536.

27. Cunningham *v.* Wardwell, 12 Me. 466; Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193.

Agent drawing on principal is virtually the principal's bill and does not require acceptance (Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537; Miller *v.* Thomson, 1 Dowl. N. S. 199, 11 L. J. C. P. 21, 3 M. & G. 576, 4 Scott N. R. 204, 42 E. C. L. 303), but this is not so where the agent exceeds an express written authority, even though the goods purchased by him as commission agent were shipped to the principal and credited by him on account due from agent (Parsons *v.* Armor, 3 Pet. (U. S.) 413, 7 L. ed. 724, purchase in name of agent and on his personal credit).

Between officers of corporation, on corporation business, drafts do not require acceptance as against the corporation. Western Min. Co. *v.* Toole, (Ariz. 1886) 11 Pac. 119; Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193; Hartford Nat. F. Ins. Co. *v.* Eastern Bldg., etc., Assoc., (Nebr. 1902) 91 N. W. 482; Halstead *v.* New York, 5 Barb. (N. Y.) 218. And see *supra*, I, B, 1, c, (I), (C), note 1.

Between public officers.— A bill drawn by one officer of government on another need not be accepted. It is accepted by the very act of drawing, the drawer and drawee being merely agents, having the same principal. Baker *v.* Montgomery, 4 Mart. (La.) 90.

Partner's draft on partnership, drawn in its business, is in like manner equivalent to an accepted bill of the partnership. Dougal *v.* Cowles, 5 Day (Conn.) 511.

28. Dougal *v.* Cowles, 5 Day (Conn.) 511.

29. Weinstock *v.* Bellwood, 12 Bush (Ky.) 139; New York, etc., State Stock Bank *v.* Gibson, 5 Duer (N. Y.) 574; Grant *v.* Austen, 5 Price 58, 17 Rev. Rep. 540.

A purchaser of goods is not bound to accept a draft in favor of a third party for the price of the goods and may set off against the price the vendor's indebtedness on mutual dealings. Relf *v.* Mobile Bank, 20 Pa. St. 435.

30. Rockville Nat. Bank *v.* Lafayette Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236. *A fortiori* a bank is not bound to accept by telegrams the checks or drafts of a depositor, although in possession of funds, as its duty to pay or accept depends upon presentation. Myers *v.* Union Nat. Bank, 27 Ill. App. 254.

Bill of lading drawn against creates no obligation to accept the bill drawn. Schuchardt *v.* Hall, 36 Md. 590, 11 Am. Rep. 514. See also *supra*, II, B, 2, a, note 43.

It is equivalent to an acceptance where a bank by agreement with the drawer retains the necessary part of the drawer's deposit to meet the specific check. Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353.

31. Desha *v.* Stewart, 6 Ala. 852.

32. Torrance *v.* Bank of British North America, L. R. 5 P. C. 246, 29 L. T. Rep. N. S. 109, 21 Wkly. Rep. 529.

33. Wintermute *v.* Post, 24 N. J. L. 420 (by parol); Lienow *v.* Pitcairn, 2 Paine (U. S.) 517, 15 Fed. Cas. No. 8,341 (holding that authority to a third person to draw on a debtor may be waived by such third person's announcement that he should draw direct on the person giving him authority); Miller *v.* Thomson, 1 Dowl. N. S. 199, 11 L. J. C. P. 21, 3 M. & G. 576, 4 Scott N. R. 204, 42 E. C. L. 303; Reg. *v.* Kinnear, 2 M. & Rob. 117.

Such waiver will not affect the drawer's rights in other respects. Denegre *v.* Milne, 10 La. Ann. 324; Webb *v.* Mears, 45 Pa. St. 222 [*affirming* 4 Phila. (Pa.) 321, 18 Leg. Int. (Pa.) 221].

34. Bentinck *v.* Dorrien, 6 East 199, 2 Smith K. B. 337.

35. May *v.* Kelly, 27 Ala. 497; Davis *v.* Clarke, 6 Q. B. 16, 13 L. J. Q. B. 305; Jackson *v.* Hudson, 2 Campb. 447; Lindus *v.* Bradwell, 5 C. B. 583, 12 Jur. 230, 17 L. J. C. P. 121, 57 E. C. L. 583; Nicholas *v.* Diamond, 2 C. L. R. 305, 9 Exch. 154, 23 L. J. Exch. 1, 2 Wkly. Rep. 12.

If the drawee named is without legal capacity the bill should be treated as on refusal to accept. Mellish *v.* Simeon, 2 H. Bl. 378, 3 Rev. Rep. 418.

make himself such by accepting the bill in due form;[36] but where the drawee is named and a stranger adds his acceptance he will not be an accepter,[37] although he may be treated by the holder as the maker of a note[38] or as a guarantor.[39]

b. Where Several Drawees Are Named. Where several drawees who are not partners are named the acceptance should be by all,[40] unless the several drawees are named in the alternative, when the bill may be accepted by either of them.[41] If they are partners one may accept for all.[42]

By drawee in another name.— It cannot be addressed to John and Joseph N and accepted by John and Jeremiah N, although they were intended (Grant *v.* Naylor, 4 Cranch (U. S.) 224, 2 L. ed. 222), but a mere misnomer in the address to a firm will not affect the liability of the partnership accepting in its right name (Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151; Lloyd *v.* Ashby, 2 B. & Ad. 23, 9 L. J. K. B. O. S. 144, 22 E. C. L. 20).

By drawee in another capacity.— It may be addressed to the drawee individually and accepted by him with an official title, as "Treasurer Neuvitas M. Co." (Bruce *v.* Lord, 1 Hilt. (N. Y.) 247, *prima facie* liable individually) or it may be addressed to the drawee as a company official, as "James Diamond, Purser, West Downs Mining Company," and accepted by him individually (Nicholas *v.* Diamond, 2 C. L. R. 305, 9 Exch. 154, 23 L. J. Exch. 1, 2 Wkly. Rep. 12). If, however, a bill is drawn on a person named and accepted "Empire Mills, by E. C. Hamilton, Treas.," it is not an acceptance by the drawee. Walker *v.* State Bank, 9 N. Y. 582.

Drawee named and accepting in official capacity may still be liable individually as in a bill drawn on "John Tassey, Administrator." Tassey *v.* Church, 4 Watts & S. (Pa.) 346.

36. Wheeler *v.* Webster, 1 E. D. Smith (N. Y.) 1; Gray *v.* Milner, 3 Moore C. P. 90, 2 Stark. 336, 3 E. C. L. 434, 8 Taunt. 739, 4 E. C. L. 361, 21 Rev. Rep. 525.

The accepter admits thereby that he is the drawee intended. Watrous *v.* Halbrook, 39 Tex. 572; Davis *v.* Clarke, 6 Q. B. 16, 51 E. C. L. 16, 1 C. & K. 177, 47 E. C. L. 176, 8 Jur. 688, 13 L. J. Q. B. 305; Peto *v.* Reynolds, 2 C. L. R. 491, 9 Exch. 410, 18 Jur. 472, 23 L. J. Exch. 98, 2 Wkly. Rep. 196; Gray *v.* Milner, 3 Moore C. P. 90, 2 Stark. 336, 3 E. C. L. 434, 8 Taunt. 739, 4 E. C. L. 361, 2 Rev. Rep. 525.

37. Rice *v.* Ragland, 10 Humphr. (Tenn.) 545, 53 Am. Dec. 737; Jackson *v.* Hudson, 2 Campb. 447; Clerk *v.* Blackstock, Holt N. P. 474, 17 Rev. Rep. 667, 3 E. C. L. 188; Spalding *v.* McKay, 5 U. C. Q. B. O. S. 656 (where a bill was drawn on a public official and accepted by his successor in office).

Acceptance supra protest see *infra*, XII, B, 7.

38. Fielder *v.* Marshall, 9 C. B. N. S. 606, 7 Jur. N. S. 777, 30 L. J. C. P. 158, 3 L. T. Rep. N. S. 858, 99 E. C. L. 606.

39. Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323; Jackson *v.* Hudson, 2 Campb. 447.

40. Dupays *v.* Shepherd, Holt K. B. 297.

Acceptance by part a qualified acceptance. —"The acceptance of some one or more of the drawees, but not of all" is a qualified acceptance. Neg. Instr. L. § 229; Bills Exch. Act, § 19.

Only those liable who accept.— If it is drawn on several and accepted by part of them, only those who accept become liable as accepters. Smith *v.* Milton, 133 Mass. 369; Rogers *v.* Coit, 6 Hill (N. Y.) 322; Mountstephen *v.* Brooke, 1 B. & Ald. 224; Owen *v.* Van Uster, 10 C. B. 318, 20 L. J. C. P. 61, 70 E. C. L. 318; Nicholas *v.* Diamond, 2 C. L. R. 305, 9 Exch. 154, 23 L. J. Exch. 1, 2 Wkly. Rep. 12.

In order to establish a joint liability in an action against two or more persons on an acceptance it must appear that defendants either were partners, and that the acceptance was for the firm, or that they contracted jointly. Meacham *v.* Batchelder, 3 Pinn. (Wis.) 281, 3 Chandl. (Wis.) 316. In Louisiana acceptances fall within La. Civ. Code, § 2088, which provides that "an obligation *in solido* is not presumed: it must be expressly stipulated." Shreveport *v.* Gooch, 15 La. Ann. 474. Each is liable for the full amount of the bill. McNabb *v.* Tally, 27 La. Ann. 640.

41. Anonymous, 12 Mod. 447; Byles Bills 90.

42. Tutt *v.* Addams, 24 Mo. 186 (although drawers and drawees have a common partner who accepts the bill without the knowledge of his partners, the drawees); Kendrick *v.* Campbell, 1 Bailey (S. C.) 522 (after dissolution of the firm in pursuance of an earlier agreement); Lloyd *v.* Ashby, 2 B. & Ad. 23, 9 L. J. K. B. O. S. 144, 22 E. C. L. 20; Mason *v.* Rumsey, 1 Campb. 384.

A partner can accept for his firm so far only as the partnership business extends (Markham *v.* Hazen, 48 Ga. 570; Pinkney *v.* Hall, 1 Salk. 126); and a surviving partner cannot accept a bill in the firm-name for goods purchased in that name after the death of his partner so as to bind the estate of the deceased partner (*Ex p.* Harris, 1 Madd. 583, 16 Rev. Rep. 266).

Acceptance in individual name of partner. —A bill drawn on a firm may be accepted even in the individual name of one partner (Pannell *v.* Phillips, 55 Ga. 618; Mason *v.* Rumsey, 1 Campb. 384), especially where the individual name was used in the firm business and by its authority (Van Reimsdyk *v.* Kane, 1 Gall. (U. S.) 630, 28 Fed. Cas. No. 16,872. But in Heenan *v.* Nash, 8 Minn. 407,

c. Agent of Drawee. The acceptance may be made by the drawee's agent,[43] but the holder may require proof of his authority[44] and may refuse to take such an acceptance.[45] If the holder receives the acceptance of an unauthorized agent

83 Am. Dec. 790, where a bill drawn on a firm was accepted by a partner in his own name, it was held that neither individual nor firm was bound). If the firm-name was that of one partner, a bill addressed to such name and accepted by the other partner in his own name binds the firm for whose benefit the proceeds are used. Stephens *v.* Reynolds, 2 F. & F. 147, 5 H. & N. 513, 29 L. J. Exch. 278, 2 L. T. Rep. N. S. 222.

If the bill is drawn on one partner by name, and so accepted, he will be individually liable on it, although it purports to be "for account of" the firm and may be chargeable by him against the firm. Cunningham *v.* Smithson, 12 Leigh (Va.) 32.

If one partner draws a bill on his firm the drawing is an acceptance by him in behalf of the firm. Dougal *v.* Cowles, 5 Day (Conn.) 511.

If two purchase land for joint profit one cannot, as a partner, accept a draft on both for the purchase-money. Schaeffer *v.* Fowler, 111 Pa. St. 451, 2 Atl. 558.

43. Even a government may accept a bill by its agent. U. S. *v.* Metropolis Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774. But as to the liability of the government on such an acceptance see Pierce *v.* U. S., 7 Wall. (U. S.) 666, 19 L. ed. 169.

A principal has been held by an agent's unauthorized acceptance in the principal's business, which was managed by the agent as the ostensible principal. Edmunds *v.* Bushell, L. R. 1 Q. B. 97, 12 Jur. N. S. 332, 35 L. J. Q. B. 20. But where the by-laws of a corporation require the signatures of two officers, an acceptance by one, with the intention of a second signature which was not added, will not bind the drawee nor the individual signer. Mercantile Nat. Bank *v.* Lauth, 143 Pa. St. 53, 21 Atl. 1017. *Compare* Craig *v.* Matheson, 32 Nova Scotia 452.

If drawn on the principal and accepted by the agent with his official title added it is the principal's acceptance (Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476; Rogers *v.* Union Stone Co., 134 Mass. 31; Hascall *v.* Life Assoc. of America, 5 Hun (N. Y.) 151; Eastwood *v.* Bain, 3 H. & N. 738, 28 L. J. Exch. 74, 7 Wkly. Rep. 90; Okell *v.* Charles, 34 L. T. Rep. N. S. 822) and so where accepted by authority of the principal by the agent in his individual name (Lindus *v.* Bradwell, 5 C. B. 583, 12 Jur. 230, 17 L. J. C. P. 121, 57 E. C. L. 583); but if the agent accepts in his individual name a bill drawn on "the agent and owners of" a ship, he will be personally liable and not the owners (Taber *v.* Cannon, 8 Metc. (Mass.) 456. See also Eells *v.* Shea, 20 Ohio Cir. Ct. 527, 11 Ohio Cir. Dec. 304, which holds that the holder in such case may elect to proceed either against him or his principal.

If drawn on the agent by his official name and accepted in the same manner the acceptance is sometimes held to be that of the principal. Shelton *v.* Darling, 2 Conn. 435; Tousey *v.* Taw, 19 Ind. 212; Gillig *v.* Lake Bigler Road Co., 2 Nev. 214 (where a bill drawn by one corporation officer on another as such, and accepted by the latter "J. E. Garrett, Secretary L. B. R. Co." was held to bind the principal, especially on proof of other like acceptances); Amison *v.* Ewing, 2 Coldw. (Tenn.) 366; Robertson *v.* Glass, 20 U. C. C. P. 250. *Contra*, Moss *v.* Livingston, 4 N. Y. 208; Haight *v.* Naylor, 5 Daly (N. Y.) 219; Madden *v.* Cox, 5 Ont. App. 473; Foster *v.* Geddes, 14 U. C. Q. B. 239. If accepted by him in his individual name it is his individual acceptance (Lallerstedt *v.* Griffin, 29 Ga. 708; Exchange Nat. Bank *v.* New York Third Nat. Bank, 112 U. S. 276, 5 S. Ct. 141, 28 L. ed. 722 [*reversing* 4 Fed. 20]; Rew *v.* Petet, 1 A. & E. 196, 3 N. & M. 456, 28 E. C. L. 110; Thomas *v.* Bishop, 2 Str. 955), although accepted "on behalf of the company" (Herald *v.* Connah, 34 L. T. Rep. N. S. 885) and although the bill was drawn between officers of a corporation and dated at its office and concluded with a request to charge to the company (Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750).

If drawn on the agent by his individual name and accepted by him with an official title added it will still be his individual acceptance (Laflin, etc., Powder Co. *v.* Sinsheimer, 48 Md. 411, 30 Am. Rep. 472; Bruce *v.* Lord, 1 Hilt. (N. Y.) 247), although the consideration moved to the principal (Nicholas *v.* Diamond, 2 C. L. R. 305, 9 Exch. 154, 23 L. J. Exch. 1, 2 Wkly. Rep. 12; Mare *v.* Charles, 5 E. & B. 978, 2 Jur. N. S. 234, 25 L. J. Q. B. 119, 4 Wkly. Rep. 267, 85 E. C. L. 978). So *a fortiori* if accepted in his individual name (Arnold *v.* Sprague, 34 Vt. 402), although the principal has been held on an acceptance of such a bill by the agent in the principal's name (Markham *v.* Hazen, 48 Ga. 570, "for the Opinion newspaper") and where the principal is indicated in the terms of acceptance (Amison *v.* Ewing, 2 Coldw. (Tenn.) 366, "payable on return of March estimates, John O. Ewing, Treas.").

If drawn by the principal on his agent and accepted by the latter, "Wm. S. Bolling, agent of" the drawer, it will be the principal's acceptance. Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432. So where it is drawn by the principal on its agent in his own name and accepted in the principal's name by "E. C. Hamilton, Treas." Walker *v.* State Bank, 9 N. Y. 582.

44. Sayer *v.* Kitchen, 1 Esp. 210. See also Bryant *v.* Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. N. S. 546, 1 Reports 336, 41 Wkly. Rep. 600.

45. Richards *v.* Barton, 1 Esp. 267; Coore *v.* Callaway, 1 Esp. 115.

he may look to the agent individually, the latter being liable in tort for his fraudulent representations as to authority.[46]

4. Time For Acceptance — a. In General.[47] A bill may be accepted after it has been transferred,[48] after its maturity[49] and dishonor,[50] after acceptance has been refused,[51] or after the death of the drawer,[52] although not in general after he has become a bankrupt.[53] On the other hand there may be an agreement for acceptance before the bill is drawn[54] or an acceptance in blank.[55]

b. Time For Consideration. Upon presentment of a bill for acceptance a reasonable time is allowed to the drawee for consideration, the usual time allowed being twenty-four hours.[56] After a delay of twenty-four hours the holder should

46. Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009; West London Commercial Bank *v.* Kitson, 13 Q. B. D. 360, 53 L. J. Q. B. 345, 50 L. T. Rep. N. S. 656, 32 Wkly. Rep. 757 (for fraudulent representation as to authority); Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59 (for the tort, but not on the acceptance); Penrose *v.* Martyr, E. B. & E. 499, 96 E. C. L. 499 (by Limited Companies Act).

Where the bill was drawn on a firm and accepted by the son of one of the partners, he became individually liable to the holder by holding himself out as a partner (Gurney *v.* Evans, 3 H. & N. 122, 27 L. J. Exch. 166), and where the bill was drawn on a firm and accepted "Per proc. The Allty-Crib Mining Company, W. T. Van U., London Manager," the manager became individually liable to the holder of the bill (Owen *v.* Van Ulster, 10 C. B. 318, 20 L. J. C. P. 61, 70 E. C. L. 318). On the other hand a partner who simply writes "accepted" without signature on such a bill renders the firm liable and not himself individually. Heenan *v.* Nash, 8 Minn. 407, 83 Am. Dec. 790.

47. The Negotiable Instruments Law, section 226, is as follows: "A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment." See also Bills Exch. Act, § 18.

Presumptions as to date of acceptance see *infra*, XIV, E [8 Cyc.].

48. *Connecticut.*— Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123.

Maryland.— Hopps *v.* Savage, 69 Md. 513, 16 Atl. 133, 1 L. R. A. 648.

Massachusetts.— Arpin *v.* Owens, 140 Mass. 144, 3 N. E. 25.

New York.— Louisville Bank *v.* Ellery, 34 Barb. (N. Y.) 630; Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458; Iselin *v.* Chemical Nat. Bank, 16 Misc. (N. Y.) 437, 40 N. Y. Suppl. 388.

Texas.— Bank of Commerce *v.* Evants, 2 Tex. App. Civ. Cas. § 762.

49. Grant *v.* Shaw, 16 Mass. 341, 8 Am. Dec. 142; Williams *v.* Winans, 14 N. J. L. 339; Christie *v.* Peart, 9 Dowl. P. C. 201, 10 L. J. Exch. 195, 7 M. & W. 491; Wynne *v.* Raikes, 5 East 514; Billing *v.* Devaux, 5 Jur. 1182, 11 L. J. C. P. 38, 3 M. & G. 565, 4 Scott N. R. 175, 42 E. C. L. 297; Mutford *v.* Walcot, 1 Ld. Raym. 574, 12 Mod. 410; Jackson *v.* Pigott, 1 Ld. Raym. 364, 12 Mod. 212; Stein *v.* Yglesias, 5 Tyrw. 172.

50. Stockwell *v.* Bramble, 3 Ind. 428; Grant *v.* Shaw, 16 Mass. 341, 8 Am. Dec. 142; Wynne *v.* Raikes, 5 East 514.

51. Wynne *v.* Raikes, 5 East 514.

After a bill has been accepted, although conditionally, by the drawee, another cannot be charged as accepter. Spalding *v.* McKay, 5 U. C. Q. B. O. S. 656.

52. Cutts *v.* Perkins, 12 Mass. 206; Debesse *v.* Napier, 1 McCord (S. C.) 106, 10 Am. Dec. 658; Hammonds *v.* Barclay, 2 East 227; Tate *v.* Hilbert, 2 Ves. Jr. 111.

53. Pinkerton *v.* Marshall, 2 H. Bl. 334.

Such acceptance, made without notice of the bankruptcy, will be binding on the accepter in favor of other parties than the drawer. Wilkins *v.* Casey, 7 T. R. 711, 4 Rev. Rep. 558.

54. Williams *v.* Winans, 14 N. J. L. 339 (especially if relied on); Greele *v.* Parker, 5 Wend. (N. Y.) 414; Lacon First Nat. Bank *v.* Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609 (provided the bill is presented for acceptance within a reasonable time); Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193.

55. Moiese *v.* Knapp, 30 Ga. 942; Molloy *v.* Delves, 7 Bing. 428, 20 E. C. L. 194, 4 C. & P. 492, 19 E. C. L. 617, 9 L. J. C. P. O. S. 171, 5 M. & P. 275 (by English statute). See also Armfield *v.* Allport, 27 L. J. Exch. 42, 6 Wkly. Rep. 63, holding that where a blank signature is written by a person on stamped paper and a bill is afterward written addressed to him, he may be sued as indorser of a note or accepter of a bill. But it has been doubted whether an acceptance properly speaking could be given before the bill was drawn. Miln *v.* Prest, 4 Campb. 393, Holt N. P. 181, 3 E. C. L. 78; Johnson *v.* Collings, 1 East 98.

56. *Louisiana.*— Wilcox *v.* Beal, 3 La. Ann. 404.

Michigan.— Case *v.* Burt, 15 Mich. 82.

New Jersey.— Overman *v.* Hoboken City Bank, 31 N. J. L. 563.

New York.— Montgomery County Bank *v.* Albany City Bank, 8 Barb. (N. Y.) 396.

protest the bill, or if he grants further delay should notify his drawer and indorsers.[57]

5. Manner of Acceptance — a. In General — (i) *When Express* — (A) *Necessity For Writing.* In general the statute of frauds does not apply to the acceptance of a bill[58] or to an agreement for its acceptance,[59] unless it is an accommodation acceptance and merely a promise to pay the debt of another,[60] and in the absence of other statutory requirements an acceptance may be by parol,[61] although

Pennsylvania.— Connelly *v.* McKean, 64 Pa. St. 113.

England.— Bellasis *v.* Hester, 1 Ld. Raym. 280; Ingram *v.* Foster, 2 Smith K. B. 242. Unless the regular daily mail departs at an earlier hour. Van Diemen's Land Bank *v.* Victoria Bank, L. R. 3 P. C. 526, 40 L. J. P. C. 28, 19 Wkly. Rep. 857; Bellasis *v.* Hester, 1 Ld. Raym. 280.

See also Neg. Instr. L. §§ 224, 225.

57. Ingram *v.* Foster, 2 Smith K. B. 242.

58. *Connecticut.*— Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Illinois.— Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510.

Iowa.— Walton *v.* Mandeville, 56 Iowa 597, 9 N. W. 913, 41 Am. Rep. 123.

Maryland.—Laflin, etc., Powder Co. *v.* Sinsheimer, 48 Md. 411, 30 Am. Rep. 472.

Massachusetts.— Storer *v.* Logan, 9 Mass. 55.

Missouri.— Curle *v.* St. Louis Perpetual Ins. Co., 12 Mo. 578.

New York.— Gallagher *v.* Nichols, 60 N. Y. 438; O'Donnell *v.* Smith, 2 E. D. Smith (N. Y.) 124 (as to consideration or its recital).

Pennsylvania.— Dull *v.* Bricker, 76 Pa. St. 255; Spaulding *v.* Andrews, 48 Pa. St. 411.

Texas.— Neumann *v.* Shroeder, 71 Tex. 81, 8 S. W. 632.

Vermont.— Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Dec. 174.

United States.—Raborg *v.* Peyton, 2 Wheat. (U. S.) 385, 4 L. ed. 268; Van Reimsdyk *v.* Kane, 1 Gall. (U. S.) 630, 28 Fed. Cas. No. 16,872.

59. Spaulding *v.* Andrews, 48 Pa. St. 411; Kelley *v.* Greenough, 9 Wash. 659, 38 Pac. 158.

This is true, at least, where the holder has been induced by the promise to act on the bill as accepted (Strohecker *v.* Cohen, 1 Speers (S. C.) 349; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 7 L. ed. 227; Shields *v.* Middleton, 2 Cranch C. C. (U. S.) 205, 21 Fed. Cas. No. 12,786), but where there is no such privity between drawee and holder, an agreement to accept has been held to be within the statute of frauds (Manley *v.* Geagan, 105 Mass. 445; Allen *v.* Leavens, 26 Oreg. 164, 37 Pac. 488, 46 Am. St. Rep. 613, 26 L. R. A. 620) and so as to need of independent consideration (Quin *v.* Hanford, 1 Hill (N. Y.) 82; Strohecker *v.* Cohen, 1 Speers (S. C.) 349; Morse *v.* Massachusetts Nat. Bank, Holmes (U. S.) 209, 17 Fed. Cas. No. 9,857).

60. Walton *v.* Mandeville, 56 Iowa 597, 9 N. W. 913, 41 Am. Rep. 123 (holding that a verbal acceptance by a drawee of an order drawn upon him is not valid and will not bind him where he has no funds of the drawer in his hands); Morse *v.* Massachusetts Nat. Bank, Holmes (U. S.) 209, 17 Fed. Cas. No. 9,857 (holding that a parol promise of a bank to pay a check drawn on it, the drawer having no funds on deposit, does not bind the bank, but is within the statute of frauds).

But as to parties relying on such accommodation see *supra*, III, B, 3.

61. *Alabama.*— Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Kennedy *v.* Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289.

California.— Joyce *v.* Wing Yet Lung, 87 Cal. 424, 25 Pac. 545.

Colorado.—Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Connecticut.— Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Delaware.— Barcroft *v.* Denny, 5 Houst. (Del.) 9.

Illinois.— St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546; Sturges *v.* Chicago Fourth Nat. Bank, 75 Ill. 595; Phelps *v.* Northup, 56 Ill. 156, 8 Am. Rep. 681; Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368; Heitschmidt *v.* McAlpine, 59 Ill. App. 231.

Indiana.— Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245 (drawee without funds); Miller *v.* Neihaus, 51 Ind. 401; Bird *v.* McElvaine, 10 Ind. 40 (non-negotiable order); Stockwell *v.* Bramble, 3 Ind. 428; Spurgeon *v.* Swain, 13 Ind. App. 188, 41 N. E. 397.

Iowa.— Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667, where the drawee has funds.

Kentucky.— Hunter *v.* Cobb, 1 Bush (Ky.) 239.

Louisiana.— Kane *v.* Robertson, 26 La. Ann. 335, where the bill is drawn payable out of a particular fund.

Massachusetts.— Putnam Nat. Bank *v.* Snow, 172 Mass. 569, 52 N. E. 1079; Cook *v.* Baldwin, 120 Mass. 317, 21 Am. Rep. 517; Dunavan *v.* Flynn, 118 Mass. 537; Pierce *v.* Kittredge, 115 Mass. 374; Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750; Ward *v.* Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387; Grant *v.* Shaw, 16 Mass. 341, 8 Am. Dec. 142; Storer *v.* Logan, 9 Mass. 55.

Mississippi.— McCutchen *v.* Rice, 56 Miss. 455.

Nebraska.—Farmers', etc., Bank *v.* Dunbier, 32 Nebr. 487, 49 N. W. 376; Camp *v.* Sadler, 22 Nebr. 732, 36 N. W. 144.

New Hampshire.— Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290; Edson *v.* Fuller, 22 N. H. 183.

New Jersey.— Williams *v.* Winans, 14 N. J. L. 339.

the holder may refuse to receive a mere parol acceptance.[62] On the other hand under the statute of Anne, inland bills could not be protested against the accepter unless accepted in writing[63] and a written acceptance is now often required by statute.[64]

New York.— Leonard *v.* Mason, 1 Wend. (N. Y.) 522.

North Carolina.— Short *v.* Blount, 99 N. C. 49, 5 S. E. 190.

Pennsylvania.— Dull *v.* Bricker, 76 Pa. St. 255; Spaulding *v.* Andrews, 48 Pa. St. 411; Ecker *v.* Snowden, 2 Miles (Pa.) 275 (parol promise to pay superseding an earlier conditional acceptance in writing).

South Carolina.— Walker *v.* Lide, 1 Rich. (S. C.) 249, 44 Am. Dec. 252.

Tennessee.— Montague *v.* Myers, 11 Heisk. (Tenn.) 539.

Texas.— Neumann *v.* Shroeder, 71 Tex. 81, 8 S. W. 632; Lemmon *v.* Box, 20 Tex. 329; White *v.* Dienger, (Tex. Civ. App. 1894) 25 S. W. 666; Walters *v.* Galveston, etc., R. Co., 1 Tex. App. Civ. Cas. § 753.

Vermont.— *In re* Goddard, 66 Vt. 415, 29 Atl. 634 (oral promise to pay); Arnold *v.* Sprague, 34 Vt. 402; Fisher *v.* Beckwith, 19 Vt. 31, 46 Am. Dec. 174.

United States.— Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245.

England.— Leach *v.* Buchanan, 4 Esp. 226; Sproat *v.* Matthews, 1 T. R. 182; Julian *v.* Sholbrooke, 2 Wils. C. P. 9.

See 7 Cent. Dig. tit. "Bills and Notes," § 116.

Must be unequivocal.— The words from which a verbal acceptance is to be inferred must not be equivocal (Walker *v.* Lide, 1 Rich. (S. C.) 249, 44 Am. Dec. 252) and must be understood and quoted as an acceptance (Vermont Marble Co. *v.* Mann, 36 Vt. 697. See also Peck *v.* Cochran, 7 Pick. (Mass.) 34). A statement by the drawee that there are sufficient funds and he will attend to the bill (Bell *v.* Pletscher, 32 Misc. (N. Y.) 746, 65 N. Y. Suppl. 669) or a promise to pay implied by the drawee's statements "that it was not his custom to accept in writing," "that the draft would be paid at maturity," "that he would take a memorandum of the draft and place it to the account of the drawer," "that there would be funds in his hands before the draft matured" (Spaulding *v.* Andrews, 48 Pa. St. 411) is sufficient; but a verbal promise to pay a bill of exchange, accompanied by a refusal to accept it, is no acceptance, although the drawee have funds in his hands (Luff *v.* Pope, 5 Hill (N. Y.) 413 [*affirmed* in 7 Hill (N. Y.) 577]). Nor is a statement to the holder, on returning the bill, that "There is your bill; it is all right" (Powell *v.* Jones, 1 Esp. 17) or a statement to a stranger that "I will have to pay it" (Martin *v.* Bacon, 2 Mill (S. C.) 132) sufficient; and where a debtor gives one creditor an order on a third person, a promise by the latter to notify other creditors, and an acknowledgment that the amount named in the order is partly due, and that the whole amount will be due on a specified date, does not constitute an acceptance of the order (De Liquero *v.* Munson, 11 Heisk. (Tenn.) 15). *Compare* Fairlee *v.* Herring, 3 Bing. 625, 11 Moore C. P. 520, 11 E. C. L. 305.

Where the indorsee of a lost bill drew on the accepters for the amount, and the latter told plaintiff's agent "there would be no difficulty about it," these words did not, under the circumstances, amount to an absolute acceptance or waive the accepters' right to be satisfied of the genuineness of the indorsement of the original bill. Robbins *v.* Lambeth, 2 Rob. (La.) 304.

A discount of the bill by the drawee is not an acceptance. Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567.

62. Neg. Instr. L. § 221; Story Bills, § 247.

63. Fairlee *v.* Herring, 3 Bing. 625, 11 Moore C. P. 520, 11 E. C. L. 305.

64. Lewin *v.* Greig, 115 Ga. 127, 41 S. E. 497; Neg. Instr. L. § 220 (in writing and signed by the drawee); Bills Exch. Act, § 17 (in writing and signed by the drawee). See also Cal. Civ. Code, § 8193, by signature only.

These statutes have been applied to a bill of exchange (Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522; Lewin *v.* Greig, 115 Ga. 127, 41 S. E. 497; Haeberle *v.* O'Day, 61 Mo. App. 390; Dickinson *v.* Marsh, 57 Mo. App. 566; Luff *v.* Pope, 5 Hill (N. Y.) 413 [*affirmed* in 7 Hill (N. Y.) 577]; Erickson *v.* Inman, 34 Oreg. 44, 54 Pac. 949; Camden Nat. State Bank *v.* Lindeman, 161 Pa. St. 199, 28 Atl. 1022); a check in a bank (Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Duncan *v.* Berlin, 60 N. Y. 151; Camden Nat. State Bank *v.* Lindeman, 161 Pa. St. 199, 28 Atl. 1022; Maginn *v.* Dollar Sav. Bank, 131 Pa. St. 362, 18 Atl. 901; Garrettson *v.* North Atchison Bank, 47 Fed. 867 [*affirming* 39 Fed. 163, 7 L. R. A. 428], Missouri case); an order for a definite sum by one on another in favor of a third person payable generally and not out of any particular fund (Anderson *v.* Jones, 102 Ala. 537, 14 So. 871; Ingle *v.* Davis, 81 Ga. 766, 8 S. E. 192; Upham *v.* Clute, 105 Mich. 350, 63 N. W. 317; Sturdevant *v.* Roberts, 5 Kulp (Pa.) 99); a contractor's order to "pay the above bill, being the amount for tinning your houses on South Sixth street, and charge the same to our account" (Hoyt *v.* Lynch, 2 Sandf. (N. Y.) 328); a promise of payment (Baer *v.* English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372; Hall *v.* Flanders, 83 Me. 242, 22 Atl. 158; Duncan *v.* Berlin, 60 N. Y. 151 [*affirming* 38 N. Y. Super. Ct. 31]; Camden Nat. State Bank *v.* Lindeman, 161 Pa. St. 199, 28 Atl. 1022), although the drawee was indebted to the drawer for the amount (Weinhauer *v.* Morrison, 49 Hun (N. Y.) 498, 2 N. Y. Suppl. 544, 18 N. Y. St. 800); and to a promise of acceptance (Flato *v.* Mulhall, 72 Mo. 522); and even before the Revised Statutes of New York, a parol agreement to accept a bill to be drawn in future could not be enforced by an

(B) *Form of Writing* — (1) IN GENERAL. The common form of acceptance is by writing the word "accepted" [65] on the face of the bill followed by the signature of the accepter,[66] but any words showing the intention of the drawee to accept or honor the bill are sufficient,[67] and if the drawee simply writes his name across the face [68] of a bill or order it is an acceptance.[69]

(2) LETTER, TELEGRAM, OR OTHER SEPARATE WRITING. A valid acceptance may, however, be made by a letter or other separate instrument,[70] or even by tele-

indorsee who did not take the bill on the faith of such agreement (Ontario Bank *v.* Worthington, 12 Wend. (N. Y.) 593).

The statutes have been held not to apply to an order for the delivery of cotton (Auerbach *v.* Pritchett, 58 Ala. 451); a contractor's order to pay "and charge the same to my account of grading and paving Lexington avenue, . . . as per contract" (Ehrichs *v.* De Mill, 75 N. Y. 370); an order to pay over rents accruing up to a specified time, although the rents were payable in money (Morton *v.* Naylor, 1 Hill (N. Y.) 583); or to an absolute assignment of wages by an order on the employer (Trumbower *v.* Ivey, 2 Pa. Co. Ct. 470).

Negotiated bills excepted.— The exception in the Missouri statute of "any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill" has been held not to apply to the payee who discounts the bill for the drawer and holds it against the drawee. Hall *v.* Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. ed. 956 [*affirming* 34 Fed. 866].

Action in drawer's name.—Under the Pennsylvania act of 1881 requiring written acceptance, the payee of an order orally accepted cannot sue in his own name, but must sue in the name of the drawer, being only an equitable assignee of part of the fund drawn on. Sturdevant *v.* Roberts, 5 Kulp (Pa.) 99.

Defense confined to accepter.— But the provision of the statute requiring acceptance in writing is for the benefit of the accepter alone, and none other can take advantage thereof. Moeser *v.* Schneider, 158 Pa. St. 412, 33 Wkly. Notes Cas. (Pa.) 259, 27 Atl. 1088; Ulrich *v.* Hower, 156 Pa. St. 414, 33 Wkly. Notes Cas. (Pa.) 17, 27 Atl. 243.

65. **"Excepted" or "except."**— The word "excepted" (Cortelyou *v.* Maben, 32 Nebr. 697, 36 N. W. 159, 3 Am. St. Rep. 284; Meyer *v.* Beardsley, 30 N. J. L. 236; Miller *v.* Butler, 1 Cranch C. C. (U. S.) 470, 17 Fed. Cas. No. 9,565) or "except" (Vanstrum *v.* Liljengren, 37 Minn. 191, 33 N. W. 555) is sufficient.

66. Spear *v.* Pratt, 2 Hill (N. Y.) 582, 38 Am. Dec. 600; Gray *v.* Milner, 3 Moore C. P. 90, 2 Stark. 739, 3 E. C. L. 434, 8 Taunt. 739, 4 E. C. L. 361, 21 Rev. Rep. 525.

In England before 19 & 20 Vict. the drawee's signature was not essential to a complete acceptance. Dufaur *v.* Oxenden, 1 M. & Rob. 90; Corlett *v.* Conway, 5 M. & W. 653.

67. Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Block *v.* Wilkerson, 42 Ark. 253; Peterson *v.* Hubbard, 28 Mich. 197.

There was sufficient acceptance in the following cases: Block *v.* Wilkerson, 42 Ark. 253 (an indorsement "Protest waived, payment guaranteed"); O'Donnell *v.* Smith, 2 E. D. Smith (N. Y.) 124 ("I promise to pay the above"); Moor *v.* Withy, Bull. N. P. 270 (a request to a third person to pay the bill); Robson *v.* Bennett, 2 Taunt. 388, 11 Rev. Rep. 614 (the marking of a bill after banking hours, by usage of London, to show that it is good).

There was no acceptance in Smith *v.* Milton, 133 Mass. 369 (the acknowledgment of the receipt of an order); Cook *v.* Baldwin, 120 Mass. 317, 21 Am. Rep. 517 ("I take notice of the above").

68. **An indorsement in blank has been held to be in effect an acceptance.** Haines *v.* Nance, 52 Ill. App. 406. But see Steele *v.* McKinlay, 5 App. Cas. 754, 43 L. T. Rep. N. S. 358, 29 Wkly. Rep. 17, holding that an irregular indorsement by a stranger, in aid of the accepter, to enable him to obtain a loan from the drawer, is not an acceptance or co-acceptance. As to such indorsements see *supra*, II, B, 6.

69. *California.*— Cal. Civ. Code, § 8193.

Georgia.— Fowler *v.* Gate City Nat. Bank, 88 Ga. 29, 13 S. E. 831.

Louisiana.— Schwartz *v.* Barringer, 20 La. Ann. 419, notwithstanding his refusal to add the word "accepted."

Michigan.— Peterson *v.* Hubbard, 28 Mich. 197, notwithstanding the addition of the words, "Paid on this order forty dollars" after the drawee's signature.

Mississippi.— Mechanics' Bank *v.* Yager, 62 Miss. 529, "in writing duly subscribed," under the code of 1880.

New York.— Wheeler *v.* Webster, 1 E. D. Smith (N. Y.) 1 ("in writing signed by the party" under New York Revised Statutes); Spear *v.* Pratt, 2 Hill (N. Y.) 582, 38 Am. Dec. 600.

Texas.— Walters *v.* Galveston, etc., R. Co., 1 Tex. App. Civ. Cas. § 753.

Vermont.— Bacon *v.* Bates, 53 Vt. 30.

England.— Powell *v.* Monnier, 1 Atk. 611. Under 19 & 20 Vict. writing the name only across the face of the bill was no longer a sufficient acceptance in writing (Hindhaugh *v.* Blakey, 3 C. P. D. 136, 47 L. J. C. P. 345, 38 L. T. Rep. N. S. 221, 26 Wkly. Rep. 480), although it was again made sufficient by 41 & 42 Vict. c. 13, and by the Bills of Exchange Act of 1882.

70. Germania Nat. Bank *v.* Taaks, 31 Hun (N. Y.) 260; Wynne *v.* Raikes, 5 East 514; Clarke *v.* Cock, 4 East 57; Billing *v.* Devaux, 5 Jur. 1182, 11 L. J. C. P. 38, 3 M. & G. 565, 4 Scott N. R. 175, 42 E. C. L. 297; *Ex p.* Dyer, 6 Ves. Jr. 9.

gram,[71] but the terms of such separate writing must be so clear as not to admit of doubt.[72]

(II) *When Implied* — (A) *By Agreement For Acceptance* — (1) Of Existing Bill. An agreement by the drawee to accept an existing bill is an acceptance of the bill,[73] if it is in writing,[74] is sufficiently certain in its description of the bill,[75] and the holder knew of the agreement and relied on it in the purchase of the bill;[76] and in some states even a verbal promise to accept is held to be a sufficient

Holder must have relied on such acceptance. — Such acceptance is available in general only to holders who have taken the bill on the strength of it. Worcester Bank *v.* Wells, 8 Metc. (Mass.) 107; Fairchild *v.* Feltman, 32 Hun (N. Y.) 398. See also Neg. Instr. L. § 222; Cal. Civ. Code, § 8196.

A bank deposit slip not referring to the particular check is not an acceptance by the bank. Union Mills First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 48 N. Y. St. 283, 17 L. R. A. 580.

Crediting on drawee's books is not sufficient. Harris *v.* Russell, 93 Ala. 59, 9 So. 541.

71. *Alabama.*— Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

Illinois.— Coffman *v.* Campbell, 87 Ill. 98.

Maryland.— Flora First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114.

Pennsylvania.— Ravenswood Bank *v.* Reneker, 18 Pa. Super. Ct. 192.

United States.—Garrettson *v.* North Atchison Bank, 39 Fed. 163, 7 L. R. A. 428 [*affirmed* in 47 Fed. 867].

See also Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773, holding that, where the holder telegraphed the drawee: "Will you pay E. F. and W. S. Ikard's check for $1800 on presentation?" the reply telegram: "Yes; will pay the Ikard check," sufficiently identified the check to sustain an action for breach of the promise to pay.

72. "The bill shall have attention" is insufficient (Rees *v.* Warwick, 2 B. & Ald. 113, 2 Stark. 411, 3 E. C. L. 467) and a letter written by one to another saying, "I will accept and pay James Cusick's order for ($20) twenty dollars," does not become an acceptance by the other's indorsing the letter (Allen *v.* Leavens, 26 Oreg. 164, 37 Pac. 488, 46 Am. St. Rep. 613, 26 L. R. A. 620).

73. *California.*— Wakefield *v.* Greenhood, 29 Cal. 597.

Illinois.— Peoria Second Nat. Bank *v.* Diefendorf, 90 Ill. 396; Jones *v.* Council Bluffs Branch State Bank, 34 Ill. 313, 85 Am. Dec. 306.

Kentucky.—Read *v.* Marsh, 5 B. Mon. (Ky.) 8, 41 Am. Dec. 253, "shall be protected."

Massachusetts.— Central Sav. Bank *v.* Richards, 109 Mass. 413 (by telegram); Savannah Nat. Bank *v.* Haskins, 101 Mass. 370, 3 Am. Rep. 373; Grant *v.* Shaw, 16 Mass. 341, 8 Am. Dec. 142 (promise after previous refusal and subsequent receipt of funds).

United States.— Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264, 7 L. ed. 138; De Tastett *v.* Crousillat, 2 Wash. (U. S.) 132, 7 Fed. Cas. No. 3,828.

England.—Mandizabal *v.* Machado, 6 C. & P. 218, 3 L. J. C. P. 70, 3 Moore & S. 841, 25 E. C. L. 402; Wynne *v.* Raikes, 5 East 514; Clarke *v.* Cock, 4 East 57; Crutchley *v.* Mann, 2 Marsh. 29, 5 Taunt. 529, 1 E. C. L. 272; *Ex p.* Dyer, 6 Ves. Jr. 9. But when the drawee said: "Ill pay the bill, but I cannot pay it now: I'll give you a bill at three months," it was not sufficient. Reynolds *v.* Peto, 11 Exch. 418.

An agreement by one joint owner after his own refusal, that his coöwner and co-drawee should accept, is not an acceptance by either. Mercantile Bank *v.* Cox, 38 Me. 500.

Where it appears that an acceptance was not intended a letter in which the drawee says, "I shall accept," is not an acceptance. Musgrove *v.* Hudson, 2 Stew. (Ala.) 464.

74. Cook *v.* Miltenberger, 23 La. Ann. 377; Johnson *v.* Clark, 39 N. Y. 216 (under New York Revised Statutes); Bank of Commerce *v.* J. G. Shaw Blank Book Co., 54 N. Y. Super. Ct. 83 (and it is not provable by parol); Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6.

A telegram is sufficient. Central Sav. Bank *v.* Richards, 109 Mass. 413; Molson's Bank *v.* Howard, 40 N. Y. Super. Ct. 15; North Atchison Bank *v.* Garretson, 51 Fed. 168, 4 U. S. App. 557, 2 C. C. A. 145 [*affirming* 47 Fed. 867]; *In re* Armstrong, 41 Fed. 381.

75. Carrollton Bank *v.* Tayleur, 16 La. 490, 35 Am. Dec. 219, holding that it must contemplate the specific bill.

76. *Alabama.*— Kennedy *v.* Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289, under New York Revised Statutes.

California.— See Cal. Civ. Code, § 8197.

Georgia.— Lugrue *v.* Woodruff, 29 Ga. 648.

Louisiana.— Crowell *v.* Van Bibber, 18 La. Ann. 637.

Maine.— Mercantile Bank *v.* Cox, 38 Me. 500.

Maryland.— Brown *v.* Ambler, 66 Md. 391, 7 Atl. 903.

Massachusetts.— St. Louis Exch. Bank *v.* Rice, 98 Mass. 288, 107 Mass. 37, 9 Am. Rep. 1; Storer *v.* Logan, 9 Mass. 55.

New York.— Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346 [*affirming* 3 Bosw. (N. Y.) 505, written promise to drawer and verbal promise to payee, who relied on it]; New York, etc., State Stock Bank *v.* Gibson, 5 Duer (N. Y.) 574; Ulster County Bank *v.* McFarlan, 5 Hill (N. Y.) 432; Ontario Bank *v.* Worthington, 12 Wend. (N. Y.) 593; Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6; McEvers *v.* Mason, 10 Johns. (N. Y.) 207.

acceptance,[77] if known to the holder and relied on by him.[78] The agreement for acceptance may be made even after a bill has been transferred.[79] It may be made to one who is not a party to the bill, if it was drawn for his account,[80] and will in general inure to subsequent holders,[81] but recovery on it will depend on proof of its breach.[82]

(2) Of Bill to Be Drawn. In like manner an agreement[83] to accept a bill

Ohio.— Sherwin *v.* Brigham, 39 Ohio St. 137.

Pennsylvania.— Steman *v.* Harrison, 42 Pa. St. 49, 82 Am. Dec. 491; Howland *v.* Carson, 15 Pa. St. 453.

South Carolina.— Strohecker *v.* Cohen, 1 Speers (S. C.) 349.

Vermont.— Havens *v.* Griffin, N. Chipm. (Vt.) 43.

United States.— Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193.

England.— Miln *v.* Prest, 4 Campb. 393, Holt N. P. 181, 3 E. C. L. 78; Grant *v.* Hunt, 1 C. B. 44, 9 Jur. 228, 14 L. J. C. P. 106, 50 E. C. L. 44; Pierson *v.* Dunlop, Cowp. 571; Clarke *v.* Cock, 4 East 57; Johnson *v.* Collings, 1 East 98.

Compare Read *v.* Marsh, 5 B. Mon. (Ky.) 8, 41 Am. Dec. 253, holding that a letter written by the drawee to the drawer after the drawing of the bill, promising to protect the bill, may operate as an acceptance, although the holder had already taken the bill conditionally and decided to hold it after he was informed of the letter.

It is not essential that the written promise be shown or exhibited to a person who takes the bill relying upon its existence; but if he chooses to act without inspecting the promise in writing, he is held to have such information as he would have acquired by reading the same. Woodard *v.* Griffiths-Marshall Grain Commission Co., 43 Minn. 260, 45 N. W. 433.

Where a bill purports on its face to be drawn on a letter of credit, the possession of the letter of credit by the holder of the bill, with an indorsement on it made by the drawer of the bill, showing that it was drawn under the letter of credit, is *prima facie* evidence that the bill was taken on the faith of the letter. Nisbett *v.* Galbraith, 3 La. Ann. 690.

77. Kennedy *v.* Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289; Spaulding *v.* Andrews, 48 Pa. St. 411; Barnett *v.* Boone Lumber Co., 43 W. Va. 441, 27 S. E. 209; Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Exchange Bank *v.* Hubbard, 62 Fed. 112, 26 U. S. App. 133, 10 C. C. A. 295 [*affirmed* in 72 Fed. 234, 38 U. S. App. 289, 18 C. C. A. 525]. See also Hatcher *v.* Stalworth, 25 Miss. 376.

Even where the statute requires an acceptance to be in writing it is held that a contract to accept is valid, although not in writing. Light *v.* Powers, 13 Kan. 96.

78. Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510; Overman *v.* Hoboken City Bank, 31 N. J. L. 563 [*affirming* 30 N. J. L. 61]; Williams *v.* Winans, 14 N. J. L. 339; Strohecker *v.* Cohen, 1 Speers (S. C.) 349; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386. Although that has been held not to be necessary. Spaulding *v.* Andrews, 48 Pa. St. 411.

79. Wynne *v.* Raikes, 5 East 514, holding this true of a promise of payment made by the drawee to the drawer.

80. Fairlee *v.* Herring, 3 Bing. 625, 11 Moore C. P. 520, 11 E. C. L. 305; Grant *v.* Hunt, 1 C. B. 44, 9 Jur. 228, 14 L. J. C. P. 106, 50 E. C. L. 44. But a promise made to the payee without notice to the drawer and in consideration of the drawee's debt to the drawer and the drawer's debt to the payee, both unreleased, is without consideration and will not support an action by the payee against the drawee after he has paid the amount to the drawer. Clement *v.* Earle, 130 Mass. 585 note; Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478.

81. Lathrop *v.* Harlow, 23 Mo. 209, under the statute.

But this is not true of a mere certificate that "the bearer . . . leaves deposited in my hands the sum of eleven thousand one hundred ($11,100) dollars which sum I hold subject to his order" (Roman *v.* Serna, 40 Tex. 306) or of a clearing-house agreement between drawer and drawee as to retention or return of checks through the clearing-house (Overman *v.* Hoboken City Bank, 30 N. J. L. 61); and a promise of acceptance made to the drawer after the bill has been negotiated will not support an action by the indorsee against the drawee (St. Louis Exch. Bank *v.* Rice, 98 Mass. 288).

82. Recovery is on the agreement irrespective of its effect as an acceptance (Barney *v.* Newcomb, 9 Cush. (Mass.) 46; Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Bissell *v.* Lewis, 4 Mich. 450; Lonsdale *v.* Lafayette Bank, 18 Ohio 126; Boyce *v.* Edwards, 4 Pet. (U. S.) 111, 7 L. ed. 799; Russell *v.* Wiggin, 2 Story (U. S.) 213, 21 Fed. Cas. No. 12,165, 5 Law Rep. 533), and where a draft is drawn on a particular fund and the drawee refused to accept it, but promised to pay the person in whose favor it was drawn, the latter could sue the drawee therefor (Luff *v.* Pope, 5 Hill (N. Y.) 413).

The bill must be first tendered for acceptance to constitute a breach of the agreement. Brown *v.* Ambler, 66 Md. 391, 7 Atl. 903.

83. Whether oral or written.— In some jurisdictions a verbal agreement is sufficient (Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510; Woodard *v.* Griffiths-Marshall Grain Commission Co., 43 Minn. 260, 45 N. W. 433; Havens *v.* Griffin, N. Chipm. (Vt.) 42; Hall *v.* Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. ed. 956 [*affirming* 34 Fed. 866]; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386), while a written

to be drawn is in effect the acceptance of such bill,[84] if the bill is drawn in strict accordance with the provisions of the agreement[85] and within a reasonable

agreement is necessary in others (Kennedy *v.* Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289 [promise made to payee]; Wakefield *v.* Greenhood, 29 Cal. 597; Plummer *v.* Lyman, 49 Me. 229; Mercantile Bank *v.* Cox, 38 Me. 500 [foreign bill]; Nichols *v.* Commercial Bank, 55 Mo. App. 81 [inland bill]; Rulo First Nat. Bank *v.* Gordon, 45 Mo. App. 293; Flato *v.* Mulhall, 4 Mo. App. 476; Fairchild *v.* Feltman, 32 Hun (N. Y.) 398; Pike *v.* Irwin, 1 Sandf. (N. Y.) 14 [an agreement for an accommodation acceptance]; Bank of Ireland *v.* Archer, 7 Jur. 379, 12 L. J. Exch. 353, 11 M. & W. 383 [although the promise had been relied on by the purchaser]).

The promise to accept must be unconditional to be deemed an acceptance. Shaver *v.* Western Union Tel. Co., 57 N. Y. 459; Harrison *v.* Smith, 2 Sweeny (N. Y.) 669. See also Germania Nat. Bank *v.* Taaks, 101 N. Y. 442, 5 N. E. 76 [*reversing* 31 Hun (N. Y.) 260], where the promise was not unconditional.

84. *Alabama.*—Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1 (holding that authority to draw conditionally followed by a telegram saying, "Will advance cost, if you buy strict good ordinary at sixteen," constitute "an unconditional promise in writing to accept a bill before it is drawn," under the Alabama statute); Kennedy *v.* Geddes, 3 Ala. 581, 37 Am. Dec. 714.

California.— James *v.* E. G. Lyons Co., 134 Cal. 189, 66 Pac. 210.

Colorado.—Fowler *v.* McPhee, 13 Colo. App. 185, 56 Pac. 1118.

Illinois.—Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546.

Missouri.— Atchison County Bank *v.* J. C. Bohart Commission Co., 84 Mo. App. 421.

New York.—Evansville Nat. Bank *v.* Kaufmann, 24 Hun (N. Y.) 612 (by letter guaranteeing payment of drafts to be drawn); Louisiana Nat. Bank *v.* Schuchardt, 15 Hun (N. Y.) 405 (a promise made after alteration of an accepted draft and conditional negotiation of the altered paper, the alteration amounting to a new drawing); Burns *v.* Rowland, 40 Barb. (N. Y.) 368; New York, etc., State Stock Bank *v.* Gibson, 5 Duer (N. Y.) 574 (and the New York statute applies to bills drawn in another state to be accepted and paid in New York); Greele *v.* Parker, 5 Wend. (N. Y.) 414.

United States.—Garrettson *v.* North Atchison Bank, 39 Fed. 163, 7 L. R. A. 428, under the Missouri statute, a telegram saying the drawer "is good. Send on your paper."

See Neg. Instr. L. § 223, which reads: "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value."

Contra, in Great Britain since 1 & 2 Geo. IV. Johnson *v.* Collings, 1 East 98; Bank of Ireland *v.* Archer, 7 Jur. 379, 12 L. J. Exch. 353, 11 M. & W. 383.

The holder may, however, bring an action directly on the promise, setting out the facts, although the statute makes a promise to accept an actual acceptance (Scott *v.* Pilkington, 15 Abb. Pr. (N. Y.) 280), and in the absence of a statute the holder of such a bill may sue the drawee on his promise to accept it contained in letters to the drawer which were shown to plaintiff and induced the purchase by him of the paper (Putnam Nat. Bank *v.* Snow, 172 Mass. 569, 52 N. E. 1079).

85. *Colorado.*— Fowler *v.* McPhee, 13 Colo. App. 185, 56 Pac. 1118.

Georgia.— Saulsbury *v.* Blandy, 53 Ga. 665.

Iowa.— Hodges *v.* Iowa Barb Steel Wire Co., 80 Iowa 65, 45 N. W. 541.

Massachusetts.—Murdock *v.* Mills, 11 Metc. (Mass.) 5.

New York.— American Water-Works Co. *v.* Venner, 18 N. Y. Suppl. 379, 45 N. Y. St. 441.

Ohio.— See Sherwin *v.* Brigham, 4 Ohio Dec. (Reprint) 482, 2 Clev. L. Rep. 228.

Texas.— Lockwood *v.* Brownson, 53 Tex. 523.

United States.— Lincoln State Nat. Bank *v.* Young, 5 McCrary (U. S.) 12, 14 Fed. 889.

England.— Mason *v.* Hunt, 1 Dougl. 297; India, etc., Chartered Bank *v.* Macfayden, 64 L. J. Q. B. 367, 72 L. T. Rep. N. S. 428, 15 Reports 333, 43 Wkly. Rep. 397.

Amount of draft.— The amount cannot be exceeded without discharging the drawee. Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492; Burke *v.* Utah Nat. Bank, 47 Nebr. 247, 66 N. W. 295 (where "with or without bill of lading attached" was held to limit the amount of accepter's liability to the amount of shipment); Lititz Nat. Bank *v.* Siple, 145 Pa. St. 49, 22 Atl. 208 (holding that it is not an acceptance and the drawee is not liable, where his promise was made by telegraphing "'yes" to a specific request and the draft was made for a larger amount). It is sufficient, although the draft when presented, concludes with the words "with exchange," no place of exchange being named and the check being dated and payable in the same town, for such words are mere surplusage and of no effect (North Atchison Bank *v.* Garretson, 51 Fed. 168, 4 U. S. App. 557, 2 C. C. A. 145 [*affirming* 47 Fed. 867]), but this is a departure from the terms of the agreement if the draft adds exchange on another place (Lindley *v.* Waterloo First Nat. Bank, 76 Iowa 629, 41 N. W. 381, 14 Am. St. Rep. 254, 2 L. R. A. 709). Under a letter of credit in these words: "I authorize you to draw on me at ninety days from time to time for such amounts as you may require, provided the whole amount running and unpaid shall not exceed $3,000," the aggregate amount of bills to be drawn during the year was not limited to three thousand dollars, but that the amount out-

time,[86] in favor of any person who on the faith thereof received the bill for a valuable consideration.[87] Reliance on the agreement is a sufficient consideration

standing at one time should not exceed three thousand dollars. Ulster County Bank *v.* McFarlan, 5 Hill (N. Y.) 432.

Name of party.— An agreement to accept bills to be drawn by (Lacon First Nat. Bank *v.* Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609) or on (Glover *v.* Tuck, 1 Hill (N. Y.) 66) a particular person will not cover bills drawn by or on some other person; but under an authority by one to another as his agent it is not necessary that the agency, which was known to the parties, should appear on the paper (Merchants' Bank *v.* Griswold, 72 N. Y. 472, 28 Am. Rep. 159 [*affirming* 9 Hun (N. Y.) 561]).

Place of payment.— A promise to accept, without more, covers only bills payable at the payee's or drawee's place of business (Michigan State Bank *v.* Leavenworth, 28 Vt. 209), but a general accepter, under a promise to accept, cannot defend on the ground that the draft was made payable in another state (Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234).

Time of drawing.— Where the drafts are to be against shipments to he shipped by June 15, drafts drawn after that date are not within the agreement. Boyd *v.* Townsend, 4 Hill (N. Y.) 183.

Time of payment.— An agreement to accept bills "at ninety days" means after sight not after date (Ulster County Bank *v.* McFarlan, 3 Den. (N. Y.) 553 [*affirming* 5 Hill (N. Y.) 432]; Allentown Nat. Bank *v.* Kimes, 4 Wkly. Notes Cas. (Pa.) 401. But see Barney *v.* Newcomh, 9 Cush. (Mass.) 46, which holds that one who is authorized to draw drafts on another "at ten or twelve days," with nothing to indicate whether ten or twelve days "after date" or "after sight" is meant, may exercise his own discretion and consult his own convenience in that particular), and the payment of bills drawn ninety days after date will not har the defense as to other bills drawn under the same authority in the same way (Ulster County Bank *v.* McFarlan, 3 Den. (N. Y.) 553). If it is to be drawn at one month to take up a specified note, the month will run from the maturity of the note. Seaboard Nat. Bank *v.* Burleigh, 74 Hun (N. Y.) 400, 26 N. Y. Suppl. 587, 57 N. Y. St. 247. So where it was to pay a specific liability then due. Burns *v.* Rowland, 40 Barb. (N. Y.) 368. But a promise to accept when drawn will not cover a bill payahle six months "after sight." Wildes *v.* Savage, 1 Story (U. S.) 22, 29 Fed. Cas. No. 17,653, 3 Law Rep. 1. Where successive letters, referring to one another, relate to one credit continued and extended and only the first letter designates the time (sixty days), the others will be construed to be for the same period. Birckhead *v.* Brown, 5 Hill (N. Y.) 634.

86. Flora First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114; Wilson *v.* Clements, 3 Mass. 1 (holding that two years is not a reasonable time); Union Bank *v.* Shea, 57 Minn. 180, 58 N. W. 985; Woodard *v.* Griffiths-Marshall Grain Commission Co., 43 Minn. 260, 45 N. W. 433; Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193; Bayard *v.* Lathy, 2 McLean (U. S.) 462, 2 Fed. Cas. No, 1,131. But see Starr *v.* Murchison, 1 N. Y. City Ct. 413.

What is reasonable.— Fifteen (Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268) or eighteen (Posey *v.* Denver Nat. Bank, 7 Colo. App. 108, 42 Pac. 684) days is reasonable.

87. *Alabama.*—Sands *v.* Matthews, 27 Ala. 399; Kennedy *v.* Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289.

California.— Naglee *v.* Lyman, 14 Cal. 450.

Colorado.— Fowler *v.* McPhee, 13 Colo. App. 185, 56 Pac. 1118.

Illinois.— Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510.

Louisiana.— Crowell *v.* Van Bibber, 18 La. Ann. 637; Von Phul *v.* Sloan, 2 Rob. (La.) 148, 38 Am. Dec. 207.

Maine.— Scott *v.* McLellan, 2 Me. 199.

Maryland.— Brown *v.* Ambler, 66 Md. 391, 7 Atl. 903; Lewis *v.* Kramer, 3 Md. 265.

Massachusetts.— St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1, 98 Mass. 288; Barney *v.* Newcomh, 9 Cush. (Mass.) 46; Wilson *v.* Clements, 3 Mass. 1.

Minnesota.— Woodard *v.* Griffiths-Marshall Grain Commission Co., 43 Minn. 260, 45 N. W. 433.

New York.— Seaboard Nat. Bank *v.* Burleigh, 147 N. Y. 720, 42 N. E. 726 [*affirming* 74 Hun (N. Y.) 400, 26 N. Y. Suppl. 587, 57 N. Y. St. 247]; Johnson *v.* Clark, 39 N. Y. 216; Ulster County Bank *v.* McFarlan, 3 Den. (N. Y.) 553; Greele *v.* Parker, 5 Wend. (N. Y.) 414 [*affirming* 2 Wend. (N. Y.) 545]; Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6. *Compare* Blakiston *v.* Dudley, 5 Duer (N. Y.) 373, holding that the New York Revised Statutes did not apply to the drawee of a bill who still held it, although he furnished goods to another, relying on the promise to accept bills drawn therefor.

Ohio.— See Sherwin *v.* Brigham, 39 Ohio St. 137.

Pennsylvania.— Steman *v.* Harrison, 42 Pa. St. 49, 82 Am. Dec. 491; Howland *v.* Carson, 15 Pa. St. 453.

Washington.—Kelley *v.* Greenough, 9 Wash. 659, 38 Pac. 158.

United States.— Boyce *v.* Edwards, 4 Pet. (U. S.) 111, 7 L. ed. 799; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386; Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264, 7 L. ed. 138; Exchange Bank *v.* Hubbard, 62 Fed. 112, 26 U. S. App. 133, 10 C. C. A. 295; Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193; Payson *v.* Coolidge, 2 Gall. (U. S.) 233, 19 Fed. Cas. No. 10,860 [*affirmed* in 2 Wheat. (U. S.)

for it.[88] The agreement may be conditional on some act on the part of the drawer.[89] The bill must be clearly and particularly described in the agreement[90]

66, 4 L. ed. 185]; Russell *v.* Wiggin, 2 Story (U. S.) 213, 21 Fed. Cas. No. 12,165, 5 Law Rep. 533; Wildes *v.* Savage, 1 Story (U. S.) 22, 29 Fed. Cas. No. 17,653, 3 Law Rep. 1.

England.— Miln *v.* Prest, 4 Campb. 393, Holt N. P. 181, 3 E. C. L. 78.

See 7 Cent. Dig. tit. "Bills and Notes," § 150.

Actual inspection of the promise is not essential if the person relying thereon had knowledge thereof either from written or oral information. Smith *v.* Ledyard, 49 Ala. 279; Michigan Bank *v.* Ely, 17 Wend. (N. Y.) 508.

Where a letter of credit is such as to authorize more than a single transaction, different individuals may make advances upon it, and it then becomes a several contract with each person so making advances, within the aggregate limit specified in the instrument. Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280. See also Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546 [*affirming* 35 Ill. App. 116], holding that where a telegram reading: "We will honor Geer & Way's draft for cost of cattle and hogs consigned to us," had been treated by both parties as referring to several different drafts and shipments, it bound the sender to accept all such drafts until it was revoked.

In Kentucky it seems that the promise of the drawee of a draft made in writing to the drawer, prior to the drawing of the draft, inures to the benefit of the holder, who purchased the draft without knowledge of the promise. Anderson County Deposit Bank *v.* Turner-Looker Co., 3 Ohio S. & C. Pl. Dec. 581, 2 Ohio N. P. 73.

Time of giving credit.— The holder who gives credit on such agreement may sue the drawee, whether the credit is given before or after the drawing of the bill. McKim *v.* Smith, 1 Am. L. J. 486.

88. Nelson *v.* Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386; Pillans *v.* Van Mierop, 3 Burr. 1663. Without funds in the drawee's hands. Palmer *v.* Rice, 36 Nebr. 844, 55 N. W. 256; De Tastett *v.* Crousillat, 2 Wash. (U. S.) 132, 7 Fed. Cas. No. 3,828. On the other hand it is not enough for a valid consideration that the legal result of taking the acceptance would be to discharge a lien existing in favor of the payee. Plummer *v.* Lyman, 49 Me. 229.

89. If so made it is not an acceptance unless the conditions are performed. Storer *v.* Logan, 9 Mass. 55 (holding that this is true where the agreement was absolute in its terms, but was known to the drawer to be conditional and to depend wholly on certain shipments being made to the drawee, and those conditions were made known to the payee when he received the bill); Germania Nat. Bank *v.* Taaks, 101 N. Y. 442, 5 N. E. 76 [*reversing* 31 Hun (N. Y.) 260]; Commercial Bank *v.* Pfeiffer, 22 Hun (N. Y.) 327; Gillespie *v.* Mather, 10 Pa. St. 28 (holding that a general acceptance of an order coupled with evidence from which a promise to pay can be deduced entitles the payee to sue the drawee on proof of the drawee's being in funds); Anderson *v.* Hick, 3 Campb. 179.

One who agrees to pay drafts in case bills of lading accompany them, with certain inspector's certificates attached, incurs no liability when his refusal is based on the absence of the certificates. Craig *v.* Marx, 65 Tex. 649. After refusal for non-performance of the condition, the subsequent receipt of the bill of lading and a fresh presentment for acceptance do not create a liability on the drawee's part to the holder (St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1), and a condition for bills of lading to be attached is not satisfied, although the property represented by the bills of lading to be attached came into the possession of the promisor (Lacon First Nat. Bank *v.* Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609). On the other hand a shipment of forty-nine bales is a substantial compliance with a condition for the shipment of fifty bales (Lathrop *v.* Harlow, 23 Mo. 209), and a shortage of contemplated shipments at the last will not defeat the last of a long succession of drafts drawn through a term of years under such a preliminary agreement (Coffman *v.* Clarinda Nat. Bank, 33 Ill. App. 641).

Any difficulties attending the collection of the first draft will not justify the drawer in refusing to accept subsequent drafts covered by the agreement. Shaffer *v.* McKanna, 24 Kan. 22.

90. *Louisiana.*— Von Phul *v.* Sloan, 2 Rob. (La.) 148, 38 Am. Dec. 207; Carrollton Bank *v.* Tayleur, 16 La. 490, 35 Am. Dec. 219.

Maryland.—Flora First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114.

Missouri.— Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161, holding, however, that while a general letter of credit is not an acceptance of a particular bill, a party taking a bill upon the faith of such letter can maintain an action against the promisor to recover the amount advanced.

New York.— Johnson *v.* Clark, 39 N. Y. 216; Bank of Commerce *v.* J. G. Shaw Blank Book Co., 54 N. Y. Super. Ct. 83; Ulster County Bank *v.* McFarlan, 3 Den. (N. Y.) 553.

United States.— Boyce *v.* Edwards, 4 Pet. (U. S.) 111, 7 L. ed. 799; Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264, 7 L. ed. 138; Coolidge *v.* Payson, 2 Wheat. (U. S.) 66, 4 L. ed. 185 [*affirming* 2 Gall. (U. S.) 233, 19 Fed. Cas. No. 10,860]; Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193; Russell *v.* Wiggin, 2 Story (U. S.) 213, 21 Fed. Cas. No. 12,165, 5 Law Rep. 533.

and should be payable at a time certain. It has been held that there was no acceptance where it was payable after sight.[91]

(B) *By Authority to Draw.* Authority to draw a bill is an implied agreement for acceptance on the part of the drawee who gives the authority[92] and may cover one or more future acceptances.[93] By the law merchant such authority amounts to an acceptance[94] if sufficiently precise and certain in its description of

91. Carnegie *v.* Morrison, 2 Metc. (Mass.) 381 (holding that a promise to "accord a credit" for £3,000 on the usual terms and conditions, which were to accept bills at ninety days' sight, did not amount to an acceptance); Wildes *v.* Savage, 1 Story (U. S.) 22, 29 Fed. Cas. No. 17,653, 3 Law Rep. 1. But it is held that the words contained in a telegram, "Will accept twenty-five gold or three thousand currency, on usual time," constitute an unconditional promise, the time of drafts drawn in previous transactions of the same kind between the parties being proved. Molson's Bank *v.* Howard, 40 N. Y. Super. Ct. 15.

92. *California.*— Naglee *v.* Lyman, 14 Cal. 450.

Maine.—Gates *v.* Parker, 43 Me. 544, holding that an authority to another as agent to adjust certain business and draw for the moneys necessary amounts to an acceptance by the principal of drafts drawn with the assent of the agent, but not of another draft to another person substituted for it without the knowledge of either principal or agent.

Missouri.— Adoue *v.* Fox, 30 Mo. App. 98.

New York.— Ruíz *v.* Renauld, 100 N. Y. 256, 3 N. E. 182 (and the authority need not be phrased in the precise and formal language of a legal document); Merchants' Bank *v.* Griswold, 72 N. Y. 472, 28 Am. Rep. 159 [*affirming* 9 Hun (N. Y.) 561, authority to a person named "as my agent" and drafts by such person in individual name]; Monroe *v.* Pilkington, 14 How. Pr. (N. Y.) 250 (with agreement to accept); Ulster County Bank *v.* McFarlan, 5 Hill (N. Y.) 432; Michigan Bank *v.* Ely, 17 Wend. (N. Y.) 508.

Pennsylvania.— Allentown Nat. Bank *v.* Kimes, 4 Wkly. Notes Cas. (Pa.) 401, 12 Phila. (Pa.) 329, 35 Leg. Int. (Pa.) 298.

United States.—Riggs *v.* Lindsay, 7 Cranch (U. S.) 500, 3 L. ed. 419; Exchange Bank *v.* Hubbard, 58 Fed. 530.

England.— Smith *v.* Brown, 2 Marsh. 41, 6 Taunt. 340, 1 E. C. L. 644.

One authorizing a draft for his own use is in effect the borrower and is liable as such to the lender irrespective of the question of acceptance. Barney *v.* Worthington, 37 N. Y. 112, 4 Transcr. App. (N. Y.) 105, 4 Abb. Pr. N. S. (N. Y.) 205.

Letters of credit.— An authority to draw on a person named with a statement that the writer will honor the drafts is a letter of credit on which the writer is liable to the party making advances (Pollock *v.* Helm, 54 Miss. 1, 28 Am. Rep. 342), and an agreement to "open a credit" for a person named in favor of persons selling goods to him binds the writer as accepter to parties selling goods to such person and taking his drafts on the writer, although the latter afterward expressly refuses to accept the drafts when presented (Bell *v.* Moss, 5 Whart. (Pa.) 189); but the following does not constitute a letter of credit: "We wish them to continue with us, and we expect to take care of them and pay drafts as heretofore" (State Nat. Bank *v.* Young, 5 McCrary (U. S.) 12, 14 Fed. 889).

A letter of credit given as an accommodation does not create any debt or contract between the immediate parties to it for the payment of a sum of money direct, but is only an authority to create a debt by a draft on the party giving it and an engagement on his part to accept and pay such draft. Lienow *v.* Pitcairn, 2 Paine (U. S.) 517, 15 Fed. Cas. No. 8,341.

Duty of party advancing on letter of credit. — The party who makes advances on a letter of credit has nothing to do with equities between the drawer and drawee (Carrollton Bank *v.* Tayleur, 16 La. 490, 35 Am. Dec. 219), but if the letter is for a limited sum of money, as is generally the case, he is bound at his peril to make inquiry whether the authority to draw has been exhausted (Ranger *v.* Sargent, 36 Tex. 26 [*affirming* 1 Tex. App. Civ. Cas. § 617).

93. Lafargue *v.* Harrison, 70 Cal. 380, 9 Pac. 259, 11 Pac. 636, 59 Am. Rep. 416; Naglee *v.* Lyman, 14 Cal. 450; Merchants' Bank *v.* Griswold, 72 N. Y. 472, 28 Am. Rep. 159 [*affirming* 9 Hun (N. Y.) 561]; Ulster County Bank *v.* McFarlan, 5 Hill (N. Y.) 432; Michigan Bank *v.* Ely, 17 Wend. (N. Y.) 508; Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234.

94. *Indiana.*— Beach *v.* State Bank, 2 Ind. 488.

Kentucky.— Vance *v.* Ward, 2 Dana (Ky.) 95.

Louisiana.— Johnson *v.* Blakemore, 28 La. Ann. 140.

Maine.— Gates *v.* Parker, 43 Me. 544.

Maryland.— Lewis *v.* Kramer, 3 Md. 265.

Massachusetts.— Mayhew *v.* Prince, 11 Mass. 54; Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

Michigan.— Bissell *v.* Lewis, 4 Mich. 450.

Missouri.— Lathrop *v.* Harlow, 23 Mo. 209.

New York.— Ruiz *v.* Renauld, 100 N. Y. 256, 3 N. E. 182; Merchants' Bank *v.* Griswold, 72 N. Y. 472, 28 Am. Rep. 159 [*affirming* 9 Hun (N. Y.) 561]; Ulster County Bank *v.* McFarlan, 3 Den. (N. Y.) 553; Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6.

Virginia.— Hooe *v.* Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425.

United States.— Coolidge *v.* Payson, 2 Wheat. (U. S.) 66, 4 L. ed. 185; Ogden *v.* Gillingham, Baldw. (U. S.) 38, 18 Fed. Cas.

the bill[95] and if it is known to, and relied on by, the holder in purchasing the bill.[96] Such an authority is, however, revoked by the bankruptcy[97] or death[98] of the drawee.

No. 10,456; Payson *v.* Coolidge, 2 Gall. (U. S.) 233. 19 Fed. Cas. No. 10,860; Bayard *v.* Lathy, 2 McLean (U. S.) 462, 2 Fed. Cas. No. 1,131; Russell *v.* Wiggin, 2 Story (U. S.) 213, 21 Fed. Cas. No. 12,165, 5 Law Rep. 533.

95. The authority must be definite (Boyce *v.* Edwards, 4 Pet. (U. S.) 111, 7 L. ed. 799) and must be strictly complied with (Lienow *v.* Pitcairn, 2 Paine (U. S.) 517, 15 Fed. Cas. No. 8,341), but it is no defense against a payee in good faith that the draft exceeds in amount what the drawer obtaining the credit represented to the drawee as due the payee, where the letter of credit addressed to the payee read: "Hussey is authorized to draw on us at thirty days for amount he may owe you, which draft we will accept and pay" (Burns *v.* Rowland, 40 Barb. (N. Y.) 368) or that it is drawn from a city not intended, no local intention or address being indicated in the letter of authorization (Posey *v.* Denver Nat. Bank, 7 Colo. App. 108, 42 Pac. 684). Where, however, the authority to draw is contained in successive telegrams, which are fraudulently used as cumulative authority for obtaining excessive advances from one bank, the bank acts at its own risk and cannot hold the drawee beyond the amount really authorized. Nevada Bank *v.* Luce, 139 Mass. 488, 1 N. E. 926. On the other hand, an authority to draw "upon us, or either of us," "and we hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts," binds the signers, jointly and severally, to the payment of acceptances made by either. Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234. A letter from a mercantile house to a bank, stating that a certain merchant is authorized to make negotiations for value on our house, authorizes drafts only in anticipation of consignments and in a transaction with which the bank has connection, but not in payment of debts. Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538.

If strictly followed in a second draft drawn after the drawee's repudiation of the first for departure from instructions it is sufficient (Johnson *v.* Clark, 39 N. Y. 216), and if such authority is sufficient it is immaterial that a later telegram of acceptance is indefinite (Exchange Bank *v.* Hubbard, 58 Fed. 530).

A blank acceptance is an authority to draw a bill on the same paper. Leslie *v.* Hastings, 1 M. & Rob. 119.

The authority was sufficiently certain in the following cases:

Louisiana.— Johnson *v.* Blakemore, 28 La. Ann. 140 (authority "to value against us upon any cotton which he may ship . . . to us"); Talmadge *v.* Williams, 27 La. Ann. 653 (holding that authority to draw in favor of creditors will include a bill drawn for discount to be used in paying creditors).

Massachusetts.— Carnegie *v.* Morrison, 2 Metc. (Mass.) 381, an agreement for a credit for one who takes it in payment of a debt and draws on it amounts to an acceptance of the draft.

Michigan.— Bissell *v.* Lewis, 4 Mich. 450, an authority to draw what may be necessary "on such times as you can make advantageously for us."

New York.— Louisiana Nat. Bank *v.* Schuchardt, 15 Hun (N. Y.) 405 (authority to make draft "payable through the clearing house"); Merchants' Exch. Nat. Bank *v.* Cardozo, 35 N. Y. Super. Ct. 162 (a letter saying: "We can, at present, only authorize you to draw at sight for five thousand dollars, at the very outside, and then do not make any more sight drafts until you hear from us").

England.— Smith *v.* Brown, 2 Marsh. 41, 6 Taunt. 340, 1 E. C. L. 644, a promise to notify "when you may draw."

There was held to be no acceptance in Atlanta Nat. Bank *v.* Northwestern Fertilizing Co., 83 Ga. 356, 9 S. E. 671 (an offer by payee to "carry" the maker of a note thirty or forty days); Franklin Bank *v.* Lynch, 52 Md. 270, 36 Am. Rep. 375 (a letter saying: "You may draw on me for seven hundred dollars").

Although not liable as accepter, because the authority does not sufficiently specify the draft to be drawn, he may be held liable on his promise to one taking the draft on the faith of the promise. Flora First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114; Franklin Bank *v.* Lynch, 52 Md. 270, 36 Am. Rep. 375.

96. *Kentucky.*— Vance *v.* Ward, 2 Dana (Ky.) 95.

Maine.— Gates *v.* Parker, 43 Me. 544.

Maryland.— Lewis *v.* Kramer, 3 Md. 265.

Massachusetts.— Storer *v.* Logan, 9 Mass. 55.

Mississippi.— Pollock *v.* Helm, 54 Miss. 1, 28 Am. Rep. 342.

New York.— Merchants' Bank *v.* Griswold, 9 Hun (N. Y.) 561; Burns *v.* Rowland, 40 Barb. (N. Y.) 368; Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6.

North Carolina.— Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268.

United States.— Coolidge *v.* Payson, 2 Wheat. (U. S.) 66, 1 L. ed. 185 [*affirming* 2 Gall. (U. S.) 233, 19 Fed. Cas. No. 10,860]; Bayard *v.* Lathy, 2 McLean (U. S.) 462, 2 Fed. Cas. No. 1,131; Russell *v.* Wiggin, 2 Story (U. S.) 213, 21 Fed. Cas. No. 12,165, 5 Law Rep. 533; Baring *v.* Lyman, 1 Story (U. S.) 396, 2 Fed. Cas. No. 983, 4 Law Rep. 303.

97. Ogden *v.* Gillingham, Baldw. (U. S.) 38, 18 Fed. Cas. No. 10,456.

98. Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

(c) *By Detention of Bill.* The detention of a bill[99] by the drawee beyond the time allowed by custom for its consideration[1] implies an acceptance on his part;[2] but this is not the case where the bill has been expressly refused,[3] is returned with a refusal,[4] or is detained by agreement[5] or by a special custom of business between the parties.[6]

(d) *By Purchase or Part Payment of Bill.* On the other hand if the drawee discounts the bill,[7] makes a partial payment on it,[8] or offers to pay it in depreciated currency[9] it does not constitute an acceptance.

(e) *By Receipt of Goods.* An acceptance may be implied from the receipt by the drawee of the goods or the proceeds of the goods against which the bill is drawn.[10]

99. This does not apply to a non-negotiable municipal order detained by the chairman of the town committee. Holbrook *v.* Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456.

1. Time for consideration see *supra*, V, A, 4, b.

2. *California.*—Cal. Civ. Code, § 8195, which provides that the holder of a bill of exchange may without prejudice to his rights against prior parties receive and treat as a sufficient acceptance a refusal by the drawee to return the bill to the holder after presentment, in which case the bill is payable immediately, without regard to its terms.

Illinois.— Hall *v.* Steel, 68 Ill. 231.

Massachusetts.— Dunavan *v.* Flynn, 118 Mass. 537; Hough *v.* Loring, 24 Pick. (Mass.) 254 (where the drawee told a third party that he would dispose of it some way or other when he was in New York).

New Jersey.— McPherson *v.* Walton, 42 N. J. Eq. 282, 11 Atl. 21, where the drawee promised to pay it out of the first moneys due.

North Carolina.—Short *v.* Blount, 99 N. C. 49, 5 S. E. 190, where the drawee promised to pay it after first refusing and then consenting to retain it.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93, where the drawee retained it and charged it to the drawer's account.

England.— Harvey *v.* Martin, 1 Camph. 425 (especially where the drawee acknowledged that it was his intention to accept it); Smith *v.* McClure, 5 East 476, 2 Smith K. B. 43, 7 Rev. Rep. 750.

Tortious act necessary.— But under some statutes it has been held that such constructive acceptance requires a tortious act by the drawee and that a mere holding of the bill beyond the time specified is insufficient (Dickinson *v.* Marsh, 57 Mo. App. 566; Matteson *v.* Moulton, 11 Hun (N. Y.) 268 [*affirmed* in 79 N. Y. 627]), even with a promise to pay it (Rousch *v.* Duff, 35 Mo. 312).

3. Briggs *v.* Sizer, 30 N. Y. 647; Jeune *v.* Ward, 1 B. & Ald. 653, 2 Stark. 326, 3 E. C. L. 430.

4. Overman *v.* Hoboken City Bank, 31 N. J. L. 563 [*affirming* 30 N. J. L. 61].

5. Sands *v.* Matthews, 27 Ala. 399 (for further examination); Matteson *v.* Moulton, 79 N. Y. 627 [*affirming* 11 Hun (N. Y.) 268, with a promise to pay the amount upon a certain contingency]; Gates *v.* Eno, 4 Hun (N. Y.) 96, 6 Thomps. & C. (N. Y.) 384 (a non-negotiable order detained as a voucher on part payment); Koch *v.* Howell, 6 Watts & S. (Pa.) 350 (detained by the drawee's agent to submit to his principal and afterward refused and retained by the principal); Mason *v.* Barff, 2 B. & Ald. 26 (to await funds promised by the drawer).

6. Hall *v.* Steel, 68 Ill. 231, special custom as to monthly estimate and credit.

7. Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567. But it has been held to amount to an implied acceptance where the drawee of a bill, not accepted by him in writing, has it in his possession and procures another to discount it or advance the money upon it to him. Rutland Bank *v.* Woodruff, 34 Vt. 89.

8. *California.*— Bassett *v.* Haines, 9 Cal. 260, although receipted in the drawee's handwriting on the bill.

Georgia.— Ingle *v.* Davis, 81 Ga. 766, 8 S. E. 192.

Kentucky.— Hunter *v.* Cobb, 1 Bush (Ky.) 239, with a memorandum calculation of the balance due.

Maine.— Gallagher *v.* Black, 44 Me. 99, where he wrote, "Received five dollars, $5.00," intending to pay that and no more.

Massachusetts.— Cook *v.* Baldwin, 120 Mass. 317, 21 Am. Rep. 517.

It was held to be a good acceptance to indorse on the paper "Paid on this order $40" (Peterson *v.* Hubbard, 28 Mich. 197), "it being all the drawee agrees to pay unless" a certain earlier payment is credited (Phillips *v.* Frost, 29 Me. 77); to pay part cash and give a certificate of deposit for the balance (Andressen *v.* Northfield First Nat. Bank, 1 McCrary (U. S.) 252, 2 Fed. 122); to charge a check to the drawer as paid (Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483, 13 Am. Rep. 751); or to take credit for it, as though he had paid it, in a settlement of accounts with the drawer (Burch *v.* Hill, 24 Tex. 155).

If the drawee files an interpleader between the payee and subsequent garnishing creditors of the drawer it does not of itself operate as an acceptance of the order. Missouri Pac. R. Co. *v.* Wright, 38 Mo. App. 141.

9. Lester *v.* Georgia R., etc., Co., 42 Ga. 244.

10. Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546; McCausland *v.* Wheeler

b. Where Drawn in Parts. Where a bill is drawn in parts the acceptance may be written on any part, and must be written on one part only.[11]

6. Delivery and Revocation. An acceptance is not complete until its delivery and the delivery itself is governed by the same rules as in other contracts of the law merchant.[12] Up to the time of its actual delivery the drawee may revoke his agreement to accept[13] or the acceptance itself;[14] but when the acceptance is once complete by delivery it becomes irrevocable[15] and cannot be revoked to the preju-

Sav. Bank, 43 Ill. App. 381; Williams *v.* Winans, 14 N. J. L. 339. *Contra*, Helm *v.* Meyer, 30 La. Ann. 943; Clements *v.* Yeates, 69 Mo. 623. Notwithstanding his refusal of the draft (Nutting *v.* Sloan, 57 Ga. 392), although this has been questioned (Allen *v.* Williams, 12 Pick. (Mass.) 297). But it does not constitute an acceptance if the drawee files and enters the bill on its journal and afterward cancels the same on notice not to pay, received within the time allowed by the clearing-house rules. German Nat. Bank *v.* Farmers' Deposit Nat. Bank, 118 Pa. St. 294, 12 Atl. 303.

The receipt of goods under a later consignment not drawn against or referred to in the bill is not an acceptance. Tieman *v.* Jackson, 5 Pet. (U. S.) 580, 8 L. ed. 234, where, however, an express assignment of the bill of lading gave the holder of the draft control of the goods.

11. Neg. Instr. L. § 313; Bills Exch. Act, § 71.

If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323 (although accepted on blanks containing the words "second of exchange, first unpaid" and fraudulently filled as different bills); Holdsworth *v.* Hunter, 10 B. & C. 449, 8 L. J. K. B. O. S. 149, 5 M. & R. 393, 21 E. C. L. 193; Davidson *v.* Robertson, 3 Dow. 218, 3 Eng. Reprint 1044; Neg. Instr. L. § 313; Bills Exch. Act, § 71.

Necessity of producing other parts see *infra*, XIV, F [8 Cyc.].

12. Dunavan *v.* Flynn, 118 Mass. 537; Guthrie Nat. Bank *v.* Gill, 6 Okla. 560, 54 Pac. 434; *Ex p.* Hayward, L. R. 6 Ch. 546, 40 L. J. Bankr. 49, 24 L. T. Rep. N. S. 782, 19 Wkly. Rep. 833; Van Diemen's Land Bank *v.* Victoria Bank, L. R. 3 P. C. 526, 40 L. J. P. C. 28, 19 Wkly. Rep. 857; Cox *v.* Troy, 5 B. & Ald. 474, 1 D. & R. 38, 24 Rev. Rep. 460, 7 E. C. L. 260 [*overruling* Thornton *v.* Dick, 4 Esp. 270]. See also Neg. Instr. L. § 2, which provides that "'Acceptance' means an acceptance completed by delivery or notification."

13. *Louisiana.*— Robbins *v.* Lambeth, 2 Rob. (La.) 304, where no third person has in the meantime been affected by it.

Maryland.—Flora First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114, both agreement for acceptance and revocation by telegram.

Massachusetts.— Ilsley *v.* Jones, 12 Gray (Mass.) 260, revocation by letter.

New York.— Ballard *v.* Fuller, 32 Barb. (N. Y.) 68, permission to overdraw bank account.

England.— Anderson *v.* Heath, 4 M. & S. 303, where an offer to accept has been refused, and notwithstanding a subsequent offer to take it.

For condition broken.— A letter of credit, conditioned on provision of funds thirty days before maturity, may be revoked on non-performance of the condition without further notice. Duncan *v.* Edgerton, 6 Bosw. (N. Y.) 36.

14. Irving Bank *v.* Wetherald, 36 N. Y. 335 (if delivery has been made by mistake and can be recalled without injury to the holder); German Nat. Bank *v.* Farmers' Deposit Nat. Bank, 118 Pa. St. 294, 12 Atl. 303 (holding that filing and journaling is a conditional acceptance merely and is revocable before delivery); Van Diemen's Land Bank *v.* Victoria Bank, L. R. 3 P. C. 526, 40 L. J. P. C. 28, 19 Wkly. Rep. 857 (although delivery was merely prevented by the mislaying of the paper by the accepter's clerk and the holder was so informed when he called for it); Cox *v.* Troy, 5 B. & Ald. 474, 1 D. & R. 38, 24 Rev. Rep. 460, 7 E. C. L. 260; Wilkinson *v.* Johnston, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198; Tummer *v.* Oddie [*cited* in Bentinck *v.* Dorrien, 6 East 199, 200]; Ralli *v.* Dennistoun, 6 Exch. 483, 20 L. J. Exch. 278; Chapman *v.* Cottrell, 3 H. & C. 865, 11 Jur. N. S. 530, 34 L. J. Exch. 186, 12 L. T. Rep. N. S. 706, 13 Wkly. Rep. 843. See also Cal. Civ. Code, § 8198 (providing that the accepter of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder, and before the holder has, with the consent of the accepter, transferred his title to another person who has given value for it upon the faith of such acceptance); Bills Exch. Act, § 21 (which makes all contracts, including that of the accepter, revocable until delivery, "provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable").

15. *Massachusetts.* — Ft. Dearborn Nat. Bank *v.* Carter, 152 Mass. 34, 25 N. E. 27, although obtained by fraud.

New Jersey.— Trent Tile Co. *v.* Ft. Dearborn Nat. Bank, 54 N. J. L. 33, 23 Atl. 423 [*affirmed* in 54 N. J. L. 599, 25 Atl. 411], although the drawer had become insolvent just before its delivery, in the absence of fraud.

dice of other parties, even by consent of the holder.[16] The usual form of revocation of acceptance is a cancellation of the acceptance itself,[17] but if the cancellation was made by mistake it will not relieve the accepter.[18]

B. Qualified or Conditional Acceptance — 1. Qualified Acceptance.[19] The acceptance may be qualified by changing the time of payment,[20] making it payable in instalments,[21] providing for renewals up to a certain time,[22] changing the place of payment or designating a particular place,[23] changing the currency desig-

New York.— Ft. Worth First Nat. Bank *v.* American Exch. Nat. Bank, 40 N. Y. App. Div. 349, 63 N. Y. Suppl. 58, where the *bona fide* holder of a draft himself obtained the acceptance and his title was derived through an indorsement forged by one who personated the payee in obtaining the draft.

United States.— Andressen *v.* Northfield First Nat. Bank, 1 McCrary (U. S.) 252, 2 Fed. 122.

England.— Grant *v.* Hunt, 1 C. B. 44, 9 Jur. 228, 14 L. J. C. P. 106, 50 E. C. L. 44 (holding that where a bill has been accepted by a letter to the drawer and it has been shown to the holder, the accepter cannot revoke it by a verbal message to the drawer); Thornton *v.* Dick, 4 Esp. 270.

16. Chitty Bills 347.

17. Guthrie Nat. Bank *v.* Gill, 6 Okla. 560, 54 Pac. 434 (where the draft was stamped "paid" and the word was erased before delivery or notice to the holder after the countermand of the draft for the drawer's insolvency); Cox *v.* Troy, 5 B. & Ald. 474, 1 D. & R. 38, 24 Rev. Rep. 460, 7 E. C. L. 260.

It must be a cancellation in fact as well as in intention. Ingham *v.* Primrose, 7 C. B. N. S. 82, 5 Jur. N. S. 710, 28 L. J. C. P. 294, 97 E. C. L. 82.

Effect of cancellation.— A cancellation by the drawer discharges the accepter as against a holder who has taken the bill by assignment without due indorsement (Edge *v.* Bumford, 31 Beav. 247, 9 Jur. N. S. 8, 31 L. J. Ch. 805, 7 L. T. Rep. N. S. 88, 10 Wkly. Rep. 812), but it is a question of fact whether cancellation by a stranger is a revocation of the acceptance (Sweeting *v.* Halse, 9 B. & C. 365, 4 M. & R. 287, 17 E. C. L. 167).

A waiver may be implied from other acts of the parties, as where the acceptance is by a collecting agent to whom the payee of a note transfers it for collection, and the payee, who drew the order, receives payment from the maker. Lindsay *v.* Price, 33 Tex. 280.

18. **Cancellation by mistake by the accepter's agent,** the banker indicated in the bill for place of payment, will not discharge accepter or prior indorser by English law (Novelli *v.* Rossi, 2 B. & Ad. 757, 9 L. J. K. B. O. S. 307, 22 E. C. L. 317) and will not render the banker liable for its payment in default of negligence on his part (Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198; Warwick *v.* Rogers, 12 L. J. C. P. 113, 5 M. & G. 340, 6 Scott N. R. 1, 44 E. C. L. 184), but in Pennsylvania such cancellation will discharge the indorser, notwithstanding an immediate reacceptance (Bogart *v.* Nevins, 6 Serg. & R. (Pa.) 361).

Cancellation by mistake by a third party will not discharge the accepter. Raper *v.* Birkbeck, 15 East 17, 13 Rev. Rep. 354.

If the acceptance is canceled in consideration of an agreement which proves invalid for want of a stamp, the cancellation will still operate as a discharge of the accepter. Sweeting *v.* Halse, 9 B. & C. 365, 4 M. & R. 287, 17 E. C. L. 167.

19. "An acceptance is qualified which is: 1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; 2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; 3. Local, that is to say, an acceptance to pay only at a particular place; 4. Qualified as to time; 5. The acceptance of some one or more of the drawees, but not of all." Neg. Instr. L. § 229. See also Bills Exch. Act, § 19.

An acceptance "in favor of A only" is not a qualified acceptance. Meyer *v.* Decroix, [1891] A. C. 520 [*affirming* 25 Q. B. D. 343].

20. Vanstrum *v.* Liljengren, 37 Minn. 191, 33 N. W. 555; Kellogg *v.* Lawrence, Lalor (N. Y.) 332 (by reference to another contract); Walker *v.* Atwood, 11 Mod. 190; Paton *v.* Winter, 1 Taunt. 420.

The paper's negotiable character is unaffected by the change of time of payment. Green *v.* Raymond, 9 Nebr. 295, 2 N. W. 881.

If the change of time is an accidental misstatement it may even be rejected as surplusage and the acceptance treated as a general acceptance. Fanshawe *v.* Peet, 2 H. & N. 1, 26 L. J. Exch. 314, 5 Wkly. Rep. 489.

The acceptance was not qualified where it was for payment on the third day of grace (Kenner *v.* Their Creditors, 1 La. 120, 280; Kenner *v.* His Creditors, 8 Mart. N. S. (La.) 36, 7 Mart. N. S. (La.) 540) or "when due" (Sylvester *v.* Staples, 44 Me. 496).

21. Bridge *v.* Livingston, 11 Iowa 57; Rice *v.* Ragland, 10 Humphr. (Tenn.) 545, 53 Am. Dec. 737.

22. Clarke *v.* Gordon, 3 Rich. (S. C.) 311, 45 Am. Dec. 768; Russell *v.* Phillips, 14 Q. B. 891, 14 Jur. 806, 19 L. J. Q. B. 297, 68 E. C. L. 891.

23. Brown *v.* Jones, 113 Ind. 46, 13 N. E. 857, 3 Am. St. Rep. 623; Rowe *v.* Young, 2 B. & B. 165, 2 Bligh 391, 4 Eng. Reprint 372; Gammon *v.* Schmoll, 1 Marsh. 80, 5 Taunt. 344, 1 E. C. L. 182; Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39. See also Neg. Instr. L. § 229; Bills Exch. Act, § 19.

It may be at a particular bank in the town named in the bill.

California.— See Cal. Civ. Code, § 8195.

nated for payment in the bill[24] or making it payable partly in money and partly in bills,[25] or it may be an acceptance for a smaller amount than that named in the bill.[26] The holder may refuse to receive such an acceptance[27] and may treat the bill as dishonored by non-acceptance.[28] On receiving an offer of such acceptance the holder must immediately notify the drawer and prior indorsers[29] and if he elects to receive it, he must notify them of it.[30] In some jurisdictions, however, he cannot receive such acceptance without their consent without discharging them.[31]

2. CONDITIONAL ACCEPTANCE. An acceptance of a bill or order may be conditional,[32] although the holder may require an absolute acceptance, without which

Kentucky.— Todd *v.* State Bank, 3 Bush (Ky.) 626.

New York.— Troy City Bank *v.* Lauman, 19 N. Y. 477; Niagara Dist. Bank *v.* Fairman, etc., Mach. Tool Mfg. Co., 31 Barb. (N. Y.) 403.

Ohio.— Myers *v.* Standart, 11 Ohio St. 29.

England.— Mutford *v.* Walcot, 1 Ld. Raym. 574, 12 Mod. 410.

It is a general acceptance where the place of payment is left blank in the acceptance and is filled by the indorsee (Todd *v.* State Bank, 3 Bush (Ky.) 626) or where the bill is payable generally and the place named in the acceptance is the drawee's residence (Myers *v.* Standart, 11 Ohio St. 29). If the bill is payable at a designated place a general acceptance is to pay at that place. Alden *v.* Barbour, 3 Ind. 414; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396.

The Negotiable Instruments Law, section 228, provides that "an acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere." So Bills Exch. Act, § 19.

24. Boehm *v.* Garcias, 1 Campb. 425 note.

The Negotiable Instruments Law, section 220, provides that "it must not express that the drawee will perform his promise by any other means than the payment of money." So Bills Exch. Act, § 17.

25. Petit *v.* Benson, Comb. 452.

26. Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492; Petit *v.* Benson, Comb. 452; Wegersloffe *v.* Keene, 1 Str. 214.

27. Andrews *v.* Baggs, Minor (Ala.) 173, 12 Am. Dec. 47; Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174; Boehm *v.* Garcias, 1 Campb. 425 note; Petit *v.* Benson, Comb. 452; Parker *v.* Gordon, 7 East 385, 6 Esp. 41, 3 Smith K. B. 358, 8 Rev. Rep. 646; Gammon *v.* Schmoll, 1 Marsh. 80, 5 Taunt. 344, 1 E. C. L. 182; Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39; Smith *v.* Abbot, 2 Str. 1152. See also *supra*, II, B, 1, *a*, (I), (B), note 90.

28. Neg. Instr. L. § 230; Bills Exch. Act, § 44.

Protest itself amounts to a refusal of the drawee's offer of such acceptance, if the offer is known to the holder (Bentinck *v.* Dorrien, 6 East 199, 2 Smith K. B. 337; Sproat *v.* Matthews, 1 T. R. 182), but not if it was unknown to him (Fairlee *v.* Herring, 3 Bing. 625, 11 Moore C. P. 520, 11 E. C. L. 305).

29. Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39.

If there are funds of drawer in drawee's hands the drawer should be notified. Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

The offer of a qualified acceptance may be transmitted by the agent making presentment to his principal and accepted by the principal and notice returned through the agent to the drawee within a reasonable time. Wylie *v.* Brice, 70 N. C. 422.

30. Paton *v.* Winter, 1 Taunt. 420.

When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto. Neg. Instr. L. § 230; Bills Exch. Act, § 44.

31. Gibson *v.* Smith, 75 Ga. 33; Taylor *v.* Newman, 77 Mo. 257; Niagara Dist. Bank *v.* Fairman, etc., Mach. Tool Mfg. Co., 31 Barb. (N. Y.) 403; Rowe *v.* Young, 2 B. & B. 165, 2 Bligh 391, 4 Eng. Reprint 372; Onthwaite *v.* Luntley, 4 Campb. 179, 16 Rev. Rep. 771; Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39. See also Neg. Instr. L. § 230; Bills Exch. Act, § 44; and *supra*, II, B, 1, *a*, (I), (B).

The drawer's liability to the holder is not changed after notice and consent to a qualified acceptance (Knox *v.* Reeside, 1 Miles (Pa.) 294) and if he has no funds in the drawee's hands and no right to draw he is not entitled to notice (Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259).

32. Stevens *v.* Androscoggin Water Power Co., 62 Me. 498; Smith *v.* Abbot, 2 Str. 1152; Julian *v.* Shobrooke, 2 Wils. C. P. 9 ("Upon account of the ship Thetis when in cash for the said vessel's cargo").

The acceptance was conditional in the following cases: Williams *v.* Gallyon, 107 Ala. 439, 18 So. 162 (where the drawees on presentment for acceptance denied owing the drawer the amount specified, but admitted a less indebtedness, said they would pay the amount "when the money was due" the drawer, and afterward wrote that they would pay "what might become due" to the drawer); Wintermute *v.* Post, 24 N. J. L. 420 ("when in funds"); Russell *v.* Phillips, 14 Q. B. 891, 14 Jur. 806, 19 L. J. Q. B. 297, 68 E. C. L. 891 ("on the condition of its being renewed until Nov. 28th, 1844"); Banbury *v.* Lisset, 2 Str. 1211 ("to pay as remitted from thence"). See also Bellefonte

he may treat the bill as dishonored,[33] and when made part of the acceptance[34] a condition binds both accepter and holder.[35] A conditional acceptance becomes absolute upon the performance or happening of the condition,[36] but is not

First Nat. Bank *v.* Rogers, 198 Pa. St. 627, 48 Atl. 686; New York Guaranty Trust Co. *v.* Grotrian, 114 Fed. 433, 52 C. C. A. 235, 57 L. R. A. 689.

The acceptance was not conditional in the following cases:

Illinois.— Ray *v.* Faulkner, 73 Ill. 469, holding that an acceptance "for the full amount, provided there is this amount in my hands," binds whatever fund there is in hand and is an absolute acceptance.

Kentucky.— Brannin *v.* Henderson, 12 B. Mon. (Ky.) 61, "I will see the within paid, eventually."

Massachusetts.— Mechanics' Nat. Bank *v.* Robins, 134 Mass. 331, holding that an acceptance with an agreement that the proceeds should be applied to the payment of a maturing note and the note delivered to the accepter is not a condition of the delivery of the acceptance.

Pennsylvania.— Tassey *v.* Church, 4 Watts & S. (Pa.) 346, where the accepter signed in an official or representative character. See also Saxton *v.* Lewis, 1 Phila. (Pa.) 75, 7 Leg. Int. (Pa.) 114, where it is said that a promise to pay when able is not a condition precedent, but mere words of civility, which mean that defendant will pay when he receives the proceeds of the bill.

South Carolina.—Clarke *v.* Gordon, 3 Rich. (S. C.) 311, 45 Am. Dec. 768, where it was held that the drawee of a bill payable at sight, accepted on condition of presentment at a certain time, will be liable on it, although not presented at that time.

Tennessee.— Chattanooga Grocery Co. *v.* Livingston, (Tenn. Ch. 1900) 59 S. W. 470.

England.— Wilkinson *v.* Lutwidge, 1 Str. 648, a promise to pay a bill if another did not pay it, where it was shown that the promisor had no expectation that such other would pay it.

33. Campbell *v.* Pettengill, 7 Me. 126, 20 Am. Dec. 349; Cline *v.* Miller, 8 Md. 274; Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174; Smith *v.* Abbot, 2 Str. 1152.

34. **The accepter must express the condition clearly,** the burden of proof being upon him to show the condition. Coffman *v.* Campbell, 87 Ill. 98.

35. *Alabama.*— Andrews *v.* Baggs, Minor (Ala.) 173, 12 Am. Dec. 47.

Arkansas.— Defee *v.* Smith, 43 Ark. 221.

Mississippi.— McCutchen *v.* Rice, 56 Miss. 455.

Missouri.— Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174.

Nebraska.— Green *v.* Raymond, 9 Nebr. 295, 2 N. W. 881.

New Jersey.— Wintermute *v.* Post, 24 N. J. L. 420.

England.— Petit *v.* Benson, Comb. 452; Smith *v.* Abbot, 2 Str. 1152.

If conditional, the holder cannot resort to the drawer till the accepter refuses to pay in accordance with the condition. Andrews *v.* Baggs, Minor (Ala.) 173, 12 Am. Dec. 47; Campbell *v.* Pettengill, 7 Me. 126, 20 Am. Dec. 349; Gallery *v.* Prindle, 14 Barb. (N. Y.) 186.

Condition not retroactive.— The terms "accepted, when the contracts of the drawer of the bill are complied with," are not retroactive; they do not refer to past transaction, but to the subsequent performance of the contractors. U. S. *v.* Metropolis Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774.

36. *Colorado.*— Hughes *v.* Fisher, 10 Colo. 383, 15 Pac. 702.

Connecticut.— Brahazon *v.* Seymour, 42 Conn. 551, holding, where a bill was accepted "payable after any liabilities which I have assumed prior to this date on said contract," that the contingency became absolute with the sufficiency of the fund.

Maine.— Stevens *v.* Androscoggin Water Power Co., 62 Me. 498, holding that an acceptance to pay, if on settlement "there is anything over," becomes on settlement an acceptance for whatever balance may be due.

Minnesota.— Everard *v.* Warner, 36 Minn. 383, 31 N. W. 353, holding that an acceptance payable on delivery of certain maps is not subject to any set-off of other claims.

New York.— Flanagan *v.* Mitchell, 16 Daly (N. Y.) 223, 10 N. Y. Suppl. 234, 32 N. Y. St. 303, holding that an acceptance payable out of a certain payment becomes absolute when the specified payment is made.

North Carolina.— Wallace *v.* Douglas, 116 N. C. 659, 21 S. E. 387, holding that if payable "when I receive funds to the use of" the drawer, the accepter is liable when the moneys have been placed to his credit, although he has not taken manual possession of them.

South Carolina.— Hunton *v.* Ingraham, 1 Strobh. (S. C.) 271.

England.— Mendizabal *v.* Machado, 6 C. & P. 218, 3 L. J. C. P. 70, 3 Moore & S. 841, 25 E. C. L. 402; Pierson *v.* Dunlop, Cowp. 571.

Canada.— Ontario Bank *v.* McArthur, 5 Manitoba 381.

"Provided the earnings of Mr. . . . are sufficient" means without deduction of expenses, and if the gross earnings are sufficient accepter must pay. Smith *v.* Bates Mach. Co., 182 Ill. 166, 55 N. E. 69.

"When in funds," literally means when the accepter is in the possession of cash which the drawer has a present right to demand and receive or to appropriate by his bill, whether such funds be the product of labor or of commodities furnished, of goods sold or money deposited or collected, or any other source. Wintermute *v.* Post, 24 N. J. L. 420, 423. It means cash — not securities (Campbell *v.* Pettengill, 7 Me. 126, 20 Am. Dec.

enforceable until complete fulfilment of the condition,[37] unless performance is prevented by the accepter's own act.[38] A condition cannot be added by the

349) or property (Carlisle *v.* Hooks, 58 Tex. 420) — the first funds received, less advances already charged against such funds, but without deduction of other general indebtedness (Hunton *v.* Ingraham, 1 Strobh. (S. C.) 271).

Where accepted according to the provisions of a particular contract resort must be had to that contract to ascertain the terms of the acceptance (Kellogg *v.* Lawrence, Lalor (N. Y.) 332), and on failure of the drawer to fulfil his contract the accepter is only liable for the amount actually due (Haseltine *v.* Dunbar, 62 Wis. 162, 22 N. W. 165). If the contract provide for completion by the owner on the contractor's failure, the owner's acceptance payable out of "the last payment" on the contract will be subject to deduction of the necessary cost of completion (Beardsley *v.* Cook, 143 N. Y. 143, 38 N. E. 109 [*reversing* 67 Hun (N. Y.) 101, 22 N. Y. Suppl. 36, 51 N. Y. St. 405]), but not to deduction of advances made, after acceptance, by the owner to the contractor in anticipation of what the contract called for (Beardsley *v.* Cook, 154 N. Y. 707, 49 N. E. 126 [*affirming* 89 Hun (N. Y.) 151, 35 N. Y. Suppl. 12, 69 N. Y. St. 240]). The fact, however, that the owner had paid an earlier payment before it was due will not render him liable where the contractor abandoned the work and the last payment never became due (Saloy *v.* Pepin, 4 La. Ann. 573); but an order accepted subject to a final settlement between drawer and drawee is subject to deduction for an amount which the drawee is required as garnishee to pay in a suit against the drawer, begun before the acceptance (Goodwin *v.* Bethel Steam Mill Co., 76 Me. 468), and under an acceptance to be paid when a particular person's lien is satisfied, the full amount of such lien is to be deducted, although, by reason of the insufficiency of the total amount owing on the entire contract, such person has to pro-rate with other subsequent lien-holders (Tyler *v.* Stack, 103 Mich. 268, 61 N. W. 496).

37. *Colorado.*— Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

Florida.— Marshall *v.* Bumby, 25 Fla. 619, 6 So. 480.

Georgia.— Baker *v.* Dobbins, 87 Ga. 545, 13 S. E. 524.

Illinois.— Cummings *v.* Hummer, 61 Ill. App. 393.

Iowa.— Nordby *v.* Clough, 79 Iowa 428, 44 N. W. 697.

Kansas.— Liggett *v.* Weed, 7 Kan. 273; Carson *v.* Kerr, 7 Kan. 268.

Louisiana.— See Baird *v.* Parker, 4 La. 263.

Maryland.— Gill *v.* Weller, 52 Md. 8; Cline *v.* Miller, 8 Md. 274 (completion of contract with accommodation note in the meantime).

Massachusetts.— Proctor *v.* Hartigan, 143 Mass. 462, 9 N. E. 841 (on completion of contract); Fiske *v.* Joy, 141 Mass. 311, 5 N. E. 514; Bailey *v.* Joy, 132 Mass. 356.

Michigan.— Jenks *v.* Wells, 90 Mich. 515, 51 N. W. 636; Gooding *v.* Underwood, 89 Mich. 187, 50 N. W. 818 (if due on final settlement).

Mississippi.— Shackelford *v.* Hooker, 54 Miss. 716.

Missouri.— Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174.

New Jersey.— Rice *v.* Porter, 16 N. J. L. 440, order for share of rent, accepted "when due."

New York.— Quinn *v.* Aldrich, 70 Hun (N. Y.) 205, 24 N. Y. Suppl. 33, 53 N. Y. St. 82.

Pennsylvania.— Johnston *v.* Parker Sav. Bank, 101 Pa. St. 597, when in funds which have not been appropriated.

Rhode Island.— Hunt *v.* Williams, 15 R. I. 595, 10 Atl. 645 (on receipt of a specified fund); Rawson *v.* Beach, 13 R. I. 151 (holding that "out of the money collected" on a designated judgment does not apply to later verdict and reduced judgment on new trial after original verdict set aside).

South Carolina.— Greene *v.* Duncan, 37 S. C. 239, 15 S. E. 956 (on completion of contract); Hickman *v.* King, Cheves (S. C.) 132 (on shipment to be made); Browne *v.* Coit, 1 McCord (S. C.) 408 (on making sufficient sales of drawer's goods).

Tennessee.— Owen *v.* Iglanor, 4 Coldw. (Tenn.) 15.

Texas.— Carlisle *v.* Hooks, 58 Tex. 420.

United States.— Guaranty Trust Co. *v.* Grotrian, 114 Fed. 433, 52 C. C. A. 235, 57 L. R. A. 689 (where acceptance was "against indorsed bills of lading" and it was held that the acceptance was conditioned on the delivery of genuine bills of lading and that if a forged bill of lading was attached the accepter might recover a payment made by him before discovery of the fraud); Hutz *v.* Karthause, 4 Wash. (U. S.) 1, 12 Fed. Cas. No. 6,963 (out of the proceeds of a certain bill); Read *v.* Wilkinson, 2 Wash. (U. S.) 514, 20 Fed. Cas. No. 11,611.

England.— Sparrow *v.* Chisman, 9 B. & C. 241, 7 L. J. K. B. O. S. 173, 4 M. & R. 206, 17 E. C. L. 115; Smith *v.* Vertue, 9 C. B. N. S. 214, 7 Jur. N. S. 395, 30 L. J. C. P. 56, 3 L. T. Rep. N. S. 583, 9 Wkly. Rep. 146, 99 E. C. L. 214 (where a bill "payable on giving up bill of lading" was held to be conditioned to extent that the bill must be delivered).

Canada.— Potters *v.* Taylor, 20 Nova Scotia 362, 7 Can. L. T. 434; Fullerton *v.* Chapman, 2 Nova Scotia Dec. 470.

38. *District of Columbia.*— Hammond *v.* Miller, 2 Mackey (D. C.) 145.

Illinois.— Phelps *v.* Northup, 56 Ill. 156, 8 Am. Rep. 681, where a collecting agent accepted a draft for a certain payment "when collected" on a note and afterward surrendered the note to the owner without collecting it.

accepter after he has given an absolute acceptance,[39] but it may be expressed in a separate agreement executed at the time of the acceptence.[40] Such agreement, however, will affect only parties with notice.[41]

C. Refusal to Accept. If acceptance is refused by the drawee the bill is dishonored.[42] No formality of language is necessary to constitute such refusal.[43] It may be accompanied by an express promise to pay the bill,[44] or may be expressed on returning the bill after its detention for twenty-four hours,[45] or in canceling the bill without returning it.[46]

D. Liability of Accepter and Effect of Acceptance — 1. In General. The accepter becomes by his acceptance the principal debtor[47] and as to other parties

Massachusetts.— Haskell *v.* Dennis, 8 Allen (Mass.) 48.

New Jersey.— Herter *v.* Goss, etc., Co., 57 N. J. L. 42, 30 Atl. 252.

New York.— Beardsley *v.* Cook, 154 N. Y. 707, 49 N. E. 126 [*affirming* 89 Hun (N. Y.) 151, 35 N. Y. Suppl. 12, 69 N. Y. St. 240]; Robinson *v.* Gray, 17 Misc. (N. Y.) 341, 39 N. Y. Suppl. 1066. See also Home Bank *v.* Drumgoole, 109 N. Y. 63, 15 N. E. 747, 14 N. Y. St. 40; Risley *v.* Smith, 64 N. Y. 576; Mersereau *v.* Villari, 74 Hun (N. Y.) 59, 26 N. Y. Suppl. 135, 56 N. Y. St. 144; Fox *v.* New York Wood Turning Co., 13 Daly (N. Y.) 153.

United States.— French Spiral Spring Co. *v.* New England Car Trust, 32 Fed. 44.

When collected.— An acceptance "when the money is collected" is due after a reasonable time allowed for collection (Vaughan *v.* Dean, 32 Ga. 502), and if the accepter afterward surrenders the collection claims to the drawer and so fails to collect, he will still be liable on his acceptance to the payee (Antram *v.* Thorndell, 74 Pa. St. 442). It was held, however, in a similar case, where the drawer had given the drawee a note for collection and afterward compromised with the maker and no money was ever collected, that the order was not an assignment *pro tanto* of the note, but a mere mandate of the payee, which was revoked by the settlement, and that defendants were not liable on the acceptance. Lindsay *v.* Price, 33 Tex. 280.

39. Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750. And it is immaterial that the drawee intended his authority to be used conditionally, if the condition was not expressed. Hutchinson *v.* Mitchell, 15 La. Ann. 326; Davidson *v.* Keyes, 2 Rob. (La.) 254, 38 Am. Dec. 209.

40. Gibbon *v.* Scott, 2 Stark. 286, 19 Rev. Rep. 723, 3 E. C. L. 412; Bowerbank *v.* Monteiro, 4 Taunt. 844, 14 Rev. Rep. 679.

41. U. S. *v.* Metropolis Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774; Bowerbank *v.* Monteiro, 4 Taunt. 844, 14 Rev. Rep. 679; Montague *v.* Perkins, 22 Eng. L. & Eq. 516.

42. See *infra*, XII, A, 1.

43. Norton *v.* Knapp, 64 Iowa 112, 19 N. W. 867 ("Kiss my foot" written across the face of the bill and signed); Webb *v.* Mears, 45 Pa. St. 222 (where a bill sent to the drawee for acceptance was returned with "acceptance waived" in a letter stating that he was not yet provided with funds by the drawer to meet it but probably would be, and if not he would try and have it satisfactorily arranged); Pridgen *v.* Cox, 13 Tex. 257 ("I protest the within" written on the back).

Refusal by letter may be sufficient. Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408; Parker *v.* Stroud, 31 Hun (N. Y.) 578.

An offer, after refusal and protest, to pay without allowance of protest fees, itself rejected and then withdrawn is not an acceptance. Anderson *v.* Heath, 4 M. & S. 303.

44. Pope *v.* Luff, 7 Hill (N. Y.) 577 [*affirming* 5 Hill (N. Y.) 413].

45. Overman *v.* Hoboken City Bank, 31 N. J. L. 563 [*affirming* 30 N. J. L. 61], by marking it "not good."

46. Jeune *v.* Ward, 1 B. & Ald. 653, 2 Stark. 326, 3 E. C. L. 430.

47. *Alabama.*— Capital City Ins. Co. *v.* Quinn, 73 Ala. 558; Wilson *v.* Isbell, 45 Ala. 142.

Connecticut.— Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Florida.— Holbrook *v.* Allen, 4 Fla. 87.

Georgia.— Fowler *v.* Gate City Nat. Bank, 88 Ga. 29, 13 S. E. 831; Parmelee *v.* Williams, 72 Ga. 42; Davis *v.* Baker, 71 Ga. 33.

Illinois.— Diversy *v.* Moor, 22 Ill. 330, 74 Am. Dec. 157.

Kentucky.— Anderson *v.* Anderson, 4 Dana (Ky.) 352; Trimble *v.* Paducah City Nat. Bank, 12 Ky. L. Rep. 909, 15 S. W. 853 (especially where this is confirmed by the accepter's own act in making payments and furnishing security).

Louisiana.— Shreveport *v.* Gooch, 15 La. Ann. 474; Banks *v.* Brander, 13 La. 274.

Maine.— Sylvester *v.* Staples, 44 Me. 496.

Mississippi.— Hamilton *v.* Catchings, 58 Miss. 92.

New York.— North American Coal Co. *v.* Dyett, 7 Paige (N. Y.) 9.

Pennsylvania.— Ashton *v.* Reeves, 3 Phila. (Pa.) 339, 16 Leg. Int. (Pa.) 37.

Tennessee.— Blair *v.* State Bank, 11 Humphr. (Tenn.) 84.

Texas.— Walters *v.* Galveston, etc., R. Co., 1 Tex. App. Civ. Cas. § 753; Hoffman *v.* Bignall, 1 Tex. App. Civ. Cas. § 703.

Vermont.— Farmers, etc., Bank *v.* Rathbone, 26 Vt. 19, 58 Am. Dec. 200.

England — Yallop *v.* Ebers, 1 B. & Ad. 698, 9 L. J. K. B. O. S. 105, 20 E. C. L. 655 [*overruling* Laxton *v.* Peat, 2 Campb. 185]; Pow-

than the drawer his liability is not dependent on the consideration existing between himself and the drawer.[48] In general, and on the face of the paper, he is liable to the drawer of the bill.[49] Where, however, the acceptance is for the accommodation of the drawer their relation is reversed and the drawer is the prin-

nal *v.* Ferrand, 6 B. & C. 439, 9 D. & R. 603, 5 L. J. K. B. O. S. 176, 30 Rev. Rep. 394, 17 E. C. L. 203; Philpot *v.* Briant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754; Clarke *v.* Devlin, 3 B. & P. 363, 7 Rev. Rep. 793; Heylyn *v.* Adamson, 2 Burr. 669, 2 Ken. K. B. 379; Dingwall *v.* Dunster, Dougl. 235; Smith *v.* Knox, 3 Esp. 46; Fentum *v.* Pocock, 1 Marsh. 16, 5 Taunt. 192, 1 E. C. L. 105; *Ex p.* Yonge, 3 Ves. & B. 31.

Accepted after transfer.— The rights of the holder of a bill of exchange, arising from the drawee's acceptance, are the same whether the acceptance precedes or follows the holder's acquisition of title. Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; Ware *v.* Macon City Bank, 59 Ga. 840; Louisville Bank *v.* Ellery, 34 Barb. (N. Y.) 630; Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458; Iselin *v.* Chemical Nat. Bank, 16 Misc. (N. Y.) 437, 40 N. Y. Suppl. 388.

Accommodation accepter is principal debtor on the bill except as against the party accommodated. Anderson *v.* Anderson, 4 Dana (Ky.) 352; Howard Banking Co. *v.* Welchman, 6 Bosw. (N. Y.) 280; Commercial Bank *v.* Norton, 1 Hill (N. Y.) 501; White *v.* Hopkins, 3 Watts & S. (Pa.) 99, 37 Am. Dec. 542; Chester Nat. Bank *v.* Gunhouse, 17 S. C. 489. So in the case of an exchange of accommodation acceptances. McCandless *v.* Hadden, 9 B. Mon. (Ky.) 186. But in Texas an accommodation accepter may require that the drawer be sued at the first term (Van Alstyne *v.* Sorley, 32 Tex. 518), and in Michigan he is considered the principal debtor only as respects the form of the action (Canadian Bank *v.* Coumbe, 47 Mich. 358, 11 N. W. 196).

The contract is strictly construed as against him. Sylvester *v.* Staples, 44 Me. 496; Decroix *v.* Meyer, 25 Q. B. D. 343 [*affirmed* in [1891] A. C. 520]. He will not be liable beyond the terms of the bill, as for reëxchange (Napier *v.* Schneider, 12 East 420) or for costs recovered against other parties (Dawson *v.* Morgan, 9 B. & C. 618, 7 L. J. K. B. O. S. 301, 17 E. C. L. 278; Stovin *v.* Taylor, 1 N. & M. 250, 28 E. C. L. 531), but he will be liable for attorney's fees provided for in the bill itself (Smith *v.* Muncie Nat. Bank, 29 Ind. 158).

Necessity of presentment to charge accepter see *infra*, X, A, 1, b.

48. *Alabama.*— Wilson *v.* Isbell, 45 Ala. 142.

Colorado.— Law *v.* Brinker, 6 Colo. 555.

Georgia.— Ray *v.* Morgan, 112 Ga. 923, 38 S. E. 335; Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Davis *v.* Baker, 71 Ga. 33.

Indiana.— Marsh *v.* Low, 55 Ind. 271.

Kentucky.— Anderson *v.* Anderson, 4 Dana (Ky.) 352.

Massachusetts.—Central Sav. Bank *v.* Richards, 109 Mass. 413; Byers *v.* Franklin Coal Co., 106 Mass. 131; Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532; Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137.

New York.— New York First Nat. Bank *v.* Morris, 1 Hun (N. Y.) 680; American Boiler Co. *v.* Foutham, 50 N. Y. Suppl. 351; Commercial Bank *v.* Norton, 1 Hill (N. Y.) 501.

United States.— Armstrong *v.* American Exch. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; *In re* Babcock, 3 Story (U. S.) 393, 2 Fed. Cas. No. 696.

England.— *Ex p.* Marshal, 1 Atk. 129, 26 Eng. Reprint 85; *Ex p.* Ryswicke, 2 P. Wms. 89; *Ex p.* Rushforth, 10 Ves. Jr. 409, 8 Rev. Rep. 10; *Ex p.* Matthews, 6 Ves. Jr. 285.

In default of acceptance a consideration is necessary to sustain a promise of payment made by the drawee to the payee without the drawer's knowledge, and the drawee's debt to the drawer, not released and not afterward paid to the drawer, is not sufficient. Clement *v.* Earle, 130 Mass. 585 note.

49. If the drawer takes up the bill on its dishonor he may bring his action against the accepter (Pilkington *v.* Woods, 10 Ind. 432; Urquhart *v.* McIver, 4 Johns. (N. Y.) 103; Smith *v.* Bryan, 33 N. C. 418), although the consideration for the acceptance may not have proceeded directly from the drawer (*Ex p.* Marshal, 1 Atk. 129, 26 Eng. Reprint 85; Simmonds *v.* Parminter, 1 Wils. C. P. 185). He may sue in the name of the payee (Gage *v.* Kendall, 15 Wend. (N. Y.) 640; Davis *v.* McConnell, 3 McLean (U. S.) 391, 7 Fed. Cas. No. 3,640) or in his own name, if the bill is payable to his own order (Cooper *v.* Jones, 79 Ga. 379, 4 S. E. 916). He may take it up from the payee and bring suit in his own name without the payee's indorsement (Coursin *v.* Ledlie, 31 Pa. St. 506; Zebley *v.* Voisin, 7 Pa. St. 527), and where it is returned protested for non-payment he may maintain an action upon it against the accepter, without making title to it under the payee (Kingman *v.* Hotaling, 25 Wend. (N. Y.) 423). He must, however, prove default of the accepter, the return of the bill to him by the payee, and his payment thereof to the latter. Quinn *v.* Hanley, 5 Ill. App. 51; Thompson *v.* Flower, 1 Mart. N. S. (La.) 301. If the name of the payee was only used for the purpose of collection the drawer need not prove that the bill was put in circulation and paid by him on its return, although unindorsed by the payee. Priestly *v.* Bell, 11 La. 126.

cipal debtor;[50] and if the acceptance is for the accommodation of the payee, the accepter will not be liable to him.[51]

2. ADMISSIONS. The acceptance of a bill is an admission of the drawer's signature[52] as well as of his legal capacity to contract[53] and of his authority to act in the manner assumed by him.[54] If the bill is drawn in a partnership name the acceptance admits the existence of the firm.[55] It also admits the legal capacity of the payee[56] and that the accepter has funds of the drawer.[57] It does not, on the

50. *Louisiana.*— Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640; Porter *v.* Sandidge, 32 La. Ann. 449.

New Hampshire.— Child *v.* Eureka Powder Works, 44 N. H. 354.

New York.— Pomeroy *v.* Tanner, 70 N. Y. 547; Griffith *v.* Read, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267.

Pennsylvania.— De Barry *v.* Withers, 44 Pa. St. 356.

Texas.— Parker *v.* Lewis, 39 Tex. 394.

England.— Priddy *v.* Henbrey, 1 B. & C. 674, 8 E. C. L. 284; Rowe *v.* Young, 2 Bligh 391, 4 Eng. Reprint 372; Bishop *v.* Young, 2 B. & P. 78.

51. Darnell *v.* Williams, 2 Stark. 166, 3 E. C. L. 361. And so in general as to any party accommodated. Sparrow *v.* Chisman, 9 B. & C. 241, 7 L. J. K. B. O. S. 173, 4 M. & R. 206, 17 E. C. L. 115.

52. *Illinois.*— Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289; Peoria, etc., R. Co. *v.* Neill, 16 Ill. 269.

Louisiana.—Whitney *v.* Bunnell, 8 La. Ann. 429.

Maryland.— Williams *v.* Drexel, 14 Md. 566.

New York.— Nat. Park Bank *v.* New York Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Salt Springs Bank *v.* Syracuse Sav. Inst., 62 Barb. (N. Y.) 101; Claflin *v.* Griffin, 8 Bosw. (N. Y.) 689; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

Ohio.— Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610.

Pennsylvania.—Levy *v.* U. S. Bank, 1 Binn. (Pa.) 27, 4 Dall. (Pa.) 234, 1 L. ed. 814; U. S. *v.* U. S. Bank, 4 Dall. (Pa.) 235 note, 1 L. ed. 814 note.

United States.— Hoffman *v.* Milwaukee Nat. City Bank, 12 Wall. (U. S.) 181, 20 L. ed. 366; Hortsman *v.* Henshaw, 11 How. (U. S.) 177, 13 L. ed. 653; U. S. Bank *v.* Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. ed. 334.

England.— Phillips *v.* Im Thurn, L. R. 1 C. P. 463, 35 L. J. C. P. 220, 14 L. T. Rep. N. S. 406, 14 Wkly. Rep. 653; Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198; Prince *v.* Brunatte, 1 Bing. N. Cas. 435, 3 Dowl. P. C. 382, 4 L. J. C. P. 90, 1 Scott 342, 27 E. C. L. 709; Porthouse *v.* Parker, 1 Campb. 82, 10 Rev. Rep. 637; Sanderson *v.* Collman, 11 L. J. C. P. 270, 4 M. & G. 209, 4 Scott N. R. 638; Beeman *v.* Duck, 12 L. J. Exch. 198, 11 M. & W. 251; Jenys *v.* Fawler, 2 Str. 946; Wilkinson *v.* Lutwidge, 1 Str. 648; Smith *v.* Chester, 1 T. R. 654, 1 Rev. Rep. 345.

Canada.— McKenzie *v.* Fraser, 2 Rev. Lég. 30; Montreal Bank *v.* De Latre, 5 U. C. Q. B. 362.

Neg. Instr. L. § 112; Bills Exch. Act, § 54.

53. Cowton *v.* Wickersham, 54 Pa. St. 302 (married woman); Smith *v.* Marsack, 6 C. B. 486, 6 D. & L. 363, 12 Jur. 1050, 18 L. J. C. P. 65, 60 E. C. L. 486 (married woman); Halifax *v.* Lyle, 6 D. & L. 424, 3 Exch. 446, 18 L. J. Exch. 197 (corporation); Taylor *v.* Croker, 4 Esp. 187 (infant). See also Neg. Instr. L. § 112; Bills Exch. Act, § 54.

He admits that the nominal drawer was living at the time the bill was drawn. Ashpitel *v.* Bryan, 3 B. & S. 474, 32 L. J. Q. B. 91, 113 E. C. L. 474 [*affirmed* in 5 B. & S. 723, 9 Jur. N. S. 791, 33 L. J. Q. B. 328, 11 L. T. Rep. N. S. 221, 12 Wkly. Rep. 1082, 117 E. C. L. 723].

54. Neg. Instr. L. § 112; Bills Exch. Act, § 54.

As agent.— Jones *v.* Turnour, 4 C. & P. 204, 19 E. C. L. 477; Robinson *v.* Yarrow, 1 Moore C. P. 150, 7 Taunt. 455, 18 Rev. Rep. 537, 2 E. C. L. 445; Montreal Bank *v.* De Latre, 5 U. C. Q. B. 362. But this is not an admission of his beneficial right to the fund against which the order is drawn (Keys *v.* Follett, 41 Ohio St. 535; Keys *v.* Cox, 7 Ohio Dec. (Reprint) 57, 1 Cinc. L. Bul. 92) and the admission of the agent's authority to draw is implied only in favor of a *bona fide* holder (Agnel *v.* Ellis, McGloin (La.) 57).

As executor.— Aspinall *v.* Wake, 10 Bing. 51, 2 L. J. C. P. 227, 3 Moore & S. 423, 25 E. C. L. 33.

55. Bass *v.* Clive, 4 Campb. 78, 4 M. & S. 13.

56. Braithwaite *v.* Gardiner, 8 Q. B. 473, 10 Jur. 591, 15 L. J. Q. B. 187, 55 E. C. L. 473 (bankrupt); Drayton *v.* Dale, 2 B. & C. 293, 3 D. & R. 543, 2 L. J. K. B. O. S. 20, 26 Rev. Rep. 356, 9 E. C. L. 135 (bankrupt); Halifax *v.* Lyle, 6 D. & L. 424, 3 Exch. 446, 18 L. J. Exch. 197 (corporation); Taylor *v.* Croker, 4 Esp. 187 (infant); Jones *v.* Darch, 4 Price 300 (infant). See also Neg. Instr. L. § 112; Bills Exch. Act, § 54.

57. *Illinois.*— Gillilan *v.* Myers, 31 Ill. 525.

Louisiana.— Burthe *v.* Donaldson, 15 La. 382.

New York.— Heurtematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657.

North Carolina.— Jordan *v.* Tarkington, 15 N. C. 357.

Ohio.— Ives *v.* Strickland, 7 Ohio Dec. (Reprint) 668, 4 Cinc. L. Bul. 852.

South Carolina.— Scarborough *v.* Geiger, 1 Bay (S. C.) 368, lapse of six years after acceptance.

other hand, admit the indorser's signature,[58] his authority to indorse,[59] or the genuineness of the body of the bill,[60] although it is an admission of the regularity in form of a foreign indorsement,[61] and, where a bill is drawn in a fictitious name to the order of the drawer, of the genuineness of an indorsement by one who signed as drawer in fact.[62]

E. What Law Governs. The law of the place where the acceptance is given determines its sufficiency in form.[63] This rule of the place intended for acceptance has been applied also to an agreement for the acceptance of a bill to be drawn[64] and to the interpretation of such agreement as a contract at common law or an acceptance.[65] The law of the place of contract also governs a promise by the drawee to pay a bill to be drawn[66] or an authority to draw such bill on the writer.[67] The law of the place of contract determines in general the liability of

If drawn against a specific fund in drawee's hands for collection it admits the drawer's right to the fund. Richardson *v.* Carpenter, 46 N. Y. 660 [*reversing* 2 Sweeny (N. Y.) 360].

58. *Maryland.*— Williams *v.* Drexel, 14 Md. 566.

New York.— Holt *v.* Ross, 54 N. Y. 472, 13 Am. Rep. 615 [*affirming* 59 Barb. (N. Y.) 554]; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287.

Ohio.— Lamson *v.* Pfaff, 1 Handy (Ohio) 449, 12 Ohio Dec. (Reprint) 231.

South Carolina.— Browne *v.* Depau, Harp. (S. C.) 251.

United States.— Hortsman *v.* Henshaw, 11 How. (U. S.) 177, 13 L. ed. 653.

England.— Robarts *v.* Tucker, 16 Q. B. 560, 71 E. C. L. 560 (or its validity); Garland *v.* Jacomb, L. R. 8 Exch. 216, 28 L. T. Rep. N. S. 877, 21 Wkly. Rep. 868; Smith *v.* Chester, 1 T. R. 654, 1 Rev. Rep. 345 (handwriting not admitted); Bills Exch. Act, § 54.

Contra, where the indorsement was by a partner of the accepter's firm in fraud of the firm and without the knowledge of the other partners. Burgess *v.* Northern Bank, 4 Bush (Ky.) 600.

59. Prescott *v.* Flinn, 9 Bing. 19, 1 L. J. C. P. 145, 2 Moore & S. 18, 23 E. C. L. 467; Robinson *v.* Yarrow, 1 Moore C. P. 150, 7 Taunt. 455, 18 Rev. Rep. 537, 2 E. C. L. 445.

60. White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Espy *v.* Cincinnati First Nat. Bank, 18 Wall. (U. S.) 604, 21 L. ed. 947. The drawee cannot recover from the drawer a payment made by him on a check that was raised in amount after it left the drawer's hands (Hall *v.* Fuller, 5 B. & C. 750), but it is otherwise, if the alteration is made by the drawer himself and before acceptance (Ward *v.* Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387) or by the drawer's agent (Young *v.* Grote, 4 Bing. 253, 5 L. J. C. P. O. S. 165, 12 Moore C. P. 484, 29 Rev. Rep. 552, 13 E. C. L. 497).

61. Thus the English accepter of a French bill cannot at suit of the indorser dispute the negotiability of the bill under a blank indorsement made in France and invalid there. *In re* Marseilles Extension R., etc., Co., 30 Ch. D. 598, 55 L. J. Ch. 116.

62. Cooper *v.* Meyer, 10 B. & C. 468, 8 L. J. K. B. O. S. 171, 21 E. C. L. 202; Aspitel *v.* Bryan, 3 B. & S. 474, 32 L. J. Q. B. 91, 113 E. C. L. 474 [*affirmed* in 5 B. & S. 723, 9 Jur. N. S. 791, 33 L. J. Q. B. 328, 11 L. T. Rep. N. S. 221, 12 Wkly. Rep. 1082, 117 E. C. L. 723].

63. This is true as to a parol acceptance. Mason *v.* Dousay, 35 Ill. 424, 85 Am. Dec. 368; Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245.

64. A parol agreement to accept a bill to be drawn is valid by the law of the place of acceptance, where the bill was to be drawn and payable, as against the law of the place where the promise was made. Hall *v.* Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. ed. 956. But a similar agreement was enforced as valid by the law where it was made as against the law of the place indicated for acceptance and payment. Scott *v.* Pilkington, 15 Abb. Pr. (N. Y.) 280; Hubbard *v.* Yorkville Exch. Bank, 72 Fed. 234, 38 U. S. App. 289, 18 C. C. A. 525 [*affirming* 62 Fed. 112, 26 U. S. App. 133, 10 C. C. A. 295]; Garrettson *v.* North Atchison Bank, 47 Fed. 867.

65. Barney *v.* Newcomb, 9 Cush. (Mass.) 46; Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Bissell *v.* Lewis, 4 Mich. 450. But the place of such agreement made by the drawee's agent will control the place named for acceptance to support the agreement, and it was held as to validity of acceptance and liability for damages to be governed by the laws of that place and not by the laws of the drawee's place named for acceptance and payment. Russell *v.* Wiggin, 2 Story (U. S.) 213, 21 Fed. Cas. No. 12,165, 5 Law Rep. 533.

66. A parol agreement to pay a bill to be drawn, if made in a state where it is not valid as an acceptance, may be enforced as a valid contract in an action for money loaned in the place contemplated for acceptance and payment. Rutland Bank *v.* Woodruff, 34 Vt. 89.

67. The place from which the authority was mailed controls the place where the draft was drawn, to determine its effect as an acceptance. Bissell *v.* Lewis, 4 Mich. 450. On the contrary the place where the draft was drawn was held to control, to support its validity as a contract, in Anderson County Deposit Bank *v.* Turner-Looker Co., 3 Ohio S. & C. Pl. Dec. 581, 2 Ohio N. P. 73.

the accepter,[68] but if a place of payment is expressly designated the law of that place will govern,[69] and this is true if the drawee's address is indicated on the bill.[70]

VI. TRANSFER.

A. Parties — 1. By Whom Made — a. In General. The lawful possession of a negotiable note confers on the holder authority to transfer all right and title to the instrument,[71] and it is a general rule that the maker cannot question the authority or capacity of the payee to make the transfer.[72] Forgery by a stranger to the paper passes no title,[73] and no valid transfer can be made by a wrong person bearing the same name as the payee or indorsee[74] or by the person intended if the paper is payable to an actual person bearing a different name.[75]

68. As to *bona fide* character of holder and availability of defense (Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482); as to damages (Roe *v.* Jerome, 18 Conn. 138); as to validity of consideration and admissibility of defense (Kelly *v.* Smith, 1 Metc. (Ky.) 313; Worcester Bank *v.* Wells, 8 Metc. (Mass.) 107; Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Boyce *v.* Edwards, 4 Pet. (U. S.) 111, 7 L. ed. 799); and as to the formal sufficiency of the indorsements under which the holder claims title (*In re* Marseilles Extension R., etc., Co., 30 Ch. D. 598, 55 L. J. Ch. 116).

69. *Massachusetts.*— Barney *v.* Newcomb, 9 Cush. (Mass.) 46.

Mississippi.— Frazier *v.* Warfield, 9 Sm. & M. (Miss.) 220.

New Jersey.— Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239.

New York.— Bright *v.* Judson, 47 Barb. (N. Y.) 29.

United States.— Bainbridge *v.* Wilcocks, Baldw. (U. S.) 536, 2 Fed. Cas. No. 755.

England.— Cooper *v.* Waldegrave, 2 Beav. 282; Don *v.* Lippmann, 5 Cl. & F. 1, 7 Eng. Reprint 303.

70. Lizardi *v.* Cohen, 3 Gill (Md.) 430 (recourse against drawer); Weller *v.* Goslin, 32 Misc. (N. Y.) 36, 65 N. Y. Suppl. 232 (presentment for payment).

71. Andrews *v.* Bond, 16 Barb. (N. Y.) 633.

The holder of the legal title alone can transfer where the legal title is in one and the equitable title in another. Evans *v.* Cramlington, 1 Carth. 5, 2 Vent. 307.

An assignment of a note, to pass title, must be made by the payee. Martin *v.* Hayes, 44 N. C. 423.

In the case of an infant owner a transfer by him may avail to pass the title without rendering him liable as an indorser. Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101; Taylor *v.* Croker, 4 Esp. 187; Smith *v.* Johnson, 3 H. & N. 222, 27 L. J. Exch. 263.

The Negotiable Instruments Law, section 41, provides that "the indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon." And see Bills Exch. Act, § 22.

72. As a bankrupt (Drayton *v.* Dale, 2 B. & C. 293, 3 D. & R. 534, 26 Rev. Rep. 356, 9 E. C. L. 135; Pitt *v.* Chappelow, 10 L. J. Exch. 487, 8 M. & W. 616), a corporation (Ehrman *v.* Union Cent. L. Ins. Co., 35 Ohio St. 324; Halifax *v.* Lyle, 6 D. & L. 424, 3 Exch. 446), an infant (Frazier *v.* Massey, 14 Ind. 382). And see *supra*, II, C.

A transfer may be subject to a statutory penalty, as in the case of an unlicensed broker, and yet be valid as a transfer of the paper. Lindsey *v.* Rutherford, 17 B. Mon. (Ky.) 245.

73. *Illinois.*— Beattie *v.* National Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, 43 L. R. A. 654.

Indiana.— Indiana Nat. Bank *v.* Holtsclaw, 98 Ind. 85.

Louisiana.— Foltier *v.* Schroder, 19 La. Ann. 17, 92 Am. Dec. 521.

Maryland.— Key *v.* Knott, 9 Gill & J. (Md.) 342.

Massachusetts.— Carpenter *v.* Northborough Nat. Bank, 123 Mass. 66.

Nebraska.— Rogers *v.* Ware, 2 Nebr. 29.

A forged indorsement cannot be ratified by the person whose name is forged, as the act is criminal and against public policy. Shisler *v.* Vandike, 92 Pa. St. 447, 37 Am. Rep. 702.

Estoppel of indorser.— An indorser is not estopped to plead that his indorsement is a forgery by the fact that he has paid other notes with his forged indorsement (Cohen *v.* Teller, 93 Pa. St. 123), but he may be estopped by his conduct from setting up the defense against a *bona fide* holder (Woodruff *v.* Munroe, 33 Md. 146).

74. Beattie *v.* National Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, 43 L. R. A. 654; Sioux Valley State Bank *v.* Drovers' Nat. Bank, 58 Ill. App. 396 (where the indorsement was made in fraud and received in good faith and for value); Foster *v.* Shattuck, 2 N. H. 446; Mead *v.* Young, 4 T. R. 28, 2 Rev. Rep. 314.

75. Bolles *v.* Stearns, 11 Cush. (Mass.) 320.

Business name.— One who, while carrying on business on his own account in the name of a company, receives in such business a note, payable to the order of the company, may transfer the note by indorsing it in his own name. Bryant *v.* Eastman, 7 Cush. (Mass.) 111.

While the signature by which the paper is transferred should be the same name under which it is made payable, a substantial compliance with this rule is sufficient.[76]

b. Agents — (i) *In General.* Commercial paper may be transferred by an agent of the owner,[77] but a transfer by an unauthorized agent is ineffectual as against the owner.[78]

(ii) *How Authority Conferred or Revoked.* Authority to an agent to transfer may be conferred by parol,[79] it may be implied,[80] and it may be conferred upon the agent after the transfer by ratification of his principal.[81] As in other cases his authority expires in general at the death of the principal,[82]

Maiden name.— A *feme covert* may indorse in her maiden name a note which was left her before marriage. Miller *v.* Delamater, 12 Wend. (N. Y.) 433.

76. Hunt *v.* Stewart, 7 Ala. 525, holding that an indorsement by Irvine P. Hunt of a note payable to Irvine Hunt will be regarded as an indorsement by the payee.

The Negotiable Instruments Law, section 73, provides that "where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature." So Bills Exch. Act, § 32.

77. Northampton Bank *v.* Pepoon, 11 Mass. 288; Griffin *v.* Nokes, Hempst. (U. S.) 72, 11 Fed. Cas. No. 5,817*a*, which latter holds that a due-bill not payable to order or bearer may be assigned by an agent.

Who may be agent.— The payee may authorize the maker to indorse for him (Turnbull *v.* Trout, 1 Hall (N. Y.) 336) or may authorize his indorsee to indorse it to himself (Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555).

78. Wilcox *v.* Turner, 46 Ga. 218; Thorpe *v.* Dickey, 51 Iowa 676, 2 N. W. 581; Gilbert *v.* Sharp, 2 Lans. (N. Y.) 412; Combs *v.* Hodge, 21 How. (U. S.) 397, 16 L. ed. 115 (especially where the negotiability of the instrument is expressly restricted on its face).

If the agent has authority which is limited to a different indorsement, of which the indorsee knows nothing, the unauthorized indorsement will not bind the principal. Citizens' Nat. Bank *v.* Importers', etc., Nat. Bank, 1 N. Y. Suppl. 664, 17 N. Y. St. 430.

Authority of attorney to transfer paper see Attorney and Client, 4 Cyc. 945, note 81.

79. Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17; Cooper *v.* Bailey, 52 Me. 230; Turnbull *v.* Trout, 1 Hall (N. Y.) 336.

80. Willison *v.* Smith, 52 Mo. App. 133 (holding that authority to collect given to a collecting agent who resides far from the place of payment is an implied authority to indorse to a resident of the place for collection); Mars *v.* Mars, 27 S. C. 132, 3 S. E. 60 (holding that delivery by one payee to his co-payee with authority to apply the proceeds implies an authority to indorse).

Authority not implied.— An authority to indorse checks for deposit to principal's credit is not an authority to indorse and collect (Grafton, etc., Mfg. Co. *v.* Redelsheimer, (Wash. 1902) 68 Pac. 879), and such authority is not implied from leaving a note in an attorney's hands for collection (Quigley *v.* Mexican Southern Bank, 80 Mo. 289, 50 Am. Rep. 503) or from an authority to the maker to leave the note with payee's son, or from its being left in his possession by the payee (Ames *v.* Drew, 31 N. H. 475).

81. McCormick *v.* Bittinger, 13 Colo. App. 170, 57 Pac. 736; Lysle *v.* Beals, 27 La. Ann. 274; Coykendall *v.* Constable, 99 N. Y. 309, 1 N. E. 884 [*reversing* 19 N. Y. Wkly. Dig. 169]; Commercial Bank *v.* Warren, 15 N. Y. 577; Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779.

The maker cannot deny the authority of the indorsement by the payee's agent as against a *bona fide* holder. New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

What amounts to ratification.—It is a ratification to knowingly receive the proceeds of the transfer (Buffalo Third Nat. Bank *v.* Butler Colliery Co., 59 Hun (N. Y.) 627, 14 N. Y. Suppl. 21, 37 N. Y. St. 798) and not repudiate the act, tender back the consideration, and demand the return of the note (Mayer *v.* Old, 57 Mo. App. 639) or to maintain a suit on the note in the name of the indorsee (Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753), and ratification may be shown by recognition of the indorsee as owner (Thorn *v.* Bell, Lalor (N. Y.) 430); but mere acquiescence in the sale, without knowledge of the indorsement, is not a ratification of the latter (Sherrill *v.* Weisiger Clothing Co., 114 N. C. 436, 19 S. E. 365).

Ratification operates as an indorsement only from the time of the ratification (Clark *v.* Peabody, 22 Me. 500; Gilbert *v.* Sharp, 2 Lans. (N. Y.) 412), even where it is made by indorsing on the note a memorandum to the effect that the note "was indorsed by Davidson Webster by my consent, who at the time was my agent" (Clark *v.* Peabody, 22 Me. 500).

82. East Indian Co. *v.* Prince, R. & M. 407, 21 E. C. L. 781. And see, generally, Principal and Agent.

In South Carolina, however, a transfer after the principal's death is permitted by statute in favor of a *bona fide* holder, if the agent was authorized to indorse in his principal's lifetime. S. C. Rev. Stat. (1893), § 1406.

As to delivery by payee's agent under indorsement by payee made before the latter's

although a transfer has been sustained after a principal has become mentally incompetent.[83]

(III) *Form of Transfer.* The agent's authority need not be expressed in the transfer,[84] which may be sufficiently executed by the agent's signature in his own name or in that of his principal.[85]

c. Fictitious Payees. If the paper is payable to a fictitious payee this is the same thing in law as if payable to bearer[86] and it may be transferred in such fictitious name.[87]

d. Married Women.[88] At common law a married woman could make no

death see Brennan *v.* Merchants', etc., Nat. Bank, 62 Mich. 343, 28 N. W. 881.

83. As against the husband's administrator. Mills *v.* American Express Co., 98 Mich. 154, 57 N. W. 97.

84. Bettis *v.* Bristol, 56 Iowa 41, 8 N. W. 808.

85. Indorsement in agent's official name is sufficient to transfer a bill or note payable to the principal.

Idaho.— Jones *v.* Stoddart, (Ida. 1902) 67 Pac. 650.

Indiana.— Cole *v.* Merchants' Bank, 60 Ind. 350.

Maine.— Russell *v.* Folsom, 72 Me. 436.

New Hampshire.— Nicholas *v.* Oliver, 36 N. H. 218.

New York.— Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Elwell *v.* Dodge, 33 Barb. (N. Y.) 336; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473. But the fact that a person who indorses as "treasurer" of the corporation payee is the secretary and general financial manager of their business is not sufficient to show that such transfer is valid. Knight *v.* Lang, 4 E. D. Smith (N. Y.) 381, 2 Abb. Pr. (N. Y.) 227.

United States.— Chillicothe Branch Ohio Bank *v.* Fox, 3 Blatchf. (U. S.) 431, 5 Fed. Cas. No. 2,683.

Indorsement in principal's name followed by agent's name and title is sufficient (Hunt *v.* Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964; Aiken *v.* Marine Bank, 16 Wis. 679), although the paper is payable to the agent or officer by his official title only (Mann *v.* Springfield Second Nat. Bank, 34 Kan. 746, 10 Pac. 150; Farmington Sav. Bank *v.* Fall, 71 Me. 49).

Indorsement by cashier of paper payable to a bank is sufficient. Collins *v.* Johnson, 16 Ga. 458; State Bank *v.* Ohio Bank, 29 N. Y. 619; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Robb *v.* Ross County Bank, 41 Barb. (N. Y.) 586; Maxwell *v.* Planters' Bank, 10 Humphr. (Tenn.) 507; Houghton *v.* Elkhorn First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107.

Adding name of bank to indorsement of cashier.— Where a bank cashier is authorized to indorse paper on behalf of the bank, and he writes his name as cashier on the back of paper, the holder is authorized to write the name of the bank over the signature of the cashier, with necessary words to make the indorsement the contract of the bank. Genesee Bank *v.* Patchin Bank, 13 N. Y. 309.

Payee named by agent's official title and so indorsed is the transfer of the principal. University Bank *v.* Hamilton, 78 Ga. 312; Falk *v.* Moebs, 127 U. S. 597, 8 S. Ct. 1319, 32 L. ed. 266. But as to individual liability in such case see Hately *v.* Pike, 162 Ill. 241, 44 N. E. 411, 53 Am. St. Rep. 304.

The Negotiable Instruments Law, section 72, provides that "where an instrument is drawn or indorsed to a person as 'cashier' or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer."

86. See *supra*, I, C, 1, c, (II), (B), (6).

87. As to parties with notice of the payee's fictitious character (Farnsworth *v.* Drake, 11 Ind. 101; McCall *v.* Corning, 3 La. Ann. 409, 48 Am. Dec. 454; Forbes *v.* Espy, 21 Ohio St. 474; Gibson *v.* Hunter, 6 Bro. P. C. 255, 2 H. Bl. 187, 288, 2 Eng. Reprint 1064; Gibson *v.* Minet, 2 Bro. P. C. 48, 1 H. Bl. 569, 3 T. R. 481, 1 Rev. Rep. 754, 1 Eng. Reprint 784; Thicknesse *v.* Bromilow, 2 Cr. & J. 425; Stone *v.* Freeland, 1 H. Bl. 316 note; Collis *v.* Emett, 1 H. Bl. 313; Hunter *v.* Jeffery, Peake Add. Cas. 146; Vere *v.* Lewis, 3 T. R. 182; Tatlock *v.* Harris, 3 T. R. 174), but not otherwise (New York City Fifth Nat. Bank *v.* Central Nat. Bank, 152 N. Y. 636, 46 N. E. 1146 [*affirming* 82 Hun (N. Y.) 559, 31 N. Y. Suppl. 541, 64 N. Y. St. 176]; Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; Armstrong *v.* Pomeroy Nat. Bank, 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. Rep. 655, 6 L. R. A. 625).

Where a real person is fraudulently personated in obtaining and indorsing the paper, the title will pass by his indorsement to a *bona fide* holder (Phillips *v.* Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 37 Am. St. Rep. 596, 23 L. R. A. 584), especially where the fraud was perpetrated on the real principal intended and the check made by his direction to the drawee in a telegram addressed to the person committing the fraud (Burrows *v.* Western Union Tel. Co., (Minn. 1902) 90 N. W. 1111), and the person to whom such note was given may assume such name and indorse the note in that name (Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501; Blodgett *v.* Jackson, 40 N. H. 21).

88. See, generally, HUSBAND AND WIFE.

transfer of a bill or note that was payable to her,[89] and such paper could not be transferred after her death by her surviving husband.[90]

e. Persons in Representative Capacity. Commercial paper belonging to the estate of a deceased owner is properly transferred by his executor or administrator[91] and paper belonging to a minor or other person under guardianship may be transferred by the guardian.[92] The representative capacity of an executor or the like is not in general a necessary part of his signature.[93] It is considered as a description of the person only and does not affect the sufficiency of the transfer.[94]

f. Public Officers. Negotiable instruments belonging to the state may be transferred by a public officer, but the liability of the state and the authority of the agent will not be enlarged by implication or estoppel.[95] In some states provision is made for the transfer of a bill or note by a sheriff acting under the authority of a common-law execution.[96]

g. Several Payees. Where paper is payable to two or more persons jointly all should join in the transfer, except in the case of partners,[97] although some

89. Tillinghast *v.* Holbrook, 7 R. I. 230; Barlow *v.* Bishop, 1 East 432, 3 Esp. 266. *Compare* Moreau *v.* Branson, 37 Ind. 195, holding that a married woman may make a good transfer, although creating no liability as indorser.

90. Craige *v.* Tingle, 63 Ga. 274.

91. Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867 (transfer by delivery under indorsement of deceased payee); Dwight *v.* Newell, 15 Ill. 333; Wade *v.* Wade, 36 Tex. 529; Watkins *v.* Maule, 2 Jac. & W. 237 (transfer by executor of one deceased joint payee to the survivor). And see, generally, EXECUTORS AND ADMINISTRATORS.

A foreign executor may transfer a bill or note payable to his testator.

Iowa.— Campbell *v.* Brown, 64 Iowa 425, 20 N. W. 745, 52 Am. Rep. 446.

Massachusetts.— Rand *v.* Hubbard, 4 Metc. (Mass.) 252.

Mississippi.— Owen *v.* Moody, 29 Miss. 79.

New York.— Petersen *v.* Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298.

United States.—Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718; Harper *v.* Butler, 2 Pet. (U. S.) 239, 7 L. ed. 410.

Contra, Stearns *v.* Burnham, 5 Me. 261, 17 Am. Dec. 228; Thompson *v.* Wilson, 2 N. H. 291; Dial *v.* Gary, 14 S. C. 573, 37 Am. Rep. 737.

A specific legatee who has been appointed executor but not qualified cannot transfer the bill. Stagg *v.* Linnenfelser, 59 Mo. 336.

The sole heir and next of kin cannot make a good transfer, as against the payee's administrator. Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80.

A residuary legatee, who was appointed executor, may transfer a note payable "to the order of J. V. Mehling estate." Peltier *v.* Babillion, 45 Mich. 384, 8 N. W. 99.

92. The transfer by a guardian is not effective unless the ward receives the benefit of the consideration (Hendrix *v.* Richards, 57 Nebr. 794, 78 N. W. 378), but if he has taken the note in his own name he may transfer it in the same way (Brewster *v.* Seeger, 173 Mass. 281, 53 N. E. 814; Jenkins *v.* Sherman, 77 Miss. 884, 28 So. 726).

Necessity of court order.— He requires the authority or direction of the probate court (Hendrix *v.* Richards, 57 Nebr. 794, 78 N. W. 378), but his transfer without such authorization passes title to a purchaser taking the note in good faith, before maturity, and in the ordinary course of business (McKinney *v.* Beeson, 14 La. 254).

93. Walter *v.* Kirk, 14 Ill. 55; Dorr *v.* Davis, 76 Me. 301; Bay *v.* Gunn, 1 Den. (N. Y.) 108 (where a note was made payable to "E Moore, assignee of J. K. Van Ness," and it was held that an indorsement by the payee, of his name, without the addition was sufficient and passed the whole interest of the payee); De Cordova *v.* Atchison, 13 Tex. 372.

The Negotiable Instruments Law, section 74, provides that "where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability."

94. Speelman *v.* Culbertson, 15 Ind. 441 ("administrator"); Davis *v.* Peck, 54 Barb. (N. Y.) 425 ("as receiver"); Bowne *v.* Douglass, 38 Barb. (N. Y.) 312 ("assignee"); Lipscomb *v.* Ward, 2 Tex. 277 ("curatrix"). See also *supra*, I, C, 1, c, (II), (B), (5), note 7.

95. Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, holding that no authority to receive or indorse notes will be implied against the state from an authority vested in the superintendent of the penitentiary to receive moneys due to the state for hire of convicts.

96. Earhart *v.* Gant, 32 Iowa 481. And see, generally, EXECUTIONS.

97. *Indiana.*— Fordyce *v.* Nelson, 91 Ind. 447, where a transfer by one to the other of two joint payees was held to be an equitable assignment.

Kentucky.— Mardis *v.* Tyler, 10 B. Mon. (Ky.) 376.

Massachusetts.— Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306.

Mississippi.—Bennett *v.* McGaughy, 3 How. (Miss.) 192, 34 Am. Dec. 77.

cases have held that a transfer by one of several payees is sufficient to pass the title;[98] and if one of several payees is also one of the makers of a note[99] or is only a nominal party[1] a transfer made without him may be supported by parol evidence. In like manner one of several payees may transfer his interest to the others and he may make a further transfer.[2] If one of two joint payees dies the paper should be transferred by the survivor.[3]

Nevada.— Haydon *v.* Nicoletti, 18 Nev. 290, 3 Pac. 473, holding the indorsement by one of two payees to be an assignment only and to transfer the paper subject to existing defenses.

New Hampshire.— Foster *v.* Hill, 36 N. H. 526.

New Jersey.— Wood *v.* Wood, 16 N. J. L. 428.

New York.— Saxton *v.* Dodge, 57 Barb. (N. Y.) 84; De Forrest *v.* Frary, 6 Cow. (N. Y.) 151.

South Carolina.— See Mars *v.* Mars, 27 S. C. 132, 3 S. E. 60.

Texas.—Roseborough *v.* Gorman, 6 Tex. 313.

England.— Carvick *v.* Vickery [*cited* in note to Whitcomb *v.* Whiting, Dougl. 628, 630].

See also Neg. Instr. L. § 71; Bills Exch. Act, § 32.

The indorsement of both to one of them transfers the title as if to a stranger. Russell *v.* Swan, 16 Mass. 314.

A release by the others to the indorser where only one indorses does not show the entire legal interest in the indorsee. Bennett *v.* McGaughy, 3 How. (Miss.) 192, 34 Am. Dec. 77.

Authority of one to indorse name of other. — One of two joint payees has no authority to indorse the name of his co-payee (Ryhiner *v.* Feickert, 92 Ill. 305, 34 Am. Rep. 130; Wood *v.* Wood, 16 N. J. L. 428), and where one of several joint payees of a non-negotiable note transfers it without authority of the others by his indorsement and the indorsee collects it from the maker, he must account to the other payees for their share (Heard *v.* Kennedy, (Ga. 1902) 42 S. E. 509). See also Lowell *v.* Reding, 9 Me. 85, 23 Am. Dec. 545, holding that where one payee authorized the other to sell the note and after its sale refused to indorse it when called upon for that purpose, the purchaser could not maintain an action on the note as indorsee under an indorsement by the seller in both names, the authority of the seller being revoked by the refusal.

Authority of one to bind other by sale.— One joint payee cannot bind the other by sale without indorsement and, under an authority to collect the note when due, he is not authorized to sell it. Ryhiner *v.* Feickert, 92 Ill. 305, 34 Am. Rep. 130.

Where a note is indorsed to two persons, neither can transfer more than a one-half interest. Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Baggett *v.* Rightor, 4 Rob. (La.) 18; Barrow *v.* Norwood, 3 La. 437. So where the note is payable to one or the other in the alternative. Musselman *v.* Oakes, 19 Ill. 81, 68 Am. Dec. 583; Quinby *v.* Merritt, 11 Humphr. (Tenn.) 439.

Manner of indorsement.—Two joint payees, who are not partners, may indorse as "A and B." Cooper *v.* Bailey, 52 Me. 230; Hungerford *v.* Perkins, 8 Wis. 267.

Presumption from indorsement by one.— It has been held that if a note is made to two persons by name it will be presumed from the indorsement of one in his own name only that the payees constitute a firm, of which the indorser is a member. McConeghy *v.* Kirk, 68 Pa. St. 200, indorsement supported by a further formal indorsement.

As to transfer of paper by partners see PARTNERSHIP.

98. Snelling *v.* Boyd, 5 T. B. Mon. (Ky.) 172; French *v.* Howard, 3 Bibb (Ky.) 301 (holding that a transfer by one of several assignees in bankruptcy of a note made to them in the business of the estate will vest the title in the indorsee); Cooper *v.* Bailey, 52 Me. 230 (where he has authority from the other to indorse it for him); Bruce *v.* Bonney, 12 Gray (Mass.) 107, 71 Am. Dec. 739 (where he has possession of the note); Warren First Nat. Bank *v.* Fowler, 36 Ohio St. 524, 38 Am. Rep. 610 (holding that either payee can transfer it, if it is executed by two makers in the singular number, "I promise," and made payable "to the order of myself").

Personal representatives.— An assignment of a promissory note payable to the testator may be made by one of several co-executors (Dwight *v.* Newell, 15 Ill. 333; Smith *v.* Whiting, 9 Mass. 334) and where two administrators take a note for a debt due to the estate one alone may transfer it (Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881). But see Johnson *v.* Mangum, 65 N. C. 146, where a note was made to several executors, and the indorsement of one was held to pass no interest in the note.

99. Main *v.* Hilton, 54 Cal. 110.

1. Pease *v.* Dwight, 6 How. (U. S.) 190, 12 L. ed. 399.

2. Fordyce *v.* Nelson, 91 Ind. 447; Goddard *v.* Lyman, 14 Pick. (Mass.) 268; Logue *v.* Smith, Wright (Ohio) 10. But the first indorser will not be liable in such case as indorser to his indorsee and co-payee. Foster *v* Hill, 36 N. H. 526.

One may transfer to third party.— It is sufficient if one of two joint payees transfers his interest to a third party, and he transfers such interest to the other joint payee. McLeod *v.* Snyder, 110 Mo. 298, 19 S. W. 494.

3. Draper *v.* Jackson, 16 Mass. 480; Allen *v.* Tate, 58 Miss. 585; Sanford *v.* Sanford, 45 N. Y. 723 (husband and wife).

2. To Whom Made — a. In General. Commercial paper may be transferred to several persons jointly, each taking an equal share.[4] It may be transferred by the indorsement of the firm to one of its own members[5] or by a corporation to one of its own officers.[6] On the other hand commercial paper cannot be transferred to a deceased person by name, with intention to pass title to his representative,[7] and a valid transfer cannot be made by an executor to himself.[8]

b. Previous Holder or Party to Paper. A bill may be transferred to the drawer,[9] to the payee,[10] or to the drawee before he has accepted the bill;[11] but where an instrument is negotiated back to a prior party, who reissues and further negotiates it, he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable,[12] and one who derives title from him with notice of this fact cannot hold such intermediate indorsers liable.[13] If, however, it is transferred to one who had previously transferred it without recourse he may hold the paper as against subsequent indorsers.[14] A bill may be transferred before maturity to the accepter and reissued by him, and the transfer to him will not extinguish or discharge the bill;[15] but as a general rule the transfer

4. Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296.

5. Low *v.* Warden, 77 Cal. 94, 19 Pac. 235; Russell *v.* Swan, 16 Mass. 314; Kirby *v.* Cogswell, 1 Cai. (N. Y.) 505 (and such holder may sue the maker). See, generally, PARTNERSHIP.

Cannot sue subsequent indorser.— Being liable with his firm as prior indorser, the holder in such case cannot maintain an action on the note against a subsequent indorser. Decreet *v.* Burt, 7 Cush. (Mass.) 551. A different rule applies, however, where the partner indorses to his firm and such indorsement transfers the whole title with the same effect as if he were not a member. Allen *v.* Mason, 17 Ill. App. 318.

Transfer by combined corporation.—A company formed by the illegal union of other companies may transfer its notes to the component companies upon its dissolution by order of court. Farnsworth *v.* Drake, 11 Ind. 101.

6. Blake *v.* Ray, 23 Ky. L. Rep. 84, 62 S. W. 531.

7. Valentine *v.* Holloman, 63 N. C. 475. *Compare* Murray *v.* East India Co., 5 B. & Ald. 204, 24 Rev. Rep. 325, 7 E. C. L. 118, holding that if an agent indorses a bill to a principal residing abroad, in ignorance of his death, the latter's administrator may sue on it.

8. Shelton *v.* Carpenter, 60 Ala. 201.

9. Callow *v.* Lawrence, 3 Moore & S. 95.

10. Scott *v.* Kokomo First Nat. Bank, 71 Ind. 445; West Boston Sav. Bank *v.* Thompson, 124 Mass. 506; Calhoun *v.* Albin, 48 Mo. 304; Adrian *v.* McCaskill, 103 N. C. 182, 9 S. E. 284, 3 L. R. A. 759, 14 Am. St. Rep. 788.

11. Desha *v.* Stewart, 6 Ala. 852; Fellows *v.* Harris, 12 Sm. & M. (Miss.) 462 (holding that as indorsee he may recover against an accommodation drawer); Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567; Attenborough *v.* Mackenzie, 25 L. J. Exch. 244, 36 Eng. L. & Eq. 562.

If the drawee is itself designated as the place of payment of the bill, a transfer to such drawee is *prima facie* to it as agent of the indorser, if he is a depositor having an account with the drawee. Boyd *v.* Emmerson, 2 A. & E. 184, 4 L. J. K. B. 43, 4 N. & M 99, 29 E. C. L. 102.

12. *Kentucky.*—Miller *v.* Henshaw, 4 Dana (Ky.) 325.

Massachusetts.— Decreet *v.* Beech, 7 Cush. (Mass.) 551.

New York.— Moore *v.* Cross, 19 N. Y. 227, 75 Am. Dec. 326.

North Carolina.— Adrian *v.* McCaskill, 103 N. C. 182, 9 S. E. 284, 14 Am. St. Rep. 788, 3 L. R. A. 759.

Wisconsin.— Cady *v.* Shepard, 12 Wis. 639.

United States.— Howe Mach. Co. *v.* Hadden, 8 Biss. (U. S.) 208, 12 Fed. Cas. No. 6,785, 18 Alb. L. J. 294, 6 Centr. L. J. 446, 24 Int. Rev. Rec. 236, 2 Month. Jur. 136, 25 Pittsb. Leg. J. 204, 6 Reporter 136.

England.— Britten *v.* Webb, 2 B. & C. 483, 3 D. & R. 650, 2 L. J. K. B. O. S. 118, 9 E. C. L. 214; Bishop *v.* Hayward, 4 T. R. 470.

Neg. Instr. L. § 80; Bills Exch. Act, § 37.

If the holder is not liable to the second indorsers, although he has previously indorsed the paper himself, he may bring suit against them. Morris *v.* Walker, 15 Q. B. 589, 69 E. C. L. 589; Wilders *v.* Stevens, 15 L. J. Exch. 108, 15 M. & W. 208; Williams *v.* Clarke, 16 M. & W. 834. See also Hubbard *v.* Matthews, 54 N. Y. 43, 13 Am. Rep. 562. Thus if the holder of a note indorses it without recourse, and the indorsee indorses back to him absolutely and for value he may sue such indorsee. Bishop *v.* Hayward, 4 T. R. 470.

13. Adrian *v.* McCaskill, 103 N. C. 182, 9 S. E. 284, 14 Am. St. Rep. 788, 3 L. R. A. 759.

14. Scott *v.* Parker, 5 N. Y. Suppl. 753, 25 N. Y. St. 865; French *v.* Barney, 23 N. C. 219; Cady *v.* Shepard, 12 Wis. 639.

15. Rogers *v.* Gallagher, 49 Ill. 182, 95 Am. Dec. 583; Attenborough *v.* Mackenzie, 25 L. J. Exch. 244, 36 Eng. L. & Eq. 562. But see Beebe *v.* Real Estate Bank, 4 Ark. 546.

of a promissory note to the maker thereof has the effect of extinguishing the note.[16]

B. Time of Transfer — 1. In General — a. Before Maturity. An indorsement may be written on a blank paper even before the bill is drawn,[17] or a bill may be postdated and transferred by indorsement before the day of its date.[18] In like manner a bill may be transferred after presentment for acceptance and dishonor before maturity[19] or after it has been prematurely paid, in which case it will remain as a valid security in the hands of a *bona fide* purchaser before maturity for value.[20]

b. After Maturity — (I) *In General.* Bills and notes may be transferred after their maturity by indorsement or otherwise.[21] Indorsement after maturity does not change the character of the original contract as to its negotiability or effect,[22] and while the indorsee takes all the rights of his indorser he is confined

16. Long *v.* Cynthiana Bank, 1 Litt. (Ky.) 290, 13 Am. Dec. 234. But if it was indorsed for the maker's accommodation and returned to him to negotiate he may reissue it as intended (Owens *v.* Miller, 29 Md. 144; Planters' Bank *v.* White, 5 Humphr. (Tenn.) 441), and the maker of a note may acquire an equitable interest and may use it in his defense to an action at law on the note (Warren *v.* Emerson, 1 Curt. (U. S.) 239, 29 Fed. Cas. No. 17,195).

A joint note is extinguished by an assignment to one of the makers on payment by him, leaving him a right of action against the others for contribution. Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874 [*affirming* 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125].

17. Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336; Schultz *v.* Astley, 2 Bing. N. Cas. 544, 29 E. C. L. 655, 7 C. & P. 99, 32 E. C. L. 519, 1 Hodges 542, 5 L. J. C. P. 130; Russel *v.* Langstaffe, Dougl. 514; Lickbarrow *v.* Mason, 6 East 21 note, 1 H. Bl. 357, 2 T. R. 63, 1 Rev. Rep. 425; Collis *v.* Emett, 1 H. Bl. 313.

18. Brewster *v.* McCardell, 8 Wend. (N. Y.) 478; Pasmore *v.* North, 13 East 517, 12 Rev. Rep. 420.

Admissibility of parol evidence to show time of indorsement see *infra*, XIV, E [8 Cyc.].

Presumptions relating to time of indorsement see *infra*, XIV, E [8 Cyc.].

19. Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61; Dunn *v.* O'Keefe, 5 M. & S. 282, 17 Rev. Rep. 326 [*affirming* 1 Marsh. 613, 6 Taunt. 305, 17 Rev. Rep. 323, 1 E. C. L. 626].

20. Newell *v.* Gregg, 51 Barb. (N. Y.) 263; Burbridge *v.* Manners, 3 Campb. 193, 13 Rev. Rep. 786 (unless the payment is noted on the instrument itself).

21. *Connecticut.*— French *v.* Jarvis, 29 Conn. 347.

Maryland.— McSherry *v.* Brooks, 46 Md. 103; Long *v.* Crawford, 18 Md. 220.

Massachusetts.— Baxter *v.* Little, 6 Metc. (Mass.) 7, 39 Am. Dec. 707.

Missouri.— Powers *v.* Nelson, 19 Mo. 190.

New York.— James *v.* Chalmers, 6 N. Y. 209; Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199]; Havens *v.* Huntington, 1 Cow. (N. Y.) 387.

Vermont.— Britton *v.* Bishop, 11 Vt. 70.

Virginia.— Broun *v.* Hull, 33 Gratt. (Va.) 23; Davis *v.* Miller, 14 Gratt. (Va.) 1.

United States.— Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295.

England.— Boehm *v.* Sterling, 2 Esp. 575, 7 T. R. 423; Mutford *v.* Walcot, 1 Ld. Raym. 574; Dehers *v.* Harriot, 1 Show. 163; Charles *v.* Marsden, 1 Taunt. 224.

Transfer after maturity to an agent for collection transfers the title to the bill (French *v.* Jarvis, 29 Conn. 347; Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295) with right of action against the maker (Smith *v.* Harrison, 33 Ala. 706).

Where a note is taken after maturity and dishonor, the holder stands as an assignee of the person from whom he receives it rather than as an indorsee according to the usage of trade. Farrington *v.* Park Bank, 39 Barb. (N. Y.) 645.

22. *Alabama.*— Ware *v.* Russell, 57 Ala. 43, 29 Am. Rep. 710, holding that if two notes represent, one the original debt and the other a collateral for it, they will pass as such and no more under separate transfers after maturity to parties without notice.

Maryland.— McSherry *v.* Brooks, 46 Md. 103.

New York.— Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322.

Oregon.— Adair *v.* Lenox, 15 Oreg. 489, 16 Pac. 182.

Rhode Island.— Capwell *v.* Machon, 21 R. I. 520, 45 Atl. 259.

Virginia.— Davis *v.* Miller, 14 Gratt. (Va.) 1.

United States.— Thompson *v.* Perrine, 106 U. S. 589, 1 S. Ct. 564, 568, 27 L. ed. 298 (holding that an overdue coupon detached from a negotiable bond not yet due retains its negotiable character as to suit by assignee in federal court); Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295; Allen *v.* O'Donald, 28 Fed. 17 (as to indorsee's right to sue in his own name).

to such rights,[23] and one who takes after maturity is not a *bona fide* holder in the sense of the law merchant unless his indorsee was a *bona fide* purchaser for value before maturity.[24]

(II) *After Suit Begun.* Even after suit is begun on a bill or note it can be transferred,[1] but when the instrument is merged in the judgment rendered on it its negotiability ceases.[2]

(III) *Where Paper Has Been Paid.* If a note is paid before its maturity by one of several makers, it is extinguished as such as against his co-makers, and cannot be further transferred by him after maturity;[3] and in general when a bill or note has been paid at maturity by the accepter or maker, who is primarily liable for its payment, it cannot be further reissued or transferred after maturity.[4] This is also true as a rule as to payment by any party[5] as against all other parties who could be prejudiced by the subsequent transfer of the paper.[6] On the other hand if a bill is paid by the drawer and reissued by him, it will remain a valid obligation as against an accepter for value in the hands of later holders;[7] and where payment is made by an indorser and the bill or note is reissued after maturity the parties liable to him will in general remain liable to subsequent holders under him.[8] As to any party negotiating a bill of exchange after the

23. *Arkansas.*— Williamson *v.* Doby, 36 Ark. 689.

California.— O'Conor *v.* Clarke, (Cal. 1896) 44 Pac. 482.

Connecticut.— Bissell *v.* Gowdy, 31 Conn. 47; French *v.* Jarvis, 29 Conn. 347.

Georgia.— Clarke *v.* Dederick, 31 Md. 148.

New York.— Merrick *v.* Butler, 2 Lans. (N. Y.) 103.

North Carolina.— Crawford *v.* Lytle, 70 N. C. 385; Parker *v.* Stallings, 61 N. C. 590, 98 Am. Dec. 84.

Texas.— Diamond *v.* Harris, 33 Tex. 634.

Vermont.— Darling *v.* Osborne, 51 Vt. 148.

Virginia.— Arents *v.* Com., 18 Gratt. (Va.) 750; Davis *v.* Miller, 14 Gratt. (Va.) 1.

United States.— Texas *v.* White, 10 Wall. (U. S.) 68, 19 L. ed. 839.

If the indorser could maintain an action on the bill the indorsee can also do so. French *v.* Jarvis, 29 Conn. 347; Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488; Leidy *v.* Tammany, 9 Watts (Pa.) 353.

24. See *infra,* IX, A, 3, a, (I).

1. Hudson *v.* Morriss, 55 Tex. 595; Ober *v.* Goodridge, 27 Gratt. (Va.) 878. See also *infra,* XIV, C [8 Cyc.].

2. Wooten *v.* Maultsby, 69 N. C. 462.

If the maker's estate is insolvent, commissioners have been appointed under the statute, and the note has been proved before them and included in their report it is no longer negotiable. Jarvis *v.* Barker, 3 Vt. 445.

3. Gordon *v.* Wansey, 21 Cal. 77. See also *infra,* XI, B, 13.

4. Pray *v.* Maine, 7 Cush. (Mass.) 253 (holding that an irregular indorser, whose indorsement was given to procure credit with the payee, cannot pay the note and reissue it so as to render the maker liable to his indorsees); Harmer *v.* Steel, 4 Exch. 1, 19 L. J. Exch. 34 (holding that an accepter who pays the bill cannot reissue it even against his co-accepter, although he has a right of action against him for contribution).

One maker of a note who pays it at maturity cannot reissue it as against his co-maker. Hopkins *v.* Farwell, 32 N. H. 425; Davis *v.* Stevens, 10 N. H. 186; Beaumont *v.* Greathead, 2 C. B. 494, 3 D. & L. 631, 15 L. J. C. P. 130, 52 E. C. L. 494. But as to his right to bring an action against his co-maker for contribution in the name of the payee see Rockingham Bank *v.* Claggett, 29 N. H. 292.

5. **Drawer.**— Gardner *v.* Maynard, 7 Allen (Mass.) 456, 83 Am. Dec. 699; Bartrum *v.* Caddy, 9 A. & E. 275, 8 L. J. Q. B. 31, 1 P. & D. 207, 1 W. W. & H. 724, 36 E. C. L. 160; Beck *v.* Robley, 1 H. Bl. 89 note.

Indorser.—Cochran *v.* Wheeler, 7 N. H. 202, 26 Am. Dec. 732; Havens *v.* Huntington, 1 Cow. (N. Y.) 387.

6. Such reissue cannot carry the liability of an accepter for the accommodation of the party who paid (Blenn *v.* Lyford, 70 Me. 149; Lazarus *v.* Cowie, 3 Q. B. 459, 2 G. & D. 487, 11 L. J. Q. B. 310, 43 E. C. L. 819; Jewell *v.* Parr, 16 C. B. 684, 81 E. C. L. 684) or for a consideration that has failed (Jewell *v.* Parr, 16 C. B. 684, 81 E. C. L. 684; Beck *v.* Robley, 1 H. Bl. 89 note).

7. Hubbard *v.* Jackson, 4 Bing. 390, 13 E. C. L. 555, 3 C. & P. 134, 14 E. C. L. 489, 6 L. J. C. P. O. S. 4, 1 M. & P. 11; Jones *v.* Broadhurst, 9 C. B. 173, 67 E. C. L. 173; Callow *v.* Lawrence, 3 Moore & S. 95.

8. Havens *v.* Huntington, 1 Cow. (N. Y.) 387; Davis *v.* Miller, 14 Gratt. (Va.) 1; Woodward *v.* Pell, L. R. 4 Q. B. 55, 9 B. & S. 994, 38 L. J. Q. B. 30, 19 L. T. Rep. N. S. 557, 17 Wkly. Rep. 117; Hubbard *v.* Jackson, 4 Bing. 390, 13 E. C. L. 555, 3 C. & P. 134, 14 E. C. L. 489, 6 L. J. C. P. O. S. 4, 1 M. & P. 11.

A prior accommodation indorser will still remain liable on the paper, although between himself and the indorser who paid the note there was an agreement for joint liability not known to the purchaser. McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162.

same has been paid, with knowledge of the fact of payment, the bill still remains negotiable.[9]

2. From When Transfer Takes Effect. The transfer of a bill is not retrospective and is therefore governed by the law in force at the time of actual transfer.[10] It takes effect when completed by writing and delivery[11] and not before, although its completion may take place only after maturity and make the indorsee subject to defense as by an indorsement after maturity.[12] Thus if indorsement is delayed and notice of equity comes to the indorsee's knowledge after delivery and before indorsement he will take subject to such notice;[13] and if the indorsement is made by an agent without authority and is ratified by the principal after the maturity of the paper, it will take effect as a transfer after maturity subject to defense.[14] On the other hand where indorsement has been omitted by mistake it will, in a court of equity, when it is completed, relate back to the time of intended transfer;[15] and a court of equity will relieve the purchaser under such transfer, if necessary, by compelling the transferrer to indorse the bill.[16]

C. Manner of Transfer — 1. By Indorsement — a. In General — (i) *Necessity For.* Indorsement is the only method recognized by the law merchant[17]

Striking out names of parties discharged. — Before the paper is reissued, the names of subsequent parties who have been discharged by the payment should be struck out. Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62; Guild *v.* Eager, 17 Mass. 615.

9. Mabry *v.* Matheny, 10 Sm. & M. (Miss.) 323, 48 Am. Dec. 753; Havens *v.* Huntington, 1 Cow. (N. Y.) 387; Callow *v.* Lawrence, 3 Moore & S. 95.

10. Lancaster Nat. Bank *v.* Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; Broun *v.* Hull, 33 Gratt. (Va.) 23.

11. The indorsement and delivery need not be synchronous, however, provided the indorsement, if made after delivery, is made before maturity, and before the intervention of equities of which such indorsee had notice. Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615; Cooper *v.* Laber, 1 Biss. (U. S.) 539, 6 Fed. Cas. No. 3,198.

12. Haskell *v.* Mitchell, 53 Me. 468, 89 Am. Dec. 711 (notwithstanding an agreement before maturity for indorsement); Lancaster Nat. Bank *v.* Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; Clark *v.* Whitaker, 50 N. H. 474, 9 Am. Rep. 286; Southard *v.* Porter, 43 N. H. 379; Whistler *v.* Forster, 14 C. B. N. S. 248, 32 L. J. C. P. 161, 8 L. T. Rep. N. S. 317, 11 Wkly. Rep. 648, 108 E. C. L. 248. *Compare* Ranger *v.* Cary, 1 Metc. (Mass.) 369, holding that where, after delivery to the purchaser before maturity, legal title is perfected by indorsement after maturity, but before suit brought, the maker could not set off a debt due him from the payee at the time the note was made, such defense not being within the contemplation of a negotiable instrument.

An indorsement after maturity will not relate back to the date of an earlier assignment, so as to make the assignee's title superior to that of the assignor. Gibson *v.* Miller, 29 Mich. 355, 18 Am. Rep. 98; Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. 414.

Where it is payable to bearer and complete title passes by delivery before maturity, an unnecessary indorsement after maturity will not render it subject to defense. Davis *v.* Wilson, 31 Tex. 136.

An indorsement in full of a non-negotiable note will not pass title, in the absence of delivery. Dean *v.* Warnock, 98 Pa. St. 565.

13. *Illinois.*— Clark *v.* Callison, 7 Ill. App. 263.

Iowa.— Grimm *v.* Warner, 45 Iowa 106.

Louisiana.— Pavey *v.* Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716.

New Hampshire.— Clark *v.* Whitaker, 50 N. H. 474, 9 Am. Rep. 286. See also Southard *v.* Porter, 43 N. H. 379.

New York.—Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 23 N. E. 180, 28 N. Y. St. 702, 16 Am. St. Rep. 765, 7 L. R. A. 595.

United States.— Osgood *v.* Artt, 17 Fed. 575.

England.— Whistler *v.* Forster, 14 C. B. N. S. 248, 32 L. J. C. P. 161, 8 L. T. Rep. N. S. 317, 11 Wkly. Rep. 648, 108 E. C. L. 248.

14. Gilbert *v.* Sharp, 2 Lans. (N. Y.) 412.

As a transfer of title to render the note available as a set-off, however, it will relate back by ratification to the time when it was made. Persons *v.* McKibben, 5 Ind. 261, 61 Am. Dec. 85.

15. Weeks *v.* Medler, 20 Kan. 57; Baggarly *v.* Gaither, 55 N. C. 80; Beard *v.* Dedolph, 29 Wis. 136 (to the exclusion of set-offs arising after its delivery).

An indorsement after the indorser becomes a bankrupt will transfer the legal title under a previous delivery. Smoot *v.* Morehouse, 8 Ala. 370, 42 Am. Dec. 644; Hersey *v.* Elliot, 67 Me. 526, 24 Am. Rep. 50; Watkins *v.* Maule, 2 Jac. & W. 237.

16. Watkins *v.* Maule, 2 Jac. & W. 237; *Ex p.* Greening, 13 Ves. Jr. 206. So as against a bankrupt (Smith *v.* Pickering, Peake 50) or his assignee (*Ex p.* Rhodes, 3 Mont. & A. 217; *Ex p.* Greening, 13 Ves. Jr. 206).

17. So by Neg. Instr. L. § 60; Bills Exch. Act, § 31. And see Schoepfer *v.* Tommack, 97 Ill. App. 562; Hempsted *v.* Drummond, 10

for the complete legal transfer of a bill or note payable to order.[18] This applies to bank checks,[19] to notes payable to the order of the maker,[20] and, under statutes, to a note payable to a person named or bearer,[21] to a non-negotiable note[22] or bond[23] payable to bearer, to a registered coupon,[24] to a warehouse receipt,[25] and to United States treasury notes.[26] Indorsement is not necessary, however, to complete a valid *donatio causa mortis*[27] or a transfer by the executor to the testator's next of kin, by way of distribution,[28] or to vest the title in the drawer when the bill is taken up by him;[29] and after a note has once been indorsed in blank further indorsement is not necessary and it will pass by delivery.[30]

(II) *Formal Requisites*—(A) *Necessity For Writing, Signature, and Seal.* Writing and signature are in general necessary to an indorsement,[31] but no particular form of signature is necessary, any form adopted as such being sufficient.[32]

L. C. Rep. 27; Forsyth *v.* Laurence, 19 Nova Scotia 148, 7 Can. L. T. 174.

18. Assignment by separate instrument is not sufficient to support an action in the assignee's name (Gookin *v.* Richardson, 11 Ala. 889, 46 Am. Dec. 232; Biscoe *v.* Sneed, 11 Ark. 104; Badgley *v.* Votrain, 68 Ill. 25, 18 Am. Rep. 541. *Contra*, by statute. Instone *v.* Williamson, 2 Bibb (Ky.) 83) or to transfer the title clear of defense (Franklin *v.* Twogood, 18 Iowa 515). See also *infra*, XIV, C [8 Cyc.].

A verbal contract will not invest the paper with the character of negotiability. Scott *v.* McDougall, 14 La. Ann. 309.

Delivery is not alone sufficient to support an action in the purchaser's name (Alday *v.* Jamison, 3 Port. (Ala.) 112; Hull *v.* Conover, 35 Ind. 372; Dana *v.* Underwood, 19 Pick. (Mass.) 99; Cock *v.* Fellows, 1 Johns. (N. Y.) 143. *Contra*, by statute. Perry *v.* Wheeler, 63 Kan. 870, 66 Pac. 1007; Washington *v.* Hobart, 17 Kan. 275; Williams *v.* Norton, 3 Kan. 295), although the negotiability of the paper is created by statute and not by the law merchant (Bacon *v.* Cohea, 12 Sm. & M. (Miss.) 516), and does not pass the complete legal title to the assignee (Carter *v.* Lehman, 90 Ala. 126, 7 So. 735; Roane *v.* Williams, 12 Ark. 74; Elliott *v.* Armstrong, 2 Blackf. (Ind.) 198). Delivery without indorsement may, however, be sufficient for collection and support payment to collecting agent. Sherwood *v.* Roys, 14 Pick. (Mass.) 172; Little *v.* Obrien, 9 Mass. 423. See also *infra*, XIV, C [8 Cyc.].

In Mississippi the statute provides generally for assignment by means of indorsement. Bacon *v.* Cohea, 12 Sm. & M. (Miss.) 516.

19. Barbour *v.* Bayon, 5 La. Ann. 304, 52 Am. Dec. 593.

A parol transfer by the payee, without indorsement, of a check payable to order, accompanied by manual delivery, is valid, but the transferee acquires by the transfer only such rights as he would have taken had the check been non-negotiable at first. Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352.

A check payable to the order of a particular bearer requires the payee's indorsement to make it negotiable, as it is not in legal effect the same as a check payable to bearer merely. Bloomingdale *v.* National Butchers', etc., Bank, 33 Misc. (N. Y.) 594, 68 N. Y. Suppl. 35.

20. Lea *v.* Mobile Branch Bank, 8 Port. (Ala.) 119; Smalley *v.* Wight, 44 Me. 442, 69 Am. Dec. 112. But under the New York statute such notes are equivalent to notes to bearer and transferable by delivery. Irving Nat. Bank *v.* Alley, 79 N. Y. 536.

21. See *infra*, VI, C, 2, note 54.

22. Jamison *v.* Jarrett, 4 Ind. 187.

23. Blackman *v.* Lehman, 63 Ala. 547, 35 Am. Rep. 57.

24. Taliaferro *v.* Baltimore First Nat. Bank, 71 Md. 200, 17 Atl. 1036.

25. Jemison *v.* Birmingham, etc., R. Co., 125 Ala. 378, 28 So. 51.

26. Myers *v.* Friend, 1 Rand. (Va.) 12.

27. See, generally, GIFTS.

28. Balmer *v.* Sunder, 11 Mo. App. 454.

29. Kingman *v.* Hotaling, 25 Wend. (N. Y.) 423; Coursin *v.* Ledlie, 31 Pa. St. 506; Zebley *v.* Voisin, 7 Pa. St. 527.

30. See *infra*, VI, C, 1, b, (II).

31. *Delaware.*— Wilmington, etc., Bank *v.* Houston, 1 Harr. (Del.) 225.

Indiana.— Williams *v.* Osbon, 75 Ind. 280; Marion, etc., Gravel Road Co. *v.* Kessinger, 66 Ind. 549; Keller *v.* Williams, 49 Ind. 504; Stowe *v.* Weir, 15 Ind. 341; Kern *v.* Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360; Cooper *v.* Drouillard, 5 Blackf. (Ind.) 152.

Minnesota.— Syracuse Third Nat. Bank *v.* Clark, 23 Minn. 263.

Vermont.— Partridge *v.* Davis, 20 Vt. 499.

United States.— Mott *v.* Wright, 4 Biss. (U. S.) 53, 17 Fed. Cas. No. 9,883.

See also Neg. Instr. L. § 61; Bills Exch. Act, § 32.

The king may transfer by his sign manual. Lambert *v.* Taylor, 4 B. & C. 138, 6 D. & R. 188, 3 L. J. K. B. O. S. 160, 10 E. C. L. 515.

32. Myers *v.* Wright, 33 Ill. 284; Ramsay *v.* Livingston, 6 Mart. N. S. (La.) 15.

By mark is a sufficient signature at common law and by the law merchant. George *v.* Surrey, M. & M. 516, 31 Rev. Rep. 755, 22 E. C. L. 576. See also Noad *v.* Chateauvert, 1 Rev. Lég. 229, 2 R. J. R. Q. 19. But *compare* Lagueux *v.* Casault, 2 Rev. Lég. 28, 2 R. J. R. Q. 136.

Figures are sufficient, if intended as a sig-

A seal is unnecessary to the sufficiency of an indorsement whether it be that of a private person or of a corporation.[33]

(B) *Position of Indorsement*[34] — (1) IN GENERAL. The proper position for an indorsement is on the back of the instrument, and this is *prima facie* the meaning of the term.[35] It may, however, be written on the face of the paper,[36] on an *allonge* or supplementary piece of paper attached,[37] or on a separate paper.[38]

nature. Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

Initials of the name of the holder of a bank check indorsed thereon are sufficient as an indorsement. Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443.

The middle name of an indorser need not be set out at length in his indorsement. Hudson *v.* Goodwin, 5 Harr. & J. (Md.) 115.

The surname alone is sufficient. Cooper *v.* Bailey, 52 Me. 230.

A corporation indorsement may be in the name of the corporation without the name of the officer making it (Templeton *v.* Hayward, 65 Ill. 178; Richmond Second Nat. Bank *v.* Martin, 82 Iowa 442, 48 N. W. 735) or in the name of the officer with his official designation (Folger *v.* Chase, 18 Pick. (Mass.) 63; Northampton Bank *v.* Pepoon, 11 Mass. 288; Spear *v.* Ladd, 11 Mass. 94). Where a note payable to the Kalamazoo Manufacturing Corporation was indorsed "For value received, I assign this note to Adolph Krebaum, without recourse on Kalamazoo Mfg. Cor.," it was held that there was a manifest ellipsis in the form of the indorsement, which, when supplied, would be regular. Walker *v.* Krebaum, 67 Ill. 252.

Representative capacity.— Bills drawn by a fiduciary to his own order are not completed, unless indorsed in the same capacity as drawn (Lapeyre *v.* Weeks, 28 La. Ann. 664), but a note payable to A and B may be transferred by the indorsement of A and B "administrators of J. F. Triplett, deceased" (McClure *v.* Bigstaff, 18 Ky. L. Rep. 601, 37 S. W. 294).

An indorsement signed with a pencil is a valid indorsement. Cooper *v.* Bailey, 52 Me. 230; Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; Closson *v.* Stearns, 4 Vt. 11, 23 Am. Dec. 245; Geary *v.* Physic, 5 B. & C. 234, 7 D. & R. 653, 4 L. J. K. B. O. S. 147, 29 Rev. Rep. 225, 11 E. C. L. 442.

33. Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120, even in the case of indorsement by a corporation.

Its addition to an individual indorsement is a mere superfluity of which a later indorser cannot take advantage as a defense (Rand *v.* Dovey, 83 Pa. St. 280) and will not affect the negotiable character of the bill (Ege *v.* Kyle, 2 Watts (Pa.) 222).

34. **The Negotiable Instruments Law**, section 36, subsection 6, provides that "where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." So Cal. Civ. Code, § 8108.

The Bills of Exchange Act, section 32, requires the indorsement to be on the bill itself or an *allonge*, or, where copies are recognized, on a copy.

35. Partridge *v.* Davis, 20 Vt. 499; Gorman *v.* Ketchum, 33 Wis. 427.

Where two notes are written upon the same sheet of paper an indorsement written over the back of one of the notes will not operate to transfer the other. Wadhams *v.* Vanderworken, 1 Root (Conn.) 385. See also Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537.

36. **Across the face.**— *Alabama.*— Walton *v.* Williams, 44 Ala. 347, of bill addressed by the drawer to himself.

Georgia.— Perry *v.* Bray, 68 Ga. 293.

Massachusetts.— Com. *v.* Butterick, 100 Mass. 12.

New Jersey.— Haines *v.* Dubois, 30 N. J. L. 259.

England.— *Ex p.* Yates, 2 De G. & J. 191, 4 Jur. N. S. 649, 27 L. J. Bankr. 9, 6 Wkly. Rep. 178, 59 Eng. Ch. 152; Rex *v.* Bigg, 2 East P. C. 882, 3 P. Wms. 419, 1 Str. 18 (described as an indorsement in indictment for erasure); Young *v.* Glover, 3 Jur. N. S. 637.

Below maker's signature.—Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Cason *v.* Wallace, 4 Bush (Ky.) 388 (inadvertently); Gibson *v.* Powell, 6 How. (Miss.) 60. But the payee of a note, who signs his name on the face as a joint maker, cannot be treated as an indorser in blank (Coates *v.* Harmon, 32 Ill. App. 204) and one who signs under the maker is liable in general as a joint maker (Cook *v.* Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. Rep. 870; Partridge *v.* Colby, 19 Barb. (N. Y.) 248; Devore *v.* Mundy, 4 Strobh. (S. C.) 15), especially where the form of the promise is joint (Dusenbury *v.* Albright, 31 Nebr. 345, 47 N. W. 1047), although he may show that the intention was otherwise (Freeman *v.* Clark, 3 Strobh. (S. C.) 281).

To left of maker's signature.— Shain *v.* Sullivan, 106 Cal. 208, 39 Pac. 606, under Cal. Civ. Code, § 8108.

If the payee inadvertently indorses in the wrong place and immediately discovers the mistake, he may cancel it and write his name in the right place. Browning *v.* Maurer, 16 Phila. (Pa.) 125, 40 Leg. Int. (Pa.) 130.

37. Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17; French *v.* Turner, 15 Ind. 59; Folger *v.* Chase, 18 Pick. (Mass.) 63.

If a torn note has been pasted upon another piece of paper, an indorsement of the note may be made on such paper. Crutchfield *v.* Easton, 13 Ala. 337.

38. Mosley *v.* Graydon, 4 Strobh. (S. C.) 7.

(2) Order of Signatures. The signatures should be placed in succession as they are made[39] and to vary or depart from this order is undesirable although permissible.[40]

(c) *Language of Indorsement* — (1) In General. No particular words are necessary to constitute an indorsement.[41] A formal assignment indorsed on a note[42] or a memorandum of the sale of a note[43] is sufficient; and an agreement to

Where a note has been mislaid or is at a distance, an indorsement may be made on a separate paper, which the indorsee may attach to the note or treat as authority to write the indorser's name on the note. Heister *v.* Gilmore, 5 Phila. (Pa.) 62, 19 Leg. Int. (Pa.) 260.

For transfer by separate instrument see *infra*, VI, C, 3, a.

39. As to successive liability of indorsers see *infra*, VI, G, 1, a, (II).

40. Quin *v.* Sterne, 26 Ga. 223, 71 Am. Dec. 204; Gibson *v.* Powell, 6 How. (Miss.) 60 (later indorser may sign above payee); Arnot *v.* Symonds, 85 Pa. St. 99, 27 Am. Rep. 630 (indorsers may sign on different ends of the paper). And see Brightly *v.* Rankin, 25 U. C. Q. B. 257; Peck *v.* Phippon, 9 U. C. Q. B. 73.

41. Marks *v.* Herman, 24 La. Ann. 335 ("I transfer the within note to J. Marks & Co., or order, payable on demand"); Lynn First Nat. Bank *v.* Smith, 132 Mass. 227 (holding that "Pay Nat'l Bank of Redemption for account of First Nat'l Bank" is an indorsement by the latter bank).

An order indorsed on a note and addressed to one of two makers only will not pass the legal title. Robinson *v.* Brown, 4 Blackf. (Ind.) 128.

In case of mistake words omitted may be supplied (Walker *v.* Krebaum, 67 Ill. 252) and in case of misspelling the indorsement may be corrected (Leonard *v.* Wilson, 2 Cr. & M. 589, 3 L. J. Exch. 171, 4 Tyrw. 415).

42. *Georgia.*— Vanzant *v.* Arnold, 31 Ga. 210.

Indiana.— Henderson *v.* Ackelmire, 59 Ind. 540.

Iowa.— Sears *v.* Lantz, 47 Iowa 658. See also Coddington Sav. Bank *v.* Anderson, (Nebr. 1902) 89 N. W. 787.

Michigan.— Markey *v.* Corey, 108 Mich. 184, 66 N. W. 493, 62 Am. St. Rep. 698, 36 L. R. A. 117.

Minnesota.— Maine Trust, etc., Co. *v.* Butler, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370.

North Carolina.— Davidson *v.* Powell, 114 N. C. 575, 19 S. E. 601.

Pennsylvania.— Hall *v.* Toby, 110 Pa. St. 318, 1 Atl. 369.

South Dakota.— Merrill *v.* Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

Virginia.— Citizens' Nat. Bank *v.* Walton, 96 Va. 435, 31 S. E. 890.

England.— Richards *v.* Frankum, 9 C. & P. 221, 38 E. C. L. 138, an assignment containing an order for payment.

Good as transfer but not as contract of indorsement.— Other cases hold such assignment to be a transfer, but not a contract of indorsement on the indorser's part.

Alabama.— Hailey *v.* Falconer, 32 Ala. 536, an indorsement in these words "For value received . . . I transfer unto John P. Hailey all my right and title in the within note, to be enjoyed in the same manner as may have been by me."

Arkansas.— Spencer *v.* Halpern, 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120.

Indiana.— Rowe *v.* Haines, 15 Ind. 445, 77 Am. Dec. 101, holding that "I assign the within note to William Martin, to secure him as security to T. Nichols" is sufficient to vest the title to the note in the person first named, and to enable him to transfer the note to another.

Kansas.— Hatch *v.* Barrett, 34 Kan. 223, 8 Pac. 129, an assignment attested and indorsed "without recourse on me, either in law or equity."

Kentucky.—Cravens *v.* Hopson, 4 Bibh (Ky.) 286, holding that a sealed assignment and guaranty indorsed is an assignment and transfer but not an indorsement.

Michigan.— Aniba *v.* Yeomans, 39 Mich. 171.

United States.—De Hass *v.* Roberts, 59 Fed. 853, under Kansas statute.

An assignment on a note of the balance due, a part having been paid and the amount indorsed, is good. Brotherton *v.* Street, 124 Ind. 599, 24 N. E. 1068; Barnett *v.* Spencer, 4 Blackf. (Ind.) 206; Bledsoe *v.* Fisher, 2 Bibb (Ky.) 471.

An assignment indorsed on the note is not a guaranty, although the note is overdue. Dixon *v.* Clayville, 44 Md. 573.

43. As an indorsement signed by the payee, "I this day sold and delivered to Catharine M. Adams the within note (Adams *v.* Blethen, 66 Me. 19, 22 Am. Rep. 547), a certificate that the note is for value and not subject to defense (Dunning *v.* Heller, 103 Pa. St. 269), and *prima facie* an indorsement by the payee in the words "Assigned to" (Henderson *v.* Ackelmire, 59 Ind. 540); but not a memorandum as to the maker's property (Pickering *v.* Cording, 92 Ind. 306, 47 Am. Rep. 145), a memorandum of the amount remaining due made with the purpose of transferring the note (Tucker *v.* Gentry, 93 Mo. App. 655, 67 S. W. 723), a memorandum indorsed and signed "sold half of this note to T. L. Rogers" (Hathaway *v.* Rogers, 112 Iowa 638, 84 N. W. 674), the word "paid" stamped by the payee to a draft on its payment by the drawee (Vogel *v.* Ball, 69 Tex. 604, 7 S. W. 101) or a printed form indorsed and signed on a draft attached to a bill of sale, stating the delivery of the goods and their freedom

pay damages on dishonor amounts to indorsement,[44] but not the giving of a mere receipt.[45] It is not customary to date an indorsement[46] or to add the words "or order"[47] or "value received."[48]

(2) GUARANTY. While it has been held that a guaranty is not a negotiation as understood by the law merchant,[49] other cases have held it to be equivalent to an indorsement[50] and to transfer the paper.[51]

from liens, followed by a printed statement that the draft is not "good unless above bill of sale is signed, and draft also properly indorsed" (Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537).

44. Blakely *v.* Grant, 6 Mass. 386.

45. More *v.* Finger, (Cal. 1899) 58 Pac. 322; Clark *v.* Whiting, 45 Conn. 149; McCoon *v.* Biggs, 2 Hill (N. Y.) 121.

46. Sanger *v.* Sumner, 13 Ark. 280, but the Arkansas statute requires assignments to be dated and raises a presumption of the date most favorable to the assignor if no date is expressed.

47. Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199]; Hodges *v.* Adams, 19 Vt. 74, 46 Am. Dec. 181; Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295; More *v.* Manning, Comyns 311; Acheson *v.* Fountain, 1 Str. 557.

48. Snow *v.* Conant, 8 Vt. 301.

49. Edgerly *v.* Lawson, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432; Belcher *v.* Smith, 7 Cush. (Mass.) 482; Tuttle *v.* Bartholomew, 12 Metc. (Mass.) 452; Taylor *v.* Binney, 7 Mass. 479; Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547; Snevily *v.* Ekel, 1 Watts & S. (Pa.) 203; New York Cent. Trust Co. *v.* Wyandotte First Nat. Bank, 101 U. S. 68, 25 L. ed. 876. See also Omaha Nat. Bank *v.* Walker, 2 McCrary (U. S.) 565, 5 Fed. 399, holding that where the payee indorses, "This note is transferred, and the collection of the same guarantied, to the holder," the maker can make any defense that could have been made to a suit by the payee.

Guarantor not liable as assignor.— A guaranty of payment indorsed by the payee does not make him liable as an assignor. Ely *v.* Bibb, 4 J. J. Marsh. (Ky.) 71.

50. *Georgia.*—Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616 (a guaranty of attorney's fees, "if this note has to be collected by law"); Vanzant *v.* Arnold, 31 Ga. 210 (a guaranty and assignment).

Illinois.— Judson *v.* Gookwin, 37 Ill. 286, a guaranty of collection.

Iowa.— Robinson *v.* Lair, 31 Iowa 9, a guaranty with waiver of demand and notice of protest.

Kansas.— Kellogg *v.* Douglass County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596.

Maine.— Williams *v.* Hagar, 50 Me. 9, so as to entitle the indorser to the benefit of an agreement to indemnify for indorsements.

Massachusetts.—Upham *v.* Prince, 12 Mass. 14; Blakely *v.* Grant, 6 Mass. 386.

Michigan.— Green *v.* Burrows, 47 Mich. 70, 10 N. W. 111.

Minnesota.— Elgin City Banking Co. *v.* Zelch, 57 Minn. 487, 59 N. W. 544, an order to pay and guaranty of payment.

Nebraska.— Pollard *v.* Huff, 44 Nebr. 892, 63 N. W. 58; Buck *v.* Davenport Sav. Bank, 29 Nebr. 407, 45 N. W. 776, 26 Am. St. Rep. 392; Weitz *v.* Wolfe, 28 Nebr. 500, 44 N. W. 485; Helmer *v.* Commercial Bank, 28 Nebr. 474, 44 N. W. 482; Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811.

New York.— Leggett *v.* Raymond, 6 Hill (N. Y.) 639.

North Dakota.— Dunham *v.* Peterson, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.

Oregon.— Delsman *v.* Friedlander, 40 Oreg. 33, 66 Pac. 297, where waiver of demand, protest, and notice was added.

South Carolina.— Barrett *v.* May, 2 Bailey (S. C.) 1.

Vermont.— Partridge *v.* Davis, 20 Vt. 499.

Washington.— Donnerberg *v.* Oppenheimer, 15 Wash. 290, 46 Pac. 254.

West Virginia.— National Exch. Bank *v.* McElfish Clay Mfg. Co., 48 W. Va. 406, 37 S. E. 541, a guaranty and waiver of protest.

Canada.— Walker *v.* O'Reilly, 7 U. C. L. J. 300, where the expression "I guarantee the payment of the within" placed over the signature of the payee, was held to be an indorsement.

The addition of an express guaranty to the order to pay leaves it still an indorsement. Byers *v.* Bellan-Price Invest. Co., 10 Colo. App. 74, 50 Pac. 368.

51. *Colorado.*— Byers *v.* Bellan-Price Invest. Co., 10 Colo. App. 74, 50 Pac. 368.

Connecticut.— Bissell *v.* Gowdy, 31 Conn. 47.

Illinois.— Childs *v.* Davidson, 38 Ill. 437; Judson *v.* Gookwin, 37 Ill. 286; Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Heaton *v.* Hulbert, 4 Ill. 489; McPherson Nat. Bank *v.* Velde, 49 Ill. App. 21; Packer *v.* Wetherell, 44 Ill. App. 95.

Maine.— Myrick *v.* Hasey, 27 Me. 9, 45 Am. Dec. 583.

Massachusetts.— Tuttle *v.* Bartholomew, 12 Metc. (Mass.) 452; Blakely *v.* Grant, 6 Mass. 386.

Michigan.— Phelps *v.* Church, 65 Mich. 231, 32 N. W. 30; Russell *v.* Klink, 53 Mich. 161, 18 N. W. 627.

Vermont.— Benton *v.* Fletcher, 31 Vt. 418; Partridge *v.* Davis, 20 Vt. 499.

Washington.— National Bank of Commerce *v.* Galland, 14 Wash. 502, 45 Pac. 35.

An indorsement "I assign and guaranty the payment" passes title with the liability

(III) *Striking Out Indorsements*— (A) *In General.* The holder[52] of commercial paper is not obliged to make his title through all the indorsements but can strike out such as are not necessary to his title;[53] and where the first of several indorsements is in blank, a holder by delivery may strike out all intervening indorsements, whether general or special, and recover against the payee under the blank indorsement.[54] An indorser may strike out a special indorsement to correct a mistake by substituting a rightful indorsee[55] or in order to effect a change of intention as to the indorsee.[56] Where paper bearing the payee's indorsement is found in his possession it is presumed that he has never delivered it or that it has been retransferred to him and whether such indorsement be a general[57]

of a guarantor. Grannis *v.* Miller, 1 Ala. 471; Bondurant *v.* Bladen, 19 Ind. 160.

52. The equitable holder only can invest himself with title in this way. Moore *v.* Maple, 25 Ill. 341. It cannot be done by one who is in possession wrongfully, such as a thief. Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496. *Contra,* Montreal Bank *v.* Dewar, 6 Ill. App. 294, where a certificate of deposit specially indorsed by the payee to the real depositor whose agent he was, was afterward stolen by the payee and his own indorsement erased. In this case the principal had received part payment from the agent as for a loan and estopped himself as against the bank.

53. Deale *v.* Krofft, 4 Cranch C. C. (U. S.) 448, 7 Fed. Cas. No. 3,698 (without impairing his right to recover as indorsee against the accepter); Home *v.* Semple, 3 McLean (U. S.) 150, 12 Fed. Cas. No. 6,658 (without impairing his right to recover against the drawer); Neg. Instr. L. § 78.

But where all the indorsements have been averred in the pleading they must be proved (Gaines *v.* Morris, 6 Rob. (La.) 4) and such indorsements should not be struck out (Merz *v.* Kaiser, 20 La. Ann. 377).

Restoring erased indorsement.— Where an indorsement to plaintiffs as agents of the drawers was erased by plaintiffs after its acceptance and the accepters, because of the erasure, refused payment to a third person who held the bill, plaintiffs were permitted to restore the indorsement (Nevins *v.* De Grand, 15 Mass. 436) and a blank indorsement under which the holder claims may be restored, if erased by mistake (Friend *v.* Bowmar, 12 La. 461).

54. *Illinois.*— Giddings *v.* McCumber, 51 Ill. App. 373.

Louisiana.— Hill *v.* Buddington, 8 Rob. (La.) 119; Gaines *v.* Morris, 6 Rob. (La.) 4; Bullock *v.* Nally, 12 La. 619; Dick *v.* Maxwell, 6 Mart. N. S. (La.) 396.

New York.— Pentz *v.* Winterbottom, 5 Den. (N. Y.) 51; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608.

Pennsylvania.— Mitchell *v.* Fuller, 15 Pa. St. 268, 53 Am. Dec. 594.

Virginia.— Ritchie *v.* Moore, 5 Munf. (Va.) 388, 7 Am. Dec. 688.

United States.— Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31; Stettinius *v.* Myer, 4 Cranch C. C. (U. S.) 349, 22 Fed. Cas. No. 13,385.

England.— Critchlow *v.* Parry, 2 Campb. 182; Smith *v.* Clarke, 1 Esp. 180, Peake 225.

See 7 Cent. Dig. tit. "Bills and Notes," § 458.

Without a previous blank indorsement he cannot strike out the words of a special indorsement to a person named so as to convert it into a blank indorsement, although after bringing the action he obtains such person's indorsement to himself, because he can only recover in that action according to his right of action at the commencement of his suit. U. S. Bank *v.* Moore, 3 Cranch C. C. (U. S.) 330, 2 Fed. Cas. No. 830.

Time for striking out.— If an indorsement can be struck out it may be done at the trial of the action. Hill *v.* Buddington, 8 Rob. (La.) 119; Gaines *v.* Morris, 6 Rob. (La.) 4. And see *infra,* VI, C, 1, a, (III), (B), note 61.

55. Thus if the indorsement to a cashier is intended for the bank the bank may strike out the cashier's name in the special indorsement and insert its own. Union Bank *v.* Carr, 2 Humphr. (Tenn.) 345. But he cannot by erasure change a special indorsement to himself by striking out his own name and inserting the name of his transferee. Grimes *v.* Piersol, 25 Ind. 246. Nor can he by changing a special indorsement to himself to an indorsement in blank alter the title by which he holds the paper. Minor *v.* Bewick, 55 Mich. 491, 22 N. W. 12.

56. He may even erase another name and insert his own in a special indorsement for collection under the authority of a separate assignment to himself by the indorser (Morris *v.* Poillon, 50 Ala. 403), but he cannot do so without special authority (Porter *v.* Cushman, 19 Ill. 572). So where a person's name had been filled in a blank indorsement to enable such person to bring suit and was afterward struck out by the holder who decided to sue in his own name (Sawyer *v.* Patterson, 11 Ala. 523) and where he had filled up a blank indorsement to a particular person merely for the purpose of collection, and the agent returned the note with the protest, the owner was allowed to strike out the special indorsement, and make it payable to himself, so as to bring the action in his own name against the indorser (Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230).

57. McCormick *v.* Eckland, 11 Ind. 293; Texas Land, etc., Co. *v.* Carroll, 63 Tex. 48 (non-negotiable paper).

or a special[58] one, it has been held that the payee may strike out such indorsement.

(B) *Where Retransferred to Former Holder.* Where the indorser of a bill afterward becomes the holder by retransfer, he may strike out all indorsements subsequent to his own, whether special or not,[59] although he need not prove the intervening title back to himself.[60] When the paper returns to the possession of such an indorser he may strike out his own indorsement[61] or he may hold the paper without striking out his own indorsement, and his title to it will be shown

58. Mendenhall *v.* Banks, 16 Ind. 284; Cooper *v.* Cooper, 14 La. Ann. 665. *Contra,* Sater *v.* Hendershott, Morr. (Iowa) 118; Wood *v.* McClaurin, 2 Brev. (S. C.) 377; Craig *v.* Brown, Pet. C. C. (U. S.) 171, 6 Fed. Cas. No. 3,327.

59. *Connecticut.*— Bond *v.* Storrs, 13 Conn. 412, special.

Illinois.— Palmer *v.* Gardiner, 77 Ill. 143, blank.

Iowa.— Jones *v.* Berryhill, 25 Iowa 289; Pilmer *v.* Des Moines Branch State Bank, 19 Iowa 112.

Louisiana.— Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583 (special); Hebrard *v.* Bollenhagen, 9 Rob. (La.) 155 (special); Gordon *v.* Nelson, 16 La. 321 (special); Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214 (special); Hill *v.* Holmes, 12 La. 96 (special).

Michigan.— Reading *v.* Beardsley, 41 Mich. 123, 1 N. W. 965, special.

New York.— Watervliet Bank *v.* White, 1 Den. (N. Y.) 608, special.

North Carolina.— French *v.* Barney, 23 N. C. 219, special.

Oregon.— Spreckels, etc., Co. *v.* Bender, 30 Oreg. 577, 48 Pac. 418.

Tennessee.— Smith *v.* McManus, 7 Yerg. (Tenn.) 477, 27 Am. Dec. 519.

Texas.— Collins *v.* Panhandle Nat. Bank, 75 Tex. 254, 11 S. W. 1053 (special); Texas Land, etc., Co. *v.* Carroll, 63 Tex. 48.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517.

See also *infra,* XIV, C [8 Cyc.]; and 7 Cent. Dig. tit. "Bills and Notes," § 458.

Time for striking out.— This may be done even at the time of trial. Bullock *v.* Nally, 12 La. 619; Oneale *v.* Beall, 2 Cranch C. C. 569, 18 Fed. Cas. No. 10,513; Conant *v.* Wills, 1 McLean (U. S.) 427, 6 Fed. Cas. No. 3,087 (special).

60. Earbee *v.* Wolfe, 9 Port. (Ala.) 366; Naglee *v.* Lyman, 14 Cal. 450. Such holder requires neither reindorsement nor receipt (Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; Cox *v.* Simms, 1 Cranch C. C. (U. S.) 238, 6 Fed. Cas. No. 3,306), but is *prima facie* entitled to recover, notwithstanding subsequent special indorsements (Bond *v.* Storrs, 13 Conn. 412) and although his own and subsequent indorsements have not been struck out (Palmer *v.* Gardiner, 77 Ill. 143).

61. *Alabama.*— Pickett *v.* Stewart, 12 Ala. 202.

Connecticut.— Bond *v.* Storrs, 13 Conn. 412.

Illinois.— Palmer *v.* Gardiner, 77 Ill. 143; Richards *v.* Darst, 51 Ill. 140.

Indiana.— Williams *v.* Potter, 72 Ind. 354.

Iowa.— Pilmer *v.* Des Moines Branch State Bank, 19 Iowa 112, holding that after erasing his indorsement he may recover without proving that he had taken up the draft on its being protested.

Kentucky.— Caldwell *v.* Evans, 5 Bush (Ky.) 380, 96 Am. Dec. 358; Clark *v.* Schwing, 1 Dana (Ky.) 333; Bell *v.* Morehead, 3 A. K. Marsh. (Ky.) 158.

Louisiana.— Merz *v.* Kaiser, 20 La. Ann. 377; Hebrard *v.* Bollenhagen, 9 Rob. (La.) 155; Gordon *v.* Nelson, 16 La. 321; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214; Banks *v.* Brander, 13 La. 274.

Mississippi.— McLemore *v.* Hawkins, 46 Miss. 715, where he accompanied the transfer with a trust which has failed or has been accomplished and the paper has been returned to him.

Oregon.— Spreckels, etc., Co. *v.* Bender, 30 Oreg. 577, 48 Pac. 418.

Texas.— Collins *v.* Panhandle Nat. Bank, 75 Tex. 254, 11 S. W. 1053.

United States.— Conant *v.* Wills, 1 McLean (U. S.) 427, 6 Fed. Cas. No. 3,087; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517; Neederer *v.* Barber, 17 Fed. Cas. No. 10,079.

England.— Low *v.* Copestake, 3 C. & P. 300, 14 E. C. L. 578.

See also *infra,* XIV, C [8 Cyc.].

But in an action by the payee of a note for the use of another, plaintiff cannot be allowed to strike out the special indorsement to such other with a view to show himself the legal owner. Langham *v.* Leharge, 6 Mo. 355.

Time for striking out.— He may strike out his indorsement at the trial of the action (Bond *v.* Storrs, 13 Conn. 412; Sweet *v.* Garwood, 88 Ill. 407; Parks *v.* Brown, 16 Ill. 454; Banks *v.* Brander, 13 La. 274; Baker *v.* Montgomery, 4 Mart. (La.) 90; Bowles *v.* Wright, 34 Miss. 409; Craig *v.* Brown, Pet. C. C. (U. S.) 171, 6 Fed. Cas. No. 3,327; Theed *v.* Lovell, 2 Str. 1103), after it has been offered in evidence to the jury and objected to on account of such indorsement (Blue *v.* Russell, 3 Cranch C. C. (U. S.) 102, 3 Fed. Cas. No. 1,568), or after the close of the trial (Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 217), and judgment will not be arrested because plaintiff's blank indorsement was not struck out at the trial (Vowell *v.* Alexander, 1 Cranch C. C. (U. S.) 33, 28 Fed. Cas. No. 17,017).

presumptively by his possession.[62] If the holder has indorsed the note for collection he may in like manner strike out his own indorsement when the paper returns to his possession,[63] or he may strike out his own indorsement as collateral.[64] On the other hand he may leave uncanceled special indorsements following his own indorsement.[65] He must, however, it is said, strike out his own special indorsement to another to entitle him to recover on the paper in his own name,[66] but where a bill has a restrictive indorsement "for collection for account" the holder cannot strike it out without discharging the drawer by the alteration.[67]

(c) *Effect of Striking Out.* If an indorsement is stricken out by the holder intentionally it discharges the indorser whose name is stricken out[68] and all

62. *Illinois.*— Henderson *v.* Davisson, 157 Ill. 379, 41 N. E. 560; Best *v.* Nokomis Nat. Bank, 76 Ill. 608; Brinkley *v.* Going, 1 Ill. 367.

Indiana.— Wulschner *v.* Sells, 87 Ind. 71; Mendenhall *v.* Banks, 16 Ind. 284; Thompson *v.* Coquillard, 3 Blackf. (Ind.) 437.

Iowa.— Scott *v.* Ward, 4 Greene (Iowa) 112.

Louisiana.— Perry *v.* Gerbeau, 5 Mart. N. S. (La.) 14.

Maine.— Thornton *v.* Moody, 11 Me. 253.

Tennessee.— Smith *v.* McManus, 7 Yerg. (Tenn.) 477, 27 Am. Dec. 519.

Texas.— Hansborough *v.* Towns, 1 Tex. 58. See also *infra*, XIV, C [8 Cyc].

In such case he need not show any retransfer to himself, but may recover notwithstanding the indorsement.

Connecticut.— Bond *v.* Storrs, 13 Conn. 412.

Georgia.— Habersham *v.* Lehman, 63 Ga. 380.

Kentucky.— Bell *v.* Morehead, 3 A. K. Marsh. (Ky.) 158.

Louisiana.— Merz *v.* Kaiser, 20 La. Ann. 377; Cooper *v.* Cooper, 14 La. Ann. 665; Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583; Hill *v.* Holmes, 12 La. 96; Mourain *v.* Devall, 12 La. 93. But see Hart *v.* Windle, 15 La. 265.

Michigan.— Atkinson *v.* Weidner, 79 Mich. 575, 44 N. W. 1042.

New York.— Chautauqua County Bank *v.* Davis, 21 Wend. (N. Y.) 584.

See also *infra*, XIV, C [8 Cyc.].

63. *Illinois.*— Fawsett *v.* U. S. National L. Ins. Co., 97 Ill. 11, 37 Am. Rep. 95; Sweet *v.* Garwood, 88 Ill. 407; Fleury *v.* Tufts, 25 Ill. App. 101.

Massachusetts.— Nevins *v.* De Grand, 15 Mass. 436.

Michigan.— Reading *v.* Beardsley, 41 Mich. 123, 1 N. W. 965.

New Hampshire.— Witherell *v.* Ela, 42 N. H. 295.

New York.— Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367 (holding that he may strike out his own special indorsement without showing that it was for collection); Manhattan Co. *v.* Reynolds, 2 Hill (N. Y.) 140; Chautauqua County Bank *v.* Davis, 21 Wend. (N. Y.) 584.

Pennsylvania.— Marr *v.* Sloan, 1 Wkly. Notes Cas. (Pa.) 601.

Texas.— Bradley *v.* Owsley, 74 Tex. 69, 11 S. W. 1052.

United States.— Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193; Greenhough *v.* Keyworth, 2 Hayw. & H. (U. S.) 9, 30 Fed. Cas. No. 18,299; Leavitt *v.* Cowles, 2 McLean (U. S.) 491, 15 Fed. Cas. No. 8,171. On resuming possession he is remitted to his original rights, notwithstanding the indorsement, and may recover thereon, or he may surrender it and sue on the original consideration. Lyman *v.* U. S. Bank, 12 How. (U. S.) 225, 13 L. ed. 965.

England.— Dehers *v.* Harriot, 1 Show. 163.

Where the holder under a blank indorsement has filled it specially to an agent for collection and the note is returned to him after dishonor, he may strike out the special indorsement and claim under the blank indorsement. Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

The holder's indorsement for collection may be struck out at the trial, or even afterward on motion at bar for a new trial. Manhattan Co. *v.* Reynolds, 2 Hill (N. Y.) 140; Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193 (at the trial). *Contra*, Craig *v.* Brown, Pet. C. C. (U. S.) 171, 6 Fed. Cas. No. 3,327.

64. McLemore *v.* Hawkins, 46 Miss. 715; Swenson *v.* Heidenheimer, (Tex. Civ. App. 1899) 52 S. W. 989.

65. Where a person who indorses a bill to another, either for value or for purposes of collection, comes again into possession thereof, he is to be regarded as the holder and proprietor of such bill, and as such entitled to recover thereon, although there may be one or more indorsements in full subsequent to the indorsement to him. Livingston, J., in Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362.

66. See *infra*, XIV, C [8 Cyc.].

67. Mechanics' Bank *v.* Valley Packing Co., 4 Mo. App. 200. But if the holder, after indorsing "for discount and credit of himself," takes the note out of the bank and transfers it himself without striking out the restrictive indorsement it will transfer the title. Oliphant *v.* Vannest, 58 N. J. L. 162, 33 Atl. 382.

68. Smith *v.* McLean, 4 N. C. 509, 7 Am. Dec. 693; Fairclough *v.* Pavia, 2 C. L. R. 1099, 9 Exch. 690, 23 L. J. Exch. 215; Neg. Instr. L. § 78.

Where struck out by mistake this is not so. Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198.

subsequent parties who are entitled to look to such indorser for payment,[69] and the holder cannot avail himself of the indorser's title and claim under it.[70] One who erases an indorsement must avoid injuring the security by giving it a suspicious appearance, and any erasure, especially if the bill is payable on demand, puts the purchaser upon inquiry.[71]

(IV) *ALTERATION OF INDORSEMENT.* The right to strike out indorsements does not include in general the right to alter a special indorsement by striking out the name of the special indorser and inserting the holder's name,[72] and such an act will amount to a material alteration and discharge the special indorser.[73]

(V) *REVOCATION OF INDORSEMENT.* Until delivery to a *bona fide* holder an indorsement is revocable.[74]

b. Blank Indorsement — (I) *FORM.* An indorsement in blank specifies no indorsee[75] and consists in general merely of the signature of the indorser written on the back of the instrument.[76]

(II) *NATURE AND EFFECT.* Such indorsement makes the instrument payable to bearer and as such transferable by delivery,[77] although the indorser in blank

69. Neg. Instr. L. § 78.

70. Minor *v.* Bewick, 55 Mich. 491, 22 N. W. 12; Bartlett *v.* Benson, 3 D. & L. 274, 15 L. J. Exch. 23, 14 M. & W. 733.

71. Gascoyne *v.* Smith, M'Clel. & Y. 338. If the action is brought by the payee, and he is in possession of the paper, the erasure may be presumed to have been properly made. Goddard *v.* Cunningham, 6 Iowa 400.

72. Unless he is the equitable owner (Porter *v.* Cushman, 19 Ill. 572) or holds by a separate assignment (Morris *v.* Poillon, 50 Ala. 403). If, however, the holder has made a prior blank indorsement special by filling it for the purpose of collection, he may afterward strike out the name of such special indorsee and insert his own. Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

73. Grimes *v.* Piersol, 25 Ind. 246.

74. Dogan *v.* Dubois, 2 Rich. Eq. (S. C.) 85; State Bank *v.* Johnson, 1 Swan (Tenn.) 217; Berkeley *v.* Tinsley, 88 Va. 1001, 14 S. E. 842; Bills Exch. Act, § 21.

75. Neg. Instr. L. § 64; Bills Exch. Act, § 34.

76. Lambert *v.* Pack, 1 Salk. 127. See also Neg. Instr. L. § 61; Bills Exch. Act, § 32.

It may consist of more, however, than the mere signature.

Alabama.—Kennon *v.* McRea, 7 Port. (Ala.) 175, "I endorse the within note."

Illinois.— McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321, "without recourse."

Iowa.— Geneser *v.* Wissner, 69 Iowa 119, 28 N. W. 471, holding that a blank indorsement may contain a waiver of demand and notice written above the signature.

Maine.—Adams *v.* Smith, 35 Me. 324, "Pay to the —— Bank on account of the Protection Ins. Company of New Jersey."

North Carolina.— French *v.* Barney, 23 N. C. 219, "without recourse."

Wisconsin.— Lyon *v.* Ewings, 17 Wis. 61, "without recourse."

77. *Alabama.*— Carter *v.* Lehman, 90 Ala. 126, 7 So. 735.

Arkansas.— Martin *v.* Warren, 11 Ark. 285.

California.— Storch *v.* McCain, 85 Cal. 304, 24 Pac. 639; Curtis *v.* Sprague, 51 Cal. 239; Poorman *v.* Mills, 35 Cal. 118, 95 Am. Dec. 90 (certificate of deposit).

Georgia.— Heard *v.* De Loach, 105 Ga. 500, 30 S. E. 940.

Illinois.— Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Morris *v.* Preston, 93 Ill. 215; Palmer *v.* Marshall, 60 Ill. 289; Wilder *v.* De Wolf, 24 Ill. 190.

Indiana.— Grimes *v.* Piersol, 25 Ind. 246.

Kentucky.—Caruth *v.* Thompson, 16 B. Mon. (Ky.) 572, 63 Am. Dec. 559.

Louisiana.— Scionneaux *v.* Waguespack, 32 La. Ann. 283; Skolfield *v.* Rhodes, 10 Rob. (La.) 128; Hill *v.* Buddington, 8 Rob. (La.) 119; Gaines *v.* Morris, 6 Rob. (La.) 4; Fitzwilliams *v.* Wilcox, 2 Rob. (La.) 303; Boswell *v.* Zender, 13 La. 366; Denton *v.* Duplessis, 12 La. 83; Banks *v.* Eastin, 3 Mart. N. S. (La.) 291; Allard *v.* Ganushau, 4 Mart. (La.) 662.

Maine.— McDonald *v.* Bailey, 14 Me. 101, although preceded by the words "eventually accountable."

Maryland.— Lucas *v.* Byrne, 35 Md. 485.

Massachusetts.— Lindsay *v.* Chase, 104 Mass. 253; Little *v.* Obrien, 9 Mass. 423.

Michigan.— Howry *v.* Eppinger, 34 Mich. 29.

Missouri.— Fitzgerald *v.* Barker, 85 Mo. 13; International Bank *v.* German Bank, 71 Mo. 183, 36 Am. Rep. 468 (certificate of deposit); Jacoby *v.* Ross, 12 Mo. App. 577.

Nebraska.— Everett *v.* Tidball, 34 Nebr. 803, 52 N. W. 816.

Mexico.— Herlow *v.* Orman, 3 N. M. 471, 6 Pac. 935.

New York.— Beall *v.* General Electric Co., 16 Misc. (N. Y.) 611, 38 N. Y. Suppl. 527, 73 N. Y. St. 594, an accommodation indorsement.

North Carolina.— Hubbard *v.* Williamson, 26 N. C. 266; French *v.* Barney, 23 N. C. 219.

Ohio.— McCoy *v.* Hornbrook, 7 Ohio Dec. (Reprint) 143, 1 Cinc. L. Bul. 170.

Tennessee.— Woodson *v.* Gordon, Peck (Tenn.) 196, 14 Am. Dec. 743, holding that

was himself a special indorsee.[78] No further indorsement is necessary,[79] although it may be afterward indorsed.[80] Such indorsement is itself equivalent to a bill of exchange payable to bearer, although the blank indorsement is afterward followed by other special indorsement.[81] An indorsement in blank is either a transfer or a power to collect the paper according to circumstances.[82] If given to an

it may be taken up by the indorser and delivered to another without further indorsement.

Texas.— Johnson *v.* Mitchell, 50 Tex. 212, 32 Am. Rep. 602 (holding that even a note payable to a person named "or bearer" and requiring the indorsement of the person named is transferable by delivery after it has been indorsed in blank by him); Greneaux *v.* Wheeler, 6 Tex. 515.

Vermont.— Sawyer *v.* White, 19 Vt. 40.

See also Neg. Instr. L. § 64; Bills Exch. Act, § 34.

See 7 Cent. Dig. tit. "Bills and Notes," § 500.

Where a note indorsed in blank returns by redelivery to the indorser it may be further transferred by him by delivery.

Arkansas.—Martin *v.* Warren, 11 Ark. 285.

Illinois.— Humphreyville *v.* Culver, 73 Ill. 485.

Louisiana.— Merz *v.* Kaiser, 20 La. Ann. 377; Sprigg *v.* Cuny, 7 Mart. N. S. (La.) 253.

Massachusetts.—Emerson *v.* Cutts, 12 Mass. 78.

United States.— Lyman *v.* U. S. Bank, 12 How. (U. S.) 225, 13 L. ed. 965.

78. Heard *v.* De Loach, 105 Ga. 500, 30 S. E. 940.

79. *Arkansas.*— Martin *v.* Warren, 11 Ark. 285.

Illinois.— Palmer *v.* Marshall, 60 Ill. 289.

Louisiana.— Hunt *v.* Stone, 19 La. Ann. 526; Banks *v.* Eastin, 3 Mart. N. S. (La.) 291.

Maine.— McDonald *v.* Bailey, 14 Me. 101.

Massachusetts.— Lindsay *v.* Chase, 104 Mass. 253.

Michigan.— Marskey *v.* Turner, 81 Mich. 62, 45 N. W. 644.

Missouri.— Lachance *v.* Loeblein, 15 Mo. App. 460.

England.—Smith *v.* Clark, 1 Esp. 180, Peake 225.

80. Melton *v.* Gibson, 97 Ind. 158.

Right of holder under blank indorsement to sue in his own name see *infra*, XIV, C [8 Cyc.].

Party in interest.— The bearer under a blank indorsement need not prove himself to be the beneficial owner, if no substantial defense is set up against the paper. Scionneaux *v.* Waguespack, 32 La. Ann. 283.

81. *California.*— Curtis *v.* Sprague, 51 Cal. 239.

Georgia.— Habersham *v.* Lehman, 63 Ga. 380.

Illinois.— Palmer *v.* Gardiner, 77 Ill. 143.

Louisiana.— Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583; Hebrard *v.* Bollenhagen, 9 Rob. (La.) 155; Hill *v.* Buddington, 8 Rob. (La.) 119; Gaines *v.* Morris, 6 Rob. (La.) 4; Hill *v.* Holmes, 12 La. 96.

New York.— Watervliet Bank *v.* White, 1 Den. (N. Y.) 608.

North Carolina.— French *v.* Barney, 23 N. C. 219.

Pennsylvania.— Rand *v.* Dovey, 83 Pa. St. 280 (holding this to be so under a blank indorsement by the payee, in disregard of a sealed indorsement above him by a corporation which was not a party to the note); Mitchell *v.* Fuller, 15 Pa. St. 268, 53 Am. Dec. 594; Bailey *v.* Armstrong, 4 Wkly. Notes Cas. (Pa.) 381 (holding that a special indorsement on a promissory note, indorsing it over to a particular person for collection, does not restrict the effect of a previous blank indorsement).

England.— Peacock *v.* Rhodes, Dougl. 611; Smith *v.* Clarke, 1 Esp. 180, Peake 225; Walker *v.* McDonald, 2 Exch. 527, 17 L. J. Exch. 377.

Contra, in Texas, where a special indorsement restricts further transfer by delivery under earlier blank indorsements. Johnson *v.* Mitchell, 50 Tex. 212, 32 Am. Rep. 602.

The Negotiable Instruments Law, section 70, provides that "where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

Non-negotiable paper.— This is true also of a blank indorsement of non-negotiable paper.

Connecticut.— Castle *v.* Candee, 16 Conn. 223.

Iowa.— Billingham *v.* Bryan, 10 Iowa 317.

Missouri.— Kuntz *v.* Tempel, 48 Mo. 71.

Vermont.— Aldis *v.* Johnson, 1 Vt. 136.

England.— Matthews *v.* Bloxsome, 10 Jur. N. S. 998, 33 L. J. Q. B. 209, 10 L. T. Rep. N. S. 415, 12 Wkly. Rep. 795; Tassell *v.* Lewis, 1 Ld. Raym. 743.

82. Armstrong *v.* Boyertown Nat. Bank, 11 Ky. L. Rep. 90 (holding that, as between the parties, the fact that the indorsement of a draft is in blank does not vest the indorsee with the absolute title to the paper and that it may be shown by parol that the draft was received for collection); Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755.

Indorsee's intention is shown by his choice of the form of action, e. g., as a power to collect — by suit in the indorser's name (Clark *v.* Piggott, 12 Mod. 193, 1 Salk. 126), as a transfer — by suit in his own name (Richardson *v.* Lincoln, 5 Metc. (Mass.) 201; Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755) or by filling the blank indorsement to himself (Ringgold *v.* Tyson, 3 Harr. & J. (Md.) 172).

Agent for collection under blank indorsement cannot dispute principal's title and

agent it carries with it a power to transfer the paper under which a *bona fide* purchaser will be protected,[83] and in general an indorsement in blank is a transfer of the title to the paper,[84] although intended by the indorser as a transfer for some special purpose.[85]

(III) *Filling Blank Indorsement*—(A) *In General.* The holder of a bill may make the general indorsement a special one by filling the blank,[86] unless pre-

power to release. Flanagan *v.* Brown, 70 Cal. 254, 11 Pac. 706.

83. *Illinois.*— Palmer *v.* Marshall, 60 Ill. 289.

Maine.— Connell *v.* Bliss, 52 Me. 476, holding that a purchaser after maturity, by delivery under a blank indorsement, may hold against the indorser, although it had been indorsed and delivered to an agent for a special purpose.

Mississippi.— Murrell *v.* Jones, 40 Miss. 565.

New York.— People *v.* Bank of North America, 75 N. Y. 547.

North Carolina.— Bradford *v.* Williams, 91 N. C. 7.

Wife's indorsement.— A wife's blank indorsement to her husband is not such "written authority" as the statute requires as will enable him to pledge the note for a purpose not intended by her. Hurt *v.* Cook, 151 Mo. 416, 52 S. W. 396.

Certificates of public debt, transferable on the books of the commissioner only, although indorsed in blank and sent to a third person to obtain payment of them, raise no presumption from the blank indorsement that the holder was entitled to sell or to discount them. Combs *v.* Hodge, 21 How. (U. S.) 397, 16 L. ed. 115 [*reversing* 6 Fed. Cas. No. 3,048, 5 Pittsb. Leg. J. (Pa.) 37].

84. *Alabama.*— Miller *v.* Henry, 54 Ala. 120.

Arkansas.— Owen *v.* Arrington, 17 Ark. 530; Worthington *v.* Curd, 15 Ark. 491; Martin *v.* Warren, 11 Ark. 285; Sterling *v.* Bender, 7 Ark. 201, 44 Am. Dec. 539.

Colorado.— Frost *v.* Fisher, 13 Colo. App. 322, 58 Pac. 872.

Connecticut.— Brush *v.* Scribner, 11 Conn. 388, 29 Am. Dec. 303.

Georgia.— Heard *v.* De Loach, 105 Ga. 500, 30 S. E. 940; Columbus Nat. Bank *v.* Leonard, 91 Ga. 805, 18 S. E. 32.

Illinois.— Illinois Conference *v.* Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252; Farwell *v.* Meyer, 36 Ill. 510; Burnap *v.* Cook, 32 Ill. 168; Cutting *v.* Conklin, 28 Ill. 506.

Indiana.— Shirk *v.* North, 138 Ind. 210, 37 N. E. 590 (holding that a wife's blank indorsement vests title, as pledgee, in husband's creditors and absolutely in subsequent *bona fide* purchasers); Moore *v.* Pendleton, 16 Ind. 481.

Kentucky.—Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209.

Louisiana.— Scionneaux *v.* Waguespack, 32 La. Ann. 283; Nerault *v.* Dodd, 3 La. 430; Allain *v.* Whitaker, 5 Mart. N. S. (La.) 511.

Maine.— McDonald *v.* Bailey, 14 Me. 101.

Maryland.— Canfield *v.* McIlwaine, 32 Md. 94; Dunham *v.* Clogg, 30 Md. 284.

Massachusetts.— Northampton Bank *v.* Pepoon, 11 Mass. 288.

Michigan.— Whitworth *v.* Pelton, 81 Mich. 98, 45 N. W. 500.

Missouri.— Jacoby *v.* Ross, 12 Mo. App. 577.

New Jersey.— Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604.

New York.— Bedell *v.* Carll, 33 N. Y. 581; Mitchell *v.* Hyde, 12 How. Pr. (N. Y.) 460.

North Dakota.— Seybold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682.

South Carolina.— McLaughlin *v.* Broddy, 63 S. C. 433, 41 S. E. 523; Hanks *v.* Dunlap, 10 Rich. Eq. (S. C.) 139.

Tennessee.— Faris *v.* Green, 4 Humphr. (Tenn.) 377.

See 7 Cent. Dig. tit. "Bills and Notes," § 466.

Title to a non-negotiable note passes by delivery under blank indorsement. Worthington *v.* Curd, 15 Ark. 491 (an instrument payable in cotton under the statute); Steere *v.* Trebilcock, 108 Mich. 464, 66 N. W. 342; Hastings *v.* McKinley, 1 E. D. Smith (N. Y.) 273; Lanneau *v.* Ervin, 12 Rich. (S. C.) 31; Tryon *v.* De Hay, 7 Rich. (S. C.) 12. But in Missouri the blank indorsement on a non-negotiable note is a mere authority to fill it up, to be exercised by the holder; and until he does this the title remains in the payee. Taylor *v.* Larkin, 12 Mo. 103, 49 Am. Dec. 119; Wiggins *v.* Rector, 1 Mo. 478.

Title to a sealed bill passes by indorsement in blank (Lucas *v.* Byrne, 35 Md. 485; Chesley *v.* Taylor, 3 Gill (Md.) 251), although the indorser be not liable as such under the statute (Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33).

Title to a registered bond not under seal, expressly transferable only at the office of the city treasurer, will not pass by a blank indorsement as against the lawful owner. Scollans *v.* Rollins, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284.

85. Giovanovich *v.* Citizens' Bank, 26 La. Ann. 15, an indorsement to a broker for the purpose of sale.

Indorsement in blank for collection see *infra*, VI, C, 1, d, (II), (D).

86. *Alabama.*— Miller *v.* Henry, 54 Ala. 120 (a sealed note); Kennon *v.* McRea, 7 Port. (Ala.) 175.

California.— Cal. Civ. Code, § 8114.

Illinois.— Illinois Conference *v.* Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252.

Iowa.— Bernard *v.* Barry, 1 Greene (Iowa) 388, and such indorsement then becomes a contract in writing, signed by the indorser, and complies with the statute of frauds.

Maryland.—Chesley *v.* Taylor, 3 Gill (Md.) 251.

vented by express restrictions in the form of the indorsement itself,[87] but in general it is not necessary to fill it even for the purpose of bringing suit on it,[88] although formerly it was held that complete title did not pass until the blank indorsement was filled up[89] and no recovery could be had in the holder's own name under a blank indorsement until it was filled.[90]

(B) *By Whom Filled.* In general a blank indorsement may be filled by any holder however remote.[91] It may be filled by a collecting agent,[92] by an executor[93] or administrator[94] of the deceased holder, or by the assignee of the indorser who has taken the paper up.[95]

(C) *How Filled.* A blank indorsement may be filled by the holder with any consistent contract,[96] but not with a contract inconsistent with the legal meaning

Missouri.— Hunter *v.* Hempstead, 1 Mo. 67, 13 Am. Dec. 468.

New York.— Norris *v.* Badger, 6 Cow. (N. Y.) 449; Lovell *v.* Evertson, 11 Johns. (N. Y.) 52.

United States.— Evans *v.* Gee, 11 Pet. (U. S.) 80, 9 L. ed. 639; U. S. Bank *v.* Roberts, 2 Cranch C. C. (U. S.) 15, 2 Fed. Cas. No. 946.

See 7 Cent. Dig. tit. "Bills and Notes," § 448.

A blank indorsement is not converted into an indorsement to the bank where a note is indorsed, "Pay to the bank," without designating the particular bank, by lodging the note at a bank for collection. Adams *v.* Smith, 35 Me. 324.

87. Snee *v.* Prescot, 1 Atk. 245, 26 Eng. Reprint 157; Sigourney *v.* Lloyd, 8 B. & C. 622, 7 L. J. K. B. O. S. 73, 3 M. & R. 56, 22 Rev. Rep. 504, 15 E. C. L. 308 [*affirmed* in 5 Bing. 525, 3 M. & P. 229, 3 Y. & J. 220, 30 Rev. Rep. 728, 15 E. C. L. 704]; Edie *v.* East India Co., 2 Burr. 1226, 1 W. Bl. 295; Archer *v.* Bank of England, Dougl. 637; Treuttel *v.* Barandon, 1 Moore C. P. 543, 8 Taunt. 100, 4 E. C. L. 59.

88. See *infra*, XIV, C [8 Cyc.].

Lost note.— The blank indorsement of a lost note need not and cannot be filled. Fairbanks *v.* Campbell, 53 Ill. App. 216.

The ordinance of Bilboa, requiring every indorsement to be filled up with the name of the indorsee, is not in force in Louisiana, and blank indorsements are legal. Baker *v.* Montgomery, 4 Mart. (La.) 90; Poutz *v.* Duplantier, 2 Mart. (La.) 328.

89. Cope *v.* Daniel, 9 Dana (Ky.) 415; Lucas *v.* Marsh, 1 Barnes Notes Cas. 453; More *v.* Manning, Comyns 311.

90. See *infra*, XIV, C [8 Cyc.].

91. *Alabama.*— Kennon *v.* McRea, 7 Port. (Ala.) 175.

Indiana.— Grimes *v.* Piersol, 25 Ind. 246.

Iowa.— Bernard *v.* Barry, 1 Greene (Iowa) 388.

Kentucky.— Caruth *v.* Thompson, 16 B. Mon. (Ky.) 572, 63 Am. Dec. 559; Cope *v.* Daniel, 9 Dana (Ky.) 415.

Maine.— Adams *v.* Smith, 35 Me. 324.

Missouri.— Hunter *v.* Hempstead, 1 Mo. 67, 13 Am. Dec. 468.

New York.— Lovell *v.* Evertson, 11 Johns. (N. Y.) 52.

Wisconsin.— Lyon *v.* Ewings, 17 Wis. 61.

An equitable owner may fill the blank indorsement so as to vest the legal title in himself. Moore *v.* Maple, 25 Ill. 341.

The privilege belongs only to a bona fide purchaser, without knowledge or notice of any inconsistent relation sustained by prior indorsers to the note (Adrian *v.* McCaskill, 103 N. C. 182, 9 S. E. 284, 14 Am. St. Rep. 788, 3 L. R. A. 759), and the payment of an accepted bill by a stranger at the request of the accepter before protest and without any of the formalities prescribed by mercantile usage does not make him a party to the bill, so as to authorize him to fill up any indorsement to himself, and maintain an action on it in his own name (Gazzam *v.* Armstrong, 3 Dana (Ky.) 554).

A blank indorsement of a non-negotiable note can be filled only by the person to whom it was made. Muldrow *v.* Agnew, 11 Mo. 616.

92. Child *v.* Eureka Powder Works, 44 N. H. 354, although an attorney for collection should not fill the blank indorsement.

93. Lucas *v.* Byrne, 35 Md. 485.

94. Mitchell *v.* Mitchell, 11 Gill & J. (Md.) 388.

95. Metcalf *v.* Yeaton, 51 Me. 198.

96. *Arkansas.*—Andrews *v.* Simms, 33 Ark. 771.

Illinois.— Maxwell *v.* Vansant, 46 Ill. 58; Croskey *v.* Skinner, 44 Ill. 321; Hance *v.* Miller, 21 Ill. 636.

Indiana.— Bowers *v.* Headen, 4 Ind. 318.

Kentucky.— Pace *v.* Welmending, 12 Bush (Ky.) 141, authority to pay.

Massachusetts.— Sweetser *v.* French, 13 Metc. (Mass.) 262; Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179.

North Carolina.— Hubbard *v.* Williamson, 26 N. C. 266.

United States.— Evans *v.* Gee, 11 Pet. (U. S.) 80, 9 L. ed. 639.

England.— Lambert *v.* Oakes, 12 Mod. 244; Lambert *v.* Pack, 1 Salk. 127.

Neg. Instr. L. § 65; Bills Exch. Act, § 34.

An assignment may be written over a blank indorsement (Hunt *v.* Armstrong, 5 B. Mon. (Ky.) 399; Needhams *v.* Page, 3 B. Mon. (Ky.) 465; Chesley *v.* Taylor, 3 Gill (Md.) 251 [of a sealed note]; Davidson *v.* Powell, 114 N. C. 575, 19 S. E. 601), or the holder may write over it an assignment with warranty and the party is estopped to say the contrary (Hungerford *v.* Thomson, Kirby (Conn.) 393).

Guaranty and assignment may be written over a blank indorsement and be valid as an

of the indorsement.[97] A guaranty contract cannot be written[98] unless a guaranty was agreed on,[99] either expressly[1] or by implication,[2] or unless such contract was

assignment and rejected as a guaranty (Beattie *v.* Browne, 64 Ill. 360; Croskey *v.* Skinner, 44 Ill. 321) or it may be valid as a contract of indorsement (Hance *v.* Miller, 21 Ill. 636).

Required by direction of court.— In assumpsit against an indorser the court has power to require a plaintiff, claiming from a blank indorsement anything different from the contract implied by law, to write over it the contract claimed, thus notifying the adverse party thereof. Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 167.

97. *Alabama.*— Jordan *v.* Long, 109 Ala. 414, 19 So. 843, holding that a waiver of statutory exemptions cannot be written, even though the body of the note contained such a waiver as to the maker.

Illinois.— Maxwell *v.* Vansant, 46 Ill. 58, holding that the blank indorsement cannot be so filled as to enlarge the indorser's liability by bringing him within a new jurisdiction.

Indiana.— De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46, holding that a contract of suretyship cannot be written over a blank indorsement.

Iowa.— Robinson *v.* Reed, 46 Iowa 219, holding that the word "security" cannot be added.

Massachusetts.— Central Bank *v.* Davis, 19 Pick. (Mass.) 373, holding that waiver of demand and notice cannot be written.

Missouri.— Morrison *v.* Smith, 13 Mo. 234, 53 Am. Dec. 145, holding that the holder of a negotiable note severally indorsed in blank by two or more persons has no right to fill up one indorsement over their signatures so as to make the assignment to him the joint act of all.

New Jersey.— Clawson *v.* Gustin, 5 N. J. L. 821, holding that the words "and stand security till paid" cannot be inserted.

Ohio.— Erwin *v.* Lynn, 16 Ohio St. 539, holding that a blank indorsement for the accommodation of the maker is single and entire and that the holder of the note cannot fill up the indorsement so as to make the note payable part to one person and part to another without consent.

Wisconsin.—Catlin *v.* Jones, 1 Pinn. (Wis.) 130, holding that waiver of demand and notice cannot be inserted.

A waiver of demand and notice cannot be written thereon by the holder in the absence of express authority.

Arkansas.— Andrews *v.* Simms, 33 Ark. 771.

Louisiana.— Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372.

South Carolina.— Fowler *v.* Fleming, 1 McMull. (S. C.) 282.

Tennessee.— Kimbro *v.* Lamb, 4 Humphr. (Tenn.) 95, 40 Am. Dec. 628.

Wisconsin.— Catlin *v.* Jones, 1 Pin. (Wis.) 130.

See 7 Cent. Dig. tit. "Bills and Notes," § 1198.

98. *Illinois.*— Schnell *v.* North Side Planing Mill Co., 89 Ill. 581; Beattie *v.* Browne, 64 Ill. 360; Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99; Allen *v.* Coffil, 42 Ill. 293 (even if the indorsement was made "as security"); Blatchford *v.* Milliken, 35 Ill. 434.

Indiana.— De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46.

Iowa.— Belden *v.* Hann, 61 Iowa 42, 15 N. W. 591.

Kentucky.— Needhams *v.* Page, 3 B. Mon. (Ky.) 465.

Massachusetts.— Howe *v.* Merrill, 5 Cush. (Mass.) 80.

New Jersey.— Clawson *v.* Gustin, 5 N. J. L. 821.

New York.— Hall *v.* Newcomb, 7 Hill (N. Y.) 416, 42 Am. Dec. 82; Seabury *v.* Hungerford, 2 Hill (N. Y.) 80; Nelson *v.* Dubois, 13 Johns. (N. Y.) 175.

Ohio.— Seymour *v.* Mickey, 15 Ohio St. 515. If, however, the indorsee writes over it a special guaranty, he must abide by it and cannot abandon it and recover on the common counts. Crandall *v.* Cuyler, Wright (Ohio) 378.

South Carolina.— Eccles *v.* Ballard, 2 McCord (S. C.) 388.

Tennessee.— Clouston *v.* Barbiere, 4 Sneed (Tenn.) 336.

The writing of a guaranty is immaterial where the note contains an express waiver of demand and notice and of diligence in proceeding against the maker. Iowa Valley State Bank *v.* Sigstad, 96 Iowa 491, 65 N. W. 407.

99. *Connecticut.*— Beckwith *v.* Angell, 6 Conn. 315.

Delaware.— Erwin *v.* Lamborn, 1 Harr. (Del.) 125.

Illinois.— Webster *v.* Cobb, 17 Ill. 459; Smith *v.* Finch, 3 Ill. 321.

Kansas.— Fuller *v.* Scott, 8 Kan. 25.

Minnesota.— Moor *v.* Folsom, 14 Minn. 340, 100 Am. Dec. 227.

Pennsylvania.— Leech *v.* Hill, 4 Watts (Pa.) 448.

Texas.— Chandler *v.* Westfall, 30 Tex. 475.

Estoppel of holder.— The holder, by electing to fix the indorser's liability as the conditional one of indorser and seeking to enforce the same, is estopped from setting up the absolute liability of guarantor, either by writing over the indorser's name or by making proof of a verbal guaranty. Clayes *v.* White, 65 Ill. 357.

Where the indorsement is filled by a guaranty so as to state the contract incorrectly, the holder may correct it by striking out the guaranty. Newton *v.* Bramlett, 55 Ill. App. 661.

1. Windheim *v.* Ohlendorf, 3 Ill. App. 436.

2. Scott *v.* Calkin, 139 Mass. 529, 2 N. E. 675.

intended.[3] A blank indorsement of non-negotiable paper may be filled with an absolute promise to pay.[4] The holder may fill the blank indorsement so as to make the instrument payable to himself;[5] he may elect to fill any one of several blank indorsements and make title through that;[6] or in transferring the bill he may fill the blank indorsement with the name of the new holder and thus avoid personal liability and risk of loss.[7] The blank indorsement may be filled up pay-

The mere fact that an indorser of a promissory note writes his name twice upon the instrument does not authorize the holder to write a contract of guaranty over one or both of the signatures; and such indorser is only liable as indorser and not as guarantor. Culver *v.* Thomas, 22 Ill. App. 651.

3. Worden *v.* Salter, 90 Ill. 160; Levi *v.* Mendell, 1 Duv. (Ky.) 77; Ulen *v.* Kittredge, 7 Mass. 233; Rivers *v.* Thomas, 1 Lea (Tenn.) 649, 27 Am. Rep. 784 (where the indorsement was made for that purpose and after maturity of the note).

4. Long *v.* Smyser, 3 Iowa 266 (a promise to pay without demand and notice); Wareham Bank *v.* Lincoln, 3 Allen (Mass.) 192; Sweetser *v.* French, 13 Metc. (Mass.) 262; Josselyn *v.* Ames, 3 Mass. 274; Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576.

An assignment to himself may be written. Lucas *v.* Pico, 55 Cal. 126. *Contra,* Chandler *v.* Witherspoon, 4 La. 67.

A guaranty cannot be written. Kendall *v.* Parker, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117; Josselyn *v.* Ames, 3 Mass. 274.

5. *Alabama.*—Miller *v.* Henry, 54 Ala. 120, sealed instrument.

California.— Lucas *v.* Pico, 55 Cal. 126.

Illinois.—Evangelical Assoc. of North America *v.* Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252; Palmer *v.* Gardiner, 77 Ill. 143; Palmer *v.* Marshall, 60 Ill. 289; Farwell *v.* Meyer, 36 Ill. 510; Weston *v.* Myers, 33 Ill. 424 (due-bill); Wilder *v.* De Wolf, 24 Ill. 190; Jackson *v.* Haskell, 3 Ill. 565.

Indiana.— Grimes *v.* Piersol, 25 Ind. 246; Moore *v.* Pendleton, 16 Ind. 481; Ferry *v.* Jones, 10 Ind. 226.

Iowa.— Skinner *v.* Church, 36 Iowa 91; Leland *v.* Parriott, 35 Iowa 454 (an indorsement containing additional agreement); Knight *v.* Fox, Morr. (Iowa) 305.

Kentucky.—Caruth *v.* Thompson, 16 B. Mon. (Ky.) 572, 63 Am. Dec. 559; Hunt *v.* Armstrong, 5 B. Mon. (Ky.) 399; Cope *v.* Daniel, 9 Dana (Ky.) 415. If the holder's title is put in issue he must fill the blank indorsement with his own name. Barret *v.* Ft. Pitt Nat. Bank, 19 Ky. L. Rep. 1611, 44 S. W. 97.

Mainc.— Metcalf *v.* Yeaton, 51 Me. 198; Adams *v.* Smith, 35 Me. 324.

Maryland.— Condon *v.* Pearce, 43 Md. 83; Lucas *v.* Byrne, 35 Md. 485; Canfield *v.* McIlwaine, 32 Md. 94; Chesley *v.* Taylor, 3 Gill (Md.) 251 (sealed instrument); Mitchell *v.* Mitchell, 11 Gill & J. (Md.) 388 (holding that it may be filled up by an administrator with the name of his intestate).

Massachusetts.— Fairfield *v.* Adams, 16 Pick. (Mass.) 381 (holding that a bank cashier may fill in his own name in an indorsement to his bank); Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; Cole *v.* Cushing, 8 Pick. (Mass.) 48; Emerson *v.* Cutts, 12 Mass. 78; Blakely *v.* Grant, 6 Mass. 386 (an indorsement, promising to pay the holder twenty per cent damages, in addition to the principal, if the bill should be dishonored, without naming the indorsee).

New York.— Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Williams *v.* Matthews, 3 Cow. (N. Y.) 252; Lovell *v.* Evertson, 11 Johns. (N. Y.) 52 (holding that a partner may fill in his own name in a blank indorsement delivered to his firm). But if in fact the indorsement in blank was intended as a transfer for the benefit of other persons he would be considered as a trustee suing for the benefit of the persons having the legal interest. Lovell *v.* Evertson, 11 Johns. (N. Y.) 52.

North Carolina.— Hubbard *v.* Williamson, 26 N. C. 266.

Ohio.— Weirick *v.* Mahoning County Bank, 16 Ohio St. 296, certificate of deposit.

Pennsylvania.— Brown *v.* Clark, 14 Pa. St. 469.

Wisconsin.— Lyon *v.* Ewings, 17 Wis. 61, an indorsement "without recourse."

United States.— Stettinius *v.* Myer, 4 Cranch C. C. (U. S.) 349, 22 Fed. Cas. No. 13,385 (holding that it may be filled by counsel with the name of plaintiff bank); U. S. Bank *v.* Roberts, 2 Cranch C. C. (U. S.) 15, 2 Fed. Cas. No. 946 (holding that an accommodation indorsement may be so filled); U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517.

6. The holder may fill the first blank indorsement with his own name, striking out intermediate indorsements (Ritchie *v.* Moore, 5 Munf. (Va.) 388, 7 Am. Dec. 688; Stettinius *v.* Myer, 4 Cranch C. C. (U. S.) 349, 22 Fed. Cas. No. 13,385; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517) or letting them stand (Cole *v.* Cushing, 8 Pick. (Mass.) 48), or he may deduce his title through all of them (Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; Cole *v.* Cushing, 8 Pick. (Mass.) 48; Emerson *v.* Cutts, 12 Mass. 78).

7. *Alabama.*— Agee *v.* Medlock, 25 Ala. 281.

Illinois.— Palmer *v.* Marshall, 60 Ill. 289.

Indiana.— Grimes *v.* Piersol, 25 Ind. 246.

New York.— Lovell *v.* Evertson, 11 Johns. (N. Y.) 52.

Pennsylvania.— Brown *v.* Clark, 14 Pa. St. 469.

England.— Vincent *v.* Horlock, 1 Campb. 442, 10 Rev. Rep. 724; *Ex p.* Shuttleworth, 3 Ves. Jr. 368.

Non-negotiable note.— The indorsement in

able to a remote holder without discharging intervening indorsers unless their indorsements are struck out.[8]

(D) *When Filled.* A blank indorsement may be filled up after the death of the indorser[9] or even at the time of trial[10] of the action brought on the instrument.[11]

c. Special Indorsement. An indorsement is said to be special or in full when it designates the indorsee by name or otherwise.[12] By such indorsement the title to the paper is transferred[13] and it is further transferable, by the strict rule of

blank does not authorize even the immediate indorsee to fill the blank with the name of a stranger. Chandler *v.* Witherspoon, 4 La. 67; Muldrow *v.* Agnew, 11 Mo. 616.

8. Cole *v.* Cushing, 8 Pick. (Mass.) 48; Bank of British North America *v.* Ellis, 2 Fed. 44 (Oregon case).

9. Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209; Cope *v.* Daniel, 9 Dana (Ky.) 415 (holding that where an instrument is indorsed in blank the indorsement is irrevocable and is not affected by the death of the indorser); Mitchell *v.* Mitchell, 11 Gill & J. (Md.) 388; Barnes *v.* Reynolds, 4 How. (Miss.) 114.

10. After plea denying assignment it may be so filled. Clark *v.* Walker, 6 Blackf. (Ind.) 82, sealed note.

Whether before or after verdict.— It may be filled even after verdict (Ogburn *v.* Teague, 67 N. C. 355. But see Hudson *v.* Goodwin, 5 Harr. & J. (Md.) 115, holding that it must be filled up before verdict or plaintiff is not entitled to judgment), but it must be filled then (Johnson *v.* Martinus, 9 N. J. L. 144, 17 Am. Dec. 464; Riker *v.* Corby, 3 N. J. L. 911; Snyder *v.* Satterly, 2 N. J. L. 87; Greenough *v.* Smead, 3 Ohio St. 415).

Whether before or after judgment.— An indorsement in blank should be filled out before judgment is rendered. Lilly *v.* Baker, 88 N. C. 151. See also Sawyer *v.* Patterson, 11 Ala. 523, holding that after judgment against one of several makers a note loses its assignable quality and the insertion of the name of another person in the blank indorsement of the payee is a nugatory act, and that the name thus inserted may be stricken out at the trial of a suit brought by the assignee against another maker. But see Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755, where it was held to vest a title in the holder, although not filled up until judgment.

Before action.— It may be filled at any time before suit brought. Canfield *v.* McIlwaine, 32 Md. 94.

11. *Alabama.*— Bancroft *v.* Paine, 15 Ala. 834; Pickett *v.* Stewart, 12 Ala. 202.

Arkansas.— Edwards *v.* Scull, 11 Ark. 325.

Illinois.— Cutting *v.* Conklin, 28 Ill. 506; McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Jackson *v.* Haskell, 3 Ill. 565.

Indiana.— Ferry *v.* Jones, 10 Ind. 226.

Kentucky.— Hunt *v.* Armstrong, 5 B. Mon. (Ky.) 399; Cope *v.* Daniel, 9 Dana (Ky.) 415.

Louisiana.— Poutz *v.* Duplantier, 2 Mart. (La.) 328.

Maryland.— Lucas *v.* Byrne, 35 Md. 485; Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640; Mitchell *v.* Mitchell, 11 Gill & J. (Md.) 388.

Massachusetts.— Scott *v.* Calkin, 139 Mass. 529, 2 N. E. 675; Fairfield *v.* Adams, 16 Pick. (Mass.) 381.

New Jersey.— Riker *v.* Corby, 3 N. J. L. 911; Snyder *v.* Satterly, 2 N. J. L. 87.

New York.— Norris *v.* Badger, 6 Cow. (N. Y.) 449; Nelson *v.* Dubois, 13 Johns. (N. Y.) 175.

North Carolina.— Davidson *v.* Powell, 114 N. C. 575, 19 S. E. 601; Hubbard *v.* Williamson, 26 N. C. 266.

United States.— Stettinius *v.* Myer, 4 Cranch C. C. (U. S.) 349, 22 Fed. Cas. No. 13,385; U. S. Bank *v.* Roberts, 2 Cranch C. C. (U. S.) 15, 2 Fed. Cas. No. 946; Vowell *v.* Lyles, 1 Cranch C. C. (U. S.) 428, 28 Fed. Cas. No. 17,021; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517.

See 7 Cent. Dig. tit. "Bills and Notes," § 452.

Blank indorsement of a sealed note may be filled up at trial (Miller *v.* Henry, 54 Ala. 120; Chesley *v.* Taylor, 3 Gill (Md.) 251), but the holder of a non-negotiable note has no right at the trial to write over the payee's indorsement an assignment to himself (Chandler *v.* Witherspoon, 4 La. 67).

The filling is a mere matter of form and its omission cannot be taken advantage of on appeal, unless the objection is raised in the court below. Cutting *v.* Conklin, 28 Ill. 506; Scammon *v.* Adams, 11 Ill. 575; Johnson *v.* Hooker, 47 N. C. 29 (where the trial is *de novo* in the court above). In support of judgment below leave will be granted, as a matter of course, even at a hearing on error, to one holding a note as indorsee, to write the words necessary for converting a blank indorsement into a special one to himself. West *v.* Meserve, 17 N. H. 432.

12. Burdick *v.* Green, 15 Johns. (N. Y.) 247; Reamer *v.* Bell, 33 Leg. Int. (Pa.) 349, 24 Pittsb. L. J. 29; Kilpatrick *v.* Heaton, 3 Brev. (S. C.) 92. See also Neg. Instr. L. § 640.

13. *Arkansas.*— Purdy *v.* Brown, 4 Ark. 535.

Georgia.— Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252.

Iowa.— Sheldon *v.* Middleton, 10 Iowa 17; Sater *v.* Hendershott, Morr. (Iowa) 118.

Kentucky.— Frankfort Bank *v.* Hunter, 3 A. K. Marsh. (Ky.) 292.

Maryland.— Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

New York.— Everett *v.* Vendryes, 25 Barb. (N. Y.) 383; Burdick *v.* Green, 15 Johns. (N. Y.) 247.

the law merchant, only by indorsement of the person named in the special indorsement;[14] but if there is a blank indorsement, it is transferable by delivery irrespective of an indorsement in full before or after the blank indorsement.[15] A special indorsement does not, however, require the words "or order," for the indorsement transfers the bill or note with all its original incidents, including its negotiability.[16]

d. Restrictive Indorsement[17] — (i) *In General.* In the case of a restrictive indorsement the indorsee takes as agent or trustee[18] and subject to the restriction.[19] To be effective it must be expressed in the indorsement[20] and an undisclosed restriction cannot be set up against a *bona fide* purchaser for value.[21] As against a subsequent indorsement the restriction may be revoked and the negotiability of the paper revived by the later indorsement.[22]

(ii) *How Restricted* — (a) *As to Amount.* The restriction may be as to amount and where this is so the liability of the indorser will not go beyond the amount designated.[23]

(b) *As to Person.* The restriction may be as to the person to receive payment, restricting payment or transfer to a particular person;[24] but although an agree-

Pennsylvania.— Reamer *v.* Bell, 79 Pa. St. 292.

South Carolina.— Wood *v.* McClaurin, 2 Brev. (S. C.) 377.

See 7 Cent. Dig. tit. "Bills and Notes," § 465.

Exception to rule.— The rule that indorsement in full vested the title to a note in the indorsee, who alone could sue on it, was always subject to exception, where it appeared that the indorsee had been merely an agent of the party in whose name the suit was instituted. Wood *v.* Tyson, 13 La. Ann. 104.

14. Cunliffe *v.* Whitehead, 3 Bing. N. Cas. 828, 6 Dowl. P. C. 63, 3 Hodges 182, 6 L. J. C. P. 255, 5 Scott 31, 32 E. C. L. 380.

Formerly when a blank indorsement was made special, an action could not be brought on the instrument in the indorser's name unless such indorsement was stricken out. Clark *v.* Pigott, 12 Mod. 193, 1 Salk. 126.

A special indorsement cannot be changed by the indorsee into a blank indorsement. Minor *v.* Bewick, 55 Mich. 491, 22 N. W. 12.

15. See *supra*, VI, C, 1, b, (II).

16. Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199]; Hodges *v.* Adams, 19 Vt. 74, 46 Am. Dec. 181; Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295; Brown *v.* De Winton, 6 C. B. 336, 6 D. & L. 62, 12 Jur. 678, 17 L. J. C. P. 281, 60 E. C. L. 336; More *v.* Manning, Comyns 311; Acheson *v.* Fountain, 1 Str. 557. *Contra*, Spence *v.* Robinson, 35 W. Va. 313, 13 S. E. 1004.

17. Restrictive indorsements are defined and their effect prescribed in Neg. Instr. L. §§ 66, 67, 69; Bills Exch. Act, § 35.

18. Fawsett *v.* U. S. National L. Ins. Co., 97 Ill. 11, 37 Am. Rep. 95; Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295.

19. Sigourney *v.* Lloyd, 8 B. & C. 622, 7 L. J. K. B. O. S. 73, 3 M. & P. 58, 32 Rev. Rep. 504, 15 E. C. L. 308 [*affirming* 5 Bing. 525, 3 M. & P. 229, 3 Y. & J. 220, 30 Rev. Rep. 728, 15 E. C. L. 704, even though it follows an indorsement in blank]; Giles *v.* Perkins, 9 East 12 (and an assignee in bankruptcy will take subject to the trust).

20. Fassin *v.* Hubbard, 55 N. Y. 465; Albion Bank *v.* Smith, 27 Barb. (N. Y.) 489.

A restriction will not be presumed where none is expressed. Potts *v.* Reed, 6 Esp. 57, 9 Rev. Rep. 808.

21. Coors *v.* German Nat. Bank, 14 Colo. 202, 23 Pac. 328, 7 L. R. A. 845; Fawsett *v.* U. S. National L. Ins. Co., 97 Ill. 11, 37 Am. Rep. 95; Wookey *v.* Pole, 4 B. & Ald. 1, 22 Rev. Rep. 594, 6 E. C. L. 365; Gorgier *v.* Mieville, 3 B. & C. 45, 10 E. C. L. 30, 4 D. & R. 641, 16 E. C. L. 217, 2 L. J. K. B. O. S. 206, 27 Rev. Rep. 290; Collins *v.* Martin, 1 B. & P. 648, 2 Esp. 520, 4 Rev. Rep. 572; Bolton *v.* Puller, 1 B. & P. 539, 4 Rev. Rep. 723; Ramsbotham *v.* Cator, 1 Stark. 228, 2 E. C. L. 93. And see *infra*, XIV, B [8 Cyc.].

22. Atkins *v.* Cobb, 56 Ga. 86 (after an indorsement for collection); Holmes *v.* Hooper, 1 Bay (S. C.) 160.

23. Cole *v.* Tuck, 108 Ala. 227, 19 So. 377, holding that where defendant, payee of a note, indorses it for a limited amount, he cannot be held liable for attorney's fees, provided for in the note, in addition to the amount indorsed.

24. Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295.

The form of an indorser's signature may be restrictive and amount to notice of a trust, to which holders under it will be subject. Nicholson *v.* Chapman, 1 La. Ann. 222, "G. W. Pritchard, Syndic."

"Credit the drawer" written by the payee on the face of a note implies no promise or undertaking on his part, but is merely a direction to all persons to whom the note may be presented to treat with the maker as the owner, notwithstanding the apparent title of the indorsee. Temple *v.* Baker, 125 Pa. St. 634, 24 Wkly. Notes Cas. (Pa.) 1, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709. It is not a restrictive indorsement, but gives the maker a title to receive the proceeds if the note should be discounted. Runyan *v.*

ment not to transfer indorsed on the paper may be the subject of an action it will not itself restrict the negotiability of the paper.[25] A restrictive indorsement may be for the benefit of a third person[26] or of the indorser.[27] It may be "for account" of a third person[28] or of the indorser;[29] but an indorsement for account of a person named may be a mere reference to the consideration and will not then amount to a restrictive indorsement.[30] An indorsement may be for deposit simply and as such effect a transfer of the paper.[31]

(c) *By Conditional Indorsement.* The indorser may make his indorsement conditional.[32] Such conditional indorsement has been held not to affect the

Milliken, 1 Phila. (Pa.) 208, 8 Leg. Int. (Pa.) 112.

25. Leland *v.* Parriott, 35 Iowa 454.

26. Carrillo *v.* McPhillips, 55 Cal. 130; Hook *v.* Pratt, 78 N. Y. 371, 34 Am. Rep. 539 ("Pay to . . . Hook, . . . for the benefit of her son Charlie"); Power *v.* Finnie, 4 Call (Va.) 411 ("Pay . . . to Jack Power only"); Ancher *v.* Bank of England, Dougl. 615 ("The within must be credited to" a person named).

27. *Indiana.*— Williams *v.* Potter, 72 Ind. 354, "payable to Bro. Jacob Heath for me."

Massachusetts.— Wilson *v.* Holmes, 5 Mass. 543, 4 Am. Dec. 75, "Pay Thomas Wilson . . . for our use."

Mississippi.— Sims *v.* Wilkins, 5 Sm. & M. (Miss.) 234, an indorsement of an order to pay a person named with a request to "settle it with him, as he may wish you to do for me."

United States.— Lee *v.* Chillicothe Branch Bank, 1 Biss. (U. S.) 325, 15 Fed. Cas. No. 8,187, 1 Bond (U. S.) 387, 15 Fed. Cas. No. 8,186, 2 Leg. & Ins. Rep. 10 ("credit my account"); Brown *v.* Jackson, 1 Wash. (U. S.) 512, 4 Fed. Cas. No. 2,015 ("pay the amount to order for my use").

England.— Snee *v.* Prescot, 1 Atk. 245, 249, 26 Eng. Reprint 157 ("to my use"); Sigourney *v.* Lloyd, 8 B. & C. 622, 7 L. J. K. B. O. S. 73, 3 M. & R. 58, 32 Rev. Rep. 504, 15 E. C. L. 308 [*affirmed* in 5 Bing. 525, 3 M. & P. 229, 3 L. J. 220, 30 Rev. Rep. 728, 15 E. C. L. 704, "pay to Samuel Williams . . . for my use"].

28. Armour Bros. Banking Co. *v.* Riley County Bank, 30 Kan. 163, 1 Pac. 506; Leary *v.* Blanchard, 48 Me. 269; U. S. National Bank *v.* Geer, 53 Nebr. 67, 73 N. W. 266, 41 L. R. A. 439; New York Third Nat. Bank *v.* Georgetown Miners' Nat. Bank, 102 U. S. 663 note, 26 L. ed. 252 note; White *v.* Georgetown Miners' Nat. Bank, 102 U. S. 658, 26 L. ed. 250; Treuttel *v.* Barandon, 1 Moore C. P. 543, 8 Taunt. 100, 4 E. C. L. 59.

29. Williams *v.* Jones, 77 Ala. 294; Leary *v.* Blanchard, 48 Me. 269; Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429; Chicago First Nat. Bank *v.* Reno County Bank, 1 McCrary (U. S.) 491, 3 Fed. 257.

An indorsement "Pay to the —— Bank on account of" the indorser is not restrictive and gives a right of action to any holder under it (Adams *v.* Smith, 35 Me. 324), and such an indorsement by a secretary for his company has been held to be susceptible of construction, and to fairly indicate either that the secretary indorsed the note for or on account of the company, or that plaintiffs, on receiving the sum due thereon, were to credit the same to the account of the company, as between the transferee and such company (Wood *v.* Wellington, 30 N. Y. 218).

Crossing a check "for account of" the indorser does not render it non-negotiable under Bills Exch. Act, § 8. National Bank *v.* Silke, [1891] 1 Q. B. 435, 60 L. J. Q. B. 199, 63 L. T. Rep. N. S. 787, 39 Wkly. Rep. 361.

30. Buckley *v.* Jackson, L. R. 3 Exch. 135, 18 L. T. Rep. N. S. 886 ("value in account with H. C. Drinkwater, Esq."); Potts *v.* Reed, 6 Esp. 57, 9 Rev. Rep. 808 ("being part of the consideration money in an Indenture of Assignment"); Murrow *v.* Stuart, 8 Moore P. C. 267, 14 Eng. Reprint 102 ("value in account with the Oriental Bank").

31. National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50; Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 16 Am. St. Rep. 342, 6 L. R. A. 191; Security Bank *v.* Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987. But such indorsement was held to create a mere agency to collect in Beal *v.* Somerville, 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291.

32. McGorray *v.* Stockton Sav., etc., Soc., 131 Cal. 321, 63 Pac. 479 (an indorsement to pay a person named whenever he shall produce and deliver up a certain certificate); Prall *v.* Hinchman, 6 Duer (N. Y.) 351 (holding that an indorsement for a special purpose, upon an express understanding that the note should not be used unless the maker succeeded in procuring an extension of credit from all other creditors is conditional only). But an indorsement is not conditional, which reads: "I assign the within note to William Martin, to secure him as security to T. Nichols," and the fact that it expresses the object for which the transfer was made does not affect its validity. Rowe *v.* Haines, 15 Ind. 445, 77 Am. Dec. 101.

Effect as to indorser.— A conditional indorsement does not bind the indorser, if the condition be not performed. Johnson *v.* Barrow, 12 La. Ann. 83.

Effect as to accepter.— The accepter is bound by the condition, if the indorsement precedes the acceptance, and will be liable to pay the payee a second time, if he pays the indorsee in disregard of the condition. Savage *v.* Aldren, 2 Stark. 232, 19 Rev. Rep. 707, 3 E. C. L. 390; Robertson *v.* Kensington, 4

paper's negotiability,[33] but it carries with it notice of the condition expressed.[34] A conditional restriction is revokable on the part of the indorser.[35]

(D) *By Indorsement "For Collection."* An indorsement "for collection," if so expressed in the indorsement, is restrictive,[36] but an indorsement in blank, although intended merely as an indorsement for collection, transfers the title,[37] and a later holder without notice[38] may take a clear title under such blank indorsement, although it is followed by an indorsement "for collection" made by the collecting agent.[39] An indorsement for collection merely makes the indorsee agent for

Taunt. 30. *Contra,* Bills Exch. Act, § 33. On the other hand, if the conditional indorsement was made after the acceptance and maturity of the paper, and has been violated in the later indorsement, the accepter will still be liable to the later indorsee. Wright *v.* Hay, 2 Stark. 398, 3 E. C. L. 461. So if the performance of the condition is made impossible by act of law, as where chattels conditioned to be first sold were taken by a commission in bankruptcy. Lancaster *v.* Harrison, 6 Bing. 726, 8 L. J. C. P. O. S. 288, 4 M. & P. 561, 19 E. C. L. 325.

As to conditions generally see *supra,* I, C, 1, d, (II), (C).

As to parol evidence to vary the instrument by conditions or otherwise see *infra,* XIV, E [8 Cyc.].

As to defenses growing out of non-performance of conditions see *infra,* XIV, B [8 Cyc.].

33. Tappan *v.* Ely, 15 Wend. (N. Y.) 362; Soares *v.* Glyn, 8 Q. B. 24, 9 Jur. 881, 14 L. J. Q. B. 313, 55 E. C. L. 24.

34. Prall *v.* Hinchman, 6 Duer (N. Y.) 351; Tappan *v.* Ely, 15 Wend. (N. Y.) 362.

35. As to later indorsers. Atkins *v.* Cobb, 56 Ga. 86; Holmes *v.* Hooper, 1 Bay (S. C.) 160.

36. *Alabama.*— Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389 ("for collection account of Missouri National Bank"); Williams *v.* Jones, 77 Ala. 294 ("for account of").

Georgia.—Central R. Co. *v.* Lynchburg First Nat. Bank, 73 Ga. 383, "for collection, for account of."

Illinois.— McPherson Nat. Bank *v.* Velde, 49 Ill. App. 21, "for collection, and return."

Massachusetts.— Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42, "for collection and credit."

Minnesota.— Syracuse Third Nat. Bank *v.* Clark, 23 Minn. 263.

Missouri.—Mechanics Bank *v.* Valley Packing Co., 70 Mo. 643 [*affirming* 4 Mo. App. 200], "for collection for account of."

Nebraska.— Roberts *v.* Snow, 27 Nebr. 425, 43 N. W. 241.

New York.— Clarke County Bank *v.* Gilman, 81 Hun (N. Y.) 486, 30 N. Y. Suppl. 1111, 63 N. Y. St. 299, "for collection and credit."

North Carolina.— Drew *v.* Jacocks, 6 N. C. 138, "Sent to William Drew, Esquire, to collect for."

Oregon.— Roberts *v.* Parrish, 17 Oreg. 583, 22 Pac. 136.

Texas.— Kempner *v.* Jordan, 3 Tex. Civ. App. 129, 22 S. W. 1001.

United States.— Lanier *v.* Nash, 121 U. S. 404, 7 S. Ct. 919, 30 L. ed. 947; Sweeny *v.* Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681; Chicago First Nat. Bank *v.* Reno County Bank, 1 McCrary (U. S.) 491, 3 Fed. 257.

Where indorsed for collection of third party over blank indorsement of payee the negotiability of the paper is not destroyed, but any stranger taking an indorsement from the collecting bank will hold for the use of the third person. Fawsett *v.* U. S. National L. Ins. Co., 97 Ill. 11, 37 Am. Rep. 95.

37. *Illinois.*— Morris *v.* Preston, 93 Ill. 215.

Maryland.— Eversole *v.* Maull, 50 Md. 95, although the blank indorsement is made without recourse.

Missouri.— Odell *v.* Gray, 15 Mo. 337, 55 Am. Dec. 147.

New York.— Hutchinson *v.* Manhattan Co., 150 N. Y. 250, 44 N. E. 775.

North Dakota.— Seyhold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682, certificate of deposit indorsed in blank.

Ohio.— McCoy *v.* Hornbrook, 7 Ohio Dec. (Reprint) 143, 1 Cinc. L. Bul. 170, an indorsement in blank to collect and apply proceeds and account for the balance.

Pennsylvania.— Wilkinson *v.* Nicklin, 2 Dall. (Pa.) 396, 1 L. ed. 431, 29 Fed. Cas. No. 17,673.

Tennessee.— Woodson *v.* Gordon, Peck (Tenn.) 196, 14 Am. Dec. 743.

And see BANKS AND BANKING, 5 Cyc. 494 *et seq.*

38. As to parties with notice it remains the property of the indorser. Flanagan *v.* Brown, 70 Cal. 254, 11 Pac. 706; Eggan *v.* Briggs, 23 Kan. 710; Reading *v.* Beardsley, 41 Mich. 123, 1 N. W. 965; Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429. See also Miltenberger *v.* McGuire, 15 La. Ann. 486.

39. *Illinois.*— American Exch. Nat. Bank *v.* Theummler, 195 Ill. 90, 62 N. E. 932, 88 Am. St. Rep. 177, 58 L. R. A. 51.

Massachusetts.— Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366.

New York.— Castle *v.* Corn Exch. Bank, 148 N. Y. 122, 42 N. E. 518; Corn Exch. Bank *v.* Farmers' Nat. Bank, 118 N. Y. 443, 23 N. E. 923, 29 N. Y. St. 965, 7 L. R. A. 559.

Oklahoma.— Winfield Nat. Bank *v.* McWilliams, 9 Okla. 493, 60 Pac. 229.

Pennsylvania.— Bradbury *v.* Foulkrod, 2 Wkly. Notes Cas. (Pa.) 506.

See also BANKS AND BANKING, 5 Cyc. 495, note 21.

the indorser to collect the paper, but does not vest in him the legal title to the paper,[40] although it is held that such an indorsement transfers a sufficient title to support an action by the indorsee.[41]

(E) *By Indorsement "Without Recourse."* An indorser may transfer title[42] and at the same time, except so far as he is still chargeable with implied warranties as a seller of the paper,[43] create no liability as indorser by indorsing a bill or note "without recourse"[44] or with words which are deemed to be of equivalent

40. *Connecticut.*—Dann *v.* Norris, 24 Conn. 333.

Illinois.— Best *v.* Nokomis Nat. Bank, 76 Ill. 608; Fleury *v.* Tufts, 25 Ill. App. 101.

Michigan.— Locke *v.* Leonard Silk Co., 37 Mich. 479. *Compare* Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844, where it is said that such an indorsement passes the legal title in trust.

Minnesota.— Rock County Nat. Bank *v.* Hollister, 21 Minn. 385.

Missouri.—Northwestern Nat. Bank *v.* Bank of Commerce, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102.

Nebraska.— Boyer *v.* Richardson, 52 Nebr. 156, 71 N. W. 981.

New York.— Clarke County Bank *v.* Gilman, 81 Hun (N. Y.) 486, 30 N. Y. Suppl. 1111, 63 N. Y. St. 299; Oppenheim *v.* West Side Bank, 22 Misc. (N. Y.) 722, 50 N. Y. Suppl. 148; Manhattan Co. *v.* Reynolds, 2 Hill (N. Y.) 140.

Ohio.— People's, etc., Bank *v.* Craig, 63 Ohio St. 374, 59 N. E. 102, 81 Am. St. Rep. 639, 52 L. R. A. 872.

Pennsylvania.— Morris *v.* Foreman, 1 Dall. (Pa.) 193, 1 L. ed. 96, 1 Am. Dec. 235 [*explained* in Gorgerat *v.* McCarty, 2 Dall. (Pa.) 144, 1 L. ed. 324, 1 Am. Dec. 270].

Texas.— Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

United States.— Peck *v.* New York First Nat. Bank, 43 Fed. 357.

See also BANKS AND BANKING, 5 Cyc. 495, note 23; 508, note 86.

Title was transferred by an indorsement "for collection for account of" a third person (Fawsett *v.* U. S. National L. Ins. Co., 5 Ill. App. 272), and where the drawers of a draft payable to themselves, indorsed it "for collection" and sent it to plaintiff in a letter, offering it the paper if it wished to discount it and send them a check for the amount, which offer was accepted and complied with by plaintiff (Payne *v.* Albany City Nat. Bank, 3 Ind. App. 214, 28 N. E. 432).

The indorsee may maintain trover for the loss of the paper. Carter *v.* Lehman, 90 Ala. 126, 7 So. 735.

41. See *infra*, XIV, C [8 Cyc.].

Unlike a mere power of attorney, such an indorsement for collection is not revoked by the indorser's death. Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844.

42. *Illinois.*— McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Hudson *v.* Shepard, 90 Ill. App. 626 (holding that an indorsement "without recourse" transferred the legal title as effectually as an unqualified indorsement).

Indiana.— Brotherton *v.* Street, 124 Ind. 599, 24 N. E. 1068.

Massachusetts.— Richardson *v.* Lincoln, 5 Metc. (Mass.) 201.

Oregon.— Carroll *v.* Nodine, 41 Oreg. 412, 69 Pac. 51, holding that, inasmuch as an indorsement without recourse operates to transfer the title only, an agreement to relieve the indorser from all liability might be shown by parol.

Pennsylvania.— Epler *v.* Funk, 8 Pa. St. 468.

Wisconsin.— Lyon *v.* Ewings, 17 Wis. 61.

United States.—Seeley *v.* Reed, 28 Fed. 164.

See 7 Cent. Dig. tit. "Bills and Notes," § 472.

43. An assignment "without recourse" leaves the assignor liable as vendor. Bevan *v.* Fitzsimmons, 40 Ill. App. 108.

As to such implied warranties see *infra*, VI, G, 2.

44. *Kansas.*— Cross *v.* Hollister, 47 Kan. 652, 28 Pac. 693.

Louisiana.— Rayne *v.* Ditto, 27 La. Ann. 622.

Maine.— Waite *v.* Foster, 33 Me. 424.

Massachusetts.— Fitchburg Bank *v.* Greenwood, 2 Allen (Mass.) 434; Richardson *v.* Lincoln, 5 Metc. (Mass.) 201.

Ohio.— Dumont *v.* Williamson, 3 Ohio Dec. (Reprint) 435, 5 Am. L. Reg. N. S. 330.

Pennsylvania.— Craft *v.* Fleming, 46 Pa. St. 140.

Virginia.— Ober *v.* Goodridge, 27 Gratt. (Va.) 878.

United States.— Welch *v.* Lindo, 7 Cranch (U. S.) 159, 3 L. ed. 301.

See 7 Cent. Dig. tit. "Bills and Notes," § 662.

As against holders with notice, this proviso may be expressed in an assignment by separate instrument made simultaneously with an indorsement in blank. Collier *v.* Mahan, 21 Ind. 110.

If they precede the name of an indorser they apply in general to that indorsement only (Doom *v.* Sherwin, 20 Colo. 234, 38 Pac. 56); but where the words are written after A's name and above B's indorsement, they may be shown by A to apply to his indorsement, although the note is in the hands of a *bona fide* holder, who supposed the words to relate to B (Fitchburg Bank *v.* Greenwood, 2 Allen (Mass.) 434; Corbett *v.* Fetzer, 47 Nebr. 269, 66 N. W. 417).

Erasing or adding words.— The words "without recourse" added to an indorsement are of course material, and their erasure will amount to a material alteration, and as such

import,[45] but the addition of these words will not affect the negotiability of the instrument[46] and will not be a notice of defects to put a purchaser on his guard.[47]

2. By Delivery. Paper may be transferred by delivery where it is expressly made payable to bearer[48] or where in contemplation of law it is so payable,[49] as where it has been indorsed in blank,[50] or is payable to a fictitious person,[51] to

will discharge the indorser. Kennon *v.* McRea, 7 Port. (Ala.) 175. On the other hand where the indorser omitted by mistake to write the words "without recourse" such words may be added, by consent of both parties, without any new consideration. Beal *v.* Wood, 5 Mo. App. 591.

45. Hailey *v.* Falconer, 32 Ala. 536 (an assignment of "all my right and title," indorsed on a note, "to be enjoyed in the same manner as may have been by me"); Rice *v.* Stearns, 3 Mass. 225, 3 Am. Dec. 129 ("at his own risk"). But not the words "old firm in liquidation," added to a partnership indorsement. Fassin *v.* Hubbard, 55 N. Y. 465.

46. *Massachusetts.*— Upham *v.* Prince, 12 Mass. 14.

Nebraska.— Consterdine *v.* Moore, (Nebr. 1902) 91 N. W. 399.

Pennsylvania.— Epler *v.* Funk, 8 Pa. St. 468.

Virginia.— Lomax *v.* Picot, 2 Rand. (Va.) 247.

United States.— Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47.

Neg. Instr. L. § 68.

47. See *infra*, IX, A, 3, b, (IV), (E), (3).

48. *Alabama.*— Sprowl *v.* Simpkins, 3 Ala. 515.

Arkansas.— Edison *v.* Frazier, 9 Ark. 219.

Illinois.— Jones *v.* Nellis, 41 Ill. 482, 89 Am. Dec. 389; Johnson *v.* Stark County, 24 Ill. 75; Gillham *v.* State Bank, 3 Ill. 245, 35 Am. Dec. 105.

Indiana.— Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316; New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Melton *v.* Gibson, 97 Ind. 158; Hall *v.* Allen, 37 Ind. 541. But this is not true under the statute unless the note is payable at some chartered bank within the state. Jamison *v.* Jarrett, 4 Ind. 187; McNitt *v.* Hatch, 4 Blackf. (Ind.) 531.

Iowa.— Laub *v.* Rudd, 37 Iowa 617; Gage *v.* Sharp, 24 Iowa 15; Lane *v.* Krekle, 22 Iowa 399; Creighton *v.* Gordon, Morr. (Iowa) 41.

Kentucky.— Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537.

Massachusetts.— Holcomb *v.* Beach, 112 Mass. 450; Cone *v.* Baldwin, 12 Pick. (Mass.) 545; Wilbour *v.* Turner, 5 Pick. (Mass.) 526.

Mississippi.— Winstead *v.* Davis, 40 Miss. 785; Cobb *v.* Duke, 36 Miss. 60, 72 Am. Dec. 157; Arnold *v.* Leonard, 12 Sm. & M. (Miss.) 258; Gillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520.

Nebraska.— Dusenbury *v.* Albright, 31 Nebr. 345, 47 N. W. 1047.

New Jersey.—Hutchings *v.* Low, 13 N. J. L. 246.

North Dakota.— Dunham *v.* Peterson, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.

Ohio.—Avery *v.* Latimer, 14 Ohio 542; Henninger *v.* Wager, 4 Ohio Dec. (Reprint) 242, 1 Clev. L. Rep. 150.

South Carolina.— Mars *v.* Mars, 27 S. C. 132, 3 S. E. 60; Hanks *v.* Dunlap, 10 Rich. Eq. (S. C.) 139; Jones *v.* Westcott, 2 Brev. (S. C.) 166, 3 Am. Dec. 704.

Utah.— Lebcher *v.* Lambert, 23 Utah 1, 63 Pac. 628.

Vermont.— Lamb *v.* Matthews, 41 Vt. 42 (holding that delivery of a note payable to bearer which gives the transferee a right "to collect it, and use the avails as needed" is an assignment of the note); Adams *v.* Soule, 33 Vt. 538.

Wisconsin.—Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452; Andrews *v.* Hart, 17 Wis. 297.

United States.— Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121.

England.— Wookey *v.* Pole, 4 B. & Ald. 1, 22 Rev. Rep. 594, 6 E. C. L. 365; Grant *v.* Vaughan, 3 Burr. 1516.

Neg. Instr. L. § 60; Bills Exch. Act, § 31. See 7 Cent. Dig. tit. "Bills and Notes," § 499.

A sealed note payable to bearer has been held to pass by delivery (Porter *v.* McCollum, 15 Ga. 528; Craig *v.* Vicksburg, 31 Miss. 216; Merritt *v.* Cole, 14 Hun (N. Y.) 324), but in some states indorsement (Sayre *v.* Lucas, 2 Stew. (Ala.) 259, 20 Am. Dec. 33; Osborn *v.* Kistler, 35 Ohio St. 99; Cushman *v.* Welsh, 19 Ohio St. 536), formal assignment (Buckner *v.* Greenwood, 6 Ark. 200; Foster *v.* Floyd, 4 McCord (S. C.) 159), or an assignment with witnesses and under seal (Kinniken *v.* Dulaney, 5 Harr. (Del.) 384) is required, and the note is non-negotiable and subject to equities until transferred by indorsement (Spence *v.* Tapscott, 93 N. C. 246; Havens *v.* Potts, 86 N. C. 31).

49. A United States "seven-thirty" note, payable to the order of ——, and not having the name of any person filled in the blank space is the same as if payable to bearer and may be transferred by delivery. U. S. *v.* Vermilye, 10 Blatchf. (U. S.) 280, 28 Fed. Cas. No. 16,618, 6 Am. L. T. Rep. 78 [*affirmed* in 21 Wall. (U. S.) 138, 22 L. ed. 609].

50. See *supra*, VI, C, 1, b, (II).

51. *Indiana.*— Farnsworth *v.* Drake, 11 Ind. 101.

Iowa.— Lane *v.* Krekle, 22 Iowa 399.

Kansas.— Kohn *v.* Watkins, 26 Kan. 691, 40 Am. Rep. 336.

Michigan.— Shaw *v.* Brown, 128 Mich. 573, 87 N. W. 757.

Nebraska.— Rogers *v.* Ware, 2 Nebr. 29.

New Hampshire.— Foster *v.* Shattuck, 2 N. H. 446.

New York.— Under the statute, if negotiated by the maker. Mechanics' Bank *v.* Straiton, 3 Abb. Dec. (N. Y.) 269, 3 Keyes

the drawer's or maker's own order and has been indorsed by him,[52] or to a designated person or bearer,[53] although in the last case the statutes of some states expressly require indorsement for the transfer of such paper.[54] Certain other instruments for the payment of money pass by delivery from hand to hand,[55]

(N. Y.) 365, 1 Transcr. App. (N. Y.) 201, 5 Abb. Pr. N. S. (N. Y.) 11 (a check to "bills payable, or order"); Stevens *v.* Strang, 2 Sandf. (N. Y.) 138; Maniort *v.* Roberts, 4 E. D. Smith (N. Y.) 83; Anderson *v.* Dundee State Bank, 20 N. Y. Suppl. 511, 47 N. Y. St. 447; Scott *v.* Parker, 5 N. Y. Suppl. 753, 25 N. Y. St. 865; Plets *v.* Johnson, 3 Hill (N. Y.) 112.

Ohio.— Forbes *v.* Espy, 21 Ohio St. 474.

Paper to fictitious payee equivalent to paper to bearer see *supra*, I, C, 1, c, (II), (B), (6).

If issued to a genuine payee and transferred under a forged indorsement of his name it is not so transferable. Dana *v.* Underwood, 19 Pick. (Mass.) 99; Rogers *v.* Ware, 2 Nebr. 29.

52. O'Conor *v.* Clarke, (Cal. 1896) 44 Pac. 482; Jones *v.* Shapera, 57 Fed. 457, 13 U. S. App. 481, 6 C. C. A. 423.

Paper payable to drawer or maker and indorsed equivalent to paper to bearer see *supra*, I, C, 1, c, (B), (4).

53. *Arkansas.*— Edison *v.* Frazier, 9 Ark. 219.

Connecticut.— Hoyt *v.* Seeley, 18 Conn. 353.

Georgia.— Porter *v.* McCollum, 15 Ga. 528, a sealed bond.

Indiana.— Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316; Melton *v.* Gibson, 97 Ind. 158; Riley *v.* Schawacker, 50 Ind. 592.

Iowa.— Allensworth *v.* Moore, 3 Greene (Iowa) 273; Shelton *v.* Sherfey, 3 Greene (Iowa) 108; Creighton *v.* Gordon, Morr. (Iowa) 41.

Massachusetts.—Wilbour *v.* Turner, 5 Pick. (Mass.) 526; Dole *v.* Weeks, 4 Mass. 451.

Michigan.— Bitzer *v.* Wagar, 83 Mich. 223, 47 N. W. 210, a note to "the order of" the payee "or bearer."

Mississippi.— Hatchcock *v.* Owen, 44 Miss. 799; Fox *v.* Hilliard, 35 Miss. 160; Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520.

New Jersey.— Hutchings *v.* Low, 13 N. J. L. 246.

New York.—Dean *v.* Hall, 17 Wend. (N. Y.) 214; Pierce *v.* Crafts, 12 Johns. (N. Y.) 90.

Pennsylvania.— Carr *v.* Le Fevre, 27 Pa. St. 413, a corporation bond.

Tennessee.— Smyth *v.* Carden, 1 Swan (Tenn.) 28.

Texas.— Hopkins *v.* Seymour, 10 Tex. 202 (a non-negotiable note); Greneaux *v.* Wheeler, 6 Tex. 515.

Vermont.— Matthews *v.* Hall, 1 Vt. 316.

United States.— Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121.

England.— Grant *v.* Vaughan, 3 Burr. 1516; Wayman *v.* Bend, 1 Campb. 175.

Paper payable to person named or bearer equivalent to paper payable to bearer see *supra*, I, C, 1, c, (II), (B), (3).

The effect of indorsing such paper is to render the transferee liable as an indorser (Davis *v.* Wilson, 31 Tex. 136) and to enable the holder, as against the maker, to declare upon it as bearer or as indorsee at his election (Cowser *v.* Tatum, 24 Ark. 13).

54. *Alabama.*— Montgomery First Nat. Bank *v.* Nelson, 105 Ala. 180, 16 So. 707 (check); Carew *v.* Northrup, 5 Ala. 367; Clark *v.* Field, 1 Ala. 468. *Contra*, prior to the act of 1837. Sprowl *v.* Simpkins, 3 Ala. 515; Kimmey *v.* Campbell, 1 Ala. 92; Carroll *v.* Meeks, 3 Port. (Ala.) 226.

Illinois.— Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144; Garvin *v.* Wiswell, 83 Ill. 215; Wilder *v.* De Wolf, 24 Ill. 190; Roosa *v.* Crist, 17 Ill. 450, 65 Am. Dec. 679; Hilborn *v.* Artus, 4 Ill. 344; Bourdeaux *v.* Coquard, 47 Ill. App. 254 (a municipal order); Porter *v.* Drennan, 13 Ill. App. 362; Garfield *v.* Berry, 5 Ill. App. 355; Rabberman *v.* Muehlhausen, 3 Ill. App. 326.

Kansas.— Blood *v.* Northup, 1 Kan. 28.

Missouri.— Beatty *v.* Anderson, 5 Mo. 447.

Ohio.— Osborn *v.* Kistler, 35 Ohio St. 99 (sealed note); Avery *v.* Latimer, 14 Ohio 542; Fallis *v.* Howarth, Wright (Ohio) 303; Putnam *v.* Stewart, 1 Ohio Dec. (Reprint) 573, 10 West. L. J. 410 (sealed note).

United States.— Bradley *v.* Trammel, Hempst. (U. S.) 164, 3 Fed. Cas. No. 1,788*a*, under Arkansas statute.

55. Bank-notes payable to bearer or to a particular person or bearer are transferable by delivery. Kemper, etc., Nav., etc., Co. *v.* Schieffelin, 5 Ala. 493 (under the statute of 1839, which excepted bank-notes from the operation of the statute of 1837); New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443; Gilbert *v.* Nantucket Bank, 5 Mass. 97; De la Chaumette *v.* Bank of England, 2 B. & Ad. 385, 9 L. J. K. B. O. S. 239, 22 E. C. L. 165, 9 B. & C. 208, 7 L. J. K. B. O. S. 179, 17 E. C. L. 100.

Bills of lading, with the invoice, may be transferred by delivery. Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373.

Certificates of deposit payable to a particular person or order "on the return of this certificate properly indorsed" are transferable by delivery without indorsement (Cassidy *v.* Faribault First Nat. Bank, 30 Minn. 86, 14 N. W. 363 [*following* Pease *v.* Rush, 2 Minn. 107]; Fultz *v.* Walters, 2 Mont. 165) and their indorsement after such transfer cannot prejudice the rights of the assignee (Shanklin *v.* Madison County, 21 Ohio St. 575).

County warrants payable to bearer, although not negotiable as bills of exchange or promissory notes, pass by delivery. Jerome

and delivery has been held sufficient for the transfer of a non-negotiable bill or note, although there is authority against this holding.[56]

3. By Assignment — a. In Writing — (i) *Negotiable Paper* — (A) *In General.* The equitable title[57] to a bill or note and to the moneys payable on it may be transferred by assignment, which may be formal or otherwise.[58] Formal assignment of the instrument may be made without indorsement by separate instrument.[59] It may, however, be transferred by a mere order by the payee of the note drawn upon the maker[60] or on his own agent,[61] by assignment of the receipt of an attorney who holds the instrument for collection,[62] by an order of the

v. Rio Grande County, 5 McCrary (U. S.) 639, 18 Fed. 873.

Crossed checks.—Carlon *v.* Ireland, 5 E. & B. 765, 2 Jur. N. S. 39, 25 L. J. Q. B. 113, 4 Wkly. Rep. 200, 85 E. C. L. 765.

Policy of insurance guaranteeing payment to the bearer passes by mere delivery without indorsement. Ellicott *v.* U. S. Insurance Co., 8 Gill & J. (Md.) 166.

Warehouse receipts.— Toner *v.* State Bank, (Ind. 1900) 56 N. E. 731; State *v.* Loomis, 27 Minn. 521, 8 N. W. 758 (by statute).

Warrants by state officer.— D. O. Mills, etc., Nat. Bank *v.* Herold, 74 Cal. 603, 16 Pac. 507, 5 Am. St. Rep. 476.

56. Moore *v.* Foote, 34 Mich. 443; Loftus *v.* Clark, 1 Hilt. (N. Y.) 310 (although payable to a particular person or order). *Contra,* Smith *v.* Lyons, Harp. (S. C.) 334, under the South Carolina act of 1798. And see Gregg *v.* Johnson, 37 Tex. 558 (where it was held that a mere transfer by delivery of a non-negotiable instrument will not enable the holder to recover without averment and proof of *bona fide* ownership); Merlin *v.* Manning, 2 Tex. 351 (holding that to maintain an action in his own name the holder must prove his ownership).

57. That transfer by assignment carries the equitable title see *infra,* VI, F, 2, b.

Notice of transfer.— Notice to the maker is not necessary to perfect the title of the assignee as against a later attachment (Sugg *v.* Powell, 1 Head (Tenn.) 221) and still less to the maintenance of an action by the indorsee against the indorser (Elmendorf *v.* Shotwell, 15 N. J. L. 153).

A sealed bill, requiring an indorsement by statute, does not pass by delivery only so as to carry a warranty of attorney to enter judgment. Cushman *v.* Welsh, 19 Ohio St. 536.

58. Mitchell *v.* Walker, 17 Fed. Cas. No. 9,670, 19 Alb. L. J. 182, 2 Browne Nat. Bank Cas. 180, 4 Cinc. L. Bul. 172, 25 Int. Rev. Rec. 64, 185, 26 Leg. Int. (Pa.) 74, 158, 26 Pittsb. Leg. J. 95, 7 Reporter 425, 8 Reporter 232, holding that, under the Pennsylvania statute of 1815, which provides for the assignment of notes in writing and that the assignee thereof may maintain suit in his own name, no particular form of assignment is necessary, but that it is sufficient if the intent to assign appears.

An indorsement upon a note, "This note has been transferred to L. M. Guy by J. Weatherby" is sufficient. Deshler *v.* Guy, 5 Ala. 186.

59. *Alabama.*— Planters', etc., Ins. Co. *v.* Tunstall, 72 Ala. 142 (although the paper is in the hands of a third person claiming adversely to the assignor); Morris *v.* Poillon, 50 Ala. 403 (where an assignment by a separate writing, made in New York between New York citizens, was held good against sequestration under Alabama law).

Arkansas.— Biscoe *v.* Sneed, 11 Ark. 104, holding that a note payable to a particular person or order can be transferred by assignment on a paper attached thereto, or accompanying it, so as to vest the legal interest and right of action in the assignee.

Connecticut.—Goodrich *v.* Stanley, 23 Conn. 79.

Iowa.— Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678, negotiable bonds.

Kentucky.— Instone *v.* Williamson, 2 Bibb (Ky.) 83.

Louisiana.— Jones *v.* Elliott, 4 La. Ann. 303; Hughes *v.* Harrison, 2 La. 89.

Minnesota.— Foster *v.* Berkey, 8 Minn. 351.

Missouri.— Thornton *v.* Crowther, 24 Mo. 164; Able *v.* Shields, 7 Mo. 120.

New York.— Fulton *v.* Fulton, 48 Barb. (N. Y.) 581.

See 7 Cent. Dig. tit. "Bills and Notes," § 508.

By deed.— A negotiable bill or note may be transferred by deed (McGee *v.* Riddlesbarger, 39 Mo. 365; McClain *v.* Weidemeyer, 25 Mo. 364), but not so as to authorize suit by the grantee in his own name (Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697). Where, however, an assignment is made by trust deed without indorsement or delivery, for love and affection only, and to take effect at the donor's death, it will convey no legal title and will not be enforceable in equity (Borum *v.* King, 37 Ala. 606), and where, at the time a note was indorsed in blank, another between the same parties was folded in it, the indorsement of the former is only an equitable assignment of the latter, although the parties may have intended an indorsement (Columbus Nat. Bank *v.* Leonard, 91 Ga. 805, 18 S. E. 32).

60. Noyes *v.* Gilman, 65 Me. 589.

61. Nininger *v.* Banning, 7 Minn. 274 (an order on the holder's agent for its delivery); Gayoso Sav. Inst. *v.* Fellows, 6 Coldw. (Tenn.) 467 (holding that an order by the holder to his collecting agent to pay over proceeds will avail against a subsequent attachment).

62. Clarke *v.* Hogeman, 13 W. Va. 718.

But if a note is being sued by the payee, a mere assignment of the receipt given for it by

court,[63] or by a notarial act,[64] or an assignment may be included in a bond given by the payee[65] or in an assignment of a judgment recovered on the note;[66] but the assignment of a collateral trust deed is not of itself an assignment of the notes secured by it.[67]

(B) *Of Part of Instrument.* The law does not permit the assignment of a part only of a bill or note, to the extent that the assignee may recover thereon at law,[68] although such transfer may be sustained in equity.[69]

(II) *NON-NEGOTIABLE PAPER.* Non-negotiable bills or notes are assignable[70] like other choses in action.[71] This may be done by indorsement and delivery,[72] but it has been held that indorsement alone is insufficient.[73]

his attorney will not be a sufficient transfer of the note, especially where the action is continued in the name of the original payee. Dickson *v.* Cunningham, Mart. & Y. (Tenn.) 203.

63. Gatton *v.* Dimmitt, 27 Ill. 400.

Where by statute notes taken by a corporation are negotiable only by order of the court, no other assignment will pass title. Bowlley *v.* Kline, (Ind. App. 1901) 60 N. E. 712.

64. Ducasse *v.* Keyser, 28 La. Ann. 419, under La. Rev. Civ. Code, art. 3170.

65. Crosby *v.* Roub, 16 Wis. 616, 84 Am. Dec. 720.

Such transfer has been held to be an indorsement where a note and mortgage securing it given to a railroad company were attached to its negotiable bond, which recited that they were transferred as security for, and were transferable only in connection with, the bond. Bange *v.* Flint, 25 Wis. 544. On the other hand a bond by the transferrer, guaranteeing payment at a different place than that stipulated in the note, and providing that the note should be transferred only in connection with the bond, must be regarded as an independent instrument and not as passing the legal title in the note. Peck *v.* Bligh, 37 Ill. 317. And where a railroad negotiated a bond and delivered with it a note as security, without indorsement, but the bond contained an assignment of such note, which was made transferable with the bond and not otherwise, the bond was the principal and the note the incident, and was not transferred as an independent instrument. Haskell *v.* Brown, 65 Ill. 29.

66. But the assignment of a judgment on a note is not such assignment of the note as to enable the assignee to bring an action against prior parties to the note. Kelsey *v.* McLaughlin, 76 Ind. 379; Ward *v.* Haggard, 75 Ind. 381.

67. Bell *v.* Blair, 65 Miss. 191, 3 So. 373; Jordan *v.* Harrison, 46 Mo. App. 172 (where the note was in the hands of a pledgee, and the trust deed securing it was transferred to another by the pledger with a forged copy of the note).

An assignment of a bond securing a note does not carry the note with it. Morgan *v.* Smith American Organ Co., 73 Ind. 179.

The indorsement of a collateral mortgage will not as a rule carry with it a note (French *v.* Turner, 15 Ind. 59; Doll *v.* Hollenbeck, 19 Nebr. 639, 28 N. W. 286. And see ASSIGNMENTS, 4 Cyc. 73, note 58), but if the note is delivered to the assignee it will pass with the mortgage (Coombs *v.* Warren, 34 Me. 89), and where a mortgage secures a note which is lost and it is assigned with the "mortgage debt" it will carry the debt secured by the lost note (McCauseland *v.* Baltimore Humane Impartial Soc., 95 Md. 741, 52 Atl. 918). In California the assignment of the mortgage which secures and recites the notes is a transfer of the notes. Cortelyou *v.* Jones, (Cal. 1900) 61 Pac. 918.

68. Miller *v.* Bledsoe, 2 Ill. 530, 32 Am. Dec. 37; Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599; Elledge *v.* Straughn, 2 B. Mon. (Ky.) 81; Bibb *v.* Skinner, 2 Bibb (Ky.) 57; Frank *v.* Kaigler, 36 Tex. 305; Lindsay *v.* Price, 33 Tex. 280; Hawkins *v.* Cardy, 1 Ld. Raym. 360.

69. Hutchinson *v.* Simon, 57 Miss. 628.

Renders instrument non-negotiable.— An indorsement on the back of a note by the payee transferring part to each of two parties renders it non-negotiable. Goldman *v.* Blum, 58 Tex. 630.

Part interest of a holder as joint owner created by delivery to him may be transferred by him by delivery to another. Titcomb *v.* Thomas, 5 Me. 282.

70. "Assignment" is applied to the transfer of choses in action not negotiable while the term "indorsement" is usually applied to the transfer of negotiable paper only. Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126.

71. *Kentucky.*— Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286.

Massachusetts.— Norton *v.* Piscataqua F. & M. Ins. Co., 111 Mass. 532.

New Jersey.— Halsey *v.* Dehart, 1 N. J. L. 109.

New York.— Prescott *v.* Hull, 17 Johns. (N. Y.) 284.

Tennessee.— Wolfe *v.* Tyler, 1 Heisk. (Tenn.) 313.

Vermont.— Stiles *v.* Farrar, 18 Vt. 444.

Notice to the maker is unnecessary. Ammidown *v.* Wheelock, 8 Pick. (Mass.) 470.

72. Merchants' Nat. Bank *v.* Gregg, 107 Mich. 146, 64 N. W. 1052; Tulloss *v.* Rapelye, 3 Abb. Pr. (N. Y.) 93.

73. Marietta Bank *v.* Pindall, 2 Rand. (Va.) 465, 476, where the court said: "Assignment means more than endorsement; it means endorsement by one party, with intent

b. By Parol. In the absence of a statute to the contrary[74] a written assignment is unnecessary, whether the note be negotiable or non-negotiable[75] and an assignment by parol is sufficient,[76] although where the note is payable to order the law merchant required other evidence of ownership than the mere possession to support a recovery.[77]

D. Delivery — 1. Necessity of — a. In General. Delivery of the instrument, either actual or constructive,[78] forms part of the contract of indorsement,[79] as well as of transfer by assignment,[80] and is essential in general to its complete legal transfer.[81] It is not necessary, however, that indorsement and delivery should be

to assign, and an acceptance of that assignment, by the other party." See also Parkison *v.* McKim, 1 Pinn. (Wis.) 214.

In **California, by statute,** such paper may be assigned by indorsement. Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24.

74. Ashworth *v.* Crockett, 11 Mo. 636.

75. Hill *v.* Alexander, 2 Kan. App. 251, 41 Pac. 1066.

76. *Illinois.*— Martin *v.* Martin, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290.

Kentucky.— Gray *v.* Briscoe, 6 Bush (Ky.) 687, where, however, the evidence of such assignment was held to be insufficient.

Louisiana.— Griffin *v.* Cowan, 15 La. Ann. 487, holding that the fact that the instrument is a mortgage note is immaterial.

Massachusetts.— Jones *v.* Witter, 13 Mass. 304.

Michigan.— Bannister *v.* Rouse, 44 Mich. 428, 6 N. W. 870.

Mississippi.— Klaus *v.* Moore, 77 Miss. 701, 27 So. 612, and the Mississippi statute of frauds requiring written assignment "of any trust or confidence" does not apply to promissory notes or collateral security therefor.

Montana.— Fultz *v.* Walters, 2 Mont. 165.

Nebraska.— Sackett *v.* Montgomery, 57 Nebr. 424, 77 N. W. 1083, 73 Am. St. Rep. 522.

New Hampshire.— Davis *v.* Lane, 8 N. H. 224.

New York.— Brown *v.* Richardson, 20 N. Y. 472; Billings *v.* Jane, 11 Barb. (N. Y.) 620; Raynor *v.* Hoagland, 39 N. Y. Super. Ct. 11. And see Lynch *v.* New Jersey First Nat. Bank, 53 Hun (N. Y.) 430, 6 N. Y. Suppl. 283, 25 N. Y. St. 127 [*affirmed* in 119 N. Y. 635, 23 N. E. 1147, 29 N. Y. St. 991].

Oregon.— Moore *v.* Miller, 6 Oreg. 254, 25 Am. Rep. 518.

As to effect of delivery without indorsement see *infra*, VI, F, 2, b.

77. *Indiana.*— Hull *v.* Conover, 35 Ind. 372.

Michigan.—Redmond *v.* Stansbury, 24 Mich. 445.

Minnesota.— Van Eman *v.* Stanchfield, 10 Minn. 255.

New Jerscy.— Crisman *v.* Swisher, 28 N. J. L. 149.

Texas.— Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327.

78. Constructive delivery is sufficient. Hunt *v.* Hunt, 119 Mass. 474; Elam *v.* Keen, 4 Leigh (Va.) 333, 26 Am. Dec. 322.

79. *Arkansas.*— Bizzell *v.* State Bank, 8 Ark. 459; May *v.* Cassiday, 7 Ark. 376, 46 Am. Dec. 292.

Colorado.—Spencer *v.* Carstarphen, 15 Colo. 445, 24 Pac. 882.

Connecticut. — Dann *v.* Norris, 24 Conn. 333; Clark *v.* Sigourney, 17 Conn. 511.

Georgia.— Daniel *v.* Royce, 96 Ga. 566, 23 S. E. 493.

Illinois.— Badgley *v.* Votrain, 68 Ill. 25, 18 Am. Rep. 541; Richards *v.* Darst, 51 Ill. 140; Brinkley *v.* Going, 1 Ill. 366, 367.

Indiana.— Wulschner *v.* Sells, 87 Ind. 71.

Kentucky.— Young *v.* Harris, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170.

Louisiana.— Ramsay *v.* Livingston, 6 Mart. N. S. (La.) 15.

Maryland. — Kiersted *v.* Rogers, 6 Harr. & J. (Md.) 282.

New Jersey. — Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617.

New York.— Gould *v.* Segee, 5 Duer (N. Y.) 260.

Texas.— Battle *v.* Cushman, (Tex. Civ. App. 1896) 33 S. W. 1037.

Virginia.— Howe *v.* Ould, 28 Gratt. (Va.) 1.

United States.— Mott *v.* Wright, 4 Biss. (U. S.) 53, 17 Fed. Cas. No. 9,883.

England.— *Ex p.* Cote, L. R. 9 Ch. 27, 43 L. J. Bankr. 19, 29 L. T. Rep. N. S. 598, 22 Wkly. Rep. 39; Arnold *v.* Cheque Bank, 1 C. P. D. 578, 45 L. J. C. P. 562, 34 L. T. Rep. N. S. 729, 24 Wkly. Rep. 759 [*citing* Marston *v.* Allen, 1 Dowl. N. S. 442, 11 L. J. Exch. 122, 8 M. & W. 494]; Adams *v.* Jones, 12 A. & E. 455, 9 L. J. Q. B. 407, 4 P. & D. 174, 40 E. C. L. 229; Lysaght *v.* Bryant, 9 C. B. 46, 19 L. J. C. P. 160, 67 E. C. L. 46; Rex *v.* Lambton, 5 Price 428, 19 Rev. Rep. 645.

80. Clark *v.* Boyd, 2 Ohio 56.

An assignment may be executed and delivered as a separate instrument without a delivery of the note or certificate of deposit transferred by it. Cowen *v.* Brownsville First Nat. Bank, 94 Tex. 547, 63 S. W. 532, 64 S. W. 778.

81. *Arkansas.*— May *v.* Cassiday, 7 Ark. 376, 46 Am. Dec. 292.

Indiana.— Wulschner *v.* Sells, 87 Ind. 71; Mendenhall *v.* Baylies, 47 Ind. 575.

Maine.— Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478.

Nebraska.— Kittle *v.* De Lamater, 3 Nebr. 325, 4 Nebr. 426.

England.— Denton *v.* Peters, L. R. 5 Q. B. 475, 23 L. T. Rep. N. S. 281; Marston *v.* Allen, 1 Dowl. N. S. 442, 11 L. J. Exch. 122, 8 M. & W. 494; Rex *v.* Lambton, 5 Price 428, 19 Rev. Rep. 645.

Canada.— La Cie de Moulins à Papier *v.*

simultaneous, although the transfer will take effect only after indorsement and delivery.[82]

b. Intent. It is essential that there be an intention on the part of the holder to relinquish his possession of the instrument[83] for the purpose of negotiation[84] and obtaining it by duress or fraud[85] or taking possession of it without any intention on the holder's part to make a delivery[86] is insufficient. On the other hand a mere intention to deliver, not accompanied by facts sufficient to constitute a constructive delivery, is insufficient.[87] Thus an agreement to make an indorsement does not of itself amount to a transfer of the legal title,[88] although where a valid agreement for the transfer of a bill or note is made an action will lie upon such agreement.[89]

2. To Whom Made. Delivery may be made to a third person as agent of the indorsee.[90]

E. Consideration. Every valid transfer requires a legal consideration,[91]

Parkin, 4 Quebec Super. Ct. 365. See also Shaw *v.* Matthison, 3 U. C. Q. B. O. S. 74.

82. Thus delivery of a corporation note may be made by the president under an indorsement made by his predecessor (Ogden *v.* Andre, 4 Bosw. (N. Y.) 583) or the note may be indorsed after it is delivered (Baggarly *v.* Gaither, 55 N. C. 80; Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779), and after transfer as collateral, a subsequent indorsement is valid to pass the legal title to the equitable owner (Irwin *v.* Bailey, 8 Biss. (U. S.) 523, 13 Fed. Cas. No. 7,079, 11 Chic. Leg. N. 376, 8 Reporter 421).

Delivery cannot be made after the indorser's death under the indorsement written by him. Clark *v.* Sigourney, 17 Conn. 511; Clark *v.* Boyd, 2 Ohio 56; Bromage *v.* Lloyd, 5 D. & L. 123, 1 Exch. 32, 16 L. J. Exch. 257. See also Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39. And after a partner's death delivery cannot be made by the survivor under a previous firm indorsement. Glasscock *v.* Smith, 25 Ala. 474.

83. Dunne *v.* Boyd, Ir. R. 8 Eq. 609.

84. Haas *v.* Sackett, 40 Minn. 53, 41 N. W. 237, 2 L. R. A. 449.

85. Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Fraud or duress in delivery as a defense see *infra*, XIV, B [Cyc.].

86. As where a child, to whom a note was drawn payable as an intended gift, takes it from his father's papers without the knowledge of the latter (Hatton *v.* Jones, 78 Ind. 466) or from his papers after his father's death (Fanning *v.* Russell, 94 Ill. 386) or where he takes from his father's papers after his death a note which the father had indorsed with the intention of making it a gift to him (Foglesong *v.* Wickard, 75 Ind. 258). See also Rasch *v.* Johns, 14 La. 46; Clark *v.* Boyd, 2 Ohio 56.

87. McGrath *v.* Reynolds, 116 Mass. 566; Davis *v.* Lane, 11 N. H. 512.

88. *Connecticut.*— Boardman *v.* Steele, 13 Conn. 547.

Illinois.— Kirkham *v.* Boston, 67 Ill. 599.

Indiana.— Weader *v.* Crawfordsville First Nat. Bank, 126 Ind. 111, 25 N. E. 887; Ball *v.* Silver, 17 Ind. 539; Mattix *v.* Leach, 16 Ind. App. 112, 43 N. E. 969.

Vermont.— See Manwell *v.* Briggs, 17 Vt. 176, agreement for collection and division of proceeds.

Wisconsin.— Dryden *v.* Britton, 19 Wis. 22.

89. *Delaware.*— Wilmington Bank *v.* Houston, 1 Harr. (Del.) 225.

Louisiana.— Leeds *v.* Bozeman, 18 La. 117.

Maryland.— Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

Michigan.— Birdsell Mfg. Co. *v.* Brown, 96 Mich. 213, 55 N. W. 801.

New York.— Stokes *v.* Polley, 164 N. Y. 266, 58 N. E. 133; Westcott *v.* Keeler, 4 Bosw. (N. Y.) 564.

England.— Moxon *v.* Pulling, 4 Campb. 50.

His liability on the agreement is not, however, conditioned on the other party exhausting remedies against maker or collateral security. Levy *v.* Wagner, (Tex. Civ. App. 1902) 69 S. W. 112.

Construction of agreement.— An agreement to transfer a negotiable instrument is *prima facie* an agreement for its transfer in accordance with the law merchant, that is, after an indorsement (Wade *v.* Guppinger, 60 Ind. 376), although an agreement to deliver notes of a corporation does not imply an agreement to indorse them, except in so far as may be necessary to pass title, which may be done by an indorsement "without recourse" (Seeley *v.* Reed, 28 Fed. 164). If, under a contract to assign the note, the vendor gives a general indorsement he assumes the usual liabilities of an indorser. Collom *v.* Bixby, 33 Minn. 50, 21 N. W. 855.

90. Brunson *v.* Brunson, Meigs (Tenn.) 630; Lysaght *v.* Bryant, 9 C. B. 46, 19 L. J. C. P. 160, 67 E. C. L. 46.

It may be made to one of two indorsees in the absence of the other, who afterward acquiesced in it. Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615.

91. *California.*— Hardison *v.* Davis, 131 Cal. 635, 63 Pac. 1005.

Iowa.— Farmers' Sav. Bank *v.* Hansmann, 114 Iowa 49, 86 N. W. 31.

Kentucky.— Perrin *v.* Broadwell, 3 Dana (Ky.) 596.

Maine.— Weston *v.* Hight, 17 Me. 287, 35 Am. Dec. 250.

but the original consideration of the note or bill may suffice for its transfer.[92] On the other hand the original consideration may be an illegal one and the liability of the indorser on his transfer be supported by legal consideration[93] or the original consideration may have failed as to the maker, and the indorser be liable on a new consideration.[94] As in the case of the original contract, an accommodation is a sufficient consideration as to third parties, although subject to inquiry between the parties immediately concerned.[95]

F. Operation and Effect Upon Equities Connected With Instrument — 1. In General. Generally speaking the transfer of a negotiable bill or note carries with it the entire note and debt secured by it,[96] all rights and powers provided for in the instrument itself[97] or in collaterals accompanying it,[98] and other rights growing out of and connected with the transfer of the paper,[99]

New York.— Taylor *v.* Surget, 14 Hun (N. Y.) 116.

North Dakota.— Drinkall *v.* Movius State Bank, (N. D. 1901) 88 N. W. 724.

As to sufficiency of consideration see *supra*, III, B.

As to presumption of consideration see *infra*, XIV, E [8 Cyc.].

92. Frederick *v.* Winans, 51 Wis. 472, 8 N. W. 301.

93. Weil's Succession, 24 La. Ann. 139.

94. Anthony *v.* Slonaker, 18 Ind. 273; Codwise *v.* Gleason, 5 Fed. Cas. No. 2,939, 3 Day (Conn.) 12.

95. Rule *v.* Williams, 8 Ky. L. Rep. 152; Heintzelman *v.* L'Amoroux, 3 Nev. 377.

He is a "debtor" from the date of his indorsement within the meaning of the statute forbidding voluntary gifts by one who is a debtor. Primrose *v.* Browning, 56 Ga. 369.

As to accommodation paper generally see *supra*, III, B, 3.

96. Thus an order indorsed on a note to pay a designated part of it to another person is not a transfer by indorsement, unless the balance of the amount payable is extinguished (Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637) and the assignment of certificates of deposit transfers to the assignee the whole sum deposited, as stated in the certificate (Springfield M. & F. Ins. Co. *v.* Peck, 102 Ill. 265). See also Dorsey *v.* Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428; Garrott *v.* Jaffray, 10 Bush (Ky.) 413.

The assignment of the balance of a note, a credit being indorsed thereon, transfers the legal right to sue. Elledge *v.* Straughn, 2 B. Mon. (Ky.) 81.

The Negotiable Instruments Law, section 62, is as follows: "The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue." So in effect Bills Exch. Act, § 32.

Indorsements, first of a part and subsequently of the residue, to the same person, will not make a valid indorsement on which the indorser is liable as such. Hughes *v.* Kiddell, 2 Bay (S. C.) 324.

Parts of set.— The transfer of one part of a set transfers the legal title to all (Walsh *v.* Blatchley, 6 Wis. 422, 70 Am. Dec. 469; Société Générale *v.* Metropolitan Bank, 27 L. T. Rep. N. S. 849, 21 Wkly. Rep. 335) and the *bona fide* purchaser of one part may claim the other parts even against a later *bona fide* purchaser (Perreira *v.* Jopp [*cited* in Holdsworth *v.* Hunter, 10 B. & C. 449, 450, 8 L. J. K. B. O. S. 149, 5 M. & R. 393, 21 E. C. L. 193]; Lang *v.* Smyth, 7 Bing. 284, 9 L. J. C. P. O. S. 91, 5 M. & P. 78, 20 E. C. L. 132). See also Neg. Instr. L. § 311; Bills Exch. Act, § 71.

97. If the instrument contains a warrant to enter judgment, it will pass by transfer of the instrument (Cross *v.* Moffat, 11 Colo. 210, 17 Pac. 771), but transfer by delivery only of a sealed note payable to a particular person or bearer will not carry a warrant to enter judgment included in the note, where the statute requires such note to be transferred by indorsement (Spence *v.* Emerine, 46 Ohio St. 433, 21 N. E. 866, 15 Am. St. Rep. 634) or where the warrant authorizes judgment to be confessed "in favor of the legal holder" only (Cushman *v.* Welsh, 19 Ohio St. 536).

A proviso that personal property for which the note was given shall remain the property of the payee until payment has been held to go with the indorsement (Spoon *v.* Frambach, 83 Minn. 301, 86 N. W. 106; Kimball Co. *v.* Mellon, 80 Wis. 133, 48 N. W. 1100), but not so as to support an action of replevin, except in the payee's name (Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597).

98. Thus the transfer will carry the indorser's right under a collateral trust deed to the priority there provided for it over general debts of the maker. Dodge *v.* Stanhope, 55 Md. 113.

99. Thus the transfer of a draft will carry with it the indorser's rights under an agreement by the drawee for acceptance (Evansville Nat. Bank *v.* Kaufmann, 24 Hun (N. Y.) 612), a verbal promise of payment by the drawee to the drawer of a check (Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667), or an agreement by the accepter of a non-negotiable

together with the right of recourse against all prior parties who are liable on the paper.[1] So too a guaranty[2] or contract of suretyship[3] will pass with the transfer of the note.

2. As Affected by Manner of Transfer — a. Transfer by Indorsement or by Delivery When Payable to Bearer. By the indorsement of commercial paper, or by its delivery, if it is payable to bearer, the purchaser before maturity and for value takes it free from all defenses between prior parties of which he had no notice.[4] But this immunity exists only as to paper which is negotiable, non-negotiable paper being subject to defenses originally existing against the payee[5]

bill to pay the assignee (Weston *v.* Penniman, 1 Mason (U. S.) 306, 29 Fed. Cas. No. 17,455); but not a promise to accept made by the drawee in a letter to the drawer after the transfer (St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1, 98 Mass. 288), and in general the assignee's ction against the maker is on the note and not on the maker's promise to the assignor to pay the same (Hatch *v.* Spearin, 11 Me. 354; Walters *v.* Swallow, 6 Whart. (Pa.) 446). So too if bills of exchange are taken for goods, under an agreement for their payment out of the proceeds of the goods, the indorsee will be entitled to the benefit of such agreement on the accepter's failure to pay (*Ex p.* Prescott, 3 Deac. & C. 218, 3 L. J. Bankr. 19, 1 Mont. & A. 316), but the indorsee must have taken the bill with knowledge of such agreement (*Ex p.* Flower, 4 Deac. & C. 449, 2 Mont. & A. 224; *Ex p.* Copeland, 3 Deac. & C. 199, 3 L. J. Bankr. 15, 2 Mont. & A. 177).

1. Thus the indorsement of a note constitutes the indorsee a creditor of the maker, and carries a right of recourse against him. Meriden Steam Mill Lumber Co. *v.* Guy, 40 Conn. 163; Linney *v.* Thompson, 3 Kan. App. 718, 45 Pac. 456.

Liability of original parties see *supra*, II, B.

2. Lemmon *v.* Strong, 59 Conn. 448, 22 Atl. 293, 21 Am. St. Rep. 123, 12 L. R. A. 270; Commercial Bank *v.* Cheshire Provident Inst., 59 Kan. 361, 53 Pac. 131, 68 Am. St. Rep. 368, 41 L. R. A. 175; Phelps *v.* Sargent, 69 Minn. 118, 71 N. W. 927; Harbord *v.* Cooper, 43 Minn. 466, 45 N. W. 860 (where the guaranty was contained in an earlier indorsement); Herrick *v.* Guarantors' Finance Co., 58 N. Y. App. Div. 30, 68 N. Y. Suppl. 560 (holding that this was true although the guaranty be contained in a separate instrument attached to, or separate and transferred with, the note); Bunker *v.* Langs, 76 Hun (N. Y.) 543, 28 N. Y. Suppl. 210, 58 N. Y. St. 243.

3. Guardians of Poor *v.* Greene, 1 H. & N. 884, 3 Jur. N. S. 247, 26 L. J. Exch. 140, 5 Wkly. Rep. 370.

4. *Arkansas.*— Woodruff *v.* Webb, 32 Ark. 612.

Illinois.— Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224, where by virtue of statute the indorsee obtains the instrument free from defenses other than fraud or circumvention in obtaining its execution.

Indiana.— Proctor *v.* Cole, 115 Ind. 15, 17 N. E. 189; Proctor *v.* Baldwin, 82 Ind. 370.

Iowa.— Goodpaster *v.* Voris, 8 Iowa 334, 74 Am. Dec. 313.

Texas.— Greneaux *v.* Wheeler, 6 Tex. 515.

England.— Edwards *v.* Jones, 2 M. & W. 414.

5. *Alabama.*— Smith *v.* Pettus, 1 Stew. & P. (Ala.) 107.

Arkansas.— Oldham *v.* Wallace, 4 Ark. 559.

California.— Bouche *v.* Louttit, 104 Cal. 230, 37 Pac. 902; James *v.* Yaeger, 86 Cal. 184, 24 Pac. 1005; Graves *v.* Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665; McGarvey *v.* Hall, 23 Cal. 140; Mitchell *v.* Hackett, 14 Cal. 661.

Connecticut.— Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580.

Florida.— Birmingham Trust, etc., Co. *v.* Jackson County Mill Co., 41 Fla. 498, 27 So. 43; Reddish *v.* Ritchie, 17 Fla. 867.

Georgia.— Hamilton *v.* Grangers' L., etc., Ins. Co., 65 Ga. 750; Cohen *v.* Prater, 56 Ga. 203.

Illinois.— Haskell *v.* Brown, 65 Ill. 29.

Indiana.— Mettart *v.* Allen, 139 Ind. 644, 39 N. E. 239; Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378; Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360; Lafayette Second Nat. Bank *v.* Brady, 96 Ind. 498; Herod *v.* Snyder, 48 Ind. 480; Summers *v.* Hutson, 48 Ind. 228; Stoner *v.* Ellis, 6 Ind. 152; Van Fossen *v.* Kitchen, 5 Ind. 227.

Iowa.— Franklin *v.* Twogood, 18 Iowa 515.

Kansas.— South Bend Iron-Works *v.* Paddock, 37 Kan. 510, 15 Pac. 574; Graham *v.* Wilson, 6 Kan. 489.

Kentucky.— Rogge *v.* Cassidy, 12 Ky. L. Rep. 54, 13 S. W. 716.

Louisiana.— Gray *v.* Thomas, 18 La. Ann. 412; Gilmore *v.* Destrehan, 10 Rob. (La.) 521.

Maryland.— Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811.

Massachusetts.— Stevens *v.* Parker, 5 Allen (Mass.) 333; Willis *v.* Twambly, 13 Mass. 204.

Missouri.— Thomson *v.* Roatcap, 27 Mo. 283; Smith *v.* Busby, 15 Mo. 388, 57 Am. Dec. 207; Maupin *v.* Smith, 7 Mo. 402.

New Hampshire.— Sanborn *v.* Little, 3 N. H. 539.

New York.— Chamberlain *v.* Gorham, 20 Johns. (N. Y.) 144.

North Carolina.— Havens *v.* Potts, 86 N. C. 31; New Windsor First Nat. Bank *v.* Bynum, 84 N. C. 24, 37 Am. Rep. 604.

Pennsylvania.— Wetter *v.* Kiley, 95 Pa. St. 461, 40 Am. Rep. 670; Miller *v.* Kreiter, 76

or arising before notice of the transfer,[6] unless the maker be estopped to set up his defense.[7]

b. Transfer Without Indorsement. In general delivery without indorsement of paper payable to order will pass only the equitable title,[8] although the indorse-

Pa. St. 78; White *v.* Heylman, 34 Pa. St. 142; Thompson *v.* McClelland, 29 Pa. St. 475; Bircleback *v.* Wilkins, 22 Pa. St. 26 (no proof of value paid); Edgar *v.* Kline, 6 Pa. St. 327.

South Carolina.— Ellison *v.* McCullough, 2 Rich. (S. C.) 170; Williams *v.* Hart, 2 Hill (S. C.) 483.

South Dakota.— Searles *v.* Seipp, 6 S. D. 472, 61 N. W. 804.

Tennessee.— Wormley *v.* Lowry, 1 Humphr. (Tenn.) 468.

Texas.— Sonnenthiel *v.* Skinner, 67 Tex. 453, 3 S. W. 686; Boyd *v.* Tarrant, 14 Tex. 230.

Vermont.— Walker *v.* Sargeant, 14 Vt. 247; Safford Cotton, etc., Co. *v.* Hull, Brayt. (Vt.) 231; Wetmore *v.* Blush, Brayt. (Vt.) 55.

United States.— Bradley *v.* Trammel, Hempst. (U. S.) 164, 3 Fed. Cas. No. 1,788*a*.

Certificates of deposit are not negotiable, in the sense of commercial paper, and the assignee is subject to the equities between the payee and the bank. Humboldt Safe-Deposit, etc., Co.'s Estate, 3 Pa. Co. Ct. 621.

School bonds.— A note executed by a school township for a debt contracted for the benefit of its property is not governed by the law merchant and an assignee thereof takes it subject to all defenses. Sheffield School Tp. *v.* Andress, 56 Ind. 157.

The defenses are usually confined to those existing against the original debtor (Fairchild *v.* Brown, 11 Conn. 26; Downey *v.* Tharp, 63 Pa. St. 322) and do not as a rule include defenses between intermediate parties (Goldthwaite *v.* National Bank, 67 Ala. 549), although it is held that defenses which the maker might set up against plaintiff's assignor are generally available against plaintiff (Russell *v.* Redding, 50 Ala. 448; Hill *v.* McPherson, 15 Mo. 204, 55 Am. Dec. 142; Billings *v.* Atchison, 15 Mo. 68).

6. *Alabama.*— Carroll *v.* Malone, 28 Ala. 521.

Georgia.— Guerry *v.* Perryman, 6 Ga. 119.

Indiana.— Abshire *v.* Corey, 113 Ind. 484, 15 N. E. 685; Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378; Sharts *v.* Awalt, 73 Ind. 304; Hoffman *v.* Zollinger, 39 Ind. 461; Sample *v.* Lamb, 3 Ind. 180; Wells *v.* Teall, 5 Blackf. (Ind.) 306.

Iowa.— Sayre *v.* Wheeler, 31 Iowa 112.

Louisiana.— Kugler *v.* Taylor, 19 La. Ann. 100.

Massachusetts.— Dyer *v.* Homer, 22 Pick. (Mass.) 253.

Mississippi.— Kershaw *v.* Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70; Northern Bank *v.* Kyle, 7 How. (Miss.) 360.

Pennsylvania.— White *v.* Heylman, 34 Pa. St. 142.

7. As, where a purchaser has taken the note on the strength of the maker's promise to pay it. Wiggin *v.* Damrell, 4 N. H. 69.

8. *Alabama.*—Hull *v.* Planters', etc., Bank, 6 Ala. 761.

California.—Folsom *v.* Bartlett, 2 Cal. 163.

Connecticut.— Freeman *v.* Perry, 22 Conn. 617.

Georgia.— Farris *v.* Wells, 68 Ga. 604.

Illinois.— Fortier *v.* Darst, 31 Ill. 212; Chickering *v.* Raymond, 15 Ill. 362; Ryan *v.* May, 14 Ill. 49; Schoepfer *v.* Tommack, 97 Ill. App. 562 (although where his right to a legal title is clear a court of equity may compel an indorsement). *Compare* Forster *v.* New Albany Second Nat. Bank, 61 Ill. App. 272.

Indiana.— Foreman *v.* Beckwith, 73 Ind. 515; Kimball *v.* Whitney, 15 Ind. 280 (holding, however, that under the statute then existing the assignee can sue in his own name).

Kansas.— Calvin *v.* Sterritt, 41 Kan. 215, 21 Pac. 103; McCrum *v.* Corby, 11 Kan. 464.

Louisiana.— Scott *v.* McDougall, 14 La. Ann. 309.

Maine.— Hersey *v.* Elliot, 67 Me. 526, 24 Am. Rep. 50; Randall *v.* Lunt, 51 Me. 246 (as against creditors); Davenport *v.* Woodbridge, 8 Me. 17 (due-bill).

Michigan.— Brown *v.* McHugh, 35 Mich. 50.

Mississippi.— Scott *v.* Metcalf, 13 Sm. & M. (Miss.) 563 (an assignment of the money due on a note); Grand Gulf Bank *v.* Wood, 12 Sm. & M. (Miss.) 482.

New Jersey.— Hughes *v.* Nelson, 29 N. J. Eq. 547.

New York.— Van Riper *v.* Baldwin, 19 Hun (N. Y.) 344; Burdick *v.* Green, 15 Johns. (N. Y.) 247 (holding that one to whom a note has been transferred by special indorsement can transfer by indorsement only the legal title and that a separate assignment under seal will not be sufficient for the purpose).

North Carolina.— Jenkins *v.* Wilkinson, 113 N. C. 532, 18 S. E. 696; Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831; Lackay *v.* Curtis, 41 N. C. 199.

Ohio.— Miles *v.* Reiniger, 39 Ohio St. 499; Seymour *v.* Leyman, 10 Ohio St. 283.

Rhode Island.— Hopkins *v.* Manchester, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387.

South Carolina.— Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779, holding that the transferee acquires an equitable title and can by proper proceedings compel an indorsement to be made.

Utah.— Lebcher *v.* Lambert, 23 Utah 1, 63 Pac. 628.

Wyoming.— Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

United States.— Osgood *v.* Artt, 17 Fed. 575.

ment be omitted by mistake;[9] and one who takes an assignment of a bill or note in any other form than by indorsement or delivery under the law merchant takes it subject to such defenses,[10] unless the defenses arise subsequently to notice of the

9. *Louisiana.*— Pavey *v.* Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716.

Michigan.— Minor *v.* Bewick, 55 Mich. 491, 22 N. W. 12.

Mississippi.— Taylor *v.* Reese, 44 Miss. 89.

New Jersey.— Galway *v.* Fullerton, 17 N. J. Eq. 389.

North Carolina.—Jenkins *v.* Wilkinson, 113 N. C. 532, 18 S. E. 696.

United States.— Lyon *v.* Sioux City First Nat. Bank, 85 Fed. 120, 55 U. S. App. 747, 29 C. C. A. 45.

Canada.— But in such case the holder has a right of action against the transferrer to compel him to make the indorsement. Coutu *v.* Rafferty, 7 Montreal Super. Ct. 146.

10. *Alabama.*— Planters', etc., Ins. Co. *v.* Tunstall, 72 Ala. 142; Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669; Winston *v.* Metcalf, 7 Ala. 837.

Arkansas.— Tatum *v.* Kelley, 25 Ark. 209, 94 Am. Dec. 717; Worthington *v.* Curd, 22 Ark. 277; Walker *v.* Johnson, 13 Ark. 522; Robinson *v.* Swigart, 13 Ark. 71; Smith *v.* Capers, 13 Ark. 9; Oldham *v.* Wallace, 4 Ark. 559.

California.— Hays *v.* Plummer, 126 Cal. 107, 58 Pac. 447, 77 Am. St. Rep. 153; Wright *v.* Levy, 12 Cal. 257.

Connecticut.— Simpson *v.* Hall, 47 Conn. 417.

Georgia.— Benson *v.* Abbott, 95 Ga. 69, 22 S. E. 127.

Illinois.— Centralia First Nat. Bank *v.* Strang, 72 Ill. 559; Fortier *v.* Darst, 31 Ill. 212; Bourdeaux *v.* Coquard, 47 Ill. App. 254; Rabberman *v.* Muehlhausen, 3 Ill. App. 326.

Indiana.— Huntington First Nat. Bank *v.* Henry, 156 Ind. 1, 58 N. E. 1057; Foreman *v.* Beckwith, 73 Ind. 515; Elliott *v.* Armstrong, 2 Blackf. (Ind.) 198; Toner *v.* Citizens' State Bank, 25 Ind. App. 29, 56 N. E. 731.

Iowa.— Franklin *v.* Twogood, 18 Iowa 515; Younker *v.* Martin, 18 Iowa 143.

Kansas.— Calvin *v.* Sterritt, 41 Kan. 215, 21 Pac. 103; Hatch *v.* Barrett, 34 Kan. 223, 8 Pac. 129; Hadden *v.* Rodkey, 17 Kan. 429; McCrum *v.* Corby, 11 Kan. 464; Blood *v.* Northrup, 1 Kan. 28; Hale *v.* Hitchcock, 3 Kan. App. 23, 44 Pac. 446.

Kentucky.— Garrott *v.* Jaffray, 10 Bush (Ky.) 413; Prather *v.* Weissiger, 10 Bush (Ky.) 117; True *v.* Triplett, 4 Metc. (Ky.) 57.

Louisiana.— Pavey *v.* Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716.

Maine.— Allen *v.* Perry, 68 Me. 232; Haskell *v.* Mitchell, 53 Me. 468, 89 Am. Dec. 711; Savage *v.* King, 17 Me. 301; Calder *v.* Billington, 15 Me. 398.

Massachusetts.— Jones *v.* Witter, 13 Mass. 304.

Michigan.— Minor *v.* Bewick, 55 Mich. 491, 22 N. W. 12; Spinning *v.* Sullivan, 48 Mich. 5, 11 N. W. 758; Matteson *v.* Morris, 40 Mich. 52; Gibson *v.* Miller, 29 Mich. 355, 18 Am. Rep. 98. See also Bilderback *v.* McConnell, 48 Mich. 345, 12 N. W. 195.

Minnesota.— Fredin *v.* Richards, 61 Minn. 490, 63 N. W. 1031; Pease *v.* Rush, 2 Minn. 107.

Mississippi.— Meggett *v.* Baum, 57 Miss. 22.

Missouri.— Bishop *v.* Chase, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515; Weber *v.* Orten, 91 Mo. 677, 4 S. W. 271; Patterson *v.* Cave, 61 Mo. 439.

Nebraska.— Sackett *v.* Montgomery, 57 Nebr. 424, 77 N. W. 1083, 73 Am. St. Rep. 522; Gaylord *v.* Nebraska Sav., etc., Bank, 54 Nebr. 104, 74 N. W. 415, 69 Am. St. Rep. 705; Doll *v.* Hollenbeck, 19 Nebr. 639, 28 N. W. 286.

New Hampshire.— Boody *v.* Bartlett, 42 N. H. 558.

New York.—Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 23 N. E. 180, 28 N. Y. St. 702, 16 Am. St. Rep. 765, 7 L. R. A. 595; Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352; Hedges *v.* Sealy, 9 Barb. (N. Y.) 214; McCarville *v.* Lynch, 14 Misc. (N. Y.) 174, 35 N. Y. Suppl. 383, 69 N. Y. St. 812.

North Carolina.— Griffin *v.* Hasty, 94 N. C. 438; Spence *v.* Tapscott, 93 N. C. 246; Havens *v.* Potts, 86 N. C. 31; Miller *v.* Tharel, 75 N. C. 148; McMinn *v.* Freeman, 68 N. C. 341.

North Dakota.— Massachusetts L. & T. Co. *v.* Twitchell, 7 N. D. 440, 75 N. W. 786.

Ohio.— Osborn *v.* Kistler, 35 Ohio St. 99; Kyle *v.* Thompson, 11 Ohio St. 616.

Pennsylvania.—Losee *v.* Bissell, 76 Pa. St. 459.

Tennessee.—Smith *v.* Lurry, Cooke (Tenn.) 325. See also Ingram *v.* Morgan, 4 Humphr. (Tenn.) 66, 40 Am. Dec. 626.

Texas.— Davis *v.* Sittig, 65 Tex. 497; Weathered *v.* Smith, 9 Tex. 622, 60 Am. Dec. 186.

Utah.— Lebcher *v.* Lambert, 23 Utah 1, 63 Pac. 628.

Washington.— Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. 414.

Wisconsin.— Terry *v.* Allis, 16 Wis. 478.

United States.— Thomson-Houston Electric Co. *v.* Capitol Electric Co., 56 Fed. 849; Osgood *v.* Artt, 17 Fed. 575; Bradley *v.* Trammel, Hempst. (U. S.) 164, 3 Fed. Cas. No. 1,788*a*.

England.— Edge *v.* Bumford, 31 Beav. 247, 9 Jur. N. S. 8, 31 L. J. Ch. 805, 7 L. T. Rep. N. S. 88, 10 Wkly. Rep. 812; Whistler *v.* Forster, 14 C. B. N. S. 248, 32 L. J. C. P. 161, 8 L. T. Rep. N. S. 317, 11 Wkly. Rep. 648, 108 E. C. L. 248.

The only assignment which will cut off the equities of the maker of a note is one made in conformity with the statute and passing the legal title. Peck *v.* Bligh, 37 Ill. 317.

transfer, under which circumstances it is held that the transferrer takes free from such defenses.[11]

3. As Affected by Time of Transfer. It is universally held that the effect of a transfer which is made after the maturity of the paper is to subject the indorsee to all defenses existing between the original parties to the paper at the time of such transfer, so far as such defenses are available against his indorser.[12]

11. *Alabama.*— Lewis *v.* Faber, 65 Ala. 460; Crayton *v.* Clark, 11 Ala. 787.

Connecticut.—Goodrich *v.* Stanley, 23 Conn. 79.

Indiana.— Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

Kentucky.— Daviess *v.* Newton, 5 J. J. Marsh. (Ky.) 89; Markham *v.* Todd, 2 J. J. Marsh. (Ky.) 364.

Louisiana.— Pavey *v.* Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716.

Maine.— Calder *v.* Billington, 15 Me. 398.

Massachusetts.— Jones *v.* Witter, 13 Mass. 304.

Minnesota.— Linn *v.* Rugg, 19 Minn. 181.

New Hampshire.— Clark *v.* Whitaker, 50 N. H. 474, 9 Am. Rep. 286; Southard *v.* Porter, 43 N. H. 379.

New York.— Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Baker *v.* Arnold, 3 Cai. (N. Y.) 279.

England.— Whistler *v.* Forster, 14 C. B. N. S. 248, 32 L. J. C. P. 161, 8 L. T. Rep. N. S. 317, 11 Wkly. Rep. 648, 108 E. C. L. 248.

12. *Alabama.*— Battle *v.* Weems, 44 Ala. 105; Carroll *v.* Malone, 28 Ala. 521; Glasscock *v.* Smith, 25 Ala. 474; Kirksey *v.* Bates, 1 Ala. 303; Robertson *v.* Breedlove, 7 Port. (Ala.) 541; Teague *v.* Russell, 2 Stew. (Ala.) 420.

Arkansas.— Sorrells *v.* McHenry, 38 Ark. 127.

California.— San José Ranch Co. *v.* San José Land, etc., Co., 132 Cal. 582, 64 Pac. 1097; Chase *v.* Whitmore, 68 Cal. 545, 9 Pac. 942; Templeton *v.* Poole, 59 Cal. 286; Hayward *v.* Stearns, 39 Cal. 58; Elgin *v.* Hill, 27 Cal. 372; Sherman *v.* Rollberg, 11 Cal. 38; Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Vinton *v.* Crowe, 4 Cal. 309; Folsom *v.* Bartlett, 2 Cal. 163.

Connecticut.—Clark *v.* Sigourney, 17 Conn. 511; Robinson *v.* Lyman, 10 Conn. 10, 25 Am. Dec. 52.

Georgia.— Harrell *v.* Broxton, 78 Ga. 129, 3 S. E. 5; Burton *v.* Wynne, 55 Ga. 615; Staley *v.* Matheny, 30 Ga. 937; Carter *v.* Christie, 30 Ga. 813; Thomas *v.* Kinsey, 8 Ga. 421; Smith *v.* Lloyd, T. U. P. Charlt. (Ga.) 253.

Idaho.— Lewiston First Nat. Bank *v.* Williams, 2 Ida. 618, 23 Pac. 552.

Illinois.— Towner *v.* McClelland, 110 Ill. 542; Bissell *v.* Curran, 69 Ill. 20; Cramer *v.* Willetts, 61 Ill. 481; Reichert *v.* Koerner, 54 Ill. 306; Lock *v.* Fulford, 52 Ill. 166; Rogers *v.* Gallagher, 49 Ill. 182, 95 Am. Dec. 583; Stafford *v.* Fargo, 35 Ill. 481; Lord *v.* Favorite, 29 Ill. 149; Cooper *v.* Nock, 27 Ill. 301; McLain *v.* Lohr, 25 Ill. 507; Griffin *v.* Ketchum, 18 Ill. 392; Capps *v.* Gorham, 14 Ill. 198; Bryan *v.* Primm, 1 Ill. 59; McCaffrey *v.* Dustin, 43 Ill. App. 34; Bradley *v.* Linn, 19 Ill. App. 322.

Indiana.— Merrell *v.* Springer, 123 Ind. 485, 24 N. E. 258, 8 L. R. A. 61; Gregg *v.* Union County Nat. Bank, 87 Ind. 238; Scott *v.* Kokomo First Nat. Bank, 71 Ind. 445; Green *v.* Louthain, 49 Ind. 139.

Iowa.— Fidelity L. & T. Co. *v.* Hogan, 94 Iowa 303, 62 N. W. 740; Duncan *v.* Finn, 79 Iowa 658, 44 N. W. 888; Wood *v.* McKean, 64 Iowa 16, 19 N. W. 817; Hedge *v.* Gibson, 58 Iowa 656, 12 N. W. 713; Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327; Tuttle *v.* Bonar, 49 Iowa 696; Schuster *v.* Marden, 34 Iowa 181; Stannus *v.* Stannus, 30 Iowa 448; Hayward *v.* Munger, 14 Iowa 516; Kurz *v.* Holbrook, 13 Iowa 562; Bates *v.* Kemp, 12 Iowa 99.

Kansas.— Eggan *v.* Briggs, 23 Kan. 710.

Louisiana.— Sagory *v.* Metropolitan Bank, 42 La. Ann. 627, 7 So. 633; Metropolitan Bank *v.* Bouny, 42 La. Ann. 439, 7 So. 586; Stern *v.* Germania Nat. Bank, 34 La. Ann. 1119; Henderson *v.* Case, 31 La. Ann. 215; Halsey *v.* Lange, 28 La. Ann. 248; Davis *v.* Bradley, 26 La. Ann. 555; Gribble *v.* Haynes, 22 La. Ann. 141; Crosby *v.* Tucker, 21 La. Ann. 512; Butler *v.* Murison, 18 La. Ann. 363; Marcal *v.* Melliet, 18 La. Ann. 223; Williams *v.* Benton, 10 La. Ann. 158; Sawyer *v.* Hoovey, 5 La. Ann. 153; Ford *v.* Dosson, 1 Rob. (La.) 39; Shipmans *v.* Archinard, 19 La. 471; Stetson *v.* Stackhouse, 18 La. 119; Lapice *v.* Clifton, 17 La. 152; Burroughs *v.* Nettles, 7 La. 113; Turcas *v.* Rogers, 3 Mart. N. S. (La.) 699; Herriman *v.* Mulhollan, 1 Mart. N. S. (La.) 605.

Maine.— Woodman *v.* Boothby, 66 Me. 389; Cummings *v.* Little, 45 Me. 183; Sprague *v.* Graham, 29 Me. 160; Wing *v.* Dunn, 24 Me. 128; Burnham *v.* Tucker, 18 Me. 179; Hatch *v.* Dennis, 10 Me. 244; Tucker *v.* Smith, 4 Me. 415.

Maryland.— Herrick *v.* Swomley, 56 Md. 439; Clarke *v.* Dederick, 31 Md. 148.

Massachusetts.—Creech *v.* Byron, 115 Mass. 324; Vinton *v.* King, 4 Allen (Mass.) 562; Fish *v.* French, 15 Gray (Mass.) 520; Bond *v.* Fitzpatrick, 4 Gray (Mass.) 89, 8 Gray (Mass.) 536; Mackay *v.* Holland, 4 Metc. (Mass.) 69; Howard *v.* Ames, 3 Metc. (Mass.) 308; American Bank *v.* Jenness, 2 Metc. (Mass.) 288; Stevens *v.* Bruce, 21 Pick. (Mass.) 193; Thompson *v.* Hale, 6 Pick. (Mass.) 259; Sargent *v.* Southgate, 5 Pick. (Mass.) 312, 16 Am. Dec. 409; Guild *v.* Eager, 17 Mass. 615; Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27; Baker *v.* Wheaton, 5 Mass. 509, 4 Am. Dec. 71; Ayer *v.* Hutchins, 4 Mass.

It is, however, a rule of equally uniform application that where a bill of exchange

370, 3 Am. Dec. 232; Gold *v.* Eddy, 1 Mass. 1.

Michigan.— Dowagiac City Bank *v.* Dill, 102 Mich. 305, 60 N. W. 767; Simons *v.* Morris, 53 Mich. 155, 18 N. W. 625; Church *v.* Clapp, 47 Mich. 257, 10 N. W. 362; Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Comstock *v.* Draper, 1 Mich. 481, 53 Am. Dec. 78.

Minnesota.— St. Paul First Nat. Bank *v.* Scott County Com'rs, 14 Minn. 77, 100 Am. Dec. 194.

Mississippi.— Money *v.* Ricketts, 62 Miss. 209; Ainsworth *v.* Ainsworth, 24 Miss. 145.

Missouri.— Booher *v.* Allen, 153 Mo. 613, 55 S. W. 238; Turner *v.* Hoyle, 95 Mo. 337, 8 S. W. 157; Julian *v.* Calkins, 85 Mo. 202; McCoy *v.* Green, 83 Mo. 626; Ford *v.* Phillips, 83 Mo. 523; Munday *v.* Clements, 58 Mo. 577; Kellogg *v.* Schnaake, 56 Mo. 136; Farris *v.* Catlett, 32 Mo. 469; Wheeler *v.* Barret, 20 Mo. 573; Shipp *v.* Stacker, 8 Mo. 145.

Nebraska.— Roberson *v.* Reiter, 38 Nebr. 198, 56 N. W. 877; Rapid City First Nat. Bank *v.* Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386; Edney *v.* Willis, 23 Nebr. 56, 36 N. W. 300; Davis *v.* Neligh, 7 Nebr. 78; Kittle *v.* De Lamater, 3 Nebr. 325.

New Hampshire.— Hardy *v.* Waddell, 58 N. H. 460; Hill *v.* Huntress, 43 N. H. 480; Southard *v.* Porter, 43 N. H. 379; McDuffie *v.* Dame, 11 N. H. 244; Odiorne *v.* Howard, 10 N. H. 343; Emerson *v.* Crocker, 5 N. H. 159. But under the New Hampshire statute of set-off, even a purchaser after maturity seems to be protected, if he took the paper for value and without notice. The cases, however, all relate to set-offs arising between the parties out of other transactions and the latest of them seems to turn on that distinction. Leavitt *v.* Peabody, 62 N. H. 185; Ordiorne *v.* Woodman, 39 N. H. 541; McDuffie *v.* Dame, 11 N. H. 244; Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704.

New Jersey.— Little *v.* Cooper, 11 N. J. Eq. 224.

New Mexico.— Lee *v.* Field, 9 N. M. 435, 54 Pac. 873.

New York.— Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; Chester *v.* Dorr, 41 N. Y. 279; Geyer *v.* Lawrence, 50 Hun (N. Y.) 604, 2 N. Y. Suppl. 803, 19 N. Y. St. 353; Merrick *v.* Butler, 2 Lans. (N. Y.) 103; Farrington *v.* Park Bank, 39 Barb. (N. Y.) 645; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Kelly *v.* Ferguson, 46 How. Pr. (N. Y.) 411; Mott *v.* Petrie, 15 Wend. (N. Y.) 317; Loomis *v.* Pulver, 9 Johns. (N. Y.) 244; Lansing *v.* Lansing, 8 Johns. (N. Y.) 454; Losee *v.* Dunkin, 7 Johns. (N. Y.) 70, 5 Am. Dec. 245; O'Callaghan *v.* Sawyer, 5 Johns. (N. Y.) 118; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Sebring *v.* Rathbun, 1 Johns. Cas. (N. Y.) 331; Johnson *v.* Bloodgood, 2 Cai. Cas. (N. Y.) 303; De Mott *v.* Starkey, 3 Barb. Ch. (N. Y.) 403; Reed *v.* Warner, 5 Paige (N. Y.) 650.

North Carolina.— Griffin *v.* Hasty, 94 N. C. 438; Howell *v.* McCracken, 87 N. C. 399; Capell *v.* Long, 84 N. C. 17; Baucom *v.* Smith, 66 N. C. 537; Little *v.* Dunlap, 44 N. C. 40; Mosteller *v.* Bost, 42 N. C. 39; Turner *v.* Beggarly, 33 N. C. 331; Haywood *v.* McNair, 19 N. C. 283.

Ohio.— Kernohan *v.* Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41; Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644; Baker *v.* Kinsey, 41 Ohio St. 403; Peck *v.* Beckwith, 10 Ohio St. 497; Moore *v.* Stadden, Wright (Ohio) 88.

Pennsylvania.— Marsh *v.* Marshall, 53 Pa. St. 396; Bower *v.* Hastings, 36 Pa. St. 285; Hill *v.* Kroft, 29 Pa. St. 186; Clay *v.* Cottrell, 18 Pa. St. 408; Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 57 Am. Dec. 618; Reakert *v.* Sanford, 5 Watts & S. (Pa.) 164; McCullough *v.* Houston, 1 Dall. (Pa.) 441, 1 L. ed. 214.

Rhode Island.— Bacon *v.* Harris, 15 R. I. 599, 10 Atl. 647.

South Carolina.— Gibson *v.* Hutchins, 43 S. C. 287, 21 S. E. 250; Cain *v.* Spann, 1 McMull. (S. C.) 258; McNeill *v.* McDonald, 1 Hill (S. C.) 1.

South Dakota.— Ormsby *v.* Hale, 15 S. D. 206, 88 N. W. 101.

Tennessee.— Click *v.* Gillespie, 4 Hayw. (Tenn.) 4.

Texas.— Walker *v.* Wilson, 79 Tex. 185, 14 S. W. 798, 15 S. W. 402; Preston *v.* Breedlove, 36 Tex. 96; Goodson *v.* Johnson, 35 Tex. 622; Diamond *v.* Harris, 33 Tex. 634; Branch *v.* Traylor, (Tex. Civ. App. 1896) 36 S. W. 592; Huddleston *v.* Kempner, 3 Tex. Civ. App. 252, 22 S. W. 871; Bennett *v.* Carsner, 1 Tex. App. Civ. Cas. § 618.

Vermont.— Miller *v.* Bingham, 29 Vt. 82; Bowen *v.* Thrall, 28 Vt. 382; Loomis *v.* Wainwright, 21 Vt. 520; Sargeant *v.* Sargeant, 18 Vt. 371; Foot *v.* Ketchum, 15 Vt. 258, 40 Am. Dec. 678; Britton *v.* Bishop, 11 Vt. 70.

Virginia.— Cussen *v.* Brandt, 97 Va. 1, 32 S. E. 791, 75 Am. St. Rep. 762; Cottrell *v.* Watkins, 89 Va. 801, 17 S. E. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754; Arents *v.* Com., 18 Gratt. (Va.) 750; Davis *v.* Miller, 14 Gratt. (Va.) 1.

Washington.— Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. 414.

West Virginia.— Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Wisconsin.— Dunbar *v.* Harnesberger, 12 Wis. 373.

United States.— Texas *v.* White, 10 Wall. (U. S.) 68, 19 L. ed. 839; Foley *v.* Smith, 6 Wall. (U. S.) 492, 18 L. ed. 931 (Louisiana case); Smyth *v.* Strader, 4 How. (U. S.) 404, 11 L. ed. 1031; Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61; Ferree *v.* New York Security, etc., Co., 74 Fed. 769, 21 C. C. A. 83; Gwathney *v.* McLane, 3 McLean (U. S.) 371, 11 Fed. Cas. No. 5,882.

or promissory note is transferred after its maturity the indorsee after maturity is not subject to equities that may arise after the transfer.[13]

G. Liability of Transferrer — 1. In General — a. Where Transferred by Indorsement — (I) *In General* — (A) *Where Indorsed in Due Course* — (1) In General. The indorsement of a bill or note is a new contract,[14] by which the

England.— Rothschild *v.* Corney, 9 B. & C. 388, 4 M. & R. 411, 17 E. C. L. 388; Deuters *v.* Townsend, 5 B. & S. 613, 10 Jur. N. S. 1072, 33 L. J. Q. B. 301, 10 L. T. Rep. N. S. 602, 12 Wkly. Rep. 1002, 117 E. C. L. 613; Tinson *v.* Francis, 1 Campb. 19, 10 Rev. Rep. 617; Crossley *v.* Ham, 13 East 498, 12 Rev. Rep. 410; Brown *v.* Turner, 2 Esp. 631, 7 T. R. 630; Bounsal *v.* Harrison, 2 Gale 113, 1 M. & W. 611, Tyrw. & G. 925; Cripps *v.* Davis, 13 L. J. Exch. 217, 12 M. & W. 159; Lee *v.* Zagury, 1 Moore C. P. 556, 8 Taunt. 114, 4 E. C. L. 66.

Canada.— Young *v.* MacNider, 25 Can. Supreme Ct. 272; Dugnay *v.* Sénécal, 1 L. C. L. J. 26; Hunt *v.* Lee, 2 Rev. Lég. 28; Ferguson *v.* Stewart, 2 U. C. L. J. 116; West *v.* MacInnes, 23 U. C. Q. B. 357.

See 7 Cent. Dig. tit. "Bills and Notes," § 878.

See also *supra*, VI, B, 1, b.

A United States "seven-thirty" note is not money; and a person who purchases it after maturity, and after the time for its conversion into bonds has passed, takes nothing but the actual right and title of his vendor. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609.

The maker and indorser of a note payable to his own order is entitled to make the same defense against a holder who receives it overdue which he could make if it had been payable to and indorsed by a third person. Potter *v.* Tyler, 2 Metc. (Mass.) 58.

13. *Connecticut.*— Stedman *v.* Jillson, 10 Conn. 55; Robinson *v.* Lyman, 10 Conn. 30, 25 Am. Dec. 52.

Iowa.— Whittaker *v.* Kuhn, 52 Iowa 315, 3 N. W. 127.

Massachusetts.— Baxter *v.* Little, 6 Metc. (Mass.) 7, 39 Am. Dec. 707.

Mississippi.— Black *v.* McMurtry, Walk. (Miss.) 389.

New York.— Jefferson County Bank *v.* Chapman, 19 Johns. (N. Y.) 322.

Ohio.— Whims *v.* Grove, 1 Ohio Cir. Ct. 98.

South Carolina.— Cain *v.* Spann, 1 McMull. (S. C.) 258.

Tennessee.— Bearden *v.* Moses, 7 Lea (Tenn.) 459.

Virginia.— Davis *v.* Miller, 14 Gratt. (Va.) 1.

This is true although arising under an earlier agreement (Fields *v.* Stunston, 1 Coldw. (Tenn.) 40) and prior to notice of the transfer (Baxter *v.* Little, 6 Metc. (Mass.) 7, 39 Am. Dec. 707; Davis *v.* Miller, 14 Gratt. (Va.) 1).

14. *Arkansas.*—Airy *v.* Nelson, 39 Ark. 43.

Connecticut.— Miller *v.* Riley, 2 Root (Conn.) 522.

Georgia.— Graham *v.* Roberson, 79 Ga. 72, 3 S. E. 611; Freeman *v.* Bigham, 65 Ga. 580.

Illinois.— Holbrook *v.* Vibbard, 3 Ill. 465; Bowes *v.* Industrial Bank, 58 Ill. App. 498.

Iowa.— Michigan Nat. Bank *v.* Green, 33 Iowa 140.

Louisiana.— Weil's Succession, 24 La. Ann. 139; Jacobs *v.* Williams, 12 Rob. (La.) 183.

Maine.— Furgerson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470; Cushman *v.* Marshall, 21 Me. 122.

Maryland.— Mudd *v.* Harper, 1 Md. 110, 54 Am. Dec. 644.

Massachusetts.— Van Staphorst *v.* Pearce, 4 Mass. 258.

New Hampshire.— Dow *v.* Rowell, 12 N. H. 49.

New York.— Morford *v.* Davis, 28 N. Y. 481; McKnight *v.* Wheeler, 6 Hill (N. Y.) 492; Sanders *v.* Bacon, 8 Johns. (N. Y.) 485.

Oregon.— Smith *v.* Caro, 9 Oreg. 278.

South Carolina.— Eccles *v.* Ballard, 2 McCord (S. C.) 388.

Texas.— Davidson *v.* Peticolas, 34 Tex. 27.

West Virginia.— Morrison *v.* Lovell, 4 W. Va. 346; Nichols *v.* Porter, 2 W. Va. 13, 94 Am. Dec. 500.

Wisconsin.— Cowles *v.* McVickar, 3 Wis. 725.

United States.— De Hass *v.* Dibert, 70 Fed. 227, 28 U. S. App. 559, 17 C. C. A. 79, 30 L. R. A. 189 (holding that the holder of a note, who has taken it by indorsement from one to whom the payee has assigned it without indorsement, may hold his indorser as such, although the maker may set up in a suit against him the defenses which he had against the payee); Mott *v.* Wright, 4 Biss. (U. S.) 53, 17 Fed. Cas. No. 9,883; Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141, 7 Law Rep. 343, 2 West. L. J. 27; Illinois Bank *v.* Brady, 3 McLean (U. S.) 268, 2 Fed. Cas. No. 888; Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204.

See 7 Cent. Dig. tit. "Bills and Notes," § 620.

Validity of original contract not essential see *supra*, VI, E.

Although the paper was secured by an illegal indemnity from the maker the indorsement may be enforced. Bowery Bank *v.* Gerety, 153 N. Y. 411, 47 N. E. 793.

The indorsement of a bill is in effect the drawing of a new bill by the indorser upon the accepter or drawee in favor of the indorsee.

Connecticut.— Kilgore *v.* Bulkley, 14 Conn. 362.

Illinois.— Bowes *v.* Industrial Bank, 58 Ill. App. 498.

indorser undertakes, conditioned on due diligence on the part of the holder,[15] that it shall be accepted and paid according to its tenor[16] to the indorsee or any one who becomes a subsequent holder according to the terms of the instrument,[17] and the indorser's liability is not lessened by the fact that the note was payable to bearer and as such did not require indorsement.[18] The indorser may enlarge his liability by a waiver of demand or notice[19] or may limit it by restrictive indorsement,[20] and the ordinary liability of indorser to indorsee may be wanting *inter se* by reason

Maine.— Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108.

Massachusetts.— Van Staphorst *v.* Pearce, 4 Mass. 258.

Missouri.— Irvin *v.* Maury, 1 Mo. 194.

South Carolina.— Eccles *v.* Ballard, 2 McCord (S. C.) 388; Bay *v.* Freazer, 1 Bay (S. C.) 66.

England.— Haly *v.* Lane, 2 Atk. 181, 26 Eng. Reprint 513; Lake *v.* Hayes, 1 Atk. 281, 26 Eng. Reprint 180; Gibson *v.* Minet, 2 Bro. P. C. 48, 1 H. Bl. 569, 3 T. R. 481, 1 Rev. Rep. 754, 1 Eng. Reprint 784; Penny *v.* Innes, 1 Cr. M. & R. 439, 4 L. J. Exch. 12, 5 Tyrw. 107; Allen *v.* Walker, 5 Dowl. P. C. 460, 1 Jur. 57, 6 L. J. Exch. 78, M. & H. 44, 2 M. & W. 317; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268; Tassell *v.* Lewis, 1 Ld. Raym. 743; Williams *v.* Field, 3 Salk. 68; Hill *v.* Lewis, Skin. 410; Claxton *v.* Swift, Skin. 255; Smallwood *v.* Vernon, 1 Str. 478.

See also *supra*, VI, C, 1, b, (II); and 7 Cent. Dig. tit. "Bills and Notes," § 620.

15. Necessity of demand to charge indorser see *infra*, X, A, 1, a.

Necessity of notice of dishonor to charge indorser see *infra*, XIII, B, 2, b.

16. Neg. Instr. L. § 116; Bills Exch. Act, § 55.

Amount to be paid.— He promises to pay the face of the note, and not merely the amount received by the indorser (Van Vleet *v.* Sledge, 45 Fed. 743) and this promise includes interest (Stumps *v.* Cooper, 3 Baxt. (Tenn.) 223) and statutory damages (Lynch *v.* Goldsmith, 64 Ga. 42; Juniata Bank *v.* Hale, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268). See also *infra*, XIV, G [8 Cyc.].

Place of payment.— He promises payment at the place where the bill is payable. Prentiss *v.* Savage, 13 Mass. 20; Powers *v.* Lynch, 3 Mass. 77; Hicks *v.* Brown, 12 Johns. (N. Y.) 142; Potter *v.* Brown, 5 East 124, 1 Smith K. B. 351, 7 Rev. Rep. 663.

He also assumes the other stipulations in the body of the note, such as a waiver of demand and notice (Woodward *v.* Lowry, 74 Ga. 148) or a provision that the indorsers shall be liable as original makers (Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 S. E. 109), but his contract does not include attorney's fees (Cole *v.* Tuck, 108 Ala. 227, 19 So. 377; Robinson *v.* Aird, (Fla. 1901) 29 So. 633; Short *v.* Coffeen, 76 Ill. 245; City Sav. Bank *v.* Kensington Land Co., (Tenn. Ch. 1896) 37 S. W. 1037. *Contra*, Benn *v.* Kutzschan, 24 Oreg. 28, 32 Pac. 763) or a waiver of statutory exemptions contained in the original contract (Jordan *v.* Long, 109 Ala. 414, 19 So. 843).

Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. Neg. Instr. L. § 312; Bills Exch. Act, § 71.

17. *Illinois.*— Judson *v.* Gookwin, 37 Ill. 286; Clifford *v.* Keating, 4 Ill. 250.

New Hampshire.— Rushworth *v.* Moore, 36 N. H. 188; Martin *v.* Farnum, 24 N. H. 191.

New Jersey.— Chaddock *v.* Vanness, 35 N. J. L. 517, 10 Am. Rep. 256.

New York.— Hays *v.* Phelps, 1 Sandf. (N. Y.) 64; Lovell *v.* Evertson, 11 Johns. (N. Y.) 52.

Vermont.— Partridge *v.* Davis, 20 Vt. 499.

West Virginia.—Nichols *v.* Porter, 2 W. Va. 13, 94 Am. Dec. 500.

United States.—Codwise *v.* Gleason, Brunn. Col. Cas. (U. S.) 40, 5 Fed. Cas. No. 2,939, 3 Day (Conn.) 12.

See 7 Cent. Dig. tit. "Bills and Notes," § 524.

A restrictive indorsement, after acceptance, to the indorsee specially making the indorser responsible "if the drawer proved insolvent," does not render him liable thereon to a remote indorsee. Erskine *v.* McLendon, 1 Stew. (Ala.) 30.

18. *Colorado.*— Doom *v.* Sherwin, 20 Colo. 234, 38 Pac. 56.

Georgia.— Smith *v.* Rawson, 61 Ga. 208.

Iowa.— Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. Rep. 411, 21 L. R. A. 440.

Maryland.— Cover *v.* Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394.

Massachusetts.—Gilbert *v.* Nantucket Bank, 5 Mass. 97.

New York.— Brush *v.* Reeves, 3 Johns. (N. Y.) 439. See also Irving Nat. Bank *v.* Alley, 79 N. Y. 536.

South Carolina.— Allwood *v.* Haseldon, 2 Bailey (S. C.) 457; Eccles *v.* Ballard, 2 McCord (S. C.) 388.

England.— Hodges *v.* Steward, 1 Salk. 125.

Canada.— Booth *v.* Barclay, 6 U. C. Q. B. 215; Scott *v.* Douglas, 5 U. C. Q. B. O. S. 207.

The person indorsing specially is liable as indorser to such persons only as make title through his indorsement. Neg. Instr. L. § 70.

19. See *infra*, XIII, I.

20. See *supra*, VI, C, 1, d.

of their special relation,[21] as principal and agent,[22] as partners,[23] or as donor to donee of a gift *causa mortis*.[24] The liability of the indorser is also sometimes affected by the apparent capacity in which he signs, and such restrictive expression may in itself indicate an absence of all personal liability.[25] For the protection of the indorser against the insolvency or fraud of drawee or maker, the liability on his part, even before payment by him, makes a "debt" on the part of the drawee or maker to him.[26]

(2) As Maker and Indorser. An indorser under some circumstances may become liable both as maker and indorser,[27] but in general he cannot be held

21. **Parol evidence to explain contract between parties** see *infra*, XIV, E [8 Cyc.].

22. Kimmell *v.* Bittner, 62 Pa. St. 203; Sharp *v.* Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; Byers *v.* Harris, 9 Heisk. (Tenn.) 652. So a corporation note payable to its agent by his name only and indorsed by him as "Israel Horsefield, agent," has been held to amount to a personal disclaimer of liability as indorser. Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. But an agent acting under a *del credere* commission is liable on such indorsement. Mackenzie *v.* Scott, 6 Bro. P. C. 280, 2 Eng. Reprint 1081; Goupy *v.* Harden, Holt 342, 3 E. C. L. 139, 6 Marsh. 454, 7 Taunt. 159, 2 E. C. L. 306, 17 Rev. Rep. 478. On the other hand a liability may be plainly intended (Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441), or there may be an express agreement for a certain liability (Clark *v.* Roberts, 26 Mich. 506).

23. Denton *v.* Peters, L. R. 5 Q. B. 475, 23 L. T. Rep. N. S. 281. But see Miller *v.* Talcott, 54 N. Y. 114 [*affirming* 46 Barb. (N. Y.) 167], holding that a first indorser, on being sued by the second indorser on the paper, cannot show that they were partners, and that he had paid his share of the note.

The indorsement of a firm-name on a bill may be sufficient to transfer the title without binding the firm as indorsers. Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476; Shaw *v.* Brown, 128 Mich. 573, 87 N. W. 757; Warder, etc., Co. *v.* Gibbs, 92 Mich. 29, 52 N. W. 73; Smith *v.* Johnson, 3 H. & N. 222, 27 L. J. Exch. 363. And this may be true of an indorsement which creates no liability as indorser by reason of usury in the transfer. Conwell *v.* Pumphrey, 9 Ind. 135, 68 Am. Dec. 611.

24. Weston *v.* Hight, 17 Me. 287, 35 Am. Dec. 250. So where an executor indorses as such to the testator's widow, under a special agreement on her part releasing the estate. Wade *v.* Wade, 36 Tex. 529.

25. So held of the indorsement of the cashier of a bank, if he was, at the time of signing, duly authorized to sign as such (State Nat. Bank *v.* Singer, 39 La. Ann. 813, 2 So. 599), of an official assignee in insolvency (Bowne *v.* Douglass, 38 Barb. (N. Y.) 312), and of an individual partner whose name is used by the partnership as its firm-name (Tuten *v.* Ryan, 1 Speers (S. C.) 240).

But when trustees of an estate under a will indorse a promissory note in their own names, adding thereto the words, "Trustees Estate of Amos D. Smith," without a stipulation that the trust estate alone should be responsible, they are personally liable upon the indorsement. Roger Williams Nat. Bank *v.* Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170. So if an administrator indorses a note "as administrator," and delivers it before maturity, for a debt contracted by the intestate's widow for necessaries furnished her, after her decease he will be personally liable thereon. Sieckman *v.* Allen, 3 E. D. Smith (N. Y.) 561. So a testamentary executor who indorses a note belonging to the estate is liable individually. Flower *v.* Swift, 5 Mart. N. S. (La.) 529, 8 Mart. N. S. (La.) 449. But an executor is not personally liable on his indorsement of negotiable paper in the name of the estate; thus, "Estate of Jona. D. Wheeler, Henry F. Wing, Executor." Grafton Nat. Bank *v.* Wing, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. Rep. 303.

26. The liability on the part of an insolvent maker to one who indorsed for his accommodation is a valid set-off against a claim of the maker or his assignee. Groff *v.* Bliss, 19 Misc. (N. Y.) 14, 42 N. Y. Suppl. 843.

Enforcement of collateral.—On dishonor by the maker the indorser may at once bring suit to enforce collateral held by him as indemnity. Merchants', etc., Nat. Bank *v.* Cumings, 149 N. Y. 360, 44 N. E. 173.

Fraud of principal.—Such liability has been held to be a debt from the date of the indorsement, as against a voluntary transfer of property by the indorser in fraud of creditors. Primrose *v.* Browning, 56 Ga. 369; Pulsifer *v.* Waterman, 73 Me. 233; Citizens' Nat. Bank *v.* Fonda, 18 Misc. (N. Y.) 114, 41 N. Y. Suppl. 112. But an accommodation indorser before payment of the bill is not such a creditor as to make a voluntary conveyance by the principal conclusive evidence of fraud, as in the case of existing debts. Long Branch Banking Co. *v.* Dennis, 56 N. J. Eq. 549, 39 Atl. 689; Severs *v.* Dodson, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641 [*reversing* 54 N. J. Eq. 305, 38 Atl. 28]. And it is not a "debt due and owing" for which judgment can be entered on bond and warrant of attorney. Sterling *v.* Fleming, 53 N. J. L. 652, 24 Atl. 1001. But it is a debt contracted "with an intention not to pay" within the meaning of the Massachusetts statute as to cause for arrest in civil actions. May *v.* Hammond, 146 Mass. 439, 15 N. E. 925.

27. **Where the same person is both maker and indorser** of a promissory note, he may be

unconditionally as maker,[28] without showing a special contract or understanding to that effect.[29]

(3) As Surety. At common law an indorser is not liable as a surety,[30] but in some states he is by presumption of law or by force of the statute a surety for the maker.[31] So an indorser is not a surety for the drawer and not liable as such to

sued in the latter capacity by his indorsee. Edwards *v.* Hasbrook, 2 Tex. 578.

He will be liable as maker or indorser where he signs as maker and indorses a note payable to a blank payee. Usry *v.* Saulsbury, 62 Ga 179.

He will be liable as maker where he makes and indorses in blank a note payable to his own order (Pace *v.* Welmending, 12 Bush (Ky.) 141; Aughinbaugh *v.* Roberts, 4 Wkly. Notes Cas. (Pa.) 181), where he indorses a note knowing that the maker is a fictitious person (Bundy *v.* Jackson, 24 Fed. 628), or where he writes over his indorsement an absolute promise to pay the note (Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444; White *v.* Howland, 9 Mass. 314, 6 Am. Dec. 71); and he will be liable as for a loan to himself where the note was made for his accommodation and the proceeds of discount paid to him (Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550).

A joint maker may make himself an indorser and remain liable as such after being discharged as a joint maker. Oneida County Bank *v.* Lewis, 23 Misc. (N. Y.) 34, 51 N. Y. Suppl. 826.

28. Finley *v.* Green, 85 Ill. 535.

The liability of an indorser of a note is not enlarged to that of a maker by the facts that the note in controversy is a renewal of one which had been discounted for the benefit of the indorser and that he received the money (Newberry *v.* Trowbridge, 13 Mich. 263), especially where he indorsed for the accommodation of the makers and received the proceeds as a payment from them of moneys due to him and credited by him to them (Johnson *v.* Zeckendorf, (Ariz. 1886) 12 Pac. 65).

29. McEntire *v.* Darley, 15 Mo. App. 583.

30. Eichelberger *v.* Pike, 22 La. Ann. 142; Wiggin *v.* Flower, 5 Rob. (La.) 406; Baggett *v.* Rightor, 4 Rob. (La.) 18; Town *v.* Morgan, 2 La. 112, 20 Am. Dec. 299; Breedlove *v.* Fletcher, 7 Mart. (La.) 524; Deitz *v.* Corwin, 35 Mo. 376; Ross *v.* Jones, 22 Wall. (U. S.) 576, 22 L. ed. 730. See also Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665, holding that the indorser is not a surety, even where the note was signed jointly by a principal and a surety, with the payee's name in blank, and the blank was filled after indorsement with the indorser's name as payee.

The accommodation indorser's liability to the holder is the same as that of an indorser for value. Connely *v.* Bourg, 16 La. Ann. 108, 79 Am. Dec. 568. But under the Georgia statute, which makes accommodation indorsers sureties, the indorser is not a surety, where he indorsed for valuable consideration with the words, "I hereby transfer, assign and indorse." Smith *v.* Brooks, 65 Ga. 356.

"Surety" added to the indorser's signature does not divest his character of indorser, and leaves him liable only on demand and notice, and in the order of the several successive indorsements. Bradford *v.* Corey, 5 Barb. (N. Y.) 461. But where an accommodation indorser, before maturity of the note, joins with the maker and holder in an act postponing payment, by which he binds himself for the note as "indorser or security," and it does not appear from the terms of the agreement that any change was to be made in the obligations of the debtors adversely to the creditor, the use of the words "indorser or security" will not affect the indorser's obligations and change them into those of a mere surety. Thompson *v.* Kelso, 3 La. Ann. 577.

In Alabama, an indorser is not a surety, within the statute for the relief of sureties by notice on their part to sue the principal, although he indorsed for the accommodation of the maker. Bates *v.* Mobile Branch Bank, 2 Ala. 689.

In Arkansas an indorser is not a surety, within the meaning of the statute allowing the surety to recover indemnity from his principal by attachment. Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213. Nor by virtue of the statute discharging persons "bound as security," if the principal debtor be not prosecuted on written request of the surety. Ross *v.* Jones, 22 Wall. (U. S.) 576, 22 L. ed. 730.

In Kentucky an indorser is not a surety by the statute making him liable as assignor only on prosecution of the principal. Williams *v.* Obst, 12 Bush (Ky.) 266.

31. **In Georgia** an "accommodation indorser is considered merely as a surety" (Ga. Code, § 2969) and entitled to contribution against similar cosureties. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653.

In Kansas an indorser is *prima facie* a surety for the maker. Horville *v.* Northrup, 14 Kan. 439.

In Louisiana an indorser may be held as a surety on proof of such intention. Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267.

In North Carolina an indorser is liable as surety, under N. C. Code, § 50, "unless it be otherwise expressed therein." Salisbury First Nat. Bank *v.* Swink, 129 N. C. 255, 39 S. E. 962 (where he indorsed "for" the maker); Davidson *v.* Powell, 114 N. C. 575, 19 S. E. 601; Ingersoll *v.* Long, 20 N. C. 436. This is true as to all holders. Garrett *v.* Reeves, 125 N. C. 529, 34 S. E. 636.

An accommodation indorser is deemed, in some states, a surety for the maker. Hunt *v.* Armstrong, 5 B. Mon. (Ky.) 399; Johnson *v.* Downs, 3 La. Ann. 590; McGuire *v.* Bosworth, 1 La. Ann. 248; Dwight *v.* Linton, 3 Rob. (La.) 57; Findlay *v.* U. S. Bank, 2

the accepter, unless he indorses for honor or for accommodation of the drawer.[32] On the other hand one may even indorse as surety for the drawee, and he will be liable in such case, notwithstanding the necessity for circuity of action.[33]

(B) *Where Indorsed After Maturity.* Subject to due presentment[34] and notice of dishonor[35] one who indorses paper after maturity is liable on it as an indorser to his immediate indorsee[36] and to subsequent holders.[37] His contract does not amount to a guaranty,[38] but where an indorser takes up the note at maturity and reissues it with his indorsement uncanceled he is liable as the maker of a new note.[39]

(C) *Where Paper Non-Negotiable* — (1) IN GENERAL. It would seem that a party indorsing a non-negotiable note cannot but intend to make himself liable in some capacity,[40] but although there has long been a disposition in some courts to hold such an indorser beyond the responsibility of an assignor of other choses in action,[41] the courts are not agreed as to the exact extent of his liability. Some cases hold that as between the payee and his immediate indorsee the same liability is created as by the indorsement of a negotiable instrument;[42] others liken his position to that of a surety against whom the note is collectable,

McLean (U. S.) 44, 9 Fed. Cas. No. 4,791. So where a partner made a note payable to his firm, indorsed it in the firm-name, and delivered it to the assignee, the conclusion is warranted that the firm was to be made surety. Tevis *v.* Tevis, 24 Mo. 535.

32. But if a bill is accepted after, and on the faith of, the indorsement and is paid at maturity by the accepter, the drawer and indorser may be liable to him jointly. Ross *v.* Saulsbury, 52 Ga. 379.

33. Wilkinson *v.* Unwin, 7 Q. B. D. 636, 50 L. J. Q. B. 338, 46 L. T. Rep. N. S. 123, 29 Wkly. Rep. 458.

It is not inconsistent with the nature of an indorsement that the indorser should thereby be liable as surety to the drawer for payment by the accepter, and it will be so construed when the circumstances warrant it. Shelmerdine *v.* Duffy, 4 Mart. N. S. (La.) 34. But an indorser is not chargeable as surety because his name was used as payee and indorser for the drawee's accommodation, although both drawer and indorser supposed that by the indorsement he would become surety for the drawee. Phelps *v.* Garrow, 8 Paige (N. Y.) 322, 35 Am. Dec. 688.

34. See *infra*, X, A, 1, a, (IV).

35. See *infra*, XIII, B, 2, b, (I), (B).

36. *Illinois.*— Walters *v.* Witherell, 43 Ill. 388.

New York.— Britt *v.* Lawson, 15 Hun (N. Y.) 123.

Ohio.— Bassenhorst *v.* Wilhy, 45 Ohio St. 333, 13 N. E. 75.

South Carolina.— Allwood *v.* Haseldon, 2 Bailey (S. C.) 457, although the indorsed note was payable to bearer.

Vermont.— Nash *v.* Harrington, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

37. Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199].

Where the owner and holder of a promissory note after maturity sells and indorses the note, signing his name after that of the original payee, he is an indorser and not a joint maker. Lank *v.* Morrison, 44 Kan. 594, 24 Pac. 1106.

38. Roquest *v.* Pickett, 20 La. Ann. 546; McCall *v.* Witkouski, 16 La. Ann. 179.

This is true, although the note was indorsed specially, was retained by the indorser for safe-keeping, and was supposed by the indorsee to be a guaranty. Shelby *v.* Judd, 24 Kan. 161.

If indorsed in blank it cannot be filled with a guaranty. Clawson *v.* Gustin, 5 N. J. L. 964.

39. Ward *v.* Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387. And without further notice of dishonor by the original maker. St. John *v.* Roberts, 31 N. Y. 441, 88 Am. Dec. 287.

If he simply delivers it to one who advances the money to take it up in the hands of a pledgee by indorsement from him, holding it at its maturity, his liability on the original indorsement will continue. Scott *v.* Kokomo First Nat. Bank, 71 Ind. 445.

Where the payee and indorser of a bill of exchange regains possession of it after it had matured and been dishonored and reissues it, the nature and extent of his contract is a question of fact, dependent on the agreement made with his transferee, to be ascertained by the jury. Montgomery, etc., R. Co. *v.* Trebles, 44 Ala. 255. So if one knowingly indorses a note after payment he binds himself and is liable for the amount of the note to the indorsee. Mabry *v.* Matheny, 10 Sm. & M. (Miss.) 323, 48 Am. Dec. 753.

40. Helfer *v.* Alden, 3 Minn. 232, 236.

41. San Diego First Nat. Bank *v.* Falkenhan, 94 Cal. 141, 29 Pac. 866.

42. Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035; San Diego First Nat. Bank *v.* Falkenhan, 94 Cal. 141, 29 Pac. 866. See also Columbus Nat. Bank *v.* Leonard, 91 Ga. 805, 18 S. E. 32; White *v.* Low, 7 Barb. (N. Y.) 204, the latter case holding that where parties whose names are on the back of a note not negotiable can be treated as indorsers, the holder has no option to proceed against them either as indorsers or guarantors.

provided due diligence is exercised in proceeding against the maker;[43] others hold that such an indorsement is equivalent to the making of a new note and is a direct, positive, and unconditional undertaking on the part of the indorser to pay the indorsee;[44] while still others define his liability as that of an assignor[45] and refuse to increase his liability by any implication whatever.[46] All agree, however, that he may become liable as an indorser by expressing such intent in his indorsement.[47]

(2) To Remote Indorsees. As a rule, however, the liabilities which the court hold to have been created by an indorsement of a non-negotiable instrument are limited to the immediate indorsee and do not extend to subsequent holders.[48]

43. Castle *v.* Candee, 16 Conn. 223; Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282; Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52; Huntington *v.* Harvey, 4 Conn. 124; Parker *v.* Riddle, 11 Ohio 102 (where the court said that the indorsement of a note, not negotiable, is not an original undertaking between the indorser and indorsee, but is collateral, and that payment must be demanded, and notice given to the indorser, as upon negotiable paper); Aldis *v.* Johnson, 1 Vt. 136.

44. *Iowa.*— Billingham *v.* Bryan, 10 Iowa 317; Peddicord *v.* Whittam, 9 Iowa 471; Hall *v.* Monohan, 6 Iowa 216, 71 Am. Dec. 404; Wilson *v.* Ralph, 3 Iowa 450; Long *v.* Smyser, 3 Iowa 266.

New York.— Cromwell *v.* Hewitt, 40 N. Y. 491, 100 Am. Dec. 527; Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403; Herrick *v.* Carman, 12 Johns. (N. Y.) 159.

North Carolina.— See Sutton *v.* Owen, 65 N. C. 123, where it is held that he is liable as a guarantor although entitled to notice.

Pennsylvania.— Leidy *v.* Tammany, 9 Watts (Pa.) 353.

Wisconsin.— Gorman *v.* Ketchum, 33 Wis. 427, where such a party is held as an original promisor.

England.—Smallwood *v.* Vernon, 1 Str. 478.

See 7 Cent. Dig. tit. "Bills and Notes," § 738.

45. *Kansas.*— South Bend Iron-Works *v.* Paddock, 37 Kan. 510, 15 Pac. 574.

Kentucky.— Campbell *v.* Farmers' Bank, 10 Bush (Ky.) 152; Edgewood Distilling Co. *v.* Nowland, 19 Ky. L. Rep. 1740, 44 S. W. 364.

Michigan.— Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281; Steere *v.* Trehilcock, 108 Mich. 464, 66 N. W. 342; Port Huron First Nat. Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589; Story *v.* Lamb, 52 Mich. 525, 18 N. W. 248.

Missouri.— Trenton First Nat. Bank *v.* Gay, 71 Mo. 627; Samstag *v.* Conley, 64 Mo. 476; Ricketson *v.* Wood, 10 Mo. 547.

Pennsylvania.— While it is true that in Leidy *v.* Tammany, 9 Watts (Pa.) 353, the court said that such an indorsement was the making of a new note, this decision is commented upon and the true point in issue in that case explained in Raymond *v.* Middleton, 29 Pa. St. 529, and the proposition laid down from a review of the authorities upon the subject that the true rule seemed to be that a holder was permitted to recover from the indorser when he might have recovered as well on the common counts as on the special contract of indorsement; and several Pennsylvania cases seem to hold that the indorser of such paper is not liable on his indorsement as such. Frevall *v.* Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; Gray *v.* Donahoe, 4 Watts (Pa.) 400. See also Wright *v.* Hart, 44 Pa. St. 454.

Rhode Island.— See American Nat. Bank *v.* Sprague, 14 R. I. 410.

South Carolina.— Tryon *v.* De Hay, 7 Rich. (S. C.) 12; Pratt *v.* Thomas, 2 Hill (S. C.) 654.

Tennessee.— The indorser of a non-negotiable instrument is not liable to a holder unless he specially contracts to pay, or for fraud in the transfer, and in these cases the indorser must resort to a special action for the consideration (Simpson *v.* Moulden, 3 Coldw. (Tenn.) 429; Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158), the liability in such case not being upon the indorsement but upon the agreement of the parties of which the signature is evidence (Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303).

England.— See Plimley *v.* Westley, 2 Bing. N. Cas. 249, 1 Hodges 324, 5 L. J. C. P. 51, 2 Scott 423, 29 E. C. L. 523.

See 7 Cent. Dig. tit. "Bills and Notes," § 738.

46. Pratt *v.* Thomas, 2 Hill (S. C.) 654; Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303.

47. Force *v.* Craig, 7 N. J. L. 272; Kline *v.* Keiser, 87 Pa. St. 485 (where the indorsement of a non-negotiable instrument was made "without recourse"); Wilson *v.* Mullen, 3 McCord (S. C.) 236.

Where the payee of a note not negotiable indorses it, intending to become surety for the maker, he may be declared against as an original promisor. Sweetser *v.* French, 13 Metc. (Mass.) 262; Josselyn *v.* Ames, 3 Mass. 274.

48. Kendall *v.* Parker, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117; Jones *v.* Wood, 3 A. K. Marsh. (Ky.) 162; Raymond *v.* Middleton, 29 Pa. St. 529; Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158. *Compare* Codwise *v.* Gleason, 3 Day (Conn.) 12, 5 Fed. Cas. No. 2,939.

(11) *Successive Liability*—(A) *In General.* As a rule[49] the liability of indorsers of commercial paper is in the order in which their names appear on the paper[50] and the position of the names is notice to purchasers of the respective rights and liabilities of the parties.[51] As to a remote holder, successive indorsers are liable severally and not jointly.[52]

(B) *Where There Are Accommodation Parties.* Even between themselves successive accommodation indorsers are liable to one another in the order in which their names appear.[53] There is no contribution between successive accommodation indorsers in the absence of special agreement;[54] and only an express

49. **Payee first indorser.**— It being necessary for the payee to indorse the note in order to make it negotiable, he must be treated as first indorser, without regard to the time of his indorsement or the position of his name on the note (Cogswell *v.* Hayden, 5 Oreg. 22), although, through inadvertence, plaintiff's name appears on the note as the first indorser (Slack *v.* Kirk, 67 Pa. St. 380, 5 Am. Rep. 438).

50. *Georgia.*— Camp *v.* Simmons, 62 Ga. 73.

Iowa.— Preston *v.* Gould, 64 Iowa 44, 19 N. W. 834.

Kentucky.— Scott *v.* Doneghy, 17 B. Mon. (Ky.) 321; Poignard *v.* Vernon, 1 T. B. Mon. (Ky.) 45.

Louisiana.— Syme *v.* Brown, 19 La. Ann. 147; Knox *v.* Dixon, 4 La. 466, 23 Am. Dec. 488; Stone *v.* Vincent, 6 Mart. N. S. (La.) 517.

Maryland.— Rhinehart *v.* Schall, 69 Md. 352, 16 Atl. 126; Watkins *v.* Worthington, 2 Bland (Md.) 509.

Michigan.— Brewer *v.* Boynton, 71 Mich. 254, 39 N. W. 49.

Tennessee.— McNeill *v.* Elam, Peck (Tenn.) 268.

Texas.— Williams *v.* Merchants' Bank, 67 Tex. 606, 4 S. W. 163.

West Virginia.— Quarrier *v.* Quarrier, 36 W. Va. 310, 15 S. E. 154, a non-negotiable note.

Although the first indorser may have actually signed after, but above, the second, this is true. Bradford *v.* Martin, 3 Sandf. (N. Y.) 647; Comparree *v.* Brockway, 11 Humphr. (Tenn.) 355. See also Sweet *v.* Woodin, 72 Mich. 393, 40 N. W. 471.

Renewal in different order.— Indorsers are liable in successive order even upon a note taken in renewal of another, on which their names appear in reversed order (Pomeroy *v.* Clark, 1 MacArthur (D. C.) 606; Hacket *v.* Lenares, 16 La. Ann. 204; Palmer *v.* Field, 76 Hun (N. Y.) 229, 27 N. Y. Suppl. 736, 59 N. Y. St. 123) and although both of them were accommodation indorsers on the original note as well as on the renewal (Pomeroy *v.* Clark, 1 MacArthur (D. C.) 606).

51. Bogue *v.* Melick, 25 Ill. 91.

52. Syme *v.* Brown, 19 La. Ann. 147; Bradford *v.* Corey, 5 Barb. (N. Y.) 461.

53. *Alabama.*— Moody *v.* Findley, 43 Ala. 167; Brahan *v.* Ragland, 3 Stew. (Ala.) 247.

District of Columbia.— Middleton *v.* McCartee, 2 Mackey (D. C.) 420; Pomeroy *v.* Clark, 1 MacArthur (D. C.) 606.

Georgia.— Stiles *v.* Eastman, 1 Ga. 205. But see Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653 [*following* Freeman *v.* Cherry, 46 Ga. 14].

Indiana.— Wilson *v.* Stanton, 6 Blackf. (Ind.) 507.

Kentucky.— Crutcher *v.* Commonwealth Bank, 4 Litt. (Ky.) 436; Hixon *v.* Reed, 2 Litt. (Ky.) 174.

Louisiana.— Gasquet *v.* Oakey, 15 La. 537; Stone *v.* Vincent, 6 Mart. N. S. (La.) 517; Bullard *v.* Wilson, 5 Mart. N. S. (La.) 196.

Maine.— Wescott *v.* Stevens, 85 Me. 325, 27 Atl. 146; Coolidge *v.* Wiggin, 62 Me. 568.

Maryland.— Clarke *v.* Harris, 3 Harr. & J. (Md.) 167.

Massachusetts.— Shaw *v.* Knox, 98 Mass. 214; Woodward *v.* Severance, 7 Allen (Mass.) 340. See also Lewis *v.* Monahan, 173 Mass. 122, 53 N. E. 150.

Michigan.— McGurk *v.* Huggett, 56 Mich. 187, 22 N. W. 308.

New York.— Kelly *v.* Burroughs, 102 N. Y. 93, 6 N. E. 109; Keeler *v.* Bartine, 12 Wend. (N. Y.) 110.

Pennsylvania.— Wolf *v.* Hostetter, 182 Pa. St. 292, 37 Atl. 988; Youngs *v.* Ball, 9 Watts (Pa.) 139.

South Carolina.— Aiken *v.* Barkley, 2 Speers (S. C.) 747, 42 Am. Dec. 397.

Tennessee.— Marr *v.* Johnson, 9 Yerg. (Tenn.) 1.

Vermont.— Martin *v.* Marshall, 60 Vt. 321, 13 Atl. 420.

Virginia.— U. S. Bank *v.* Beirne, 1 Gratt. (Va.) 234, 42 Am. Dec. 551.

West Virginia.— Willis *v.* Willis, 42 W. Va. 522, 26 S. E. 515.

United States.— McDonald *v.* Magruder, 3 Pet. (U. S.) 470, 7 L. ed. 744 [*reversing* 3 Cranch C. C. (U. S.) 298, 16 Fed. Cas. No. 8,761].

Contra, Atwater *v.* Farthing, 118 N. C. 388, 24 S. E. 736; Richards *v.* Simms, 18 N. C. 48; Daniel *v.* McRae, 9 N. C. 590, 11 Am. Dec. 787; Douglas *v.* Waddle, 1 Ohio 413, 13 Am. Dec. 630.

See 7 Cent. Dig. tit. "Bills and Notes," § 615.

To entitle one accommodation indorser, paying the note to contribution from another, the payment must be one that he would have been obliged to make. Machado *v.* Fernandez, 74 Cal. 362, 16 Pac. 19.

54. *Alabama.*— Montgomery First Nat. Bank *v.* Dawson, 78 Ala. 67; Abercrombie *v.* Conner, 10 Ala. 293; Rhodes *v.* Sherrod, 9 Ala. 63; Spence *v.* Barclay, 8 Ala. 581; Sherrod *v.* Rhodes, 5 Ala. 683.

agreement can render them liable to one another as cosureties.[55] One who signs as surety for the maker of a note will be liable before one who indorses it for the maker's accommodation;[56] and an accommodation maker is liable to the accommodation indorser, where both signed the note for the accommodation of a third person,[57] unless a cosuretyship was specially agreed upon.[58] So the accommodation accepter is liable to the accommodation indorser[59] and the accommodation drawer to the indorser.[60]

b. Where Transferred by Delivery. Where a note payable to bearer is transferred by delivery the transferrer is no longer a party to it and is not liable on the instrument.[61] A transfer by delivery will amount to an indorsement, however,

Connecticut.— Kirschner *v.* Conklin, 40 Conn. 77.

Louisiana.— Knox *v.* Dixon, 4 La. 466, 23 Am. Dec. 488.

Maine.— Wescott *v.* Stevens, 85 Me. 325, 27 Atl. 146; Coolidge *v.* Wiggin, 62 Me. 568.

Maryland.— Rhinehart *v.* Schall, 69 Md. 352, 16 Atl. 126; Wood *v.* Repold, 3 Harr. & J. (Md.) 125.

Massachusetts.— Moore *v.* Cushing, 162 Mass. 594, 39 N. E. 177, 44 Am. St. Rep. 393; Woodward *v.* Severance, 7 Allen (Mass.) 340.

Michigan.— Harrah *v.* Doherty, 111 Mich. 175, 69 N. W. 242; McGurk *v.* Huggett, 56 Mich. 187, 22 N. W. 308.

Missouri.— Stillwell *v.* How, 46 Mo. 589; McNeilly *v.* Patchin, 23 Mo. 40, 66 Am. Dec. 651; Druhe *v.* Christy, 10 Mo. App. 566.

New York.— Egbert *v.* Hanson, 34 Misc. (N. Y.) 596, 70 N. Y. Suppl. 383.

Virginia.— U. S. Bank *v.* Beirne, 1 Gratt. (Va.) 234, 42 Am. Dec. 551.

United States.— McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162.

England.— Macdonald *v.* Whitfield, 8 App. Cas. 733, 52 L. J. P. C. 70, 49 L. T. Rep. N. S. 466.

See 7 Cent. Dig. tit. "Bills and Notes," § 615.

A judgment recovered against both is not conclusive evidence of their relation to one another. Crompton *v.* Spencer, 20 R. I. 330, 38 Atl. 1002.

55. Kirschner *v.* Conklin, 40 Conn. 77; Stillwell *v.* How, 46 Mo. 589; McCune *v.* Belt, 45 Mo. 174; McEntire *v.* Darley, 15 Mo. App. 583; Hogue *v.* Davis, 8 Gratt. (Va.) 4; Farmers' Bank *v.* Vanmeter, 4 Rand. (Va.) 553; McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162; McDonald *v.* Magruder, 3 Pet. (U. S.) 470, 7 L. ed. 744.

It is sufficient if they agreed among themselves that each would be surety if the others would (Brady *v.* Reynolds, 13 Cal. 31; Logan *v.* Ogden, 101 Tenn. 392, 47 S. W. 489), that each would indorse if the other would (Armstrong *v.* Cook, 30 Ind. 22), that each would indorse if the others would, nothing being said about the order of indorsement, or precedence of liability (Hagerthy *v.* Phillips, 83 Me. 336, 22 Atl. 223), or that their indorsement should be joint and not several, and that on payment by either of the whole amount the other should pay his equal proportion (Smith *v.* Morrill, 54 Me. 48). So where two indorse a note payable to one of them, for the sole purpose and with the express agreement of being sureties of the maker, with equal liabilities. Dunn *v.* Wade, 23 Mo. 207. So where, in pursuance of a resolution, a note for the debt of a corporation was signed by its treasurer and indorsed by its directors. Middleton *v.* McCartee, 2 Mackey (D. C.) 420. So a previous agreement between indorsers for value that each should receive half the proceeds, which they did. Galbrath *v.* Martin, 5 Humphr. (Tenn.) 50. And their going together to the holder after notice of dishonor and paying each one half is sufficient evidence of such agreement. Talcott *v.* Cogswell, 3 Day (Conn.) 512.

56. Core *v.* Wilson, 40 Ind. 204.

So where the payee's name is left blank by the surety and the blank filled with the name of the accommodation indorser. Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665.

57. Simons *v.* Hort, 3 Brev. (S. C.) 452.

As co-maker for the accommodation of the other maker he cannot call upon an accommodation indorser for contribution. Hillegas *v.* Stephenson, 75 Mo. 118, 42 Am. Rep. 393; Dawson *v.* Pettway, 20 N. C. 531.

The directors of a corporation executing a note as makers and indorsers for its use are liable to contribution as cosureties. Slaymaker *v.* Gundacker, 10 Serg. & R. (Pa.) 75.

58. Law *v.* Stewart, 3 Cranch C. C. (U. S.) 411, 15 Fed. Cas. No. 8,130.

An oral agreement to that effect cannot be shown. Kling *v.* Kehoe, 58 N. J. L. 529, 33 Atl. 946.

59. Moody *v.* Findley, 43 Ala. 167; Gomez *v.* Lazarus, 16 N. C. 205; Gillespie *v.* Campbell, 39 Fed. 724, 5 L. R. A. 698 (although the indorsers knew the acceptance to be without consideration).

60. Moody *v.* Findley, 43 Ala. 167; Dunn *v.* Sparks, 7 Ind. 490; McCune *v.* Belt, 45 Mo. 174; Barnet *v.* Young, 29 Ohio St. 7.

But they will be cosureties if the bill was executed for the accommodation of the accepter and with the understanding that they should each pay one half if the accepter failed to pay it. Edelen *v.* White, 6 Bush (Ky.) 408; Denton *v.* Lytle, 4 Bush (Ky.) 597.

61. *Georgia.*— Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361.

Illinois.— Roberts *v.* Haskell, 20 Ill. 59.

Kentucky.— Butler *v.* Suddeth, 6 T. B. Mon. (Ky.) 541; Triplett *v.* Holly, 4 Litt (Ky.) 130.

if it is accompanied with a promise to refund the amount received, if the note is dishonored.[62]

c. Where Transferred by Assignment. An assignment is not equivalent to an indorsement[63] by the law merchant and does not render the assignor liable as an indorser to his immediate assignee[64] or to subsequent holders.[65] An assignment without recourse will not render an assignor liable who was not otherwise so, because he subsequently indorsed the note without consideration for the purpose of enabling the assignee to bring an action on it against the maker.[66] Like an indorser without recourse, or a transferrer by delivery, he is liable only on his implied warranties as a vendor of the instrument.[67] An assignor is liable only as assignor under such warranties, even though the assignment contains a guaranty.[68]

2. Implied Warranties[69] — a. In General — (i) *Of Title.* As a general rule

Louisiana.— Martin *v.* McMasters, 14 La. 420.

Tennessee.— Smyth *v.* Carden, 1 Swan (Tenn.) 28.

See 7 Cent. Dig. tit. "Bills and Notes," § 499.

So of a non-negotiable note.— Taylor *v.* Acre, 8 Ala. 491.

62. Stone *v.* Smith, 30 Tex. 138, 94 Am. Dec. 299.

63. An assignor may enlarge his liability by adding the words "with recourse." Kline *v.* Keiser, 87 Pa. St. 485.

64. *Arkansas.*— May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064.

California.— Keller *v.* Hicks, 22 Cal. 457, 83 Am. Dec. 78.

Delaware.— Pyle *v.* McMonagle, 2 Harr. (Del.) 468; Wilmington, etc., Bank *v.* Houston, 1 Harr. (Del.) 225.

Indiana.— Bullitt *v.* Scribner, 1 Blackf. (Ind.) 14; Bond *v.* Holloway, 18 Ind. App. 251, 47 N. E. 838.

Kentucky.— Johnson *v.* Welby, 2 B. Mon. (Ky.) 122; Traders Deposit Bank *v.* Chiles, 14 Ky. L. Rep. 617.

United States.— De Hass *v.* Roberts, 59 Fed. 853.

See 7 Cent. Dig. tit. "Bills and Notes," § 770.

The assignment of a non-negotiable note has the same effect. Cochran *v.* Strong, 44 Ga. 636; Boylan *v.* Dickerson, 3 N. J. L. 24.

In Iowa a payee's assignment on the back of the note of "all my right and title" binds him as an indorser. Sears *v.* Lantz, 47 Iowa 658.

An assignor promises to pay the assignee if the maker is unable so to do. Douthitt *v.* Hudson, 4 Ala. 110; Grannis *v.* Miller, 1 Ala. 471.

65. McCarty *v.* Rhea, 1 Blackf. (Ind.) 55; Mardis *v.* Tyler, 10 B. Mon. (Ky.) 376.

The last assignee of a note is entitled to recover of a prior assignor to the extent that he would be entitled to recover of his immediate assignor (Turneys *v.* Hunt, 8 B. Mon. (Ky.) 401), he bringing suit for that purpose in the name of the intermediate assignor (Mardis *v.* Tyler, 10 B. Mon. (Ky.) 376).

Suit in equity.— The assignee of a note may maintain a suit in equity against a remote assignor but a suit at law does not lie in such case. Dorsey *v.* Hadlock, 7 Blackf. (Ind.) 113.

66. Collier *v.* Mahan, 21 Ind. 110.

67. Implied warranties see *infra*, VI, G, 2.

68. Dent *v.* Ashley, Hempst. (U. S.) 55, 7 Fed. Cas. No. 3,809*b*. "Unless in writing a different purpose be expressed; or the note can be legally placed on the footing of a bill of exchange." Kracht *v.* Obst, 14 Bush (Ky.) 34. So with the addition: "If Arthur should not be good, we stand good for him and responsible," under seal. Cravens *v.* Hopson, 4 Bibb (Ky.) 286.

But where an assignment of a note contains also an express promise that it shall be paid when due, an action will lie against the assignor without suing the original promisor. Perkins *v.* Perkins, 1 Root (Conn.) 541.

69. The Negotiable Instruments Law, section 115, provides that "every person negotiating an instrument by delivery or by a qualified indorsement, warrants: 1. That the instrument is genuine and in all respects what it purports to be; 2. That he has a good title to it; 3. That all prior parties had capacity to contract; 4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes." Section 116 provides that "every indorser who indorses without qualification, warrants to all subsequent holders in due course: 1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and 2. That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor he duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

The Bills of Exchange Act, section 55, provides that "the indorser of a bill by indorsing it . . . is precluded from denying to a holder in due course the genuineness and regularity

the transfer of a bill or note is held to imply a warranty of title in the transferrer.[70]

(II) *Of Validity.* The transferrer of commercial paper, even where indorsed "without recourse,"[71] warrants the validity of the instrument.[72] Thus

in all respects of the drawer's signature and all previous indorsements; Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

70. *Alabama.*— Bankhead *v.* Owen, 60 Ala. 457.

Arkansas.— Smith *v.* Corege, 53 Ark. 295, 14 S. W. 93.

California.— Mills *v.* Barney, 22 Cal. 240.

Louisiana.— Michel *v.* Valentine, 10 Rob. (La.) 404.

Maine.— Furgerson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470.

Maryland.— See Fisher *v.* Rieman, 12 Md. 497.

Michigan.— Fish *v.* Detroit First Nat. Bank, 42 Mich. 203, 3 N. W. 849.

Mississippi.— Williams *v.* Tishomingo Sav. Inst., 57 Miss. 633.

New York.— Meriden Nat. Bank *v.* Gallaudet, 120 N. Y. 298, 24 N. E. 994, 30 N. Y. St. 999; Ledwich *v.* McKim, 53 N. Y. 307.

Ohio.—Cornwell *v.* Kinney, 1 Handy (Ohio) 496, 12 Ohio Dec. (Reprint) 255.

West Virginia.— Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828.

England.— Lake *v.* Hayes, 1 Atk. 281, 26 Eng. Reprint 180; Heylyn *v.* Adamson, 2 Burr. 669, 2 Ld. Ken. 379; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268.

See 7 Cent. Dig. tit. "Bills and Notes," § 667.

If the payee's indorsement is wanting, one who transfers the note in that condition by delivery does not warrant the title as against the payee. Mills *v.* Porter, 2 Hun (N. Y.) 524, 5 Thomps. & C. (N. Y.) 63.

Without recourse.— In the absence of fraud the words "without recourse" in the assignment protect the assignor from liability for failure of title in the note. Wolcott *v.* Timberman, 28 Iowa 454. *Contra*, in the case of an indorsement "without recourse." Wolcott *v.* Timberman, 28 Iowa 454; Frazer *v.* D'Invilliers, 2 Pa. St. 200, 44 Am. Dec. 190.

71. Ware *v.* McCormack, 96 Ky. 139, 16 Ky. L. Rep. 385, 28 S. W. 157, 959; Seeley *v.* Reed, 28 Fed. 164.

Thus he warrants that the note is not void for fraud against the maker (Watson *v.* Cheshire, 18 Iowa 202, 87 Am. Dec. 382; Palmer *v.* Courtney, 32 Nebr. 773, 49 N. W. 754); that the consideration is not illegal (Blethen *v.* Lovering, 58 Me. 437; Hannum *v.* Richardson, 48 Vt. 508, 21 Am. Rep. 152; Seeley *v.* Reed, 28 Fed. 164) or usurious (Drennan *v.* Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354; Challiss *v.* McCrum, 22 Kan. 157, 31 Am. Rep. 181); that prior indorsers had legal capacity to indorse (Lobdell *v.* Baker, 3 Metc. (Mass.) 469); that it is not already paid (Mays *v.* Callison, 6 Leigh (Va.) 230) or that no payments have been made except as indorsed (Carroll *v.* Nodine, (Oreg. 1902) 69 Pac. 51); that no party has been discharged by the indorser himself (Hankerson *v.* Emery, 37 Me. 16); and that the bill is not subject to set-off (Ticonic Bank *v.* Smiley, 27 Me. 225, 46 Am. Dec. 593). So where he knows that the instrument is of no value he may be compelled to repay the consideration that he has received for it from a *bona fide* purchaser not aware of the facts (Dayton *v.* Tillotson, 39 Iowa 404; Watson *v.* Chesire, 18 Iowa 202, 87 Am. Dec. 382) and where a note is assigned without recourse the assignor is liable for fraudulent representations as to the solvency of the maker (Harton *v.* Scales, Minor (Ala.) 166).

72. *Georgia.*— Persons *v.* Jones, 12 Ga. 371, 58 Am. Dec. 476; McNeil *v.* Knott, 11 Ga. 142; McDougald *v.* Georgia Cent. Bank, 3 Ga. 185 (holding that an indorser cannot set up that the bill was not executed in the manner required by the charter of the corporation).

Indiana.— Huston *v.* Centerville First Nat. Bank, 85 Ind. 21; Willson *v.* Binford, 81 Ind. 588; Henderson *v.* Fox, 5 Ind. 489; Howell *v.* Wilson, 2 Blackf. (Ind.) 418.

Iowa.— Snyder *v.* Reno, 38 Iowa 329.

Maine.— Furgerson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470.

Massachusetts.— Prescott Nat. Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909 (holding that an indorser cannot set up that the note was made on Sunday); Bowman *v.* Hiller, 130 Mass. 153, 39 Am. Rep. 442 (holding that an indorser cannot set up the duress of the maker, which was known to him at the time of indorsing); Copp *v.* McDugall, 9 Mass. 1.

New York.— Shaw *v.* Outwater, 77 Hun (N. Y.) 87, 28 N. Y. Suppl. 312, 59 N. Y. St. 859. See also Dalrymple *v.* Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438 [*affirming* 2 Hun (N. Y.) 488, 5 Thomps. & C. (N. Y.) 57], holding that an indorser cannot set up that it was made in fraud of creditors under the Bankruptcy Act.

Pennsylvania.— Rapp *v.* National Security Bank, 136 Pa. St. 426, 20 Atl. 508.

South Carolina.—Payne *v.* Trezevant, 2 Bay (S. C.) 23.

Texas.— Houston City Bank *v.* Houston First Nat. Bank, 45 Tex. 203.

Vermont.— Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682.

Virginia.— Lyons *v.* Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129.

Wisconsin.— Lawton *v.* Howe, 14 Wis. 241; Hurd *v.* Hall, 12 Wis. 112.

United States.— Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6; Root *v.* Wallace, 4 McLean (U. S.) 8, 19 Fed. Cas. No. 12,039.

England.— Lake *v.* Hayes, 1 Atk. 281, 26

he is held impliedly to warrant that the paper is supported by a valid consideration,[73] that it is properly stamped,[74] that prior parties had capacity to contract,[75] that the instrument is still subsisting as a valid obligation,[76] and in general

Eng. Reprint 180; Heylyn *v.* Adamson, 2 Burr. 669, 2 Ld. Ken. 379; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268; Chanter *v.* Hopkins, 4 M. & W. 399.

But see Sterling First Nat. Bank *v.* Drew, 191 Ill. 186, 60 N. E. 856 [*affirming* 93 Ill. App. 630].

See 7 Cent. Dig. tit. "Bills and Notes," § 667.

The indorsement of a non-negotiable note is a warranty of its validity (Willis *v.* French, 84 Me. 593, 24 Atl. 1010, 30 Am. St. Rep. 416; Furgerson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470; Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828) and genuineness (Furgerson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470. But see Charnley *v.* Dulles, 8 Watts & S. (Pa.) 353).

73. *Georgia.*— Graham *v.* Maguire, 39 Ga. 531.

New York.— Delaware Bank *v.* Jarvis, 20 N. Y. 226.

Pennsylvania.— Flynn *v.* Allen, 57 Pa. St. 482.

Vermont.— Chandler *v.* Mason, 2 Vt. 193.

Virginia.— Moffett *v.* Bickle, 21 Gratt. (Va.) 280.

Wisconsin.— Giffert *v.* West, 37 Wis. 115.

England.— Edwards *v.* Dick, 4 B. & Ald. 212, 23 Rev. Rep. 255, 6 E. C. L. 455; Bowyer *v.* Bampton, 2 Str. 1155.

Failure of consideration.— He cannot set up that the original consideration has failed (Flynn *v.* Allen, 57 Pa. St. 482), but one who transfers a bill by delivery after maturity is not liable to his transferee, although he knew that the maker claimed to have a defense because of failure of consideration (Diamond *v.* Harris, 33 Tex. 634).

Usury in making of note cannot be set up by the indorser (Frank *v.* Longstreet, 44 Ga. 178; Hazzard *v.* Citizens' State Bank, 72 Ind. 130; Tam *v.* Shaw, 10 Ind. 469; Morford *v.* Davis, 28 N. Y. 481; Fake *v.* Smith, 2 Abb. Dec. (N. Y.) 76, 7 Abb. Pr. N. S. (N. Y.) 106) or by one who transfers without indorsement (Littauer *v.* Goldman, 72 N. Y. 506, 28 Am. Rep. 171 [*reversing* 9 Hun (N. Y.) 231]).

An indorsement does not warrant the consideration to be sufficient; e. g., that it is not accommodation paper (People's Bank *v.* Bogart, 81 N. Y. 101, 37 Am. Rep. 481 [*affirming* 16 Hun (N. Y.) 270]), but the indorser is liable for falsely representing that it is business paper (Webb *v.* Odell, 49 N. Y. 583).

74. Cundy *v.* Marriott, 1 B. & Ad. 696, 20 E. C. L. 654; Young *v.* Cole, 3 Bing. N. Cas. 724, 3 Hodges 126, 6 L. J. C. P. 201, 4 Scott 489, 32 E. C. L. 334.

If made abroad he warrants that it was stamped according to the law where it was made (Gompertz *v.* Bartlett, 2 C. L. R. 395, 2 E. & B. 849, 18 Jur. 266, 23 L. J. Q. B. 65, 2 Wkly. Rep. 43, 75 E. C. L. 849), but not that such foreign stamp was properly canceled (Pooley *v.* Brown, 11 C. B. N. S. 566, 8 Jur. N. S. 938, 31 L. J. C. P. 134, 5 L. T. Rep. N. S. 750, 10 Wkly. Rep. 345, 103 E. C. L. 566).

75. *Connecticut.*— Kilgore *v.* Bulkley, 14 Conn. 362.

Indiana.— Brown *v.* Summers, 91 Ind. 151.

Louisiana.— Butler *v.* Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265; Martin *v.* Drake, 1 Rob. (La.) 218.

Maryland.— Condon *v.* Pearce, 43 Md. 83, holding that an indorser warrants the authority of a prior indorser who signed as an agent or corporation officer.

Massachusetts.— Glidden *v.* Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769.

New Jersey.—Edmunds *v.* Rose, 51 N. J. L. 547, 18 Atl. 748, 14 Am. St. Rep. 704.

New York.—Erwin *v.* Downs, 15 N. Y. 575; Archer *v.* Shea, 14 Hun (N. Y.) 493; Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22.

Texas.— Beal *v.* Alexander, 6 Tex. 531.

Vermont.— Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682.

England.— Haly *v.* Lane, 2 Atk. 181, 26 Eng. Reprint 513; Critchlow *v.* Parry, 2 Campb. 182; Lambert *v.* Oakes, 1 Ld. Raym. 443, 12 Mod. 244; Lambert *v.* Pack, 1 Salk. 127.

Canada.— See Merchants Bank *v.* United Empire Club Co., 44 U. C. Q. B. 468.

See 7 Cent. Dig. tit. "Bills and Notes," § 672.

Coverture.— The indorser cannot set up the coverture of a prior indorser. Butler *v.* Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265; Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473; Ogden *v.* Blydenburgh, 1 Hilt. (N. Y.) 182.

It warrants the existence of a firm purporting to sign as makers. Meriden Nat. Bank *v.* Gallaudet, 120 N. Y. 298, 24 N. E. 994, 30 N. Y. St. 999 [*reversing* 55 N. Y. Super. Ct. 233, 13 N. Y. St. 269].

Such warranty is available at suit of a remote transferee. Lobdell *v.* Baker, 3 Metc. (Mass.) 469.

76. *Alabama.*— Ellis *v.* Grooms, 1 Stew. (Ala.) 47.

Arkansas.— Airy *v.* Nelson, 39 Ark. 43.

Georgia.— McNeil *v.* Knott, 11 Ga. 142.

Indiana.— French *v.* Turner, 15 Ind. 59.

Iowa.— Campbell *v.* Ayres, 9 Iowa 108.

Kentucky.— Maupin *v.* Compton, 3 Bibb (Ky.) 214.

Louisiana.— Denton *v.* Duplessis, 12 La. 83.

North Carolina.— Jones *v.* Yeargain, 12 N. C. 420.

West Virginia.— Merchants' Nat. Bank *v.*

that there is no legal defense growing out of his own connection with the paper.[77]

(III) *Of Genuineness.* The transferrer of commercial paper, even where indorsed "without recourse,"[78] warrants the signatures of all prior parties to be genuine,[79] except the drawer's signature to the accepter, which the latter is

Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828.

Wisconsin.— Daskam *v.* Ullman, 74 Wis. 474, 43 N. W. 321.

77. Smith *v.* Corege, 53 Ark. 295, 14 S. W. 93; Fake *v.* Smith, 2 Abb. Dec. (N. Y.) 76, 7 Abb. Pr. N. S. (N. Y.) 106.

78. Challiss *v.* McCrum, 22 Kan. 157, 31 Am. Rep. 181; McCormack *v.* Ware, 13 Ky. L. Rep. 678; Palmer *v.* Courtney, 32 Nebr. 773, 49 N. W. 754; Dumont *v.* Williamson, 18 Ohio St. 515, 98 Am. Dec. 186.

So of an indorsement of payment.— Carroll *v.* Nodine, 41 Oreg. 412, 69 Pac. 51.

79. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17; Bankhead *v.* Owen, 60 Ala. 457; Woodward *v.* Harbin, 1 Ala. 104.

Arkansas.— Smith *v.* Corege, 53 Ark. 295, 14 S. W. 93.

California.— Bunker *v.* Osborn, 132 Cal. 480, 64 Pac. 853; Mills *v.* Barney, 22 Cal. 240.

Colorado.— Rhodes *v.* Jenkins, 18 Colo. 49, 31 Pac. 491, 36 Am. St. Rep. 263.

Connecticut.— Terry *v.* Bissell, 26 Conn. 23.

Georgia.— Sneed *v.* Hughes, 14 Ga. 542.

Illinois.— Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640.

Indiana.— Bell *v.* Cafferty, 21 Ind. 411; Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

Iowa.— Snyder *v.* Reno, 38 Iowa 329.

Kansas.— Cochran *v.* Atchison, 27 Kan. 728; Smith *v.* McNair, 19 Kan. 330, 27 Am. Rep. 117.

Kentucky.— Ware *v.* McCormack, 96 Ky. 139, 28 S. W. 157, 959; Hurst *v.* Chambers, 12 Bush (Ky.) 155; Burgess *v.* Northern Bank, 4 Bush (Ky.) 600; Wynn *v.* Poynter, 3 Bush (Ky.) 54; Brown *v.* Boone, 19 Ky. L. Rep. 549, 41 S. W. 18.

Louisiana.— McCall *v.* Corning, 3 La. Ann. 409, 48 Am. Dec. 454; Merchants' Bank *v.* Exchange Bank, 16 La. 457; Olivier *v.* Andry, 7 La. 496.

Maryland.— Condon *v.* Pearce, 43 Md. 83. *Compare* Fisher *v.* Rieman, 12 Md. 497, holding that a public bill-broker does not warrant the genuineness of the signatures upon paper sold in good faith, but not indorsed by him.

Massachusetts.— Worthington *v.* Cowles, 112 Mass. 30; Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473; Cabot Bank *v.* Morton, 4 Gray (Mass.) 156; Coolidge *v.* Brigham, 1 Metc. (Mass.) 547; State Bank *v.* Fearing, 16 Pick. (Mass.) 533, 28 Am. Dec. 265; Ellis *v.* Wild, 6 Mass. 321; Young *v.* Adams, 6 Mass. 182.

Minnesota.— Crosby *v.* Wright, 70 Minn. 251, 73 N. W. 162; Brown *v.* Ames, 59 Minn. 476, 61 N. W. 448.

Mississippi.— Williams *v.* Tishomingo Sav. Inst., 57 Miss. 633.

Missouri.— Thompson *v.* McCullough, 31 Mo. 224, 77 Am. Dec. 644.

Nebraska.— Hastings First Nat. Bank *v.* Omaha Nat. Bank, 59 Nebr. 192, 80 N. W. 810.

New Jersey.— Wood *v.* Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523.

New York.— Lennon *v.* Grauer, 159 N. Y. 433, 54 N. E. 11; Frank *v.* Lanier, 91 N. Y. 112; Dalrymple *v.* Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438 [*affirming* 2 Hun (N. Y.) 488, 5 Thomps. & C. (N. Y.) 57]; Turnbull *v.* Bowyer, 40 N. Y. 456, 100 Am. Dec. 523 [*affirming* 2 Rob. (N. Y.) 406]; Gabay *v.* Doane, 66 N. Y. App. Div. 507, 73 N. Y. Suppl. 381; New York City Third Nat. Bank *v.* Merchants' Nat. Bank, 76 Hun (N. Y.) 475, 27 N. Y. Suppl. 1070, 59 N. Y. St. 359; Mosher *v.* Carpenter, 13 Hun (N. Y.) 602; Jennings *v.* Whittemore, 2 Thomps. & C. (N. Y.) 377; Oppenheim *v.* West Side Bank, 22 Misc. (N. Y.) 722, 50 N. Y. Suppl. 148; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287; Herrick *v.* Whitney, 15 Johns. (N. Y.) 240.

Ohio.— Wheeler *v.* Miller, 2 Handy (Ohio) 149, 12 Ohio Dec. (Reprint) 375.

Pennsylvania.— Chambers *v.* Union Nat. Bank, 78 Pa. St. 205; Swanzey *v.* Parker, 50 Pa. St. 441, 88 Am. Dec. 549; Rick *v.* Kelly, 30 Pa. St. 527.

Rhode Island.— Aldrich *v.* Jackson, 5 R. I. 218.

South Carolina.— Strange *v.* Ellison, 2 Bailey (S. C.) 385.

Tennessee.— Barton *v.* Trent, 3 Head (Tenn.) 167; Harris *v.* Bradley, 7 Yerg. (Tenn.) 31.

Texas.— Harrison *v.* Smith, 2 Tex. App. Civ. Cas. § 396.

Vermont.— Allen *v.* Clark, 49 Vt. 390.

Virginia.— Lyons *v.* Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129.

Wisconsin.— Giffert *v.* West, 37 Wis. 115.

United States.— U. S. *v.* Onondaga County Sav. Bank, 39 Fed. 259; Semmes *v.* Wilson, 5 Cranch C. C. (U. S.) 285, 21 Fed. Cas. No. 12,658.

England.— Lake *v.* Hayes, 1 Atk. 281, 26 Eng. Reprint 180; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; Heylyn *v.* Adamson, 2 Burr. 669, 2 Ld. Ken. 379; Critchlow *v.* Parry, 2 Campb. 182; Gurney *v.* Womersley, 3 C. L. R. 3, 4 E. & B. 133, 1 Jur. N. S. 328, 24 L. J. Q. B. 46, 3 Wkly. Rep. 61, 82 E. C. L. 133; Gompertz *v.* Bartlett, 2 C. L. R. 395, 2 E. & B. 849, 18 Jur. 266, 23 L. J. Q. B. 65, 2 Wkly. Rep. 43, 75 E. C. L. 849; Fuller *v.* Smith, 1 C. & P. 197, 12 E. C. L. 121, R. & M. 49, 21 E. C. L. 701, 28 Rev. Rep. 772; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268; Macgregor *v.* Rhodes, 6 E. & B. 266, 2 Jur. N. S. 834, 25 L. J. Q. B.

presumed to know.[80] In the case of successive indorsements by two joint payees, however, the second has been held to be no warranty of the genuineness of the first.[81]

(iv) *Of Solvency.* On the sale of negotiable paper without indorsement,[82] and in the absence of misrepresentation, there is no implied warranty of the solvency of the parties to it,[83] but the delivery of a bank-note amounts, it is said,

318, 4 Wkly. Rep. 483, 88 E. C. L. 266; Free *v.* Hawkins, Holt 550, 3 E. C. L. 217, 1 Moore C. P. 535, 8 Taunt. 92, 4 E. C. L. 56; Lambert *v.* Oakes, 1 Ld. Raym. 443, 12 Mod. 244; Jones *v.* Ryde, 1 Marsh. 157, 5 Taunt. 488, 15 Rev. Rep. 561, 1 E. C. L. 252; Lambert *v.* Pack, 1 Salk. 127; Fenn *v.* Harrison, 3 T. R. 757, 4 T. R. 177.

Compare Baxter *v.* Duren, 29 Me. 434, 50 Am. Dec. 602. See also Neal *v.* Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 673, 781.

Sale by agent.— If the sale of a forged note is made by an agent the principal for whom he acts will be liable. Thompson *v.* McCullough, 31 Mo. 224, 77 Am. Dec. 644. If the sale is made by a broker he will be liable for the money received, although he has paid it over to his principal (Fuller *v.* Smith, 1 C. & P. 197, 12 E. C. L. 121, R. & M. 49, 21 E. C. L. 701, 28 Rev. Rep. 772), although he was known to be but an agent (Merriam *v.* Wolcott, 3 Allen (Mass.) 258, 80 Am. Dec. 69), and although he sold the bill for less than its face and paid over the proceeds to his undisclosed principal (Worthington *v.* Cowles, 112 Mass. 30; Wilder *v.* Cowles, 100 Mass. 487; Morrison *v.* Currie, 4 Duer (N. Y.) 79).

He cannot avail himself of the non-negotiable form of a prior corporation indorsement under seal. Rand *v.* Dovey, 83 Pa. St. 280.

80. Howard *v.* Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105; Carthage First Nat. Bank *v.* Yost, 58 Hun (N. Y.) 606, 11 N. Y. Suppl. 862, 34 N. Y. St. 180; Belmont First Nat. Bank *v.* Barnesville First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723, 65 Am. St. Rep. 748, 41 L. R. A. 584.

He is liable, however, for the genuineness of the maker's signature even to the maker's administrator to whom he had paid it as genuine. Wilson *v.* Alexander, 4 Ill. 392.

81. Foster *v.* Collner, 107 Pa. St. 305.

82. It seems that the indorsement of a negotiable note warrants the solvency of the maker in Indiana. Willson *v.* Binford, 81 Ind. 588; Ward *v.* Haggard, 75 Ind. 381; Black *v.* Duncan, 60 Ind. 522; Tam *v.* Shaw, 10 Ind. 469; Sering *v.* Findlay, 7 Ind. 247; Howell *v.* Wilson, 2 Blackf. (Ind.) 418. So of a non-negotiable note. Mathes *v.* Shank, 94 Ind. 501; Dick *v.* Hitt, 82 Ind. 92; Matchett *v.* Anderson Foundry, etc., Works, (Ind. App. 1902) 64 N. E. 229.

83. *Illinois.*— Hinckley *v.* Kersting, 21 Ill. 247, 74 Am. Dec. 102.

Indiana.— Williams *v.* Osbon, 75 Ind. 280; French *v.* Turner, 15 Ind. 59.

Kentucky.— Hurst *v.* Chambers, 12 Bush (Ky.) 155; Markley *v.* Withers, 4 T. B. Mon. (Ky.) 14.

Louisiana.— Barthet *v.* Andry, 14 La. 30; Rippey *v.* Dromgoole, 8 Mart. (La.) 709.

Maine.— Milliken *v.* Chapman, 75 Me. 306, 46 Am. Rep. 486.

Massachusetts.— Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; Day *v.* Kinney, 131 Mass. 37.

Pennsylvania.— Lyons *v.* Divelbis, 22 Pa. St. 185.

Rhode Island.— Beckwith *v.* Farnum, 5 R. I. 230; Burgess *v.* Chapin, 5 R. I. 225; Bicknall *v.* Waterman, 5 R. I. 43.

South Carolina.— Brumby *v.* Dugan, 2 Hill (S. C.) 508.

Tennessee.— Looney *v.* Pinckston, 1 Overt. (Tenn.) 384.

Virginia.— Lyons *v.* Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129.

England.— Smith *v.* Mercer, L. R. 3 Exch. 51, 37 L. J. Exch. 24, 17 L. T. Rep. N. S. 317; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; Young *v.* Cole, 3 Bing. N. Cas. 724, 3 Hodges 126, 6 L. J. C. P. 201, 4 Scott 489, 32 E. C. L. 334; Gurney *v.* Womersley, 3 C. L. R. 3, 4 E. & B. 133, 1 Jur. N. S. 328, 24 L. J. Q. B. 46, 3 Wkly. Rep. 61, 82 E. C. L. 133; Fuller *v.* Smith, 1 C. & P. 197, 12 E. C. L. 121, R. & M. 49, 21 E. C. L. 701, 28 Rev. Rep. 772; Emly *v.* Lye, 15 East 7, 13 Rev. Rep. 347; Guardians of Poor *v.* Greene, 1 H. & N. 884, 3 Jur. N. S. 247, 26 L. J. Exch. 140, 5 Wkly. Rep. 370; Bank of England *v.* Newman, 1 Ld. Raym. 442; Bruce *v.* Bruce, 1 Marsh. 165, 5 Taunt. 495 note, 15 Rev. Rep. 566 note, 1 E. C. L. 256; Jones *v.* Ryde, 1 Marsh. 157, 5 Taunt. 487, 15 Rev. Rep. 561, 1 E. C. L. 252.

But see Henshaw *v.* Coe, Kirby (Conn.) 50; Pyle *v.* McMonagle, 2 Harr. (Del.) 468; Robinson *v.* Ross, 1 Del. Ch. 253; Herald *v.* Scott, 2 Ind. 55; Stewart *v.* Orvis, 47 How. Pr. (N. Y.) 518, in all of which cases the seller was held to warrant the solvency of the maker.

See 7 Cent. Dig. tit. "Bills and Notes," § 782.

A transfer without indorsement for the market value of a bill is prima facie a sale and subject to the rule of *caveat emptor.* Beckwith *v.* Farnum, 5 R. I. 230; Burgess *v.* Chapin, 5 R. I. 225; Bicknall *v.* Waterman, 5 R. I. 43; Evans *v.* Whyle, 5 Bing. 485, 15 E. C. L. 684, 7 L. J. C. P. O. S. 205, M. & M. 468, 22 E. C. L. 565, 3 M. & P. 130; Read *v.* Hutchinson, 3 Camph. 352; *Ex p.* Roberts, 2 Cox Ch. 171; Fenn *v.* Harrison, 3 T. R. 757, 4 T. R. 177; *Ex p.* Shuttleworth, 3 Ves. Jr. 368. *Compare* Lewis *v.* Jeffrey, 7 Montreal Q. R. 141.

to a warranty of the solvency of the bank at that time,[84] and one who transfers commercial paper may warrant the solvency of the maker or accepter by parol.[85]

(v) *Of Good Faith.* Where one transfers by delivery bills or notes payable to bearer, he undertakes that he has no knowledge of any facts which prove the paper to be worthless.[86] Thus if one assigns a promissory note to another, knowing that an indorsement on it is a forgery, he is liable to refund what was paid for it, upon his transferee failing to recover from the indorser whose name was forged.[87]

b. How Conditioned or Excluded. The warranty implied in an indorsement is not absolute, but stands or falls with the indorsement,[88] and in any case an implied warranty may be expressly excluded.[89] It will not be inferred, however,

The part payment of a discount of a bill by delivering without indorsement other bills, which prove to be worthless, will not render the bank which delivers them liable. Fydell *v.* Clark, 1 Esp. 447. So if the transferrer delivers in payment and in good faith the note of a third person who is then insolvent. Roberts *v.* Fisher, 43 N. Y. 159, 3 Am. Rep. 680.

84. Houghton *v.* Adams, 18 Barb. (N. Y.) 545.

The transferrer is under an implied obligation to refund the amount received where a note is changed into smaller notes as a favor and the note proves to be bad (Rogers *v.* Langford, 1 Cr. & M. 637, 3 Tyrw. 654; Turner *v.* Stones, 1 D. & L. 122, 7 Jur. 745, 12 L. J. Q. B. 303. *Contra*, Edmunds *v.* Digges, 1 Gratt. (Va.) 359, 42 Am. Dec. 561); where deposited by him and the bank which issued them fails the day of their deposit (Corbit *v.* Smyrna Bank, 2 Harr. (Del.) 235, 30 Am. Dec. 635; Timmins *v.* Gibbins, 18 Q. B. 722, 17 Jur. 378, 21 L. J. Q. B. 403, 83 E. C. L. 722); and where a discount is paid in banknotes of a country bank which has failed, unknown to either party (Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175).

Payment of bills of a bank which fails leaves the purchaser still liable for the goods purchased, unless the seller expressly took the risk as to the bills.

Maine.— Frontier Bank *v.* Morse, 22 Me. 88, 38 Am. Dec. 284.

New Hampshire.— Fogg *v.* Sawyer, 9 N. H. 365.

New York.— Ontario Bank *v.* Lightbody, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179 [*affirming* 11 Wend. (N. Y.) 9].

Ohio.— Westfall *v.* Braley, 10 Ohio St. 188, 75 Am. Dec. 509.

South Carolina. — Harley *v.* Thornton, 2 Hill (S. C.) 509 note.

Vermont.— Wainwright *v.* Webster, 11 Vt. 576, 34 Am. Dec. 707; Gilman *v.* Peck, 11 Vt. 516, 34 Am. Dec. 702.

Wisconsin.— Townsends *v.* Racine Bank, 7 Wis. 185.

England.— Popley *v.* Ashley, Holt K. B. 122; Owenson *v.* Morse, 7 T. R. 64.

The person receiving such notes must return them within a reasonable time. Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Rogers *v.* Langford, 1 Cr. & M. 637, 3 Tyrw. 654.

85. Milks *v.* Rich, 80 N. Y. 269, 36 Am. Rep. 615 [*affirming* 15 Hun (N. Y.) 178]; Cardell *v.* McNiel, 21 N. Y. 336. So if in writing, but not expressing the consideration as required by the statute of frauds (Dauber *v.* Blackney, 38 Barb. (N. Y.) 432; Johnson *v.* Gilbert, 4 Hill (N. Y.) 178), and where there is an express guaranty of the maker's solvency, which is void by the statute of frauds, an action will lie for the value of goods so paid for, on evidence that absolute payment was not intended (Monroe *v.* Hoff, 5 Den. (N. Y.) 360).

It is not such a warranty for the vendor to say that the note is good. Cresap *v.* Manor, 63 Tex. 485.

86. Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Delaware Bank *v.* Jarvis, 20 N. Y. 226; People's Bank *v.* Bogart, 16 Hun (N. Y.) 270; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; Fenn *v.* Harrison, 3 T. R. 757, 4 T. R. 177.

He is liable for fraudulent misrepresentations (May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064) and for fraudulent concealment of material facts (Smith *v.* Corege, 53 Ark. 295, 14 S. W. 93; Persons *v.* Jones, 12 Ga. 371, 58 Am. Dec. 476). So one who assigns a note "without recourse" is liable for fraud or misrepresentation in the transfer. Prettyman *v.* Short, 5 Harr. (Del.) 360.

87. *Georgia.*— Clayton *v.* O'Connor, 35 Ga. 193; Sneed *v.* Hughes, 14 Ga. 542.

Kentucky.— Wilcoxson *v.* Morse, 19 Ky. L. Rep. 1830, 44 S. W. 142.

Louisiana.— Taylor *v.* Burke, 4 La. Ann. 16; Hewitt *v.* Waterman, 3 La. Ann. 716.

New York.— Boston Nat. Bank *v.* Armour, 1 Silv. Supreme (N. Y.) 444, 6 N. Y. Suppl. 714, 23 N. Y. St. 832.

Pennsylvania.—Bartle *v.* Saunders, 2 Grant (Pa.) 199.

88. Case *v.* Bradburn, 1 Daly (N. Y.) 256, holding that one who indorses a forged check warrants the genuineness of the check and of prior indorsements, but to the extent only of binding himself as indorser, and that if the proper steps have not been taken to charge him as indorser he is not liable to a subsequent holder who has given value for the check.

89. Beal *v.* Roberts, 113 Mass. 525 (holding that the purchaser may agree to "take his chances"); Bell *v.* Dagg, 60 N. Y. 528 [*reversing* 2 Thomps. & C. (N. Y.) 623];

that a transferee took the risks of the note being a forgery because it was passed to him long after dishonor and at a heavy discount.[90]

H. What Law Governs — 1. In General. The indorsement of a bill is a separate contract from the drawing and is governed, as other contracts are, by the law of the place where it is made.[91] This principle applies to each separate indorsement and each may have a distinct *locus contractus*.[92] The place of indorsement is not the place where it is written but the place where it is delivered.[93]

Baldwin *v.* Van Deusen, 37 N. Y. 487 (holding that a warranty that a note sold is the genuine note of a person named, "and not further or otherwise," is not broken by the fact that such person was an infant and negatives any further warranty in respect to it).

The implication may be negatived by the express provisions of the instrument, as for payment in particular notes which proved to be worthless. Dakin *v.* Anderson, 18 Ind. 52.

A verbal agreement for a warranty is not waived by subsequent acceptance of the note without a written warranty. Cardell *v.* McNiel, 21 N. Y. 336.

An implied warranty is subject to the statute of limitation running from the date of the indorsement. Blethen *v.* Lovering, 58 Me. 437.

90. Semmes *v.* Wilson, 5 Cranch C. C. (U. S.) 285, 21 Fed. Cas. No. 12,658.

Warranties are not implied where a particular form of transfer is prescribed and not followed (Moore *v.* Worthington, 2 Duv. (Ky.) 307); where there is an express warranty (Buehler *v.* Pierce, 70 N. Y. App. Div. 621, 75 N. Y. Suppl. 1120); or where the transferrer furnishes at the same time information as to the solvency of the parties to the note and it afterward appears that all the names but that of the payee were forged (Monticello Bank *v.* Bostwick, 71 Fed. 641); but the fact that he said when offering them for discount that they were good and in case of non-payment he would see them paid is no evidence of a waiver by the bank of the implied warranty of the genuineness of the signatures (Cabot Bank *v.* Morton, 4 Gray (Mass.) 156).

91. *Alabama.*— Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42.

Connecticut.— Greathead *v.* Walton, 40 Conn. 226; Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29.

Illinois.— Dunnigan *v.* Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496; Crouch *v.* Hall, 15 Ill. 263; Schuttler *v.* Piatt, 12 Ill. 417; Holbrook *v.* Vibbard, 3 Ill. 465.

Indiana.—Patterson *v.* Carrell, 60 Ind. 128; Rose *v.* Park Bank, 20 Ind. 94, 83 Am. Dec. 306; Brown *v.* Bunn, 16 Ind. 406; Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79; Smith *v.* Blatchford, 2 Ind. 184, 52 Am. Dec. 504.

Iowa.— Michigan Nat. Bank *v.* Green, 33 Iowa 140; Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244; Bernard *v.* Barry, 1 Greene (Iowa) 388.

Kentucky.— Hyatt *v.* Commonwealth Bank, 8 Bush (Ky.) 193; Short *v.* Trabue, 4 Metc. (Ky.) 299.

Louisiana.— Trabue *v.* Short, 18 La. Ann. 257; Hatch *v.* Gilmore, 3 La. Ann. 508.

Massachusetts.— Williams *v.* Wade, 1 Metc. (Mass.) 82; Powers *v.* Lynch, 3 Mass. 77.

New Hampshire.— Dow *v.* Rowell, 12 N. H. 49.

New Jersey.— Freese *v.* Brownell, 35 N. J. L. 285, 10 Am. Rep. 239.

New York.— Cook *v.* Litchfield, 9 N. Y. 279 [*reversing* 5 Sandf. (N. Y.) 330]; Artisans' Bank *v.* Park Bank, 41 Barb. (N. Y.) 599; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

North Carolina.— Hatcher *v.* McMorine, 15 N. C. 122.

Ohio.— Conahan *v.* Smith, 2 Disn. (Ohio) 9.

Pennsylvania.— Lennig *v.* Ralston, 23 Pa. St. 137.

Tennessee.— Trabue *v.* Short, 5 Coldw. (Tenn.) 293.

Texas.— Bailey *v.* Heald, 17 Tex. 102.

West Virginia.—Nichols *v.* Porter, 2 W. Va. 13, 94 Am. Dec. 500.

United States.— Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. ed. 967; Slacum *v.* Pomery, 6 Cranch (U. S.) 221, 3 L. ed. 205; Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141, 7 Law Rep. 343, 2 West. L. J. 27; McClintick *v.* Cummins, 3 McLean (U. S.) 158, 15 Fed. Cas. No. 8,699; Burrows *v.* Hannegan, 1 McLean (U. S.) 315, 4 Fed. Cas. No. 2,206; Towne *v.* Smith, 1 Woodb. & M. (U. S.) 115, 24 Fed. Cas. No. 14,115, 9 Law Rep. 12.

England.— Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 27 E. C. L. 584, 6 C. & P. 25, 25 E. C. L. 303, 4 Moore & S. 695.

See 7 Cent. Dig. tit. "Bills and Notes," § 647.

92. Rose *v.* Park Bank, 20 Ind. 94, 83 Am. Dec. 306; Carlisle *v.* Chambers, 4 Bush (Ky.) 268, 96 Am. Dec. 304; Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141, 7 Law Rep. 343, 2 West. L. J. 27.

93. *Georgia.*— Stanford *v.* Pruet, 27 Ga. 243, 73 Am. Dec. 734.

Illinois.— Gay *v.* Rainey, 89 Ill. 221, 31 Am. Rep. 76.

Kansas.— Briggs *v.* Latham, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546.

Kentucky.— Young *v.* Harris, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170.

Louisiana.— Breedlove *v.* Fletcher, 7 Mart. (La.) 524.

New York.— Lee *v.* Selleck, 33 N. Y. 615 [*affirming* 32 Barb. (N. Y.) 522, 20 How. Pr.

2. Validity of Indorsement. The law of the place of indorsement determines the validity of the indorsement,[94] the legal authority of the indorser,[95] and the formal sufficiency of the indorsement as a contract of the indorser;[96] and will in general control the law of the place of payment[97] or of the forum.[98] On the other hand there may be a valid transfer of an instrument which was illegal in the original place of contract;[99] and the place of indorsement may be controlled, as against the maker, by the place of his contract, where that is also the forum.[1]

3. Rights and Liabilities of Indorser and Indorsee. Ordinarily the rights and liabilities of the indorser and indorsee are governed by the law of the place of indorsement,[2] but they are to be controlled by the law of the place of perform-

(N. Y.) 275]; Cook *v.* Litchfield, 9 N. Y. 279; Weil *v.* Lange, 6 Daly (N. Y.) 549.

United States.— Stubbs *v.* Colt, 30 Fed. 417; Mott *v.* Wright, 4 Biss. (U. S.) 53, 17 Fed. Cas. No. 9,883; *In re* Conrad, 6 Fed Cas. No. 3,126, 6 Am. L. Rev. 385, 4 Am. L. T. 189, 3 Leg. Gaz. 331, 1 Leg. Gaz. Rep. 284, 1 Leg. Op. (Pa.) 201, 8 Phila. (Pa.) 147, 28 Leg. Int. (Pa.) 324.

See 7 Cent. Dig. tit. "Bills and Notes," § 648.

94. Clanton *v.* Barnes, 50 Ala. 260; Moore *v.* Clopton, 22 Ark. 125.

95. Owen *v.* Moody, 29 Miss. 79; Andrews *v.* Carr, 26 Miss. 577; Harper *v.* Butler, 2 Pet. (U. S.) 239, 7 L. ed. 410, which cases hold that a transfer made by an executor or administrator will be sufficient, if it is valid by the law of the place of transfer. *Contra*, Stearns *v.* Burnham, 5 Me. 261, 17 Am. Dec. 228; Thompson *v.* Wilson, 2 N. H. 291.

96. Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 27 E. C. L. 584, 6 C. & P. 25, 25 E. C. L. 303, 4 Moore & S. 695. But a blank indorsement in France of an English bill payable in England will be recognized so far as to enable the indorsee to recover against the accepter in an English court. *In re* Marseilles Extension R., etc., Co., 30 Ch. D. 598, 55 L. J. Ch. 116.

97. Brook *v.* Vannest, 58 N. J. L. 162, 33 Atl. 382. But see Everett *v.* Vendryes, 19 N. Y. 436, holding that as between the indorsee and the drawer the validity in New Grenada of a bill of exchange drawn there but payable in New York is to be determined by New York law.

98. Benton *v.* German-American Nat. Bank, 45 Nebr. 850, 64 N. W. 227; McClintick *v.* Cummins, 3 McLean (U. S.) 158, 15 Fed. Cas. No. 8,699.

99. Morrison *v.* Levell, 4 W. Va. 346, an original contract between alien enemies.

1. Roosa *v.* Crist, 17 Ill. 450, 65 Am. Dec. 679, holding that where a note has been transferred according to the law of the place of transfer by delivery, but such transfer is bad for want of indorsement by the law both of the place of the original contract and of the forum, it will not be enforced at suit of the holder in the court of the latter place. But see De la Chaumette *v.* Bank of England, 2 B. & Ad. 385, 9 L. J. K. B. O. S. 239, 22 E. C. L. 165, 9 B. & C. 208, 7 L. J. K. B. O. S. 179, 17 E. C. L. 100, where a Bank of England note transferred by delivery in France, where such transfer was sufficient, was held in England, the place both of the original contract and of the forum, to have been lawfully transferred, as against the maker.

2. *Alabama.*— Clanton *v.* Barnes, 50 Ala. 260; Lowry *v.* Western Bank, 7 Ala. 120; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42.

Connecticut.— Greathead *v.* Walton, 40 Conn. 226; Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29.

Illinois.—Dunnigan *v.* Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496; Gay *v.* Rainey, 89 Ill. 221, 31 Am. Rep. 76; Holbrook *v.* Vibbard, 3 Ill. 465; Humphreys *v.* Collier, 1 Ill. 297. But see Stacy *v.* Baker, 2 Ill. 417.

Indiana.— Rose *v.* Park Bank, 20 Ind. 94, 83 Am. Dec. 306; Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79; Smith *v.* Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240.

Iowa.— Michigan Nat. Bank *v.* Green, 33 Iowa 140; Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244; Chatham Bank *v.* Allison, 15 Iowa 357.

Kansas.— Briggs *v.* Latham, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546.

Kentucky.— Hyatt *v.* Commonwealth Bank, 8 Bush (Ky.) 193; Carlisle *v.* Chambers, 4 Bush (Ky.) 268, 96 Am. Dec. 304; Short *v.* Trabue, 4 Metc. (Ky.) 299; Weil *v.* Sturgus, 23 Ky. L. Rep. 644, 63 S. W. 602.

Louisiana.— Trabue *v.* Short, 18 La. Ann. 257; Duncan *v.* Sparrow, 3 Rob. (La.) 167.

Massachusetts.— Baxter Nat. Bank *v.* Talbot, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52; Williams *v.* Wade, 1 Metc. (Mass.) 82; Braynard *v.* Marshall, 8 Pick. (Mass.) 194; Powers *v.* Lynch, 3 Mass. 77.

Mississippi.— Allen *v.* Bratton, 47 Miss. 119.

New Hampshire.— Dow *v.* Rowell, 12 N. H. 49. *Compare* New York L. Ins. Co. *v.* McKellar, 68 N. H. 326, 44 Atl. 516.

New York.— Lee *v.* Selleck, 33 N. Y. 615 [*affirming* 32 Barb. (N. Y.) 522, 20 How. Pr. (N. Y.) 275]; Cook *v.* Litchfield, 9 N. Y. 279; Artisans' Bank *v.* Park Bank, 41 Barb. (N. Y.) 599; Hodges *v.* Shuler, 24 Barb. (N. Y.) 68 [*affirmed* in 22 N. Y. 114]; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

North Carolina.— Hatcher *v.* McMorine, 15 N. C. 122.

Pennsylvania.— Lennig *v.* Ralston, 23 Pa. St. 137.

ance, where such appears to have been the intention.[3] The law of the place where a bill is indorsed and made payable will control that of the place where it is drawn, although the latter be also the place where the action is brought.[4]

4. RIGHT OF ACTION. The law of the place of contract and of the forum rather than that of indorsement will determine the indorsee's right to sue other parties,[5] especially where it is also the law of the place of payment.[6] As to an assignee's right to sue upon the instrument, the law of the place of transfer is subordinate to that of the forum.[7] On the other hand if by the law of the place of transfer the personal representative of a deceased holder can transfer an instrument so as to enable his transferee to bring suit, the transfer will carry the power of suit everywhere.[8]

VII. MATURITY AND GRACE.

A. Maturity — 1. IN GENERAL. Questions as to the exact time of maturity of commercial paper may arise in considering whether an action upon it has been brought prematurely;[9] whether an action is barred by the statute of limitations;[10] whether judgment has been prematurely entered under a warrant of attorney to confess judgment;[11] whether a confession of judgment is valid under

South Carolina. — Holt *v.* Salmon, Rice (S. C.) 91.

Tennessee.— Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874; Trabue *v.* Short, 5 Coldw. (Tenn.) 293.

West Virginia.—Nichols *v.* Porter, 2 W. Va. 13, 94 Am. Dec. 500.

United States.— Slacum *v.* Pomery, 6 Cranch (U. S.) 221, 3 L. ed. 204; Mott *v.* Wright, 4 Biss. (U. S.) 53, 17 Fed. Cas. No. 9,883; Davis *v.* Clemson, 6 McLean (U. S.) 622, 7 Fed. Cas. No. 3,630; Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141, 7 Law Rep. 343, 2 West. L. J. 27.

England.— Horne *v.* Rouquette, 3 Q. B. D. 514, 39 L. T. Rep. N. S. 219, 26 Wkly. Rep. 894; Rouquette *v.* Overmann, L. R. 10 Q. B. 525, 44 L. J. Q. B. 221, 33 L. T. Rep. N. S. 333.

See 7 Cent. Dig. tit. "Bills and Notes," § 647.

3. Watson *v.* Lane, 52 N. J. L. 550, 20 Atl. 894, 10 L. R. A. 784; Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. ed. 967. See also Rothschild *v.* Currie, 1 Q. B. 43, 5 Jur. 865, 10 L. J. Q. B. 77, 4 P. & D. 737, 41 E. C. L. 428; Hirschfeld *v.* Smith, L. R. 1 C. P. 340, 1 H. & R. 284, 12 Jur. N. S. 523, 35 L. J. C. P. 177, 14 L. T. Rep. N. S. 886, 14 Wkly. Rep. 455.

Where no place of payment is designated the indorser will be entitled to notice of dishonor if such notice is required by the *lex loci contractus*. Wright *v.* Andrews, 70 Me. 86.

4. Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131.

5. De la Chaumette *v.* Bank of England, 2 B. & Ad. 385, 9 L. J. K. B. O. S. 239, 22 E. C. L. 165, 9 B. & C. 208, 7 L. J. K. B. O. S. 179, 17 E. C. L. 100.

6. If the indorsement is in accordance with the law of the place of contract and of payment, although not valid by the law of the place of transfer, the accepter will be liable where the bill was made, as in the case of a blank indorsement in France of an English accepted bill. Bradlaugh *v.* De Rin, L. R. 5 C. P. 473, 39 L. J. C. P. 254, 22 L. T. Rep. N. S. 623, 18 Wkly. Rep. 931 [*reversing* L. R. 3 C. P. 538]; Lebel *v.* Tucker, L. R. 3 Q. B. 77, 8 B. & S. 830, 37 L. J. Q. B. 46, 17 L. T. Rep. N. S. 244, 16 Wkly. Rep. 338; *In re* Marseilles Extension R., etc., Co., 30 Ch. D. 598, 55 L. J. Ch. 116. And see Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 27 E. C. L. 584, 6 C. & P. 25, 25 E. C. L. 303, 4 Moore & S. 695.

7. Even where the law of the place of transfer does not allow the assignee to sue in his own name, he may generally do so if permitted by the *lex fori*. Roosa *v.* Crist, 17 Ill. 450, 65 Am. Dec. 679; Foss *v.* Nutting, 14 Gray (Mass.) 484. Especially if the place of forum is also the place where the contract was made. Lodge *v.* Phelps, 1 Johns. Cas. (N. Y.) 139, 2 Cai. Cas. (N. Y.) 321. But see *contra*, as to a non-negotiable note. Owen *v.* Moody, 29 Miss. 79.

8. Andrews *v.* Carr, 26 Miss. 577; Grace *v.* Hannah, 51 N. C. 94; Leake *v.* Gilchrist, 13 N. C. 73; Harper *v.* Butler, 2 Pet. (U. S.) 239, 7 L. ed. 410. See also Barrett *v.* Gillard, 10 Tex. 69, holding that the assignee of a non-negotiable note from the administrator of the deceased payee may bring suit on it in his own name if he can do so by the law of the payee's domicile. *Contra*, Stearns *v.* Burnham, 5 Me. 261, 17 Am. Dec. 228; Thompson *v.* Wilson, 2 N. H. 291.

9. Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

Accrual of cause of action see *infra*, XIV, A [8 Cyc.].

10. Effinger *v.* Richards, 35 Miss. 540; McCoy *v.* Farmer, 65 Mo. 244; Dawley *v.* Wheeler, 52 Vt. 574. See, generally, LIMITATIONS OF ACTIONS.

11. Taylor *v.* Jacoby, 2 Pa. St. 495, 45 Am. Dec. 615.

a statute authorizing confession of judgment upon debts due;[12] whether a tender was too late or premature;[13] whether the paper has been presented for payment and notice of dishonor given at the proper time;[14] whether it has been protested prematurely or too late;[15] whether it has been transferred before maturity, so as to give the holder the position of a *bona fide* purchaser;[16] whether a bill was prematurely paid by an accommodation accepter or surety;[17] and in other cases. Substantially the same principles determine the time of maturity for all these purposes.

2. WHAT LAW GOVERNS. The time of maturity of commercial paper is determined by the law of the place where it is payable.[18]

3. PAPER PAYABLE AT A FIXED TIME — a. In General. Where a bill or note is in terms payable on a fixed day, as on a day specified, or in a specified number of days, months, or years after date, it becomes due on that day, and a tender on the day following or a later day, without interest, is not good,[19] while a tender before that day is premature.[20] As the paper does not become due until the time so fixed, an action before that time is premature.[21] Where a negotiable instrument is payable at a fixed time, it is overdue as soon as that time is past, and a transferee after that time is a transferee after maturity, and not a *bona fide* holder.[22] The time for payment of a note may be fixed, by indorsement of a contemporaneous agreement, on a different day than is specified on its face,[23] or, except as against purchasers without notice, by a separate written agreement;[24] but the time fixed in a note cannot be changed by a contradictory memorandum in the margin.[25]

b. Parol Evidence. Parol evidence of intention is admissible to explain a latent ambiguity in the statement of the time of payment, but, by the weight of authority, not to explain a patent ambiguity, or to contradict, add to, or vary the instrument.[26]

12. Baldwin *v.* Freydendall, 10 Ill. App. 106.

13. Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; May *v.* Cooper, Fortescue 376.

14. Towle *v.* Starz, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463; Commercial Bank *v.* Barksdale, 36 Mo. 563; Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; McMurchey *v.* Robinson, 10 Ohio 496.

Presentment for payment see *infra*, X.

Notice of dishonor see *infra*, XIII.

15. Bell *v.* Chicago First Nat. Bank, 115 U. S. 373, 6 S. Ct. 105, 29 L. ed. 409.

16. Helmer *v.* Krolick, 36 Mich. 371; Rapid City First Nat. Bank *v.* Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386; Baucom *v.* Smith, 66 N. C. 537.

Bona fide holder see *infra*, IX.

17. Payment of a bill by an accommodation accepter before the day of maturity, if made with intent to pay the acceptance, will operate as payment at the commencement of the day of maturity, so as to entitle the accepter to commence an action on that day before business hours. Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

18. Skelton *v.* Dustin, 92 Ill. 49; Commercial Bank *v.* Barksdale, 36 Mo. 563. And see *supra*, I, D, 2; *infra*, VII, B, 3.

19. City Bank *v.* Cutter, 3 Pick. (Mass.) 414. And see, generally, TENDER.

Indorser.— Where an indorser of a note is given notice of dishonor on the day of maturity, the note is due and payable by him on that day and he has not a reasonable time in which to pay. City Bank *v.* Cutter, 3 Pick. (Mass.) 414.

20. May *v.* Cooper, Fortescue 376. And see, generally, TENDER.

21. Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117. And see *infra*, XIV, A [8 Cyc.].

22. St. Paul First Nat. Bank *v.* Scott County, 14 Minn. 77, 100 Am. Dec. 194; Baucom *v.* Smith, 66 N. C. 537. See also *infra*, IX, A, 3, b, (IV), (C).

23. Effinger *v.* Richards, 35 Miss. 540; Powell *v.* Guy, 20 N. C. 55. And see Goodnight *v.* Texas Land, etc., Co., (Tex. Civ. App. 1896) 34 S. W. 974.

24. The time of payment of a note as fixed thereby may be controlled as between the parties, and as against purchasers with notice, by a separate written agreement that it shall not become due until the performance of certain conditions. Jacobs *v.* Mitchell, 46 Ohio St. 601, 22 N. E. 768.

25. Fisk *v.* McNeal, 23 Nebr. 726, 37 N. W. 616, 8 Am. St. Rep. 162.

26. *Georgia.*— Neal *v.* Reams, 88 Ga. 298, 14 S. E. 617; McCrary *v.* Caskey, 27 Ga. 54.

Indiana.— Wade *v.* Darrow, 15 Ind. 212.

Iowa.— Works *v.* Hershey, 35 Iowa 340.

Maine.— Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539.

Massachusetts.— Wright *v.* Fisher, 13 Pick. (Mass.) 419 note; Newman *v.* Kettelle, 13 Pick. (Mass.) 418.

e. Omission of Words. Where, however, words are omitted in the expression of the time of payment, so that there is a patent ambiguity which cannot be explained by parol evidence of intention, it is nevertheless competent to show the circumstances under which the paper was given, and the paper will be given effect according to the intention, as it may appear from the words used, when read in the light of such circumstances.[27]

d. Fixed Time After Date. Where commercial paper is payable a specified number of days, months, or years "after date," it matures, if days of grace are not allowed,[28] on the last day of the time specified, reckoning from the date,[29] unless there is something on the face of the paper to show a different intention.[30] And this is true although the paper may have been intentionally postdated[31] or

Ohio.— Kelsey *v.* Hibbs, 13 Ohio St. 340; Jones *v.* Brown, 11 Ohio St. 601.

Pennsylvania.— Hill *v.* Gaw, 4 Pa. St. 493. But see Horner *v.* Horner, 145 Pa. St. 258, 23 Atl. 441.

Texas.— Self *v.* King, 28 Tex. 552.

Wisconsin.— Lamon *v.* French, 25 Wis. 37.

England.— Hoare *v.* Graham, 3 Campb. 57, 13 Rev. Rep. 752. See also Moseley *v.* Hanford, 10 B. & C. 729, 8 L. J. K. B. O. S. 261, 21 E. C. L. 308; Free *v.* Hawkins, Holt 550, 3 E. C. L. 217, 1 Moore C. P. 535, 8 Taunt. 92, 4 E. C. L. 56.

Canada.— McQueen *v.* McQueen, 9 U. C. Q. B. 536.

Compare Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408.

Admissibility of parol evidence generally see *infra*, XIV, E [8 Cyc.].

27. *Alabama.*— Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408, holding a note payable "twenty-five after date," negotiable and payable at a bank, to mean "twenty-five days after date."

Illinois.— Massie *v.* Belford, 68 Ill. 290 (holding that a specified day, "eighteen and sixty-eight" meant "eighteen hundred and sixty-eight"); Weems *v.* Parker, 60 Ill. App. 167 (holding that a note payable "ninety —— after date" was payable ninety days after date).

Maine.— Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539, holding a note given to an insurance company for a policy, and payable "Six —— after date," to be a note payable six months after date.

Massachusetts.— Pearson *v.* Stoddard, 9 Gray (Mass.) 199, holding that "four months after ——" meant "four months after date."

Mississippi.— Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59, holding that a note payable "twenty-four after date" was admissible in evidence under an averment that twenty-four months after date was the time meant, and that it was for the jury to say whether such was the intention of the parties.

28. As to grace generally see *infra*, VII, B.

29. Rapid City First Nat. Bank *v.* Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386; Baucom *v.* Smith, 66 N. C. 537; Bumpass *v.* Timms, 3 Sneed (Tenn.) 459. *Compare* Wallace *v.* Hill, Minor (Ala.) 70 (where a note dated December 4, 1820, and payable "on or before the 25th day of December next," was construed as payable December 25, 1821); Neal *v.* Reams, 88 Ga. 298, 14 S. E. 617 (where a note dated March 4, 1885, and payable "on the 5th March after date" was construed as payable March 5, 1886); Drapeau *v.* Pominville, 11 Quebec Super. Ct. 326.

One day after date.— A note payable, without grace (see *infra*, VII, B), "one day after date," is due, not in a reasonable time, but on the day after its date, and if it is transferred on the second day thereafter or any later day the transferee takes after maturity, and therefore subject to equities and defenses. Baucom *v.* Smith, 66 N. C. 537. See also Beall *v.* Leverett, 32 Ga. 105, 79 Am. Dec. 298. And it has been held that where a note was due only one day after date it will not be presumed that a transferee took it before maturity. Beall *v.* Leverett, 32 Ga. 105, 79 Am. Dec. 298. A note which is payable in one day without grace does not become due until the day after its date, and an action brought on that day is premature in those jurisdictions in which an action cannot be brought on the day on which a note falls due. Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Taylor *v.* Jacoby, 2 Pa. St. 495, 45 Am. Dec. 615; Moore *v.* Hollaman, 25 Tex. Suppl. 81.

Confession of judgment.— Under a statute rendering valid as against creditors confessions of judgment for debts due, a judgment on a note payable one day after date, confessed on the day of its date, would be invalid. See Baldwin *v.* Freydendall, 10 Ill. App. 106.

Date or sight.— A promise to accept a draft "for one month" means one month from date, not from sight. Seaboard Nat. Bank *v.* Burleigh, 74 Hun (N. Y.) 400, 26 N. Y. Suppl. 587, 57 N. Y. St. 247 [*distinguishing* Ulster County Bank *v.* McFarlan, 5 Hill (N. Y.) 432].

30. A note payable "one year, August 15, after date," and dated July 20, matures on the 15th of August in the next year. Washington County Bank *v.* Jerome, 8 Mich. 490.

31. Bumpass *v.* Timms, 3 Sneed (Tenn.) 459. See also Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

In such case the instrument has legal effect from the time of its delivery, but the date fixes the period from which the time for its

antedated.[32] If there is no date the time is reckoned from delivery of the paper.[33]

e. Mistake in Date. If commercial paper is wrongly dated by mistake, and not intentionally antedated or postdated,[34] the mistake may be shown, as between the original parties, and the instrument will be given effect according to their intention.[35] The mistake may also be shown by a transferee, and he will be protected as a *bona fide* holder if he took the paper before its actual maturity.[36] But it is not admissible to show a different date from that expressed as against a *bona fide* transferee before the apparent maturity of the instrument.[37]

f. Reckoning Time — (I) *Months.* In reckoning the time of maturity of commercial paper governed by the law merchant, a "month" is taken as meaning a calendar month, so that a bill or note dated on a certain day, and payable one or more months after date, becomes due on the same day as its date of the month in which it is payable, or on the third day thereafter, if entitled to grace,[38] unless such month, being shorter, lacks such day, in which case the paper will become due on the last day of the month.[39] If the paper has an impossible date, as September 31, it is regarded as dated on the last day of the month, and becomes due on the corresponding day of the month in which it is payable.[40]

(II) *Usances.* In Europe bills of exchange are often made payable in one or more "usances," a usance being a "time fixed by the usage" of the countries

payment or maturity is to be calculated. Bumpass *v.* Timms, 3 Sneed (Tenn.) 459.

32. Baldwin *v.* Freydendall, 10 Ill. App. 106; Luce *v.* Shoff, 70 Ind. 152; Cochran *v.* Duffy, 8 Ohio Dec. (Reprint) 103, 5 Cinc. L. Bul. 646. And see Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197; Powell *v.* Waters, 8 Cow. (N. Y.) 669. *Contra,* Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591; Raefle *v.* Moore, 58 Ga. 94. Where a note given for a debt due is antedated and made payable one day after date, a judgment confessed thereon on the day of its date is not invalid as against creditors under a statute rendering invalid confessions of judgment for debts not due. Baldwin *v.* Frevendall, 10 Ill. App. 106.

Antedating to evade statute or accomplish wrong.— The antedating of a note may be shown, however, and it will be given effect from its delivery only, when the antedating was for the purpose of evading a statute, and in other cases in which it appears that it was for the purpose of unjustly imposing or defeating a liability, or accomplishing a fraudulent or wrongful design. "In short, whenever justice requires it, the party to be injuriously affected by such antedating, may show the actual time, and effect will be given or denied to the instrument accordingly." Baldwin *v.* Freydendall, 10 Ill. App. 106, 112.

33. Giles *v.* Boune, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646. See also Richardson *v.* Ellett, 10 Tex. 190.

34. See *supra,* VII, A, 3, d.

35. Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

36. *Maine.*— Drake *v.* Rogers, 32 Me. 524.

Minnesota.— Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

New York.— Germania Bank *v.* Distler, 4 Hun (N. Y.) 633, 67 Barb. (N. Y.) 333 [*affirmed* in 64 N. Y. 642].

Ohio.— Dennison *v.* Jessup, 1 Disn. (Ohio) 580, 12 Ohio Dec. (Reprint) 808.

Pennsylvania.— McSparran *v.* Neeley, 91 Pa. St. 17.

England.— Fitch *v.* Jones, 5 E. & B. 238, 1 Jur. N. S. 854, 24 L. J. Q. B. 293, 3 Wkly. Rep. 507, 85 E. C. L. 238, especially where the correct date is indicated by the maker in a memorandum indorsed or written on the instrument.

37. Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197. And see Clinton Nat. Bank *v.* Graves, 48 Iowa 228; Huston *v.* Young, 23 Me. 85; Cranson *v.* Goss, 107 Mass. 439, 9 Am. Rep. 45.

Defenses against bona fide transferees see *infra,* XIV, B [8 Cyc.].

38. *Alabama.*—Wooley *v.* Clements, 11 Ala. 220.

Louisiana.— Wood *v.* Mullen, 3 Rob. (La.) 395; Wagner *v.* Kenner, 2 Rob. (La.) 120.

Maryland.—Beck *v.* Thompson, 4 Harr. & J. (Md.) 531.

Mississippi.— Barlow *v.* Planters' Bank, 7 How. (Miss.) 129.

New York.— Roehner *v.* Knickerbocker L. Ins. Co., 63 N. Y. 160 [*affirming* 4 Daly (N. Y.) 512]; Leffingwell *v.* White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97.

Ohio.— McMurchey *v.* Robinson, 10 Ohio 496.

Tennessee.— State Bank *v.* Officer, 3 Baxt. (Tenn.) 173.

Texas.—Young *v.* Van Benthuysen, 30 Tex. 762; Campbell *v.* Lane, 25 Tex. Suppl. 93.

Vermont.— Ripley *v.* Greenleaf, 2 Vt. 129.

England.— Cockell *v.* Gray, 3 B. & B. 186, 7 E. C. L. 676; Chitty Bills 420; Bills Exch. Act, § 14.

39. Wood *v.* Mullen, 3 Rob. (La.) 395, holding that a note dated the 29th of August, payable at six months, was due, with grace, the 3d of March following, as the day of nominal maturity was February 28, and absolute maturity was three days later.

40. Wagner *v.* Kenner, 2 Rob. (La.) 120.

between which a bill is drawn, and varying in different countries.[41] There is no such usage, nor any known usance, in the United States or Great Britain.[42] The courts do not take judicial notice of a foreign usance, but it must be proved.[43]

(III) *Days.* Where commercial paper is payable a certain number of days after date it falls nominally due at the last of the number of days specified, reckoning from the date, and paper payable thirty days or sixty days, etc., after date means the number of days specified, and not months.[44] In leap year the 29th of February is counted.[45]

(IV) *Including and Excluding Days*—(A) *Day of Date.* Where commercial paper is payable at a fixed period from or after date, after sight, or after the happening of a specified event, its maturity is determined, both by the law merchant and under the Negotiable Instruments Law, by excluding the day of its date or other day from which the time begins to run,[46] and the same is true of paper payable "in" a given number of days.[47]

(B) *Day of Maturity.* On the other hand the day of payment or maturity is included as the last day of the currency of the paper. The maker or accepter has the whole of that day in which to make payment, and in most jurisdictions therefore it is held that an action cannot be brought, even after demand and refusal to pay, until the day following or, where grace is allowed, until the day following the last day of grace.[48] It follows that the day of maturity is to be

41. See 1 Daniel Neg. Instr. (5th ed.), § 631.

42. 1 Daniel Neg. Instr. (5th ed.), § 631; 1 Parsons Notes & B. 389.

43. Buckley *v.* Campbell, 1 Salk. 131.

44. *Alabama.*— Bradley *v.* Northern Bank, 60 Ala. 252.

California.— Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430.

Indiana.— Helphenstine *v.* Vincennes Nat. Bank, 65 Ind. 582, 32 Am. Rep. 86.

Massachusetts.— Woodbridge *v.* Brigham, 12 Mass. 403, 7 Am. Dec. 85, 13 Mass. 556.

Missouri.— Blacker *v.* Ryan, 65 Mo. App. 230.

45. Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Helphenstine *v.* Vincennes Nat. Bank, 65 Ind. 582, 32 Am. Rep. 86 [*overruling* Porter *v.* Holloway, 43 Ind. 35; Kohler *v.* Montgomery, 17 Ind. 220; Craft *v.* State Bank, 7 Ind. 219; Swift *v.* Tousey, 5 Ind. 196].

46. *California.*— Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430.

Connecticut.— Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240.

Indiana.— Fisher *v.* State Bank, 7 Blackf. (Ind.) 610.

Maine.— Ammidown *v.* Woodman, 31 Me. 580.

Massachusetts.— Woodbridge *v.* Brigham, 12 Mass. 403, 7 Am. Dec. 85; Wentworth *v.* Clap, 11 Mass. 87 note; Henry *v.* Jones, 8 Mass. 453.

Missouri.— McCoy *v.* Farmer, 65 Mo. 244.

New York.— Roehner *v.* Knickerbocker L. Ins. Co., 63 N. Y. 160 [*affirming* 4 Daly (N. Y.) 512].

Texas.— Young *v.* Van Benthuysen, 30 Tex. 762; Moore *v.* Hollaman, 25 Tex. Suppl. 81.

United States.— Mitchell *v.* Degrand, 1 Mason (U. S.) 176, 17 Fed. Cas. No. 9,661; Hill *v.* Norvell, 3 McLean (U. S.) 583, 12 Fed. Cas. No. 6,497.

England.— Coleman *v.* Sayer, 1 Barn. K. B. 303; May *v.* Cooper, Fortescue 376.

As to paper payable on demand see *infra*, VII, A, 7, b, (I), note 90.

47. Wentworth *v.* Clap, 11 Mass. 87 note; Henry *v.* Jones, 8 Mass. 453.

48. *California.*—Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184; McFarland *v.* Pico, 8 Cal. 626; Wilcombe *v.* Dodge, 3 Cal. 260, 58 Am. Dec. 411. And see Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430.

Georgia.— Raefle *v.* Moore, 58 Ga. 94.

Illinois.— See Walter *v.* Kirk, 14 Ill. 55; McCoy *v.* Babcock, 1 Ill. App. 414.

Kansas.— Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

Louisiana.— Leigh *v.* Knickerbocker L. Ins. Co., 26 La. Ann. 436.

Minnesota.— See Daly *v.* Proetz, 20 Minn. 411.

New Jersey.— Sutcliffe *v.* Humphreys, 58 N. J. L. 42, 32 Atl. 706.

New York.— Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Smith *v.* Aylesworth, 40 Barb. (N Y.) 104; Osborn *v.* Moncure, 3 Wend. (N. Y.) 170.

Pennsylvania.— Taylor *v.* Jacoby, 2 Pa. St. 495, 45 Am. Dec. 615; Thomas *v.* Shoemaker, 6 Watts & S. (Pa.) 179; Bevan *v.* Eldridge, 2 Miles (Pa.) 353.

Texas.— Skidmore *v.* Little, 4 Tex. 301; Campbell *v.* Lane, 25 Tex. Suppl. 93; Moore *v.* Hollaman, 25 Tex. Suppl. 81. And see Young *v.* Van Benthuysen, 30 Tex. 762.

Washington.— Joergenson *v.* Joergenson, 28 Wash. 477, 68 Pac. 913.

England.— Kennedy *v.* Thomas, [1894] 2 Q. B. 759, 63 L. J. Q. B. 761, 71 L. T. Rep. N. S. 144, 9 Reports 564, 42 Wkly. Rep. 641. And see Gaskin *v.* Davis, 2 F. & F. 294.

Note payable day after date.—A suit upon a promissory note payable one day after date, without grace, begun on the day following the execution of the note, is premature. Davis *v.*

excluded in reckoning the period for the running of the statute of limitations on a bill or note.[49] The paper, however, may be lawfully protested, and notice of dishonor given, at any time on the day of maturity, after a demand and refusal to pay.[50] A bill or note is not transferred after maturity, so as to prevent the transferee from claiming as a *bona fide* holder, if it is transferred at any time on the day when it is payable, or on the last day of grace, if the paper is entitled to grace.[51]

Eppinger, 18 Cal. 378, 79 Am. Dec. 184. See also Taylor *v.* Jacoby, 2 Pa. St. 495, 45 Am. Dec. 615.

Decisions to the contrary.— In some jurisdictions the rule stated in the text is not recognized to the full extent, but it is held that paper is due on demand at any reasonable time on the day of maturity, and that an action therefore may be maintained on that day, after a demand and refusal to pay.

Arkansas.—Heise *v.* Bumpass, 40 Ark. 545; Holland *v.* Clark, 32 Ark. 697.

Maine.— Veazie Bank *v.* Paulk, 40 Me. 109; Greeley *v.* Thurston, 4 Me. 479, 16 Am. Dec. 285. *Compare* Lunt *v.* Adams, 17 Me. 230.

Massachusetts.— Gordon *v.* Parmelee, 15 Gray (Mass.) 413; Staples *v.* Franklin Bank, 1 Metc. (Mass.) 43, 35 Am. Dec. 345; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209.

New Hampshire.— Dennie *v.* Walker, 7 N. H. 199.

South Carolina.— McKenzie *v.* Durant, 9 Rich. (S. C.) 61; Wilson *v.* Williman, 1 Nott & M. (S. C.) 440.

Tennessee.— Coleman *v.* Ewing, 4 Humphr. (Tenn.) 241.

Accrual of right of action generally see *infra*, XIV, A [8 Cyc.].

In absence of a demand.— All the authorities agree that, in the absence of a demand of payment on the day fixed therefor, an action commenced on that day is premature.

Alabama.—Randolph *v.* Cook, 2 Port. (Ala.) 286.

Arkansas.— Moore *v.* Horsley, 42 Ark. 163; Heise *v.* Bumpass, 40 Ark. 545; Holland *v.* Clark, 32 Ark. 697.

California.— Bell *v.* Sackett, 38 Cal. 407.

Illinois.— Walter *v.* Kirk, 14 Ill. 55.

Indiana.— Benson *v.* Adams, 69 Ind. 353, 35 Am. Rep. 220.

Kansas.— Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

Maine.— Vandesande *v.* Chapman, 48 Me. 262; Greeley *v.* Thurston, 4 Me. 479, 16 Am. Dec. 285.

Massachusetts.— Estes *v.* Tower, 102 Mass. 65, 3 Am. Rep. 439; Gordon *v.* Parmelee, 15 Gray (Mass.) 413; Pierce *v.* Cate, 12 Cush. (Mass.) 190, 59 Am. Dec. 176; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

Michigan.— Wiesinger *v.* Benton Harbor First Nat. Bank, 106 Mich. 291, 64 N. W. 59.

Minnesota.— Daly *v.* Proetz, 20 Minn. 411.

Texas.— Hamilton, etc., Mill Co. *v.* Sinker, 74 Tex. 51, 11 S. W. 1056; Watkins *v.* Willis, 58 Tex. 521; Cox *v.* Reinhardt, 41 Tex. 591.

England.— Kennedy *v.* Thomas, [1894] 2 Q. B. 759, 63 L. J. Q. B. 761, 71 L. T. Rep. N. S. 144, 9 Reports 564, 42 Wkly. Rep. 641; Wells *v.* Giles, 2 Gale 209; Leftley *v.* Mills, 4 T. R. 170.

Tender.— Tender may be made by the accepter of a bill, even after demand, on the day of maturity, and the accepter will not in such case be liable for the protest fees. Leftley *v.* Mills, 4 T. R. 170.

Note given for insurance premium.— The words "at maturity," in a note which provides that if not paid at maturity the policy of insurance, for the premium on which the note is given, shall be void, refer to and include the whole day, unless specially and distinctly limited to a certain hour of the day. Leigh *v.* Knickerbocker L. Ins. Co., 26 La. Ann. 436.

49. *California.*— Bell *v.* Sackett, 38 Cal. 407.

Connecticut.— Blackman *v.* Nearing, 43 Conn. 56, 21 Am. Rep. 634.

Kansas.— Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

New York.— Cornell *v.* Moulton, 3 Den. (N. Y.) 12.

Texas.— Watkins *v.* Willis, 58 Tex. 521.

In some jurisdictions this is not true where a demand has been made on the day of maturity, although it is true where no demand has been made. Holland *v.* Clark, 32 Ark. 697. And see *supra*, note 48.

50. King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560; Corp *v.* McComb, 1 Johns. Cas. (N. Y.) 328; King *v.* Holmes, 11 Pa. St. 456; Kennedy *v.* Thomas, [1894] 2 Q. B. 759, 63 L. J. Q. B. 761, 71 L. T. Rep. N. S. 144, 9 Reports 564, 42 Wkly. Rep. 641; Burbridge *v.* Manners, 3 Campb. 193.

Presentment for payment see *infra*, X.

Dishonor and protest see *infra*, XII.

Notice of dishonor see *infra*, XIII.

51. *Connecticut.*—New Haven Sav. Bank *v.* Bates, 8 Conn. 505.

Illinois.— Walter *v.* Kirk, 14 Ill. 55. See also Johnson *v.* Glover, 121 Ill. 283, 12 N. E. 257, 10 N. E. 214.

Louisiana.— Holton *v.* Hubbard, 49 La. Ann. 715, 22 So. 338.

New Hampshire.— Crosby *v.* Grant, 36 N. H. 273.

New York.— Continental Nat. Bank *v.* Townsend, 87 N. Y. 8; Herman *v.* Bencke, 8 N. Y. St. 345; Wallach *v.* Bader, 7 N. Y. St. 375.

Pennsylvania.— Dunshee *v.* Carothers, (Pa. 1886) 7 Atl. 183; Dillworth *v.* Ackley, 1 Walk. (Pa.) 180, 31 Leg. Int. (Pa.) 273.

Contra, Pine *v.* Smith, 11 Gray (Mass.) 38.

4. Paper Payable On or Before Fixed Time. Where commercial paper is payable "on or before" a fixed time the maker simply has an option to pay it before the time fixed, and the paper does not mature until the expiration of that time.[52] The same is true of an instrument payable "by," or "on or by," a certain date,[53] or within a certain time,[54] and of an instrument payable in a certain time, but redeemable before that time.[55] The holder cannot require payment or maintain an action until expiration of the time fixed, unless he is given such an option,[56] and a transferee before the time fixed is entitled to protection as a transferee before maturity.[57]

5. Paper Payable On or After Fixed Time. A note payable "on or after" a certain date is due and actionable at any time after such date.[58]

6. Paper Payable at a Bank. In some jurisdictions it is held that the maker or accepter of paper payable at a bank has until the end of the day of maturity in which to pay, even after demand and dishonor and notice thereof, so that an action cannot be brought until the day following,[59] while in other jurisdictions it

Effect of dishonor.— A transferee of paper on the day of maturity is none the less a *bona fide* holder because the paper has been dishonored, if he takes without notice of that fact and the fact does not appear on the paper. New Haven Sav. Bank *v.* Bates, 8 Conn. 505. *Compare* Crosby *v.* Grant, 36 N. H. 273. And see *infra*, IX.

52. *Arkansas.*— Moore *v.* Horsley, 42 Ark. 163.

Illinois.— See Cisne *v.* Chidester, 85 Ill. 523.

Indiana.— See Dunkle *v.* Nichols, 101 Ind. 473.

Maine.— Leader *v.* Plante, 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415.

Michigan.— Helmer *v.* Krolick, 36 Mich. 371; Mattison *v.* Marks, 31 Mich. 421, 18 Am. Rep. 197.

Missouri.—See Springfield First Nat. Bank *v.* Skeen, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748.

Ohio.— Jordan *v.* Tate, 19 Ohio St. 586.

Texas.— See Goodnight *v.* Texas Land, etc., Co., (Tex. Civ. App. 1896) 34 S. W. 974.

Vermont.— Bates *v.* Leclair, 49 Vt. 229.

Wisconsin.— Pagal *v.* Nickel, 107 Wis. 471, 83 N. W. 767; Ward *v.* Perrigo, 33 Wis. 143.

United States.— See Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044; Kikindal *v.* Mitchell, 2 McLean (U. S.) 402, 14 Fed. Cas. No. 7,763.

And see Neg. Instr. L. § 23, subs. 2.

Option after a certain time.—Where a note payable in five years, with interest, provides that the maker at the end of three years may pay the whole or a part of the same, time is of the essence of the contract. The maker has a right to pay the note or a part of it, with interest to the time of payment, at the end of the three years, but not before or after that time. Goodnight *v.* Texas Land, etc., Co., (Tex. Civ. App. 1896) 34 S. W. 974.

53. Preston *v.* Dunham, 52 Ala. 217; Massie *v.* Belford, 68 Ill. 290.

54. If payable "within one year" it is due one year after date, with an option in the maker to pay before maturity. Leader *v.* Plante, 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415.

55. Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044.

56. Moore *v.* Horsley, 42 Ark. 163.

Option in payee.—An instrument, however, may be payable at a fixed time, or in a less time at the option of the payee, in which case it does not mature until the time fixed, unless the payee exercises his option. Such is the case where a certificate of deposit is payable in twelve months, but "payable in six mo. if desired." Citizens' Bank *v.* Jones, 121 Cal. 30, 53 Pac. 354.

57. Helmer *v.* Krolick, 36 Mich. 371. See also Springfield First Nat. Bank *v.* Skeen, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748; Jordan *v.* Tate, 19 Ohio St. 586.

Government bonds.— Where a government bond is payable in twenty years, but redeemable at the pleasure of the government after five years, it is not overdue until after twenty years, although it has been called in for payment before the expiration of that time, and a purchaser before then is a purchaser before maturity. Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044, where Matthews, J., said: "The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and even, though not demanded, to exonerate the Government from liability for interest accruing after that date; but, consistently with the terms of the statutes and the obvious purposes in view, in the original creation and issue of the securities in the form adopted, it cannot be that the legal effect of such a call for the purpose of redemption is the same as if the bond had been originally framed as an obligation to pay absolutely on a day previously fixed."

58. Brookshire *v.* Allen, (Tex. Civ. App. 1895) 32 S. W. 164.

59. *Indiana.*— Benson *v.* Adams, 69 Ind. 353, 35 Am. Rep. 220.

Kansas.— Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

New Jersey.— Sutcliffe *v.* Humphreys, 58 N. J. L. 42, 32 Atl. 706.

New York.—Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Smith *v.* Aylesworth, 40 Barb. (N. Y.) 104.

is held that an action may be brought, even without demand, at any time after banking hours on the day of maturity.[60]

7. Paper Payable On or After Demand — a. What Paper Is Payable on Demand — (I) *In General.* Commercial paper is payable on demand where it is expressed to be payable "on demand,"[61] "when demanded,"[62] "after date," "on demand after date,"[63] "at sight," or "on demand at sight,"[64] "on presentation,"[65] "in any time within six years,"[66] "on call," "at any time called for," or "when called for,"[67] on call of the directors of a corporation, as in the case of notes given for subscriptions to stock, or "at such times and in such portions as the directors might require,"[68] or in a specified time, but with an option in the payee to collect any time, "by discounting a proportional amount of interest that shall have been paid in advance."[69]

(II) *Provisions as to Interest.* Paper is none the less payable on demand because it contains a provision as to interest, as where it is payable "on demand" with interest after a specified time, or "after maturity,"[70] with interest "annually,"[71]

Pennsylvania.— Bevan *v.* Eldridge, 2 Miles (Pa.) 353.

And see *supra*, VII, A, 3, f, (IV), (B).

The statute of limitations does not begin to run until then. Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

60. Vandesande *v.* Chapman, 48 Me. 262; Church *v.* Clark, 21 Pick. (Mass.) 310; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

61. Neg. Instr. L. § 26, subs. 1.

But paper payable "on demand, the first of January next," is payable on the first of January after its date and not on demand. Brett *v.* Ming, 1 Fla. 447.

62. Kingsbury *v.* Butler, 4 Vt. 458.

63. *California.*— O'Neil *v.* Magner, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88.

Georgia.— Morrison *v.* Morrison, 102 Ga. 170, 29 S. E. 125.

Iowa.— Leonard *v.* Olson, 99 Iowa 162, 68 N. W. 677, 61 Am. St. Rep. 230, 35 L. R. A. 381.

Massachusetts.— Fenno *v.* Gay, 146 Mass. 118, 15 N. E. 87; Hitchings *v.* Edmands, 132 Mass. 338.

Michigan.— Peninsular Sav. Bank *v.* Hosie, 112 Mich. 351, 70 N. W. 890.

Missouri.— St. Charles First Nat. Bank *v.* Hunt, 25 Mo. App. 170, "after date."

New Jersey.— Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 39 Atl. 650.

Oregon.— See Dodd *v.* Denny, 6 Oreg. 156.

Wisconsin.— Turner *v.* Iron Chief Min. Co., 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L. R. A. 533.

64. Dixon *v.* Nuttall, 1 C. M. & R. 307, 6 C. & P. 320, 3 L. J. Exch. 290, 4 Tyrw. 1013, 25 E. C. L. 453; Neg. Instr. L. § 26, subs. 1. See also *infra*, VII, A, 8.

65. Neg. Instr. L. § 26, subs. 1. See also *infra*, VII, A, 8.

66. Young *v.* Weston, 39 Me. 492.

67. *Alabama.*— Mobile Sav. Bank *v.* McDonnell, 83 Ala. 595, 4 So. 346. And see Brockway *v.* Gadsden Mineral Land Co., 102 Ala. 620, 15 So. 431.

Georgia.— Lynch *v.* Goldsmith, 64 Ga. 42.

Illinois.— Bilderback *v.* Burlingame, 27 Ill. 338.

Indiana.— Kraft *v.* Thomas, 123 Ind. 513, 24 N. E. 346, 18 Am. St. Rep. 345, where the words were "when kald for."

Texas.— Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

Virginia.—Bowman *v.* McChesney, 22 Gratt. (Va.) 609.

England.— Waters *v.* Thanet, 2 Q. B. 757, 2 G. & D. 166, 6 Jur. 708, 11 L. J. Q. B. 87, 42 E. C. L. 899.

When fixed time also named.— But a note payable "six months after date . . . when called for" is due at the end of six months. Davis *v.* Glenn, 72 N. C. 519.

68. *New York.*— Howland *v.* Edmonds, 24 N. Y. 307; Colgate *v.* Buckingham, 39 Barb. (N. Y.) 177.

Ohio.— Kilbreath *v.* Gaylord, 34 Ohio St. 305.

Utah.— Crofoot *v.* Thatcher, 19 Utah 212, 57 Pac. 171, 75 Am. St. Rep. 725.

Vermont.— Lycoming F. Ins. Co. *v.* Batcheller, 62 Vt. 148, 19 Atl. 982.

United States.— Gaytes *v.* Hibbard, 5 Biss. (U. S.) 99, 10 Fed. Cas. No. 5,287.

But in such case the call must be made, and it is then that the paper becomes due on demand. See the cases above cited; and *infra*, VII, A, 7, b, (I) note 92.

69. Dawley *v.* Wheeler, 52 Vt. 574.

70. *California.*— Holmes *v.* West, 17 Cal. 623.

Colorado.— Lee *v.* Balcom, 9 Colo. 216, 11 Pac. 74.

Iowa.— Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639.

Maine.— Rice *v.* West, 11 Me. 323, "on demand, with interest after six months." *Compare* Hobart *v.* Dodge, 10 Me. 156, 25 Am. Dec. 214.

Massachusetts.— Wright *v.* Fisher, 13 Pick. (Mass.) 419 note; Loring *v.* Gurney, 5 Pick. (Mass.) 15.

71. *Georgia.*— Lynch *v.* Goldsmith, 64 Ga. 42; Meador *v.* Dollar Sav. Bank, 56 Ga. 605.

Massachusetts.— Converse *v.* Johnson, 146 Mass. 20, 14 N. E. 925.

New Hampshire.— Shaw *v.* Shaw, 43 N. H. 170, "on demand, with interest annually, payable in four months from date."

"with interest within six months from date," [72] "without interest," [73] or "without interest during the life of the promisor." [74]

(III) *No Time of Payment Expressed.* Commercial paper is payable on demand where no time of payment at all is expressed [75] and no time is expressed within this rule when a day and month is stated without stating the year [76] and in similar cases.[77] This does not apply, however, where the intention of the parties can be ascertained from the instrument notwithstanding the omission.[78] Where a note payable at a fixed time is extended indefinitely it becomes

North Carolina.— Knight *v.* Braswell, 70 N. C. 709.

Vermont.— Gove *v.* Downer, 59 Vt. 139, 7 Atl. 463.

72. Jillson *v.* Hill, 4 Gray (Mass.) 316.

73. Porter *v.* Porter, 5 Me. 376.

74. Newman *v.* Kettelle, 13 Pick. (Mass.) 418.

75. *Arkansas.*— Huyck *v.* Meador, 24 Ark. 191.

California.—Keyes *v.* Fenstermaker, 24 Cal. 329; Holmes *v.* West, 17 Cal. 623.

Colorado.— Lee *v.* Balcom, 9 Colo. 216, 11 Pac. 74.

Connecticut.— Bacon *v.* Page, 1 Conn. 404.

Georgia.— Lynch *v.* Goldsmith, 64 Ga. 42; Meador *v.* Dollar Sav. Bank, 56 Ga. 605; Freeman *v.* Ross, 15 Ga. 252.

Illinois.— Stewart *v.* Smith, 28 Ill. 397.

Indiana.— Osborne *v.* Fulton, 1 Blackf. (Ind.) 233.

Iowa.—Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639; Green *v.* Drebilbis, 1 Greene (Iowa) 552.

Kentucky.— Francis *v.* Castleman, 4 Bibb (Ky.) 282; Payne *v.* Mattox, 1 Bibb (Ky.) 164.

Louisiana.— Burthe *v.* Donaldson, 15 La. 382.

Maine.— Porter *v.* Porter, 51 Me. 376; Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141; Shirley *v.* Todd, 9 Me. 83.

Massachusetts.— Converse *v.* Johnson, 146 Mass. 20, 14 N. E. 925.

Minnesota.— Libby *v.* Mikelborg, 28 Minn. 38, 8 N. W. 903.

Missouri.— Collins *v.* Trotter, 81 Mo. 275; Mason *v.* Patton, 1 Mo. 279.

Nebraska.— Roberts *v.* Snow, 27 Nebr. 425, 43 N. W. 241.

New Jersey.— Adams *v.* Adams, 55 N. J. Eq. 42, 35 Atl. 827.

New York.— Union Mills First Nat. Bank *v.* Clark, 42 Hun (N. Y.) 16; Bartholomew *v.* Seaman, 25 Hun (N. Y.) 619; Payne *v.* Slate, 39 Barb. (N. Y.) 634; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Weeks *v.* Pryor, 27 Barb. (N. Y.) 79; McLeod *v.* Hunter, 29 Misc. (N. Y.) 558, 61 N. Y. Suppl. 73; Cornell *v.* Moulton, 3 Den. (N. Y.) 12; Gaylord *v.* Van Loan, 15 Wend. (N. Y.) 308; Lobdell *v.* Hopkins, 5 Cow. (N. Y.) 516; Herrick *v.* Bennett, 8 Johns. (N. Y.) 374; Thompson *v.* Ketchum, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332.

North Carolina.— Ervin *v.* Brooks, 111 N. C. 358, 16 S. E. 240; Knight *v.* Braswell, 70 N. C. 709.

Ohio.— Jones *v.* Brown, 11 Ohio St. 601.

Oregon.— Dodd *v.* Denny, 6 Oreg. 156.

Pennsylvania.— Messmore *v.* Morrison, 172 Pa. St. 300, 34 Atl. 45; Hall *v.* Toby, 110 Pa. St. 318, 1 Atl. 369.

Texas.— Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310; Chambers *v.* Hill, 26 Tex. 472; Salinas *v.* Wright, 11 Tex. 572.

Vermont.—Thrall *v.* Mead, 40 Vt. 540; Pindar *v.* Barlow, 31 Vt. 529.

Wisconsin.— Husbrook *v.* Wilder, 1 Pinn. (Wis.) 643.

England.— Down *v.* Halling, 4 B. & C. 33, 10 E. C. L. 602, 2 C. & P. 11, 12 E. C. L. 423, 6 D. & R. 455, 3 L. J. K. B. O. S. 234; Whitlock *v.* Underwood, 2 B. & C. 157, 3 D. & R. 356, 1 L. J. K. B. O. S. 251, 9 E. C. L. 76; Boehm *v.* Sterling, 2 Esp. 575, 7 T. R. 423.

Canada.— Thorne *v.* Scovil, 4 N. Brunsw. 557; Desy *v.* Daly, 12 Quebec Super. Ct. 183, 3 Rev. de Jur. 492.

And see Neg. Instr. L. § 26, subs. 2.

See 7 Cent. Dig. tit. "Bills and Notes," § 284.

"A promissory note payable 'after date,' with no other time for payment stated, is payable on demand." Morrison *v.* Morrison, 102 Ga. 170, 174, 29 S. E. 125. And see Hotel Lanier Co. *v.* Johnson, 103 Ga. 604, 30 S. E. 558.

Parol evidence.— Some courts have held that when no time of payment is expressed in an instrument parol evidence is admissible to show the time intended. Horner *v.* Horner, 145 Pa. St. 258, 23 Atl. 441. But the weight of authority is to the contrary. Jones *v.* Brown, 11 Ohio St. 601. See *infra*, XIV, E [8 Cyc.].

76. Collins *v.* Trotter, 81 Mo. 275, holding that a note dated June 29, 1878, and payable the "first day of March," without designating the year, was payable on demand.

77. "—— days after date."— A note payable "—— days after date" is payable on demand. Dodd *v.* Denny, 6 Oreg. 156.

78. See *supra*, VII, A, 3, c.

The provision of the South Dakota statute (S. D. Comp. Laws, § 4465) that a negotiable instrument not specifying any time of payment is payable immediately is subject to the subsequent provision (section 4571) declaring foregoing provisions as to the rights and obligations of the parties to contracts subordinate to their intention. Tobin *v.* McKinney, 15 S. D. 257, 84 N. W. 228, 88 N. W. 572.

payable on demand.[79] If a bill or draft does not designate a time of payment it may be presented at once and becomes due immediately on acceptance,[80] but not before then.[81]

(iv) *Issue of Overdue Paper.* Where an instrument is issued, accepted, or indorsed when overdue, it is, as respects the person so issuing, accepting, or indorsing it, payable on demand. This is true, both by the law merchant,[82] and under the Negotiable Instruments Law.[83]

(v) *In a Reasonable Time on Demand.* A note is payable in a reasonable time on demand, when it is payable "at the convenience" of the maker,[84] "as soon as I possibly can,"[85] when the maker and payee mutually agree,[86] etc. If a note payable in work or merchandise fixes no time of payment it will be due in a reasonable time on demand.[87]

b. Maturity of Paper Payable on Demand — (i) *In General.* Some courts have held that paper payable on demand does not become due until a demand is made, so that a demand is necessary before an action can be maintained, and before the statute of limitations will begin to run;[88] and some seem to hold that payment must be demanded in what is a reasonable time under all the circumstances, and that the statute of limitations will run after the expiration of such

79. Greer *v.* Lafayette County Bank, 128 Mo. 559, 30 S. W. 319. See also Ramot *v.* Schotenfels, 15 Iowa 457, 83 Am. Dec. 425.

80. Freeman *v.* Ross, 15 Ga. 252; Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639; Burthe *v.* Donaldson, 15 La. 382; Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310.

81. Bedell *v.* Scarlett, 75 Ga. 56; Roswell Mfg. Co. *v.* Hudson, 72 Ga. 24.

82. *Alabama.*— State Branch Bank *v.* Gaffney, 9 Ala. 153.

Arkansas.— Levy *v.* Drew, 14 Ark. 334; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California.— Beer *v.* Clifton, 98 Cal. 323, 33 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 580; Thompson *v.* Williams, 14 Cal. 160; Beebe *v.* Brooks, 12 Cal. 308.

Connecticut.— Bishop *v.* Dexter, 2 Conn. 419.

Iowa.— Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250; McKewer *v.* Kirtland, 33 Iowa 348.

Kansas.— Shelby *v.* Judd, 24 Kan. 161; Swartz *v.* Redfield, 13 Kan. 550.

Maine.— Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478.

Massachusetts.— Colt *v.* Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584.

Missouri.— Light *v.* Kingsbury, 50 Mo. 331.

New Hampshire.— Libbey *v.* Pierce, 47 N. H. 309.

New Jersey.— Frech *v.* Yawger, 47 N. J. L. 157, 54 Am. Rep. 123.

New York.— Leavitt *v.* Putnam, 3 N. Y. 494, 53 Am. Dec. 322 [*reversing* 1 Sandf. (N. Y.) 199]; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75; Berry *v.* Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75.

Oregon.— Smith *v.* Caro, 9 Oreg. 278.

Pennsylvania.— Tyler *v.* Young, 30 Pa. St. 143; McKinney *v.* Crawford, 8 Serg. & R. (Pa.) 351.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727.

Vermont.— Verder *v.* Verder, 63 Vt. 38, 21 Atl. 611.

Wisconsin.— Corwith *v.* Morrison, 1 Pinn. (Wis.) 489.

United States.— Cox *v.* Jones, 2 Cranch C. C. (U. S.) 370, 6 Fed. Cas. No. 3,303; Stewart *v.* French, 2 Cranch C. C. (U. S.) 300, 23 Fed. Cas. No. 13,427.

Pledge of note as collateral.—Where a note which was originally given as collateral for a debt remained in the holder's hands after payment of the debt as collateral security for a general indebtedness, and after it became due was made collateral for another specific debt, it was held an overdue note in the holder's hands subject to defenses. Jenkins *v.* Bauer, 8 Ill. App. 634.

83. Neg. Instr. L. § 26, subs. 2.

84. Smithers *v.* Junker, 41 Fed. 101, 7 L. R. A. 264. See also Works *v.* Hershey, 35 Iowa 340; and *infra*, VII, A, 12, d.

85. Kincaid *v.* Higgins, 1 Bibb (Ky.) 396.

86. Page *v.* Cook, 164 Mass. 116, 41 N. E. 115, 49 Am. St. Rep. 449, 28 L. R. A. 759. And see *infra*, VII, A, 12, d.

87. Weymouth *v.* Gile, 83 Me. 437, 22 Atl. 375; Self *v.* King, 28 Tex. 552.

88. Nott *v.* State Nat. Bank, 51 La. Ann. 871, 25 So. 475; McLure *v.* Longworth, Wright (Ohio) 582; Gordon *v.* Preston, Wright (Ohio) 341; Lee *v.* Cassin, 2 Cranch C. C. (U. S.) 112, 15 Fed. Cas. No. 8,184; Barough *v.* White, 4 B. & C. 325, 10 E. C. L. 600, 2 C. & P. 8, 12 E. C. L. 420, 6 D. & R. 379, 3 L. J. K. B. O. S. 227; Brooks *v.* Mitchell, 11 L. J. Exch. 51, 9 M. & W. 15; Dixon *v.* Nuttall, 1 C. M. & R. 307, 6 C. & P. 320, 3 L. J. Exch. 290, 4 Tyrw. 1013, 25 E. C. L. 453.

Maker's right to pay.—The maker of paper payable on demand has a right to pay it at any time, without any demand by the payee, although the paper provides that he is to have a reasonable time in which to pay after

time.[89] Most of the courts, however, have held that paper payable on demand is due immediately, so that an action can be brought at any time without any other demand than the suit, and so that the statute of limitations begins to run from its date;[90] and this rule is not affected by statutes declaring demand paper to be

demand. Stover *v.* Hamilton, 21 Gratt. (Va.) 273.

89. Thrall *v.* Mead, 40 Vt. 540.

90. *Alabama.*— Mobile Sav. Bank *v.* McDonnell, 83 Ala. 595, 4 So. 346; Hunter *v.* Wood, 54 Ala. 71; Owen *v.* Henderson, 7 Ala. 641; Sommerville *v.* Williams, 1 Stew. (Ala.) 484. See also Massie *v.* Byrd, 87 Ala. 672, 6 So. 145.

Arkansas.— Pullen *v.* Chase, 4 Ark. 210.

California.— O'Neil *v.* Magner, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88; Cousins *v.* Partridge, 79 Cal. 224, 21 Pac. 745; Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61; Pierce *v.* Jackson, 21 Cal. 636; Holmes *v.* West, 17 Cal. 623.

Colorado.— Lee *v.* Balcom, 9 Colo. 216, 11 Pac. 74.

Connecticut.— Old Alms-House Farm *v.* Smith, 52 Conn. 434; Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469.

Georgia.— Under Ga. Code (1895), § 3700, a promissory note, bill of exchange, or other paper payable on demand is due immediately (Hotel Lanier Co. *v.* Johnson, 103 Ga. 604, 30 S. E. 558), but a bill of exchange or order is not due until it is presented and accepted, where no time of payment is specified (Bedell *v.* Scarlett, 75 Ga. 56).

Illinois.— Hall *v.* Jones, 32 Ill. 38; Sea *v.* Glover, 1 Ill. App. 335.

Indiana.— Kraft *v.* Thomas, 123 Ind. 513, 24 N. E. 346, 18 Am. St. Rep. 345; Mercer *v.* Patterson, 41 Ind. 440; Faukboner *v.* Faukboner, 20 Ind. 62; Bradfield *v.* McCormick, 3 Blackf. (Ind.) 161.

Iowa.— Leonard *v.* Olson, 99 Iowa 162, 68 N. W. 677, 61 Am. St. Rep. 230, 35 L. R. A. 381.

Maryland.— Ruff *v.* Bull, 7 Harr. & J. (Md.) 14, 16 Am. Dec. 290.

Massachusetts.— Seward *v.* Hayden, 150 Mass. 158, 22 N. E. 629, 15 Am. St. Rep. 183, 5 L. R. A. 844; Fenno *v.* Gay, 146 Mass. 118, 15 N. E. 87; Converse *v.* Johnson, 146 Mass. 20, 14 N. E. 925; Jillson *v.* Hill, 4 Gray (Mass.) 316; Burnham *v.* Allen, 1 Gray (Mass.) 496; Wright *v.* Fisher, 13 Pick. (Mass.) 419 note; Newman *v.* Kettelle, 13 Pick. (Mass.) 418; Little *v.* Blunt, 9 Pick. (Mass.) 488; Loring *v.* Gurney, 5 Pick. (Mass.) 15; Presbrey *v.* Williams, 15 Mass. 193; Field *v.* Nickerson, 13 Mass. 131.

Michigan.—Citizens' Sav. Bank *v.* Vaughan, 115 Mich. 156, 73 N. W. 143; Peninsular Sav. Bank *v.* Hosie, 112 Mich. 351, 70 N. W. 890; Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173; Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Palmer *v.* Palmer, 36 Mich. 487, 24 Am. Rep. 605.

Missouri.— Collins *v.* Trotter, 81 Mo. 275; Easton *v.* McAllister, 1 Mo. 662.

Montana.— McFarland *v.* Cutter, 1 Mont. 383.

New Hampshire.— Peaslee *v.* Breed, 10 N. H. 489, 34 Am. Dec. 178.

New Jersey.— Larason *v.* Lambert, 12 N. J. L. 247.

New York.— Shutts *v.* Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; McMullen *v.* Rafferty, 89 N. Y. 456; De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494 [*affirming* 11 Hun (N. Y.) 432]; Wheeler *v.* Warner, 47 N. Y. 519, 7 Am. Rep. 478 [*explaining* Merritt *v.* Todd, 23 N. Y. 28, 80 Am. Dec. 243]; Howland *v.* Edmonds, 24 N. Y. 307; Rochester Cent. Bank *v.* Kimball, 73 N. Y. App. Div. 100, 76 N. Y. Suppl. 227 [*affirming* 70 N. Y. App. Div. 624, 75 N. Y. Suppl. 1122]; Sheldon *v.* Heaton, 88 Hun (N. Y.) 535, 34 N. Y. Suppl. 856, 68 N. Y. St. 825; Bartholomew *v.* Seaman, 25 Hun (N. Y.) 619; Hirst *v.* Brooks, 50 Barb. (N. Y.) 334; Colgate *v.* Buckingham, 39 Barb. (N. Y.) 177; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; Haxton *v.* Bishop, 3 Wend. (N. Y.) 13; Thompson *v.* Ketchum, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332.

North Carolina.— Ervin *v.* Brooks, 111 N. C. 358, 16 S. E. 240; Knight *v.* Braswell, 70 N. C. 709; Caldwell *v.* Rodman, 50 N. C. 139.

Ohio.— Darling *v.* Wooster, 9 Ohio St. 517; Hill *v.* Henry, 17 Ohio 9.

Pennsylvania.— Messmore *v.* Morrison, 172 Pa. St. 300, 34 Atl. 45; Hall *v.* Toby, 110 Pa. St. 318, 1 Atl. 369.

South Carolina.— Smith *v.* Blythewood, Rice (S. C.) 245, 33 Am. Dec. 111; Harrison *v.* Cammer, 2 McCord (S. C.) 246.

Tennessee.— Dews *v.* Eastham, 2 Yerg. (Tenn.) 463, due-bills.

Texas.—Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806; Swift *v.* Trotti, 52 Tex. 498; Pitschki *v.* Anderson, 49 Tex. 1; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Cook *v.* Cook, 19 Tex. 434.

Vermont.— Dawley *v.* Wheeler, 52 Vt. 574; Kingsbury *v.* Butler, 4 Vt. 458.

Virginia.—Bowman *v.* McChesney, 22 Gratt. (Va.) 609.

Wisconsin.— Turner *v.* Iron Chief Min. Co., 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L. R. A. 533; Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827; Husbrook *v.* Wilder, 1 Pinn. (Wis.) 643.

England.— Waters *v.* Thanet, 2 Q. B. 757, 2 G. & D. 166, 6 Jur. 708, 11 L. J. Q. B. 87, 42 E. C. L. 899; Norton *v.* Ellam, 1 Jur. 433, 6 L. J. Exch. 121, 1 M. & H. 69, 2 M. & W. 461; Rumball *v.* Ball, 10 Mod. 38; Christie *v.* Fonswick, 1 Selw. N. P. 372.

Canada.— Brown *v.* Barden, 13 Quebec Super. Ct. 151.

See also X, A, 1, b, (II).

overdue after a certain time from its date, and which are intended only to affect indorsers, purchasers, etc.[91] This rule may not apply, where there is something on the paper, or in the circumstances under which it was given, to show that it was not the intention that it should become due immediately.[92] Some courts have held demand paper not to be due immediately because of a provision as to interest, on the ground that such a provision raised a presumption that the paper was not intended to be due immediately,[93] but this is contrary to the weight of authority.[94]

(II) *Maturity For Purposes of Transfer.* In some cases it has been held

Excluding day of date.— But it has been held that in computing the running of the statute of limitations the day of date is to be excluded. Seward *v.* Hayden, 150 Mass. 158, 22 N. E. 629, 15 Am. St. Rep. 183, 5 L. R. A. 844 [*overruling* Presbrey *v.* Williams, 15 Mass. 193].

91. Effect of statutes.— The California statute (Cal. Civ. Code, § 3135) providing that the apparent maturity of a promissory note payable on demand is six months after date if it does not bear interest, and one year after date if it does bear interest, is intended to affect the rights and liabilities of indorsers, etc., and does not change the rule that a note payable on demand is due immediately so far as the maker is concerned. Cousins *v.* Partridge, 79 Cal. 224, 21 Pac. 745. And it was held that the former Connecticut statute, which provided that any promissory note payable on demand should be considered overdue and dishonored if it should remain unpaid four months from its date was intended only to affect the rights and liabilities of indorsers, guarantors, and purchasers, and that it did not change the rule that demand paper is payable immediately. Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469.

92. Where by the express terms of an obligation payable on demand delay in making demand is contemplated, there is no rule of law which requires that the demand be made within the statutory period for bringing an action. Jameson *v.* Jameson, 72 Mo. 640, holding that where an obligation for the payment of money one day after date contained a condition that if the payee should demand payment during her natural life it should be due and payable, but in case of her death before any or all of the debt should be paid it should not be paid at all, a demand made by the payee more than ten years after the date of the paper was in time, and that an action brought immediately thereafter was not barred.

Notes given for stock subscriptions.— Where a note is given to a corporation in payment for a subscription to its stock, and is payable on demand or call of the directors, or at such times and in such sums as the directors may require, it does not become due, according to the weight of authority, until an actual demand or call for payment by the directors.

Alabama.— Brockway *v.* Gadsden Mineral Land Co., 102 Ala. 620, 15 So. 431.

Ohio.— Kilbreath *v.* Gaylord, 34 Ohio St. 305.

Utah.— Crofoot *v.* Thatcher, 19 Utah 212, 57 Pac. 171, 75 Am. St. Rep. 725.

Vermont.— Lycoming F. Ins. Co. *v.* Batcheller, 62 Vt. 148, 19 Atl. 982.

United States.— Gaytes *v.* Hibbard, 5 Biss. (U. S.) 99, 10 Fed. Cas. No. 5,287.

Contra, Howland *v.* Edmonds, 24 N. Y. 307; Colgate *v.* Buckingham, 39 Barb. (N. Y.) 177.

Demand in a reasonable time.— A note does not become due immediately, but on demand in a reasonable time, where it is payable at the convenience of the maker (Works *v.* Hershey, 35 Iowa 340; Smithers *v.* Junker, 41 Fed. 101, 7 L. R. A. 264) or "as soon as I possibly can" (Kincaid *v.* Higgins, 1 Bibb (Ky.) 396), or when the maker and payee shall mutually agree (Page *v.* Cook, 164 Mass. 116, 41 N. E. 115, 49 Am. St. Rep. 449, 28 L. R. A. 759).

Extraneous circumstances.— A note payable on demand is none the less due immediately because the consideration was the acceptance by the payee of the maker's draft payable at twelve months, by which the maker was enabled to purchase the property. Shannon *v.* The America, 12 La. Ann. 519. Where a note was payable on demand and was unambiguous, and there was no evidence of a subsequent agreement affecting the time of payment, it was held to be due immediately, although it recited that it was given in payment of cattle which were to remain the property of the payee until paid for, and although the cattle were allowed to remain in the payee's pasture during the pasture season. Gove *v.* Downer, 59 Vt. 139, 7 Atl. 463. Notes given on a purchase of the payee's interest in a business, and payable on demand, were held due immediately, although it was stated in the letter accompanying them that they were to be payable when the maker should procure a partner, it appearing that he had already disposed of the business. Beaudrias *v.* Curtiss, 17 N. Y. Suppl. 708, 44 N. Y. St. 478.

93. Hobart *v.* Dodge, 10 Me. 156, 25 Am. Dec. 214; Scovil *v.* Scovil, 45 Barb. (N. Y.) 517 (per Bacon, J.); Payne *v.* Slate, 39 Barb. (N. Y.) 634; Barough *v.* White, 4 B. & C. 325, 10 E. C. L. 600, 2 C. & P. 8, 12 E. C. L. 420, 6 D. & R. 379, 3 L. J. K. B. O. S. 227; Thorne *v.* Scovil, 4 N. Brunsw. 557.

94. *California.*— Holmes *v.* West, 17 Cal. 623.

Colorado.— Lee *v.* Balcom, 9 Colo. 216, 11 Pac. 74.

Georgia.— Lynch *v.* Goldsmith, 64 Ga. 42.

that paper payable on demand is not overdue for the purpose of transfer, so as to make the transferee a purchaser after maturity, until after a demand has been made,[95] and some have held that it is overdue immediately after it is issued.[96] Most of the courts, however, hold that it is not overdue for the purpose of transfer until after the lapse of a reasonable time, and that it is then overdue.[97] What is a reasonable time depends upon the circumstances of the particular case, such as the form of the instrument, local usage, nearness of the parties, etc.,[98] and is

Iowa.— Leonard *v.* Olson, 99 Iowa 162, 68 N. W. 677, 61 Am. St. Rep. 230, 35 L. R. A. 381; Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639.

Massachusetts.— Converse *v.* Johnson, 146 Mass. 20, 14 N. E. 925; Jillson *v.* Hill, 4 Gray (Mass.) 316; Wright *v.* Fisher, 13 Pick. (Mass.) 419 note; Newman *v.* Kettelle, 13 Pick. (Mass.) 418.

New York.—McMullen *v.* Rafferty, 89 N. Y. 456; Bartholomew *v.* Seaman, 25 Hun (N. Y.) 619; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180.

Wisconsin.— Turner *v.* Iron Chief Min. Co., 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L. R. A. 533.

England.— Norton *v.* Ellam, 1 Jur. 433, 6 L. J. Exch. 121, 1 M. & H. 69, 2 M. & W. 461.

95. Barough *v.* White, 4 B. & C. 325, 10 E. C. L. 600, 2 C. & P. 8, 12 E. C. L. 420, 6 D. & R. 379, 3 L. J. K. B. O. S. 227; Brooks *v.* Mitchell, 11 L. J. Exch. 51, 9 M. & W. 15.

Reason for rule.— This has been put upon the ground that a promissory note payable on demand is intended to be a continuing security. Baron Parke, in Brooks *v.* Mitchell, 11 L. J. Exch. 51, 9 M. & W. 15.

96. Hotel Lanier Co. *v.* Johnson, 103 Ga. 604, 30 S. E. 558; Meador *v.* Dollar Sav. Bank, 56 Ga. 605; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180.

97. *California.*— Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451.

Connecticut.— Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268; Nevins *v.* Townsend, 6 Conn. 5.

Illinois.— Stewart *v.* Smith, 28 Ill. 397.

Indiana.— Gregg *v.* Union County Nat. Bank, 87 Ind. 238.

Maine.— Shirley *v.* Todd, 9 Me. 83.

Massachusetts.— Wylie *v.* Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; American Bank *v.* Jenness, 2 Metc. (Mass.) 288; Ranger *v.* Cary, 1 Metc. (Mass.) 369; Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Sylvester *v.* Crapo, 15 Pick. (Mass.) 92; Thompson *v.* Hale, 6 Pick. (Mass.) 259; Field *v.* Nickerson, 13 Mass. 131; Thurston *v.* McKown, 6 Mass. 428; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232.

Michigan.— Carll *v.* Brown, 2 Mich. 401.

Minnesota.— La Due *v.* Kasson First Nat. Bank, 31 Minn. 33, 16 N. W. 426.

Nebraska.— Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

New Hampshire.—Cross *v.* Brown, 51 N. H. 486; Carlton *v.* Bailey, 27 N. H. 230; Emerson *v.* Crocker, 5 N. H. 159.

New York.— Herrick *v.* Woolverton, 41 N. Y. 581, 1 Am. St. Rep. 461; Niver *v.* Best, 10 Barb. (N. Y.) 369; Wethey *v.* Andrews, 3 Hill (N. Y.) 582; Loomis *v.* Pulver, 9 Johns. (N. Y.) 244; Losee *v.* Dunkin, 7 Johns. (N. Y.) 70, 5 Am. Dec. 245; Sanford *v.* Mickles, 4 Johns. (N. Y.) 224; Furman *v.* Haskins, 2 Cai. (N. Y.) 369.

Ohio.— Howe *v.* Hartness, 11 Ohio St. 449, 78 Am. Dec. 312.

Pennsylvania.— Barbour *v.* Fullerton, 36 Pa. St. 105; Cromwell *v.* Arrott, 1 Serg. & R. (Pa.) 180.

Rhode Island.— Guckian *v.* Newbold, 23 R. I. 553, 594, 51 Atl. 210; Bacon *v.* Harris, 15 R. I. 599, 10 Atl. 647; Atlantic De Laine Co. *v.* Tredick, 5 R. I. 171.

Vermont.— Morey *v.* Wakefield, 41 Vt. 24, 98 Am. Dec. 562; Camp *v.* Scott, 14 Vt. 387; Dennett *v.* Wyman, 13 Vt. 485.

United States.— Mitchell *v.* Catchings, 23 Fed. 710; Bull *v.* Kasson First Nat. Bank, 14 Fed. 612 [*reversed* on other grounds in 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97].

England.— Chartered Mercantile Bank *v.* Dickson, L. R. 3 P. C. 574.

And see Neg. Instr. L. § 92.

98. Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451; Carll *v.* Brown, 2 Mich. 401; Losee *v.* Dunkin, 7 Johns. (N. Y.) 70, 5 Am. Dec. 245.

Particular instances.— Paper payable on demand has been held not to be overdue, under the circumstances of the particular case, when transferred in one day (Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451); two days (Dennett *v.* Wyman, 13 Vt. 485); five days (Stewart *v.* Smith, 28 Ill. 397); seven days (Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Thurston *v.* McKown, 6 Mass. 428); twenty-three days (Mitchell *v.* Catchings, 23 Fed. 710); twenty-five days (Carll *v.* Brown, 2 Mich. 401); one month (Ranger *v.* Cary, 1 Metc. (Mass.) 369); five weeks (Wethey *v.* Andrews, 3 Hill (N. Y.) 582); five months (Sanford *v.* Mickles, 4 Johns. (N. Y.) 224); ten months (Chartered Mercantile Bank *v.* Dickson, L. R. 3 P. C. 574); or two years (Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268). On the other hand such paper has been held overdue in two months (Camp *v.* Scott, 14 Vt. 387); six weeks (Losee *v.* Dunkin, 7 Johns. (N. Y.) 70, 5 Am. Dec. 245); three months (Herrick *v.* Woolverton, 41 N. Y. 581, 1 Am. St. Rep. 461); four months (La Due *v.* Kasson First Nat. Bank, 31 Minn. 33, 16 N. W. 426); five months (Bull *v.* Kasson First Nat. Bank, 14 Fed. 612); six months (Thompson *v.* Hale, 6 Pick. (Mass.) 259); seven and one-half months (Carlton *v.* Bailey, 27 N. H. 230); eight

ordinarily a question of law for the court.[99] Where it provides for the payment of interest, this is to be considered in determining what is a reasonable time.[1] As a bill or draft specifying no time of payment is not due until presented,[2] a transferee before it is presented takes before maturity.[3]

c. Paper Payable a Certain Time After Demand. Some of the courts hold that paper payable a certain time after demand or notice does not become due so that an action can be maintained, and that the statute of limitations does not begin to run until demand has been made or notice given and the specified time has afterward expired,[4] while others hold that a cause of action accrues, so as to set the statute in motion, as soon as the creditor might, by making a demand, have made the paper payable, and that the statute begins to run therefore at the expiration of the time which is to elapse after demand and before payment.[5]

8. Paper Payable At or After Sight. A note payable "at sight," or a certain time "after sight," does not become due until it is seen or presented, or on expiration of the specified time afterward, as the case may be.[6] Where a bill is made

months (American Bank *v.* Jenness, 2 Metc. (Mass.) 288; Field *v.* Nickerson, 13 Mass. 131; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232); nine months (Nevins *v.* Townsend, 6 Conn. 5); ten months (Emerson *v.* Crocker, 5 N. H. 159; Morey *v.* Wakefield, 41 Vt. 24, 98 Am. Dec. 562); eleven months (Sylvester *v.* Crapo, 15 Pick. (Mass.) 92); thirteen months (Cross *v.* Brown, 51 N. H. 486: Atlantic De Laine Co. *v.* Tredick, 5 R. I. 171); fourteen months (Wylie *v.* Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; Cromwell *v.* Arrott, 1 Serg. & R. (Pa.) 180); eighteen months (Furman *v.* Haskin, 2 Cai. (N. Y.) 369); two years (Loomis *v.* Pulver, 9 Johns. (N. Y). 244); twenty-seven months (Niver *v.* Best, 10 Barb. (N. Y.) 369); three years (Shirley *v.* Todd, 9 Me. 83); or six years (Gregg *v.* Union County Nat. Bank, 87 Ind. 238).

Effect of payments.— In Sanford *v.* Mickles, 4 Johns. (N. Y.) 224, it was held that a note payable on demand and transferred five months after date, with several payments indorsed on it, was not *prima facie* overdue at the time of the transfer. But in Bayliss *v.* Pearson, 15 Iowa 279, it was held that if payment of a demand note is made it will imply a demand and the note will become payable and overdue (for the purpose of interest) from that time. Such payment, however, is not conclusive of the note being overdue after the payment. The payment raises no presumption of law that it is overdue. Hughes *v.* Monty, 24 Iowa 499.

Note secured by mortgage.— Where a demand note was secured by a mortgage and it was agreed that the note should lie as long as the security was satisfactory, its transfer two years after date was held to be within a reasonable time. Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268.

99. *California.*— Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451.
Illinois.— Stewart *v.* Smith, 28 Ill. 397.
Michigan.— Carll *v.* Brown, 2 Mich. 401.
New York.— Furman *v.* Haskin, 2 Cai. (N. Y.) 369.
Vermont.— Dennett *v.* Wyman, 13 Vt. 485.
Contra, Barbour *v.* Fullerton, 36 Pa. St. 105, holding under the particular circumstances of the case that the question was one for the jury under proper instructions from the court. See also Bacon *v.* Harris, 15 R. I. 599, 10 Atl. 647.

1. Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444, 40 Nebr. 497, 58 N. W. 1135; Weeks *v.* Pryor, 27 Barb. (N. Y.) 79; Wethey *v.* Andrews, 3 Hill (N. Y.) 582. See also Thompson *v.* Hale, 6 Pick. (Mass.) 259.

2. See *supra,* VII, A, 7, a, (III).

3. Bedell *v.* Scarlett, 75 Ga. 56; Roswell Mfg. Co. *v.* Hudson, 72 Ga. 24.

4. *Alabama.*— Massie *v.* Byrd, 87 Ala. 672, 673, 6 So. 145, holding that, where a promissory note, although made payable "one day after date," contains a further stipulation for the punctual payment of interest annually, and of the principal "on thirty days notice," a right of action on it for the principal does not accrue until the expiration of thirty days after demand or notice and that the statute of limitations does not begin to run until that time.
California.— Chase *v.* Evoy, 49 Cal. 467.
Connecticut.— Cooke *v.* Pomeroy, 65 Conn. 466, 32 Atl. 935, holding that an action on a note payable thirty days after demand was not barred by the statute of limitations, although no demand was made or action brought until fourteen years after its delivery.
Maryland.— Rhind *v.* Hyndman, 54 Md. 527, 39 Am. Rep. 402.
New York.— Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 267, 28 Am. Dec. 464.
England.— Thorpe *v.* Booth, R. & M. 388, 21 E. C. L. 776; Holmes *v.* Kerrison, 2 Taunt. 323, 11 Rev. Rep. 594.
And see, generally, Limitations of Actions.

5. Palmer *v.* Palmer, 36 Mich. 487, 24 Am. Rep. 605. See also Oleson *v.* Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; Knapp *v.* Greene, 79 Hun (N. Y.) 264, 29 N. Y. Suppl. 350, 60 N. Y. St. 559.

6. Sturdy *v.* Henderson, 4 B. & Ald. 592, 6 E. C. L. 615; Sutton *v.* Toomer, 7 B. & C. 416, 1 M. & R. 125, 14 E. C. L. 190 (holding

payable a certain time "after sight," the time is computed from the time of acceptance or of protest for non-acceptance.[7] The day of sight or acceptance is excluded.[8] A draft or bill drawn payable at no particular time is payable at sight.[9]

9. Maturity of Checks — a. In General. A check on a bank, unless it is otherwise expressed or postdated is payable immediately on presentation.[10] But it has been held that if there are no funds in the bank to meet it, the check is due by the drawer immediately, without presentment or notice of non-payment, so that an action may be maintained at once, and the statute of limitations runs from its date.[11] A postdated check is payable on demand on and after its date.[12]

b. Maturity For Purposes of Transfer. A check is not overdue for the purposes of transfer, unless there has been unreasonable delay in presenting it. One who takes it without notice of equities or defenses within a reasonable time after its date or delivery is a *bona fide* holder, but it is otherwise if a reasonable time has elapsed.[13] Ordinarily one day, or even several days, is not an unreasonable

that in a note payable ten days "after sight," with interest to the day of "acceptance," the word "acceptance" means the same thing as "sight," and that the note becomes due at the time designated after sight, whether accepted or not); Dixon *v.* Nuttall, 1 C. M. & R. 307, 6 C. & P. 320, 3 L. J. Exch. 290, 4 Tyrw. 1013, 25 E. C. L. 453; Holmes *v.* Kerrison, 2 Taunt. 323, 11 Rev. Rep. 594; Cousineau *v.* Lecours, 4 Montreal Super. Ct. 249. But see Oleson *v.* Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; Aymar *v.* Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538, which require presentment within a reasonable time.

"On demand, at sight."— A note payable "on demand, at sight" is not due, and no action lies, until after presentment for sight. The words "at sight" are not to be rejected. Dixon *v.* Nuttall, 1 C. M. & R. 307, 6 C. & P. 320, 3 L. J. Exch. 290, 4 Tyrw. 1013, 25 E. C. L. 453.

7. Brown *v.* Turner, 11 Ala. 752; Mitchell *v.* Degrand, 1 Mason (U. S.) 176, 17 Fed. Cas. No. 9,661; Campbell *v.* French, 2 H. Bl. 163, 6 T. R. 200, 3 Rev. Rep. 154.

Acceptance supra protest.— If a bill is payable after sight the time should be reckoned, it has been held, from the date of an acceptance *supra protest* and not from the time of the drawee's refusal to accept. Williams *v.* Germaine, 7 B. & C. 468, 6 L. J. K. B. O. S. 90, 1 M. & R. 394, 31 Rev. Rep. 248, 14 E. C. L. 212.

8. Mitchell *v.* Degrand, 1 Mason (U. S.) 176, 17 Fed. Cas. No. 9,661; Coleman *v.* Sayer, 1 Barn. K. B. 303.

9. Freeman *v.* Ross, 15 Ga. 252; Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639; Burthe *v.* Donaldson, 15 La. 382; Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310.

10. Lester *v.* Given, 8 Bush (Ky.) 357; Brush *v.* Barrett, 82 N. Y. 400, 37 Am. Rep. 569; Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

11. Brush *v.* Barrett, 82 N. Y. 400, 37 Am. Rep. 569.

12. Mayer *v.* Mode, 14 Hun (N. Y.) 155; Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192 [*affirming* 10 Wend. (N. Y.) 304]; Hill *v.* Gaw, 4 Pa. St. 493.

Parol evidence is not admissible to show a contemporaneous oral agreement that a postdated check should not become due on demand on and after its date. Hill *v.* Gaw, 4 Pa. St. 493. See *supra*, VII, A, 3, b.

13. *California.*—Himmelmann *v.* Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

Iowa.— Newton First Nat. Bank *v.* Needham, 29 Iowa 249.

Kentucky.— Lester *v.* Given, 8 Bush (Ky.) 357, 360 (where it was said that "the holder of a check, though taken some days after its date, takes it free from all equities, because it is never treated as overdue, being payable on presentment or demand." But as the check in this case was transferred only a few days after its date, the statement that a check is "never treated as overdue," must be regarded as *dictum*); Walden *v.* Webber, 15 Ky. L. Rep. 846.

Massachusetts.—Rochester First Nat. Bank *v.* Harris, 108 Mass. 514; Ames *v.* Meriam, 98 Mass. 294.

Minnesota.— Estes *v.* Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424.

New York.— Fealey *v.* Bull, 163 N. Y. 397, 57 N. E. 631; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 5 Hun (N. Y.) 556]; Davis *v.* Dayton, 7 Misc. (N. Y.) 488, 27 N. Y. Suppl. 969, 58 N. Y. St. 61 [*affirming* 6 Misc. (N. Y.) 623, 26 N. Y. Suppl. 727, 56 N. Y. St. 601].

Pennsylvania.— Laber *v.* Steppacher, 103 Pa. St. 81; Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 57 Am. Dec. 618; Matthews *v.* Foederer, 19 Phila. (Pa.) 295, 45 Leg. Int. (Pa.) 174.

United States.— Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97 [*reversing* 14 Fed. 612].

England.— Rothschild *v.* Corney, 9 B. & C. 388, 4 M. & R. 411, 17 E. C. L. 178; Down *v.* Halling, 4 B. & C. 330, 10 E. C. L. 602, 2 C. & P. 11, 12 E. C. L. 423, 6 D. & R. 455, 3 L. J. K. B. O. S. 234. *Compare* London, etc.,

time,[14] but a delay of several weeks or months is unreasonable.[15] The purchaser of a postdated check before the day of its date is a purchaser before maturity.[16] A certified check is not deemed dishonored by delay between its date and its transfer to a *bona fide* purchaser for value.[17]

10. Maturity of Certificates of Deposit — a. In General. Most of the courts hold that a certificate of deposit issued by a bank is in effect a promissory note, and subject to substantially the same rules.[18] It may be payable on a fixed day or at a fixed time after date,[19] but such instruments are usually payable on demand. They are so payable when no time is expressed.[20] Some courts hold that such a certificate, like a note payable on demand,[21] is due immediately, so that an action may be brought thereon, and the statute of limitations will begin to run without any actual demand,[22] while others hold that it does not become due until an actual demand is made and there is a tender of the certificate properly indorsed.[23]

Banking Co. *v.* Groome, 8 Q. B. D. 288, 51 L. J. Q. B. 224, 46 J. P. 614, 46 L. T. Rep. N. S. 60, 30 Wkly. Rep. 382.

See also *supra*, VII, A, 7, b, (II).

Delivery after date.— A check takes effect from its delivery, and when it is delivered after its date, the time which has elapsed since its delivery determines whether a transferee is a *bona fide* holder. Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 5 Hun (N. Y.) 556].

14. *Massachusetts.*— Rochester First Nat. Bank *v.* Harris, 108 Mass. 514.

Minnesota.— Estes *v.* Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424.

New York.— Fealey *v.* Bull, 163 N. Y. 397, 57 N. E. 631.

Pennsylvania.— Laber *v.* Steppacher, 103 Pa. St. 81.

England.— Rothschild *v.* Corney, 9 B. & C. 388, 4 M. & R. 411, 17 E. C. L. 178.

But *compare* Himmelmann *v.* Hotaling, 40 Cal. 111, 6 Am. Rep. 600; Down *v.* Halling, 4 B. & C. 330, 10 E. C. L. 602, 2 C. & P. 11, 12 E. C. L. 423, 6 D. & R. 455, 3 L. J. K. B. O. S. 234.

15. Newton First Nat. Bank *v.* Needham, 29 Iowa 249; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 5 Hun (N. Y.) 556].

A memorandum check marked "Mem." and indorsed two and one-half years after date puts the purchaser on inquiry as in the case of overdue paper. Skillman *v.* Titus, 32 N. J. L. 96.

16. Mayer *v.* Mode, 14 Hun (N. Y.) 155.

17. Nolan *v.* New York Bank Nat. Banking Assoc., 67 Barb. (N. Y.) 24, where there was a delay of several months. And see Banks and Banking, 5 Cyc. 534.

18. See *supra*, I, B, 3, b; and Banks and Banking, 5 Cyc. 520.

19. In Towle *v.* Starz, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463, it was held that a certificate of deposit providing that "J. J. Starz has deposited in this bank two thousand dollars, payable to the order of himself on the return of this certificate properly indorsed, with interest at four per cent. To be left six months. No interest after maturity. Not subject to check," was a time, and not a demand, certificate, and matured at the expiration of six months. See also Hunt *v.* Divine, 37 Ill. 137; Rapid City First Nat. Bank *v.* Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386.

Option.— A certificate of deposit, "payable, . . . on return of this certificate, twelve months after date, with interest . . . for the time specified only. Payable in 6 mo. if desired with interest. . . . No interest after due," is not due at the end of six months, so as to relieve the indorser from liability to the indorsee if not then presented for payment, but matures at the end of a year. Citizens' Bank *v.* Jones, 121 Cal. 30, 53 Pac. 354.

20. Lynch *v.* Goldsmith, 64 Ga. 42; Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173; Mitchell *v.* Easton, 37 Minn. 335, 33 N. W. 910; Cottle *v.* Buffalo Mar. Bank, 166 N. Y. 53, 59 N. E. 736.

21. See *supra*, VII, A, 7, b, (I).

22. Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61; Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173; Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Mitchell *v.* Easton, 37 Minn. 335, 33 N. W. 910; Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827.

23. *Georgia.*— Hillsinger *v.* Georgia Railroad Bank, 108 Ga. 357, 33 S. E. 985, 75 Am. St. Rep. 42.

Indiana.— Brown *v.* McElroy, 52 Ind. 404.

Maryland.— Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

Massachusetts.— Shute *v.* Pacific Nat. Bank, 136 Mass. 487.

Missouri.— Hodgson *v.* Cheever, 8 Mo. App. 318.

New York.— Cottle *v.* Buffalo Mar. Bank, 166 N. Y. 53, 59 N. E. 736; Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Howell *v.* Adams, 68 N. Y. 314; Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Payne *v.* Gardiner, 29 N. Y. 146; Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun (N. Y.) 605.

Pennsylvania.— McGough *v.* Jamison, 107 Pa. St. 336; Finkbone's Appeal, 86 Pa. St.

b. Maturity For Purposes of Transfer. In some jurisdictions a certificate of deposit payable on demand is overdue for the purposes of transfer immediately after its issue.[24] In others it is overdue after the lapse of a reasonable time but not before,[25] while in still others it is not overdue until it is presented and an actual demand for payment made.[26] A certificate payable at a fixed time is overdue as soon as that time has elapsed.[27]

11. Paper Payable in Instalments. Where a note is made payable in instalments, at fixed times, each instalment becomes due at the time specified, so that an action will then lie to recover the same, and the statute of limitations will then commence to run;[28] but in the absence of express provision an action can be maintained for those instalments only which have become due.[29] A note payable in instalments, however, may require a demand.[30] Such a note may contain

368; Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507.

South Dakota.— Tobin *v.* McKinney, 15 S. D. 257, 88 N. W. 572, 14 S. D. 228, 84 N. W. 228.

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

United States.— Riddle *v.* Butler First Nat. Bank, 27 Fed. 503.

24. Meador *v.* Dollar Sav. Bank, 56 Ga. 605.

25. *California.*— Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451.

Indiana.— Gregg *v.* Union County Nat. Bank, 87 Ind. 238.

Michigan.— Birch *v.* Fisher, 51 Mich. 36, 16 N. W. 220; Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610.

Nebraska.— Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444, where a certificate of deposit provided: "This deposit not subject to check. With interest at six per cent. if left six months; no interest after six months," and was held to be overdue so as to charge purchaser with notice of equities after six months but not before.

Ohio.— Howe *v.* Hartness, 11 Ohio St. 449, 78 Am. Dec. 312.

26. Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun (N. Y.) 605, 607, where the court held that one to whom a certificate of deposit had been transferred seven years after its date was a *bona fide* holder. "The very nature of the instrument," said the court, "and the ordinary modes of business, show that a certificate of deposit, like a deposit credited in a passbook, is intended to represent moneys actually left with the bank for safe keeping, which are to be retained until the depositor actually demands them. Such a certificate is not dishonored until presented."

27. Where a certificate of deposit in the usual form, payable to the order of the payee "on the return of this certificate properly indorsed," had stamped across its face the words: "This certificate, payable 3 months after date with 6 per cent interest per annum for the time specified," and was transferred by the payee more than three months after its date, it was held that the instrument was a time certificate, and was taken by the transferee subject to all the defenses existing against the payee. Rapid City First Nat. Bank *v.* Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386.

28. Hobbs *v.* Moore, 86 Me. 517, 30 Atl. 110; Ewer *v.* Myrick, 1 Cush. (Mass.) 16; Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518; Tucker *v.* Randall, 2 Mass. 283; Rideout *v.* Woods, 30 N. H. 375; Bush *v.* Stowell, 71 Pa. St. 208, 10 Am. Rep. 694. *Compare*, however, Layton *v.* France, 2 Houst. (Del.) 405; Siddall *v.* Rawcliffe, 1 Cr. & M. 487, 2 L. J. Exch. 237, 1 M. & Rob. 263, 2 Tyrw. 441.

Construction of note.— A promissory note for the payment, "ten years after date," of "seven hundred and fifty dollars, with interest semiannually. Fifty dollars of the principal to be paid annually until the whole is paid," is a contract that the interest shall be paid semiannually, that fifty dollars of the principal shall be paid annually, and that the whole amount of the note, principal and interest, shall be paid in ten years after date. Ewer *v.* Myrick, 1 Cush. (Mass.) 16.

Instalments "in each year."— If a note is made payable, a certain portion "in each year," the instalments become due at the end of each year, reckoned from the date of the note. Rideout *v.* Woods, 30 N. H. 375.

Monthly payments.—Where a note is made payable twenty-four months after date, in monthly payments without interest, the monthly payments are to be made in the consecutive months immediately following the date of the note, so that the whole amount will be paid in twenty-four months after its date. Hobbs *v.* Moore, 86 Me. 517, 30 Atl. 110.

29. Lightfoot *v.* Decatur Branch Bank, 2 Ala. 345.

Where one who had a note payable on demand agreed by deed with the maker to receive payment in five equal instalments, and that if sued contrary to such agreement he should be discharged of all demands, and when the first three instalments were paid and the fourth was not paid the payee sued on the note, it was held that he was entitled to recover the entire balance of the note, as the maker had not complied with the new agreement. Upham *v.* Smith, 7 Mass. 265.

30. **In instalments when requested, etc.**— Where a note is made payable in instalments

a condition that the entire amount shall become due and payable on default in the payment of any instalment of the principal or of interest.[31] If an instalment of a note is overdue at the time it is transferred, the purchaser takes the whole note as overdue paper and is not a *bona fide* holder.[32] But if there are several notes, even though secured by one mortgage, the fact that one note is overdue does not render the others so, or make them subject to defenses in the hands of a purchaser,[33] unless there is an express provision[34] or a statute to such effect.[35]

12. Paper Payable on Contingency or Conditionally — a. In General. If a note or other paper is made payable on the happening of a contingency or performance of a condition[36] it becomes due and payable, both for the purpose of an action and for the purpose of the running of the statute of limitations, as soon as the contingency or condition is performed or fulfilled, and as a general rule does not become due and payable until then.[37] The chief difficulty in this connection

" when requested," no part of it becomes due and no action will lie upon it until a demand is made. Hudson *v.* Barton, 1 Rolle 189. So a promissory note promising to pay a certain sum to a corporation in such instalments and at such times as the directors of the company may from time to time assess or require is payable on demand, or in instalments on demand. White *v.* Smith, 77 Ill. 351, 20 Am. Rep. 251. See also *supra*, VII, A, 7, b, (I).

31. See *infra*, VII, A, 13.

32. Field *v.* Tibbetts, 57 Me. 358, 99 Am. Dec. 779; Vinton *v.* King, 4 Allen (Mass.) 562; Vette *v.* La Barge, 64 Mo. App. 179, 2 Mo. App. Rep. 907; McCorkle *v.* Miller, 64 Mo. App. 153, 2 Mo. App. Rep. 921.

" The reason of the rule is that, where one or more of the instalments remain due, the presumption arises that there is some valid reason for the failure or refusal to pay, which, if established, would likely go to the defeat of the entire debt, and thus all subsequent purchasers or holders of the discredited paper are put on inquiry." McCorkle *v.* Miller, 64 Mo. App. 153, 156, 2 Mo. App. Rep. 921.

Credit of payment indorsed on note.— Where a note payable in instalments has been dishonored by non-payment of an instalment, the fact that the instalment was credited upon the note as paid will not enable the transferee to claim the note as a *bona fide* purchaser. Vette *v.* La Barge, 64 Mo. App. 179, 2 Mo. App. Rep. 907.

Credits not indorsed on note.— But where a note is payable in instalments, the fact that no credits are indorsed thereon creates no presumption that none of the instalments have been paid, so as to preclude the purchaser from becoming a *bona fide* holder without notice. McCorkle *v.* Miller, 64 Mo. App. 153, 2 Mo. App. Rep. 921.

33. Boss *v.* Hewitt, 15 Wis. 260.

34. See *infra*, VII, A, 13, b, (III).

35. In Georgia there is an express statutory provision that where there are several notes constituting one transaction but due at different times the fact that one is overdue and unpaid is notice to the purchaser of all to put him on his guard as to each. Ga. Code, § 2786 [Ga. Code (1895), § 3695]. See Harrell *v.* Broxton, 78 Ga. 129, 3 S. E. 5.

36. As to effect of contingencies and conditions upon negotiability see *supra*, I, C, 1, d, (II), (C).

37. Frisbie *v.* Moore, 51 Cal. 516; Glancy *v.* Elliott, 14 Ill. 456; Smeich *v.* Herbst, 135 Pa. St. 539, 19 Atl. 950; Henry *v.* Colman, 5 Vt. 402.

Illustrations.— It has been so held, for example, of notes payable when the payee should pay and take up another note of the maker (Henry *v.* Colman, 5 Vt. 402); on confirmation by a court of a title to land (Frisbie *v.* Moore, 51 Cal. 516); when a certain mortgage should be satisfied of record (Coulter *v.* Clark, 2 Ind. App. 512, 28 N. E. 723); out of another note when collected (Wilson *v.* Morrison, 29 Ga. 269); as soon as the amount could be made in a certain suit pending (Allen *v.* Davis, 11 Mo. 479); when the payee should be finally successful in a certain action, and all appeals should be disposed of and all right to appeal should expire (Clute *v.* McCrea, 12 N. Y. St. 648); when the United States should pay judgments of the court of commissioners of Alabama claims in the so-called " class 2 cases " (Powers *v.* Manning, 154 Mass. 370, 28 N. E. 290, 13 L. R. A. 258); when a dividend on a certain estate should be declared (Effinger *v.* Richards, 35 Miss. 540); of a draft payable when in funds (Harrell *v.* Marston, 7 Rob. (La.) 34); an accepted order payable when a building contract or other contract between the accepter and a third person should be completed by the latter (Newhall *v.* Clark, 3 Cush. (Mass.) 376, 50 Am. Dec. 741; Home Bank *v.* Drumgoole, 109 N. Y. 63, 15 N. E. 747, 14 N. Y. St. 40, and other cases cited *infra*, note 38); a note payable when able (Veasey *v.* Reeves, 6 Ind. 406 [with which, however, compare *infra*, VII, A, 12, d]); a due-bill payable when the payment shall be mutually arranged (McAfee *v.* Fisher, 64 Cal. 246, 30 Pac. 811 [with which, however, compare *infra*, VII, A, 12, d]); a note payable at the convenience of the maker (Kreiter *v.* Miller, 1 Pennyp. (Pa.) 46 [with which, however, compare *infra*, VII, A, 12, d]); and of notes given during the Civil war and made payable after peace should be declared or a treaty of peace ratified (Nelson *v.* Manning, 53 Ala. 549; Gaines *v.* Dorsett, 18 La. Ann. 563; Chapman *v.* Wacaser, 64 N. C. 532 [with

is in construing the instrument and ascertaining its meaning, and in determining in particular cases whether the contingency has happened or the condition has been performed.[38] The maturity of a note may be rendered conditional by an

which, however, compare McNinch *v.* Ramsay, 66 N. C. 229]; Brewster *v.* Williams, 2 S. C. 455; Atcheson *v.* Scott, 51 Tex. 213; Knight *v.* McReynolds, 37 Tex. 204).

38. **"After paying" certain debts.**— In an order directing the payment of a sum of money "after paying" certain debts, the words "after paying" mean either paying or retaining a sum sufficient to pay. Allis *v.* Jewell, 36 Vt. 547.

"Recovery" of land.— A note payable on the contingency that land, for which it is given in part payment, should be recovered by the payee, becomes payable upon the surrender of the land by the adverse claimant. Burks *v.* Watson, 48 Tex. 107.

Perfection of title to land.— Where a vendor indorsed upon a note given for the purchase-money of land sold that it was not to be collected until the title to the land should be made clear, it was held that payment could not be enforced until the title to the whole of the land should be perfected in accordance with indorsement. Smeich *v.* Herbst, 135 Pa. St. 539, 19 Atl. 950.

Advertisement of lands for sale.— It was held that a note payable "whenever the lands in the late purchase in Iowa territory should be advertised for sale" became due when the lands in that purchase, or any part thereof, were proclaimed for sale. Glancy *v.* Elliott, 14 Ill. 456.

Note of putative father of child.— Where a note was given by the putative father of an unborn child, with which the payee was then pregnant, payable at such times and in such articles as the payee might need for her support, it was held that the time of payment had arrived when the payee was about to be confined. Corbitt *v.* Stonemetz, 15 Wis. 170.

Payment out of maker's estate.— Where a note recited that the maker promised to pay the payee a certain sum "out of my estate, if she should outlive me; but if not, to her heirs as she shall direct," it was held to be in no event payable before the death of the maker, or otherwise than from his estate, so that an action thereon by the heirs of the payee against the maker could not be maintained. Kelsey *v.* Chamberlain, 47 Mich. 241, 10 N. W. 355.

Note payable out of crop.— In an action tried in July, 1898, on a note payable out of the crop of 1897, it was held that the court would presume that the crop had matured and that there had been opportunity to market it, so as to render the note due. Hill *v.* Cohen, 22 Ky. L. Rep. 1438, 60 S. W. 922.

Note payable in goods as ordered.— In an action on a note payable, one fifth in cash and four fifths in stone "within six months, as ordered" by the payee, it was held that the payee must prove demand of stone before suit. Keeffe *v.* Bannin, 57 N. Y. App. Div. 361, 68 N. Y. Suppl. 352.

Foreclosure of mortgage.— Where a due-bill was made payable as soon as the maker should have time to foreclose a certain mortgage and sell the land by judicial sale, or as soon as he should otherwise dispose of or settle the mortgage, and it appeared in an action thereon that the mortgaged land was covered by a homestead right and that said right was set up in the foreclosure proceedings and allowed by the court, it was held that the note would not become payable until expiration of the homestead right by its own limitations or by abandonment. Stout *v.* Hill, 45 Ill. 326.

Payable out of appropriation for public work.— An accepted draft payable in payments "out of the appropriation, as soon as made," for work done for the government by the accepter, becomes due on payment of the work by the government although no appropriation may have been made by the legislature. Nagle *v.* Homer, 8 Cal. 353.

Note payable "when able."— In an action on a note payable by the makers when able, it being proved that when they made it they had a stock of goods worth three thousand dollars, it was held that the note matures as soon as the makers were able to pay it, and that *prima facie* they were able to pay the note as soon as it was given. Veasey *v.* Reeves, 6 Ind. 406.

On resumption of specie payment.—Where a note contained a promise to pay on or before a specified day, in gold or silver, but was on condition that Tennessee banks should resume specie payment by that time, and if not, then that it should be payable as soon as they should resume specie payment, it was held that the condition only referred to the promise to pay in specie, that the payee could waive payment in specie and recover in currency, and that the note, as a promise to pay in currency, became due on the day specified. Walters *v.* McBee, 1 Lea (Tenn.) 364.

On performance of contract.— A note, due-bill, or accepted order promising to pay money, not on a specified day, but when a building which is being erected for the promisor or accepter by a third person is completed or other contract performed, becomes due and payable absolutely as soon as this condition is performed, but does not become due and payable until then. Linnehan *v.* Matthews, 149 Mass. 29, 20 N. E. 453; Proctor *v.* Hartigan, 143 Mass. 462, 9 N. E. 841; Farquhar *v.* Brown, 132 Mass. 340; Somers *v.* Thayer, 115 Mass. 163; Newhall *v.* Clark, 3 Cush. (Mass.) 376, 50 Am. Dec. 741; Home Bank *v.* Drumgoole, 109 N. Y. 63, 15 N. E. 747, 14 N. Y. St. 40; Duffield *v.* Johnston, 96 N. Y. 369. See also Crocker-Woolworth Nat. Bank *v.* Carle, 133 Cal. 409, 65 Pac. 95. This is true although the contractor becomes unable to complete

agreement to such effect appended to or indorsed on the note,[39] or, except as to purchasers without notice, by a separate written agreement.[40]

b. Excluding Day of Maturity. Where a note is payable a certain time after the happening of a particular event, the maker has the whole of the day of maturity in which to pay it, and an action cannot be maintained until the day following.[41]

c. Maturity on Fixed Day, or Conditionally Before. A note or other instrument may be made payable on a fixed day in the future, or a certain time after demand or sight, or before such time on the happening of a contingency or the performance of a condition. In such a case it matures and is payable absolutely on the day fixed, and will become due before then, if the contingency happens or the condition is performed.[42]

d. Maturity in a Reasonable Time. Where the debt for which commercial paper is given is due, and the happening of a future event is fixed upon merely as a convenient time for payment, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time.[43] It has

the contract and it is canceled. Linnehan *v.* Matthews, 149 Mass. 29, 20 N. E. 453; Newhall *v.* Clark, 3 Cush. (Mass.) 376, 50 Am. Dec. 741; Duffield *v.* Johnston, 96 N. Y. 369. But it has been held that the accepter cannot set up non-performance of the contract where its performance was delayed by changes made at his request, and he refused to allow the payee to complete it. Home Bank *v.* Drumgoole, 109 N. Y. 63, 15 N. E. 747, 14 N. Y. St. 40. *Compare*, however, Newhall *v.* Clark, 3 Cush. (Mass.) 376, 50 Am. Dec. 741. A draft drawn by a builder on one for whom he is erecting a house in favor of one from whom he has purchased material, and accepted by the drawee as "payable when house is ready for occupancy," becomes payable as soon as the house is ready for occupancy, by whomsoever completed, and it is no defense for the accepter to show that he completed it himself on the drawer's failure so to do. Cook *v.* Wolfendale, 105 Mass. 401. If a person gives another a note promising to pay a sum of money on or by a certain day "or" when a house which a third person has contracted to build for him is completed the note, because of the insertion of a specific day of payment, becomes due at all events on that day, whether the house is completed or not. Stevens *v.* Blunt, 7 Mass. 240; Goodloe *v.* Taylor, 10 N. C. 458.

An order on a client to pay attorney's fees on the final distribution of a sum due by virtue of a certain action, from which the client is to receive a share, is payable on the making of the final order of distribution in such action, and is not suspended until the entire fund is actually paid to the beneficiaries. Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009.

39. Effinger *v.* Richards, 35 Miss. 540; Smeich *v.* Herbst, 135 Pa. St. 539, 19 Atl. 950.

40. Jacobs *v.* Mitchell, 46 Ohio St. 601, 22 N. E. 768.

41. Hathaway *v.* Patterson, 45 Cal. 294. And see *supra*, VII, A, 3, f, (IV), (B).

42. This is true for example of a promise to pay a certain time after date "or before, if made out of the sale" of certain property (Cisne *v.* Chidester, 85 Ill. 523; Walker *v.* Woollen, 54 Ind. 164, 23 Am. Rep. 639 [*followed* in Noll *v.* Smith, 64 Ind. 511, 31 Am. Rep. 131]; Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808; Palmer *v.* Hummer, 10 Kan. 464, 15 Am. Rep. 352; Ernst *v.* Steckman, 74 Pa. St. 13, 15 Am. Rep. 542); a promise to pay a certain time after date "or as soon as" the maker shall collect a specified debt (McCarty *v.* Howell, 24 Ill. 341); a promise to pay in nine months "or as" the maker's horse earns the money (Gardner *v.* Barger, 4 Heisk. (Tenn.) 668); a promise to pay on a certain date "or when" a building which another has undertaken to build for the maker is completed (Stevens *v.* Blunt, 7 Mass. 240; Goodloe *v.* Taylor, 10 N. C. 458. See also Joergenson *v.* Joergenson, 28 Wash. 477, 68 Pac. 913; Elliott *v.* Beech, 3 Manitoba 213. A note promising to pay another a certain sum, and reciting, "it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said Pero, which is to be paid in the course of the season now coming," was held to be an absolute promise to pay by the end of the season, or before if the amount should be realized out of the property purchased. Cota *v.* Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464.

43. Crooker *v.* Holmes, 65 Me. 195, 20 Am. Rep. 687; De Wolfe *v.* French, 51 Me. 420, 421 (where it was said: "If, in fixing upon the happening of a future contingent event as the time when money is to be paid, the parties intend to make the debt a contingent one, and the event never happens, the creditor's right to recover it will never accrue. But, if the debt is understood to be absolute, and the happening of the future event is fixed upon as a convenient time for payment merely, and, for some unforeseen or unthought of cause, the event never happens, the creditor's right to recover will not be defeated,— the law will require the payment to be made within a reasonable time after it

been held that paper is payable in a reasonable time when it is payable at the convenience of the promisor,[44] when the parties shall mutually agree,[45] "eventually,"[46] or "as soon as I possibly can."[47]

13. Acceleration of Maturity by Other Default or Exercise of Option — a. In General. A note or other instrument payable at a fixed time, or a mortgage or deed of trust securing the same, may contain a provision that it shall become due before the time fixed, at the option of the holder, in the event of some other default than in its payment,[48] as in the case of a provision for maturity of the principal on default in the payment of an instalment of interest,[49] or of taxes or

is ascertained that the event will never happen. The debt will be contingent or otherwise, depending upon the intention of the parties"); Sears *v.* Wright, 24 Me. 278; Ubsdell *v.* Cunningham, 22 Mo. 124; Capron *v.* Capron, 44 Vt. 410; Nunez *v.* Dautel, 19 Wall. (U. S.) 560, 22 L. ed. 161; Scull *v.* Roane, Hempst. (U. S.) 103, 21 Fed. Cas. No. 12,570*c*.

"As soon as collected."— In Ubsdell *v.* Cunningham, 22 Mo. 124, it was held that a due-bill or note promising to pay another a certain sum "as soon as collected" from certain accounts, was not a conditional obligation, but merely prescribed the time of payment by indicating the fund out of which the debtor expected to pay, and that the paper became due and payable as soon as all that could be collected on the accounts was collected. *Compare*, however, Wilson *v.* Morrison, 29 Ga. 269.

On settlement of accounts.—And in Scull *v.* Roane, Hempst. (U. S.) 103, 21 Fed. Cas. No. 12,570*c*, it was held that a note payable on a settlement of accounts between the maker and another matured in a reasonable time, and that one year was a reasonable time.

As soon as land shall be sold.— Where the maker of a note promised to pay a certain sum when he should sell the place he lived on, it was held that the debt was absolute, although its payment might be postponed, it being his duty to sell within a reasonable time. Crooker *v.* Holmes, 65 Me. 195, 20 Am. Rep. 687.

On sale of goods.—Where a note was made payable "from the avails of the logs bought of Martin Mower, when there is a sale made," it was held to be payable, not upon a contingency, but absolutely, and when a reasonable time had elapsed to make sale of the logs. Sears *v.* Wright, 24 Me. 278.

44. Works *v.* Hershey, 35 Iowa 340 (holding that a note payable on demand after date, "when convenient" was payable in a reasonable time); Jones *v.* Eisler, 3 Kan. 134; Smithers *v.* Junker, 41 Fed. 101, 7 L. R. A. 264 (holding that a note reciting that it was for value received, and promising to pay a certain sum, "payable at my convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment," did not contemplate that the money should become due only at the pleasure of the maker without regard to lapse of time or the rights of the payee, but that the maker is to have a reasonable time, to be determined by himself, in which to pay the note). But in Kreiter *v.* Miller, 1 Pennyp. (Pa.) 46, it was held that a promissory note payable "at my convenience whenever I have funds in hands to pay the same," was payable at the option of the maker only, he being the judge of his "convenience."

45. Ramot *v.* Schotenfels, 15 Iowa 457, 83 Am. Dec. 425; Page *v.* Cook, 164 Mass. 116, 117, 41 N. E. 115, 49 Am. St. Rep. 449, 28 L. R. A. 759, in which latter case it was said: "According to the literal construction of this note, although the defendant promises to pay the plaintiff the sum named when he demands it, she may escape the performance of his promise by refusing to agree with the plaintiff when it shall be paid. We think that it hardly could have been the intention of the parties to put it into the power of the defendant thus to avoid payment, and that it is more reasonable to construe it as meaning that it is payable when and after the payor ought reasonably to have agreed. . . . The promise to pay is absolute. It is only the time of payment which is left to future agreement. Evidently it is expected from the tenor of the note that the parties will agree, and that a time will be fixed, and that the note will be paid. But no time is fixed within which that agreement is to be made. The law will therefore imply a reasonable time." But in McAfee *v.* Fisher, 64 Cal. 246, 30 Pac. 811, it was held that an instrument as follows: "Due Mr. Maurice Dore the sum of five thousand five hundred and ninety-one dollars, in settlement of land purchased in Sutter County, the payment of which to be mutually arranged," was not due until the payment should be arranged.

46. Brannin *v.* Henderson, 12 B. Mon. (Ky.) 61.

47. Kincaid *v.* Higgins, 1 Bibb (Ky.) 396. But *compare* Veasey *v.* Reeves, 6 Ind. 406; Harrell *v.* Marston, 7 Rob. (La.) 34.

48. As to whether such provisions render an instrument non-negotiable see *supra*, I, C, 1, f, (I), (A), (3).

49. *California.*— Pacific Mut. L. Ins. Co. *v.* Shepardson, 77 Cal. 345, 19 Pac. 583; Dean *v.* Applegarth, 65 Cal. 391, 4 Pac. 375; Whitcher *v.* Webb, 44 Cal. 127.

Georgia.— Kilcrease *v.* Johnson, 85 Ga. 600, 11 S. E. 870; Griffin *v.* Macon City Bank, 58 Ga. 584.

Illinois.— Morgenstern *v.* Klees, 30 Ill. 422; Sea *v.* Glover, 1 Ill. App. 335.

insurance on mortgaged property,[50] or a provision in one of a series of notes or other instruments, or a mortgage or deed of trust securing the same, that the entire sum shall become due and payable on default in the payment of any one of the instruments,[51] or of a provision in a note payable in instalments that the whole shall become payable on default in the payment of any instalment.[52]

b. Purposes For Which the Paper Matures — (1) *In General.* Where a note provides that it shall become due on default in the payment of any instalment of interest, such default renders it due immediately, and entitles the holder to maintain an action at once for the entire debt.[53] The same is true where a series of

Indiana.— Stephens *v.* Huntington, etc., Bldg., etc., Assoc., 76 Ind. 109; Ausem *v.* Boyd, 6 Ind. 475.

Iowa.— Oskaloosa College *v.* Hickok, 46 Iowa 237.

Minnesota.— St. Paul Title Ins., etc., Co. *v.* Thomas, 60 Minn. 140, 61 N. W. 1134.

Missouri.— Noell *v.* Gaines, 68 Mo. 649; Vette *v.* La Barge, 64 Mo. App. 179, 2 Mo. App. Rep. 907.

Texas.— Seastrunk *v.* Pioneer Sav., etc., Co., (Tex. Civ. App. 1896) 34 S. W. 466.

Washington.— Cloud *v.* Rivord, 6 Wash. 555, 34 Pac. 136.

Wisconsin.— Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

United States.— Swett *v.* Stark, 31 Fed. 858; Gregory *v.* Marks, 8 Biss. (U. S.) 44, 10 Fed. Cas. No. 5,802, 9 Chic. Leg. N. 394, 23 Int. Rev. Rec. 281, 4 L. & Eq. Rep. 283.

Application of stipulation to renewal notes.—Where a note having interest coupons attached stipulated that on default in payment of any of the coupons the principal should become due, and on maturity, and after payment of the coupons, was renewed, it was held that notes given for interest for the period of renewal were subject to the stipulation in the note. Heath *v.* Achey, 96 Ga. 438, 23 S. E. 396.

Absence of holder from place of payment. — Where a note by its terms is payable, principal and interest, at a specified place, and if the interest is not paid when due the whole to become due and payable, the payee must be at the place of payment when the interest matures, or have designated someone there to receive such interest, or he will not be entitled to claim that a default has been made, and that the whole debt is due and payable. Adams *v.* Rutherford, 13 Oreg. 78, 8 Pac. 896.

Where the principal of coupon bonds became payable on default in the payment of matured interest coupons, remaining unpaid for ninety days after demand made, the holder is not required to make presentment and demand of such coupons on the day they fall due, in order to place the maker in default, but he may make presentment at any time after maturity, and if payment is not made within ninety days thereafter enforce the conditions of the bond. Wood *v.* Consolidated Electric Light Co., 36 Fed. 538.

Delivery after maturity of interest coupon. — Where a note which provided that on delinquency of any of the attached interest coupons the entire amount should become due was executed without consideration, indorsed by the payee, retained by the maker, and delivered to plaintiff for consideration after an interest coupon had matured, it was held that the maker was not liable for either principal or interest before delivery, and therefore that plaintiff purchased before maturity. Beach *v.* Bennett, (Colo. App. 1901) 66 Pac. 567.

Relief in equity against enforcement of contract.— If a promissory note, payable at a future day, provides for the payment of interest quarterly, and that if default be made in the payment of interest quarterly the whole note shall immediately become due at the option of the holder, a failure to pay the interest makes the principal due, and a court of equity will not relieve against the enforcement of the contract as made. Whitcher *v.* Webb, 44 Cal. 127. And see Morling *v.* Bronson, 37 Nebr. 608, 56 N. W. 205.

50. Chambers *v.* Marks, 93 Ala. 412, 9 So. 74.

51. Morgan *v.* Martien, 32 Mo. 438; McClelland *v.* Bishop, 42 Ohio St. 113. And see *infra*, VII, A, 13, b.

Failure to give collateral security.—Where a person executed certain renewal notes, agreeing in writing that if they were not paid at their due dates "the right to take action on notes or collateral is as fully preserved as if the original notes had not been surrendered"; that the existing collaterals should be held by the payee until a certain date, new collaterals to be then substituted at the payee's demand, or, if the maker should fail to substitute such new collaterals, "that the notes . . . shall all become due at that time," it was held that the mere failure of the maker to pay one of the notes at maturity did not mature the remaining notes. Ladd *v.* Union Mut. L. Ins. Co., 116 Fed. 878.

52. Sea *v.* Glover, 1 Ill. App. 335; German Mut. F. Ins. Co. *v.* Franck, 22 Ind. 364; Carlon *v.* Kenealy, 1 D. & L. 331, 13 L. J. Exch. 64, 12 M. & W. 139.

53. *California.*— Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Whitcher *v.* Webb, 44 Cal. 127.

Georgia.— Heath *v.* Achey, 96 Ga. 438, 23 S. E. 396; Kilcrease *v.* Johnson, 85 Ga. 600, 11 S. E. 870.

Indiana.— Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510; Stephens *v.* Hunting, etc.,

notes provides that all shall become due on default in the payment of any one,[54] and where a note payable in instalments provides that the whole shall become due on default in the payment of any instalment.[55]

(II) *Indorsers and Guarantors.* In such cases the default also renders the paper due as respects indorsers[56] and guarantors.[57]

(III) *Notes Secured by Mortgage.* Where notes are secured by a mortgage or deed of trust, which provides that all shall become due and payable on default in the payment of any one of them when it becomes due, or on default in the payment of interest, such default will render all due for the purpose of foreclosing the mortgage,[58] but according to the better opinion it does not render

Bldg., etc., Assoc., 76 Ind. 109; Billingsley *v.* Dean, 11 Ind. 331; Ausem *v.* Byrd, 6 Ind. 475.

Minnesota.— St. Paul Title Ins., etc., Co. *v.* Thomas, 60 Minn. 140, 61 N. W. 1134.

Missouri.— Vette *v.* La Barge, 64 Mo. App. 179, 2 Mo. App. Rep. 907; McCorkle *v.* Miller, 64 Mo. App. 153, 2 Mo. App. Rep. 921.

Ohio.— Mallon *v.* Stevens, 6 Ohio Dec. (Reprint) 1042, 9 Am. L. Rec. 702, 6 Cinc. L. Bul. 69.

United States.— Gregory *v.* Marks, 8 Biss. (U. S.) 44, 10 Fed. Cas. No. 5,802, 9 Chic. Leg. N. 394, 23 Int. Rev. Rec. 281, 4 L. & Eq. Rep. 283.

Interest coupons.— But where interest coupons are attached to a note payable on a certain day and the note provides that if any interest shall remain unpaid after due, the principal, note, and interest coupons shall become due and payable at once, at the option of the holder, the holder, on default in payment of one of the interest coupons, can recover only the amount of the face of the note, with the interest coupon as to which the maker is in default, and cannot recover on the coupons not due, for they represent interest which will only accrue if the note continues to run. Cloud *v.* Rivord, 6 Wash. 555, 34 Pac. 136.

54. Rogers *v.* Watson, 81 Tex. 400, 17 S. W. 29.

55. Sea *v.* Glover, 1 Ill. App. 335; German Mut. F. Ins. Co. *v.* Franck, 22 Ind. 364; Morling *v.* Bronson, 37 Nebr. 608, 56 N. W. 205; Carlon *v.* Kenealy, 1 D. & L. 331, 13 L. J. Exch. 64, 12 M. & W. 139; Blake *v.* Lawrence, 4 Esp. 147.

Statute of limitations.— On such default the statute of limitations begins to run as to the entire debt. Hemp *v.* Garland, 4 Q. B. 519, 3 G. & D. 402, 7 Jur. 302, 12 L. J. Q. B. 134, 45 E. C. L. 519.

56. Liability of indorser.—Where a note is payable in instalments, subject to a condition that the whole amount shall become due on default in the payment of any instalment, and is indorsed and transferred, the indorser is liable for the whole amount on default being made by the maker in payment of the first instalment. Carlon *v.* Kenealy, 1 D. & L. 331, 13 L. J. Exch. 64, 12 M. & W. 139.

Discharge of indorser.— Since a note payable at a future day, but providing that it shall become due and payable on default in payment of an instalment of interest, matures upon the first default in payment of interest, indorsers are discharged if payment is not then demanded and notice of non-payment given. Mallon *v.* Stevens, 6 Ohio Dec. (Reprint) 1042, 9 Am. L. Rec. 702, 6 Cinc. L. Bul. 69.

57. Liability of guarantor.— When a note provides that it shall become due and payable, at the option of the holder, on default in the payment of any instalment of interest, the liability of a guarantor of the note attaches when such default occurs, and the holder exercises his option to declare the note due. New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537. And see Sea *v.* Glover, 1 Ill. App. 335.

58. Stanclift *v.* Norton, 11 Kan. 218; McClelland *v.* Bishop, 42 Ohio St. 113; Swett *v.* Stark, 31 Fed. 858. And see the title Mortgages.

Bona fide holders.—Where a mortgage securing notes provides that upon failure to pay any instalment of interest the principal of all the notes shall become due, a *bona fide* holder of the notes may foreclose on default in the payment of interest, without regard to equities between the original parties. Swett *v.* Stark, 31 Fed. 858. And where a mortgage securing a series of notes provides that in case of default in the payment of the note first falling due all of said notes shall at the election of the payee become due and payable, such election by a purchaser of the unmatured notes after default in the payment of the note first falling due will not relate back to the date of said default, so as to make said unmatured notes subject to defenses against the payee, as in the hands of a purchaser after maturity. Battle Creek Nat. Bank *v.* Dean, 86 Iowa 656, 53 N. Y. 338.

Effect of tender before sale.— In Wolz *v.* Parker, 134 Mo. 458, 35 S. W. 1149, it was held that where a deed of trust securing a series of notes provides that default in the payment of any note at its maturity shall render all due and payable, default in the payment of a note is cured by a subsequent tender of the amount due thereon before sale under the deed of trust, with interest and accrued costs, and that on refusal to accept such payment a sale under the deed of trust should be enjoined. See also Philips *v.* Bailey, 82 Mo. 639; Whelan *v.* Reilly, 61 Mo. 565.

them due for other purposes before the time fixed by their terms,[59] as for the purpose of a personal action or judgment on such of the notes as are not due by their terms,[60] or for the purpose of demand and notice to charge indorsers.[61] It does not place all of the notes on an equality for the purpose of distribution on foreclosure of the mortgage.[62]

c. **Exercise of Option** — (I) *In General.* A provision in notes accelerating maturity on non-payment of interest, instalments, or other default may be absolute in form and leave no option to either party;[63] but it is generally optional with the holder whether he will take advantage of the provision or not.[64] In such a case the option cannot be exercised by the maker, if the holder sees fit to waive the provision.[65]

(II) *Notice of Election.* The holder need not give the maker notice of his election to declare the note due for non-payment of interest or other default,[66] unless there is some provision therefor.[67] In the absence of such a provision the

59. White *v.* Miller, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673; Westminster College *v.* Peirsol, 161 Mo. 270, 61 S. W. 811; Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154 [*overruling* on this point Noell *v.* Gaines, 68 Mo. 649]; Mason *v.* Barnard, 36 Mo. 384; Morgan *v.* Martien, 32 Mo. 438; McMillan *v.* Grayston, 83 Mo. App. 425; Lawson *v.* Cundiff, 81 Mo. App. 169; Mallory *v.* West Shore, etc., R. Co., 35 N. Y. Super. Ct. 174; McClelland *v.* Bishop, 42 Ohio St. 113. *Contra*, Chambers *v.* Marks, 93 Ala. 412, 9 So. 74; Wheeler, etc., Mfg. Co. *v.* Howard, 28 Fed. 741; Gregory *v.* Marks, 8 Biss. (U. S.) 44, 10 Fed. Cas. No. 5,802, 9 Chic. Leg. N. 394, 23 Int. Rev. Rec. 281, 4 L. & Eq. Rep. 283.

60. White *v.* Miller, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673; Mason *v.* Barnard, 36 Mo. 384; Morgan *v.* Martien, 32 Mo. 438; Mallory *v.* West Shore, etc., R. Co., 35 N. Y. Super. Ct. 174. *Contra*, Chambers *v.* Marks, 93 Ala. 412, 9 So. 74; Wheeler, etc., Mfg. Co. *v.* Howard, 28 Fed. 741; Gregory *v.* Marks, 8 Biss. (U. S.) 44, 10 Fed. Cas. No. 5,802, 9 Chic. Leg. N. 394, 23 Int. Rev. Rec. 281, 4 L. & Eq. Rep. 283.

61. Where a series of notes for distinct sums was payable at certain times, and a mortgage attached to each contained a stipulation that if default be made in the payment of any of the notes all should become due, it was held that for the purpose of demand and notice to charge indorsers the notes were payable according to their terms, irrespective of the stipulations in the mortgage, and that foreclosure of the mortgage after default in payment of the first note of the series, and payment thereof out of the proceeds of the sale, was not a bar to an action to charge an indorser on one of the series afterward falling due, who had due notice of demand and non-payment. McClelland *v.* Bishop, 42 Ohio St. 113.

62. The proceeds on foreclosure should be applied to the payment of the notes in the order in which they become due on their face. Battle Creek Nat. Bank *v.* Dean, 86 Iowa 656, 53 N. W. 338; Hurck *v.* Erskine, 45 Mo. 484; Thompson *v.* Field, 38 Mo. 320; Mitchell *v.* Ladew, 36 Mo. 526, 88 Am. Dec. 156.

63. See Mallon *v.* Stevens, 6 Ohio Dec. (Reprint) 1042, 9 Am. L. Rec. 702, 6 Cinc. L. Bul. 69.

64. Belloc *v.* Davis, 38 Cal. 242; Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207; Wall *v.* Marsh, 9 Baxt. (Tenn.) 438; Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

65. Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207; Wall *v.* Marsh, 9 Baxt. (Tenn.) 438.

Statute of limitations.—Where a note payable at a fixed time in the future provides that it shall become due and payable immediately on default in the payment of any instalment of interest, and the holder does not elect to declare it due on such default, the statute of limitations does not begin to run until the expiration of the time of payment fixed in the note. Belloc *v.* Davis, 38 Cal. 242. See also Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207.

Compounding interest.—Where a note provides that if interest is not paid when due, it shall become a part of the principal and draw the same rate of interest, and that on failure to pay interest when due the principal shall become due and payable, it is optional with the holder whether, on default in the payment of interest, he will treat the principal as due or let the note run on with compound interest. Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

Election by assignee.— Under a provision in a non-negotiable note that any failure to pay interest when due shall, at the election of the payee, make the principal and interest at once due, the election may be exercised by an assignee thereof. Seastrunk *v.* Pioneer Sav., etc., Co., (Tex. Civ. App. 1896) 34 S. W. 466.

66. Where a promissory note, payable at a future time, provides for the payment of interest quarterly, and contains a clause that if default be made in the payment of the interest then the note shall immediately become due at the option of the holder, a failure to pay the interest makes the note due absolutely, at the option of the holder, without any notice to the payer. Whitcher *v.* Webb, 44 Cal. 127.

67. See Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510.

commencement of an action on the instrument, or of foreclosure proceedings, is a sufficient election.[68]

(III) *Time of Election.* The holder of an instrument containing a provision accelerating maturity at his option on non-payment of interest or other default is not required to exercise his option at any particular time or immediately after default, but has a reasonable time in which to do so,[69] unless there is some express provision to the contrary in the contract.

d. Waiver or Loss of Option. Where the holder of paper merely has an option to treat it as due before the time fixed for its maturity, for non-payment of interest or other default, he may waive or lose his option by unreasonable delay in exercising it,[70] by an agreement with the maker for an extension of time,[71] if the agreement is performed by the latter,[72] or by accepting payment after the default.[73]

68. *California.*— Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Leonard *v.* Tyler, 60 Cal. 299; Whitcher *v.* Webb, 44 Cal. 127.

Colorado.— Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223.

Illinois.— Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037; Princeton L. & T. Co. *v.* Munson, 60 Ill. 371; Cundiff *v.* Brokaw, 7 Ill. App. 147; Sea *v.* Glover, 1 Ill. App. 335.

Indiana.— Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510.

Iowa.— Jurgensen *v.* Carlsen, 97 Iowa 627, 66 N. W. 877.

Michigan.— Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

Minnesota.— St. Paul Title Ins., etc., Co. *v.* Thomas, 60 Minn. 140, 61 N. W. 1134.

Nebraska.— Morling *v.* Bronson, 37 Nebr. 608, 56 N. W. 205.

New York.— Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443.

Where each of a series of notes contains a stipulation that default in the payment of any one of them shall at the holder's election mature all of them, the institution of suit on all the notes within a reasonable time after default in payment of one is sufficient notice of the holder's election to have them all mature. Kerr *v.* Morrison, (Tex. Civ. App. 1894) 25 S. W. 1011.

69. Fletcher *v.* Dennison, 101 Cal. 292, 35 Pac. 868; Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Crossmore *v.* Page, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789; Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223. And see Pacific Mut. L. Ins. Co. *v.* Shepardson, 77 Cal. 345, 19 Pac. 583.

70. Where a note provided that if default be made in payment of the interest as provided therein then the note should "immediately" become due at the option of the holder, it was held that the holder was entitled only to a reasonable time after default in which to exercise his option and that seven months was not a reasonable time. Crossmore *v.* Page, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789. *Compare* Fletcher *v.* Dennison, 101 Cal. 292, 35 Pac. 868 (where it was held that the holder of a mortgage note containing a provision giving him the option to compound the interest or declare the principal due, upon any default in the payment of interest, did not waive his right to make an election, as a matter of law, by a delay of fifty-nine days after a default); Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223 (where it was held that a delay of four months was not unreasonable in times of financial stringency).

71. Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423; Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037. *Compare* Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223.

Extension of one of several notes.—Where there were several notes secured by a mortgage containing a provision that all should become due on failure to pay any one of them, or interest thereon, and the first note, when it matured, was extended to a time when interest became due on all the notes, and there was then default in the payment of the first note and of the interest on all the notes, it was held that the extension of the first note did not operate as a waiver of the right to declare all the notes due because of the failure to pay the interest. Brown *v.* McKay, 151 Ill. 315, 37 N. E. 1037.

72. Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423. And see Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223.

73. In Belloc *v.* Davis, 38 Cal. 242, it was held that a provision in a note that upon the failure to pay interest monthly the principal should become due and payable was in the nature of a penalty for the benefit of the creditor, and was waived by him by the acceptance of past-due interest. *Compare,* however, Stephens *v.* Huntington, etc., Bldg., etc., Assoc., 76 Ind. 109, where it was held that where a note becomes due because of default in the payment of interest no subsequent payment of a part or all of the amount in default will render the note not due in the absence of an agreement. Where purchase-money notes given for land stipulated that all should become due on failure to pay any of them at maturity, and only a part of the first note was paid when it became due, thus rendering all the others due, it was held that a subsequent payment of the balance of the first note did not restore the others to their original standing. Rogers *v.* Watson, 81 Tex. 400, 17 S. W. 29.

e. Warrant of Attorney to Confess Judgment. If a note is accompanied by a warrant of attorney to confess judgment at any time after date, judgment may be entered upon it at any time, although before maturity.[74]

14. Provision Postponing Maturity. A deed of trust or mortgage securing notes payable at different times may provide that none of them shall become due until the maturity of the last, and in such case it will postpone the maturity of all the notes until that time.[75]

15. Paper Maturing on Sunday or Holiday — a. In Absence of Statute. Where commercial paper is entitled to grace, and the third day of grace falls on Sunday or a legal holiday, the paper is due on the preceding day.[76] Where paper is not entitled to grace, and the day fixed for its payment falls on Sunday or a legal holiday, some of the courts have held, in the absence of a statute, that the preceding day is the day of maturity, both for purpose of demand, protest, and notice, and for the purpose of a tender of payment,[77] while other courts have held that the day following is the day of maturity.[78]

b. Under Statutes. In many jurisdictions the maturity of paper falling due by its terms on Sunday or a holiday is regulated by statute. Some of the statutes make it due on the day following or the next business day following,[79] while others make it due on the preceding day.[80] In some states, by statute, if a legal

74. Adam *v.* Arnold, 86 Ill. 185; Sherman *v.* Baddely, 11 Ill. 622; Towle *v.* Gonter, 5 Ill. App. 409. And see, generally, JUDGMENTS.

75. Brownlee *v.* Arnold, 60 Mo. 79.

76. See *infra*, VII, B, 9.

77. Sanders *v.* Ochiltree, 5 Port. (Ala.) 73, 30 Am. Dec. 551; Barker *v.* Parker, 6 Pick. (Mass.) 80; Doremus *v.* Burton, 5 Biss. (U. S.) 57, 7 Fed. Cas. No. 4,002.

Paper due one day after date.— But it has been held that where a promissory note not entitled to grace is dated on Saturday and is due one day after date, it is in law due and payable on the Monday following. Mahoney *v.* O'Leary, 34 Ala. 97; Sanders *v.* Ochiltree, 5 Port. (Ala.) 73, 30 Am. Dec. 551.

What law governs.— The law of the place of payment determines the maturity of paper falling due on Sunday or a legal holiday. Commercial Bank *v.* Barksdale, 36 Mo. 563. See also Roberts *v.* Wold, 61 Minn. 291, 63 N. W. 739.

Judicial notice.— The courts will take judicial notice that a certain day falls on Sunday. Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893; Reed *v.* Wilson, 41 N. J. L. 29.

Holiday by local custom.— If a note falls due on a day which is not a legal holiday, but which is a holiday by local custom, as Commencement Day at Harvard, the parties thereto, if they know of such custom, and of the custom to demand payment on the preceding day, are bound thereby. City Bank *v.* Cutter, 3 Pick. (Mass.) 414. It must be shown, however, that the parties had knowledge of the custom. Dabney *v.* Campbell, 9 Humphr. (Tenn.) 680.

78. *Connecticut.*—Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240. See also Sands *v.* Lyon, 18 Conn. 18.

Minnesota.—Roberts *v.* Wold, 61 Minn. 291, 63 N. W. 739.

Missouri.— Kuntz *v.* Tempel, 48 Mo. 71.

Nebraska.— Capital Nat. Bank *v.* American Exch. Nat. Bank, 51 Nebr. 707, 71 N. W. 743.

New York.— Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530.

Ohio.— Barrett *v.* Allen, 10 Ohio 426.

Texas.— Hirshfield *v.* Ft. Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639.

United States.— Patriotic Bank *v.* Alexandria Farmers' Bank, 2 Cranch C. C. (U. S.) 560, 18 Fed. Cas. No. 10,811.

If a check is postdated on Sunday it should not be presented until the following Monday, no grace being allowed. Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530.

79. See Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893; Roberts *v.* Wold, 61 Minn. 291, 63 N. W. 739 (under Dakota statute); Morris *v.* Bailey, 10 S. D. 507, 74 N. W. 443.

Paper executed before creation of holiday. — A statute creating a legal holiday and making it a non-juridical day as to demand, protest, and notice is generally in express terms confined to paper made after its passage. Toothaker *v.* Cornwall, 3 Cal. 144. Where it is not so confined in terms, it applies perhaps to paper executed either before or after its passage. See Barlow *v.* Gregory, 31 Conn. 261.

80. See Bartlett *v.* Leathers, 84 Me. 241, 24 Atl. 842; Hitchcock *v.* Hogan, 99 Mich. 124, 57 N. W. 1095. The rule of the law merchant that a note without grace falling due on Sunday is not payable until the following Monday is not changed, except when Sunday falls on a legal holiday, by Tex. Rev. Stat. arts. 2835, 2837, providing that a legal holiday shall be treated as Sunday in regard to the presentment and protest of notes, and that when Sunday and a legal holiday fall on the date of the maturity of paper it may be presented and protested on the preceding Saturday. Hirshfield *v.* Ft. Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639.

Saturday half-holiday.— Under Mich. Laws (1893), No. 185, providing that every Satur-

holiday falls on Sunday the following day is a holiday, and paper falling due either on the Sunday or Monday must be presented on the following Tuesday.[81]

16. MATURITY OF INTEREST. Where a note is made payable with interest, and nothing is said as to the time of maturity of the interest, it does not become due until the principal becomes due.[82] If the interest is payable annually, with an option to the maker to make it part of the principal in case of default, no action can be brought for it until the principal becomes due;[83] but if the interest is expressly made payable annually, or at other stated periods, without more, it becomes due at the time or times fixed, and an action may be maintained therefor before maturity of the principal.[84] Where a note provides for payment of

day from twelve o'clock noon till twelve o'clock at night, as regards the presentment of notes for payment, shall be a half-holiday; that such notes shall be payable and presentable for acceptance and payment on the business day next succeeding such half-holiday; but that every Saturday shall, for the holding of the court and the transaction of any business authorized by law, be deemed a business day,— notes maturing on Saturday are payable on Monday. Hitchcock *v.* Hogan, 99 Mich. 124, 57 N. W. 1095. Under this statute a note falling due by its terms on Sunday, and maturing therefore under a previous statute on Saturday, becomes due and payable on Monday. Hitchcock *v.* Hogan, 99 Mich. 124, 57 N. W. 1095. Under N. Y. Laws (1887), c. 289, § 1, providing that every Saturday from twelve o'clock at noon until twelve o'clock at midnight shall be a public holiday for all purposes in regard to the presentation for payment, demand, and notice of protest of commercial paper, but further providing that for the purpose of protesting, or otherwise holding liable any party to commercial paper not paid before twelve o'clock at noon on any Saturday, a demand of acceptance or payment thereof may be made, and notice of protest or dishonor given, on the next succeeding secular or business day, where paper due on Saturday is presented on Saturday forenoon, and not then paid, it may be again presented on Monday, and may be then protested, and notice then given. Sylvester *v.* Crohan, 138 N. Y. 494, 34 N. E. 273, 53 N. Y. St. 113 [*affirming* 63 Hun (N. Y.) 509, 18 N. Y. Suppl. 546, 45 N. Y. St. 320].

81. Hagerty *v.* Engle, 43 N. J. L. 299.

82. *Kansas.*— Motsinger *v.* Miller, 59 Kan. 573, 53 Pac. 869; Ramsdell *v.* Hulett, 50 Kan. 440, 31 Pac. 1092.

Missouri.— Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402.

New Jersey.—Cooper *v.* Wright, 23 N. J. L. 200.

New York.— Bander *v.* Bander, 7 Barb. (N. Y.) 560.

Rhode Island.— Guckian *v.* Newbold, 23 R. I. 553, 51 Atl. 210.

United States.— Tanner *v.* Dundee Land Invest. Co., 8 Sawy. (U. S.) 187, 12 Fed. 646.

Interest at a certain rate "per annum."— Where a note is made payable at a future day, with interest at a prescribed rate "per annum," the interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect. Tanner *v.* Dundee Land Invest. Co., 8 Sawy. (U. S.) 187, 12 Fed. 646. See also Motsinger *v.* Miller, 59 Kan. 573, 53 Pac. 869; Ramsdell *v.* Hulett, 50 Kan. 440, 31 Pac. 1092; Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402. *Compare,* however, Murphy *v.* San Luis Obispo, (Cal. 1897) 48 Pac. 974.

Parol evidence.— In such a case the language is not ambiguous, and parol evidence is not admissible to show an agreement to pay the interest annually. Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402.

Note payable in instalments.— On a note promising to pay a certain sum in ten annual instalments, with interest, the interest is payable on each instalment as it becomes due, and not annually on the whole principal sum remaining unpaid. Bander *v.* Bander, 7 Barb. (N. Y.) 560.

As to the right to days of grace on interest see *infra,* VII, B, 4, d.

83. Wood *v.* Whisler, 67 Iowa 676, 25 N. W. 847.

84. *Connecticut.*— Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354.

Georgia.— Ray *v.* Pease, 97 Ga. 618, 25 S. E. 360.

Illinois.— Walker *v.* Kimball, 22 Ill. 537.

Iowa.— Jurgensen *v.* Carlsen, 97 Iowa 627, 66 N. W. 877; Carter *v.* Carter, 76 Iowa 474, 41 N. W. 168; Failing *v.* Clemmer, 49 Iowa 104.

Kentucky.— Talliaferro *v.* King, 9 Dana (Ky.) 331, 35 Am. Dec. 140.

Maine.— Howes *v.* Bennett, (Me. 1886) 3 Atl. 661; Bannister *v.* Roberts, 35 Me. 75.

Massachusetts.— Stearns *v.* Brown, 1 Pick. (Mass.) 530; Cooley *v.* Rose, 3 Mass. 221; Greenleaf *v.* Kellogg, 2 Mass. 568.

Michigan.— Cook *v.* Wiles, 42 Mich. 439, 4 N. W. 169.

Vermont.— Mt. Mansfield Hotel Co. *v.* Bailey, 64 Vt. 151, 24 Atl. 136, 16 L. R. A. 295; Austin *v.* Imus, 23 Vt. 286; Catlin *v.* Lyman, 16 Vt. 44.

Wisconsin.— Zautcke *v.* North Milwaukee Townsite Co. No. 3, 95 Wis. 21, 69 N. W. 978; Macloon *v.* Smith, 49 Wis. 200, 5 N. W. 336.

A subsequent action for the principal will not be barred by a judgment already recovered for the interest. Dulaney *v.* Payne, 101 Ill. 325, 40 Am. Rep. 205; Kurz *v.* Suppiger,

interest annually, it becomes due at the end of each year, reckoning from the date of the note.[85] Although interest on a note may be payable at fixed periods before maturity of the principal, so that the holder may maintain an action therefor as it becomes due, it has been held that he is not bound so to do, but may if he sees fit wait until the principal is due before demanding payment of the interest or suing therefor.[86] A note may postpone the maturity of interest beyond the time when the principal becomes due.[87]

B. Days of Grace — 1. In General. Days of grace are certain days allowed for the payment of a bill or note in addition to the time contracted for in the bill or note itself.[88] By the law merchant three days were allowed for the payment of foreign bills of exchange, in addition to the time fixed by their terms.[89] The courts held that the rule applied also to inland bills of exchange,[90] and to promissory notes when, by the statute of Anne, they were made negotiable and placed on the same footing as bills of exchange.[91] These days are called "days of grace," because they were formerly allowed as a matter of favor, but as this custom of merchants was sanctioned by the courts and grew into law, they came to be regarded and treated by the courts as a matter of right, and are so regarded now, except in so far as they have been abolished by statute.[92]

18 Ill. App. 630; Sparhawk *v.* Wills, 6 Gray (Mass.) 163.

Liability of indorser.— It seems that when interest on a note becomes due and payable at fixed periods before maturity of the principal, an indorser of the note, as well as the maker, may be held liable before maturity of the principal. But to hold the indorser there must first be a proper demand on the maker and notice to the indorser of non-payment. Mt. Mansfield Hotel Co. *v.* Bailey, 64 Vt. 151, 24 Atl. 136, 16 L. R. A. 295.

Interest coupons may be sued on before other coupons become due. Boyer *v.* Chandler, 160 Ill. 394, 43 N. E. 803, 32 L. R. A. 113.

85. On a note dated June 19, 1893, promising to pay "the principal sum of four thousand dollars, with interest thereon from date until paid at the rate of 7 per cent. per annum, payable annually, in each year, until said principal sum is fully paid; said payments to be made as follows: $1,000 on or before Sept. 15th, 1894, and $1,000 on or before Sept. 15th, in each year, until fully paid," the interest matures on June 19 in each year after the date of the note, and on September 15. Jurgensen *v.* Carlsen, 97 Iowa 627, 66 N. W. 877. See also Walker *v.* Kimball, 22 Ill. 537; Carter *v.* Carter, 76 Iowa 474, 41 N. W. 168; Failing *v.* Clemmer, 49 Iowa 104; Cooley *v.* Rose, 3 Mass. 221; Greenleaf *v.* Kellogg, 2 Mass. 568. This may be indicated by a provision in a mortgage given to secure the note. Meyer *v.* Graeber, 19 Kan. 165.

Interest payable semiannually.— So if a note is dated and the interest made payable semiannually the date will fix the day for maturity of interest. Zautcke *v.* North Milwaukee Townsite Co. No. 3, 95 Wis. 21, 69 N. W. 978.

"With annual interest."— Where a note is payable three years after date, "with annual interest at ten per cent" the interest is payable each year. Cook *v.* Wiles, 42 Mich. 439, 4 N. W. 169. See also Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354; Austin *v.* Imus, 23 Vt. 286; Catlin *v.* Lyman, 16 Vt. 44.

86. Howe *v.* Bradley, 19 Me. 31; National Bank of North America *v.* Kirby, 108 Mass. 497; Mt. Mansfield Hotel Co. *v.* Bailey, 64 Vt. 151, 24 Atl. 136, 16 L. R. A. 295; Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697.

Statute of limitations.—Although the annual interest upon a note may be collected from the maker as it falls due, it has been held that it is not separated from the principal, so that an action to recover the same will be barred by the statute of limitations, until an action to recover the principal is thus barred. Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697. But on interest coupons it has been held that the statute begins to run from their maturity. Amy *v.* Dubuque, 98 U. S. 470, 25 L. ed. 228.

Discharge of indorser.— The indorser of a note is not discharged from liability for interest becoming due before maturity of the principal because the holder, instead of demanding payment of the interest when due, and giving notice of non-payment, waits until the principal is due. Howe *v.* Bradley, 19 Me. 31.

A separate action cannot be maintained for interest on a note after the principal has also become due. Howe *v.* Bradley, 19 Me. 31.

87. Where a note is payable on a specified day, and contains a stipulation not to bear interest until another specified day after maturity, a judgment entered thereon after maturity, and before the date fixed for accrual of interest, must be for the principal only. Billingsley *v.* Billingsley, 24 Ala. 518.

88. Bouvier L. Dict.

89. Tassell *v.* Lewis, 1 Ld. Raym. 743.

90. Coleman *v.* Sayer, 1 Barn. K. B. 303. And see *infra*, VII, B, 4, b, (I).

91. Brown *v.* Harraden, 4 T. R. 148. And see *infra*, VII, B, 4, c, (I).

92. Bouvier L. Dict. See also Blacker *v.* Ryan, 65 Mo. App. 230, 2 Mo. App. Rep. 1265; Trask *v.* Martin, 1 E. D. Smith (N. Y.)

2. Statutes Relating to Grace — a. In General. The right to days of grace on commercial paper is now regulated by statute, both in England and in most of the United States, the statutes varying to some extent in the different jurisdictions.[93] A statute allowing grace on particular instruments or generally does not apply to instruments given before its enactment.[94]

b. Statutes Abolishing Grace. In a number of states statutes have been enacted abolishing grace altogether.[95] A statute abolishing days of grace does not affect paper executed before its enactment,[96] but it may in terms be limited to a particular description of paper.[97]

3. What Law Governs. Where commercial paper is made or drawn in one place and is made payable in another, the right to days of grace and the number of days are governed by the law of the place of payment.[98] Where no place of payment is expressed in a note the place of payment, the law of which determines the right to days of grace, is the place of execution, without regard to the residence of the parties or the place at which the note is dated.[99]

4. What Paper Is Entitled to Grace — a. In General. In some jurisdictions the question as to what paper is entitled to grace is determined by the law merchant, either because there is no statutory provision on the subject or because the statute expressly so provides.[1] In other jurisdictions the statutes expressly specify in varying terms what paper shall be entitled to grace, as all bills and notes not

505; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; and *infra*, VII, B, 8.

93. See *infra*, VII, B, 4, a.

94. Reese *v.* Mitchell, 41 Ill. 365; Barker *v.* Parker, 6 Pick. (Mass.) 80.

95. Neg. Instr. L. § 145. See also Ill. Rev. Stat. (1899), c. 98, § 15; Mass. Rev. Laws (1902), c. 73, § 102.

96. In a New York case it was held that a statute (act of 1894) abolishing grace did not affect a note dated prior to the passage of the act and payable two years after date, although it was not delivered until after the act took effect. Button *v.* Belding, 22 N. Y. App. Div. 618, 48 N. Y. Suppl. 981. See also Evans *v.* Geo. D. Cross Lumber Co., 21 Ohio Cir. Ct. 80, 11 Ohio Cir. Dec. 543.

97. The New York statute (N. Y. Laws (1857), c. 416, § 2) abolishing grace upon all checks or bills of exchange drawn on any bank "or individual banker, carrying on banking business under the act to authorise the business of banking," and which were "on their face, payable on any specified day, or in any number of days, after the date or sight thereof," did not apply to bills payable on their face in months or years. Commercial Bank *v.* Varnum, 49 N. Y. 269 [*reversing* 3 Lans. (N. Y.) 86]. It applied to a draft payable on a designated day after its date. Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139. It applied, however, only to paper drawn on a bank or individual banker doing business under the act of April 18, 1838, to authorize the business of banking, and under supplementary and amendatory statutes. It did not apply to private bankers exercising in their business the privileges common to all. Kern *v.* Lewis, 8 N. Y. Suppl. 79.

98. *Illinois.*— Skelton *v.* Dustin, 92 Ill. 49.

Indiana.— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Iowa.— Thorp *v.* Craig, 10 Iowa 461.

Kentucky.— Goddin *v.* Shipley, 7 B. Mon. (Ky.) 575.

Maine.— Burnham *v.* Webster, 19 Me. 232.

New York.— Bowen *v.* Newell, 8 N. Y. 190, Seld. Notes (N. Y.) 87 [*reversing* 5 Sandf. (N. Y.) 326].

Vermont.— Blodgett *v.* Durgin, 32 Vt. 361; Bryant *v.* Edson, 8 Vt. 325, 30 Am. Dec. 472.

United States.— Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37.

99. Blodgett *v.* Durgin, 32 Vt. 361; Bryant *v.* Edson, 8 Vt. 325, 30 Am. Dec. 472. And see Burnham *v.* Webster, 19 Me. 232.

The place of date, however, is *prima facie* the place of execution, and therefore the place of payment. Burnham *v.* Webster, 19 Me. 232.

Holder's ignorance of place of execution.— It seems clear therefore that where a note payable generally is executed in one place and dated in another a holder who is not aware that the place of execution is other than the place at which the paper is dated will be protected if he charges the indorser by presentment and notice according to the law of the latter place. Blodgett *v.* Durgin, 32 Vt. 361. See also Burnham *v.* Webster, 19 Me. 232.

Joint makers residing in different states.— The place of execution of a joint promissory note, where the first maker signs in one state and the second maker in another, is in the former, where, in addition to the fact of its execution there by the first maker, the note bears date in that state, and it was there that its consideration passed; and the law of such state as to days of grace governs as to both makers, where no place of payment is mentioned in the note. Bryant *v.* Edson, 8 Vt. 325, 30 Am. Dec. 472.

1. See Sand. & H. Dig. Ark. § 488.

payable on demand,[2] promissory notes and bonds payable in money at a bank or certain place of payment, bills of exchange, and all other instruments payable in money at bank or certain place of payment,[3] bills of exchange and promissory notes payable at bank, or left at bank for collection,[4] bills payable at sight or on time, and notes, orders, and drafts payable on time,[5] etc.

b. Bills of Exchange, Orders, and Checks — (I) *Bills of Exchange.* It seems that formerly the custom of allowing grace applied only to foreign bills of exchange,[6] but at an early day in England it was held applicable to inland bills as well,[7] so that it is now settled, except where a different rule is established by statute, that all bills of exchange which are negotiable by the law merchant, whether foreign or inland, are entitled to grace,[8] provided in some jurisdictions they are payable not at sight, but at a fixed time in the future or a certain time after sight.[9]

(II) *Orders.* Orders for the payment of money at a future day, if they are negotiable, are in substance and effect bills of exchange, and as such entitled to grace.[10]

(III) *Bills, Drafts, or Orders Payable at Sight.* In some jurisdictions it has been held that bills of exchange payable, not at a fixed time, but at sight or on presentment, are not entitled to grace by the law merchant, in the absence of a local custom, which must be proved,[11] while in other jurisdictions

2. See Bills Exch. Act, §§ 14, 89.

3. See Ala. Code (1896), §§ 869, 870.

4. Ga. Civ. Code (1895), § 3688. See Dalton City Co. *v.* Haddock, 54 Ga. 584.

Statute construed.—A statute (Me. Stat. (1824), c. 272) allowing three days' grace on promissory notes, bills of exchange, drafts, or orders, when the same shall have been discounted by any bank, or left therein for collection, does not apply to such paper, unless it has been so discounted or left for collection before it arrives at maturity by its terms. Rea *v.* Dorrance, 18 Me. 137. See also under this statute Bowley *v.* Bowley, 41 Me. 542; Buck *v.* Appleton, 14 Me. 284; McDonald *v.* Smith, 14 Me. 99; Pickard *v.* Valentine, 13 Me. 412. Proof that a note was indorsed to a cashier, and by him handed to a notary for protest, is sufficient to establish the fact that it was either negotiated to or left in the bank for collection, and consequently that the makers are entitled to grace under such a statute. Burnham *v.* Webster, 19 Me. 232.

5. See How. Anno. Stat. Mich. § 1581.

6. See Tassell *v.* Lewis, 1 Ld. Raym. 743.

7. Coleman *v.* Sayer, 1 Barn. K. B. 303.

8. *Alabama.*— Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Hart *v.* Smith, 15 Ala. 807, 50 Am. Dec. 161; Brown *v.* Turner, 11 Ala. 752; Wooley *v.* Clements, 11 Ala. 220.

Arkansas.— Wards *v.* Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703; Craig *v.* Price, 23 Ark. 633.

California.— Minturn *v.* Fisher, 4 Cal. 35.

Connecticut.— Norton *v.* Lewis, 2 Conn. 478.

Illinois.— Cook *v.* Renick, 19 Ill. 598.

Indiana.— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Piatt *v.* Eads, 1 Blackf. (Ind.) 81.

Kentucky.—Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168.

Massachusetts.— Cribbs *v.* Adams, 13 Gray (Mass.) 597.

Missouri.— Blacker *v.* Ryan, 65 Mo. App. 230.

Nebraska.— Green *v.* Raymond, 9 Nebr. 295, 2 N. W. 881.

New York.— Commercial Bank *v.* Varnum, 49 N. Y. 269 [*reversing* 3 Lans. (N. Y.) 86]; Bowen *v.* Newell, 8 N. Y. 190, Seld. Notes (N. Y.) 87; Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673.

Ohio.— McMurchey *v.* Robinson, 10 Ohio 496.

United States.— Bell *v.* Chicago First Nat. Bank, 115 U. S. 373, 6 S. Ct. 105, 29 L. ed. 409; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37.

England.— Coleman *v.* Sayer, 1 Barn. K. B. 303; Tassell *v.* Lewis, 1 Ld. Raym. 743; Leftley *v.* Mills, 4 T. R. 170; Brown *v.* Harraden, 4 T. R. 148.

A bill payable one day after sight is entitled to grace. Craig *v.* Price, 23 Ark. 633.

9. See *infra*, VII, B, 4, b, (III).

10. Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168.

11. *California.*— Minturn *v.* Fisher, 4 Cal. 35.

Iowa.— Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639.

Kentucky.— Piner *v.* Clary, 17 B. Mon. (Ky.) 645.

New York.— Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391; Trask *v.* Martin, 1 E. D. Smith (N. Y.) 505.

Ohio.— Sleeper *v.* Ingersoll, 2 Ohio Dec. (Reprint) 166, 1 West. L. Month. 677.

A bill or draft which expresses no time of payment is payable at sight or on presentment (see *supra*, VII, A, 7, a, (III)) and is not entitled to grace in those jurisdictions in which grace is not allowed on sight bills (Davenport First Nat. Bank *v.* Price, 52

there have been decisions to the contrary.[12] In some states sight bills are expressly excluded by the statute allowing grace,[13] while in others they are expressly included.[14]

(IV) *Checks on Banks or Bankers.* An ordinary check on a bank or banker, payable immediately on presentment, is not entitled to grace,[15] even though it may have been postdated.[16] Some of the courts have applied the same rule to instruments in the form of a check payable at a future day,[17] but by the weight of authority a check or draft on a bank, payable at a fixed future day or a certain number of days after date, is a bill of exchange and not an ordinary check, and is entitled to grace.[18]

c. Promissory Notes, Due-Bills, and Sealed Instruments — (I) *Promissory Notes.* Since the statute of Anne made promissory notes negotiable and placed them on the same footing as bills of exchange it has been held in most jurisdictions that negotiable promissory notes, if payable at a fixed time in the future, are entitled to grace to the same extent precisely as bills of exchange.[19] In some

Iowa 570, 3 N. W. 639 [holding that this rule is not changed by a statute providing that all bills of exchange, drafts, and orders, "except those drawn payable on demand," shall be entitled to grace]; Trask *v.* Martin, 1 E. D. Smith (N. Y.) 505).

12. *Alabama.*— Knott *v.* Venable, 42 Ala. 186; Hart *v.* Smith, 15 Ala. 807, 50 Am. Dec. 161.

Arkansas.— Wards *v.* Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703.

Massachusetts.— Cribbs *v.* Adams, 13 Gray (Mass.) 597.

Missouri.— See Lucas *v.* Ladew, 28 Mo. 342.

West Virginia.— Thornburg *v.* Emmons, 23 W. Va. 325.

England.— Dehers *v.* Harriot, 1 Show. 163. See also Janson *v.* Thomas, 3 Dougl. 421, 26 E. C. L. 276, expressing doubt on the question.

13. See Del. Rev. Code, c. 63, § 2.

14. Green *v.* Raymond, 9 Nebr. 295, 2 N. W. 881.

15. *California.*— Minturn *v.* Fisher, 4 Cal. 35.

Illinois.— Culter *v.* Reynolds, 64 Ill. 321.

Kentucky.— Piner *v.* Clary, 17 B. Mon. (Ky.) 645.

Louisiana.— Barbour *v.* Bayon, 5 La. Ann. 304, 52 Am. Dec. 593.

Massachusetts.—Taylor *v.* Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180.

Montana.— McDonald *v.* Stokey, 1 Mont. 388.

Nebraska.— Wood River Bank *v.* Omaha First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

New York.— Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530.

Ohio.— Andrew *v.* Blachly, 11 Ohio St. 89; Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

Pennsylvania.— Champion *v.* Gordon, 70 Pa. St. 474, 10 Am. Rep. 681.

16. Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Andrew *v.* Blachly, 11 Ohio St. 89.

17. *Massachusetts.*— Way *v.* Towle, 155 Mass. 374, 29 N. E. 506, 31 Am. St. Rep. 552; Taylor *v.* Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180.

Ohio.— Andrew *v.* Blachly, 11 Ohio St. 89 [*limiting* Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632], holding that the circumstance that a draft for money, otherwise in the usual form of a check, is payable on a future specified day is *prima facie* but not conclusive evidence that it is a bill of exchange so as to be entitled to grace, and that such an instrument is a check and not entitled to grace, where it is drawn upon a bank or banker and is designed by the parties as an absolute transfer and appropriation to the holder of so much of an actually existing fund belonging to the drawer in the hands of the drawee.

Pennsylvania.— Champion *v.* Gordon, 70 Pa. St. 474, 10 Am. Rep. 681; Lawson *v.* Richards, 6 Phila. (Pa.) 179, 23 Leg. Int. (Pa.) 348.

Rhode Island.— Westminster Bank *v.* Wheaton, 4 R. I. 30.

United States.— *In re* Brown, 2 Story (U. S.) 502, 4 Fed. Cas. No. 1,985, 10 Hunt. Mer. Mag. 377, 6 Law Rep. 508.

18. *California.*— Minturn *v.* Fisher, 4 Cal. 35.

Georgia.— Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590; Henderson *v.* Pope, 39 Ga. 361.

Illinois.— Culter *v.* Reynolds, 64 Ill. 321.

Minnesota.— Harrison *v.* Nicollet Nat. Bank, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746.

Missouri.— Ivory *v.* State Bank, 36 Mo. 475, 88 Am. Dec. 150.

New York.— Bowen *v.* Newell, 8 N. Y. 190, Seld. Notes (N. Y.) 87 [*reversing* 5 Sandf. (N. Y.) 326]; Taylor *v.* French, 4 E. D. Smith (N. Y.) 458; Merchants' Bank *v.* Woodruff, 6 Hill (N. Y.) 174; Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673.

Tennessee.—Brown *v.* Lusk, 4 Yerg. (Tenn.) 210.

19. *Alabama.*— Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Connecticut.— New Haven Sav. Bank *v.* Bates, 8 Conn. 505; Norton *v.* Lewis, 2 Conn. 478; Shepard *v.* Hall, 1 Conn. 329.

Iowa.— Seaton *v.* Hinneman, 50 Iowa 395; Goodpaster *v.* Voris, 8 Iowa 334, 74 Am. Dec. 313; Hudson *v.* Matthews, Morr. (Iowa) 94.

jurisdictions, however, there have been decisions to the contrary.[20] Where grace is allowed on promissory notes negotiable interest coupon notes are entitled to grace.[21]

(II) *NOTES PAYABLE ON DEMAND.* In most jurisdictions it is held that promissory notes payable, not at a fixed time but on demand, are not entitled to grace by the law merchant, on the ground that making the paper payable on demand shows a contrary intention;[22] but some of the statutes allowing grace have been held applicable to demand notes, as well as to notes payable at a fixed

Kentucky.— Goddin *v.* Shipley, 7 B. Mon. (Ky.) 575.

Louisiana.— McDonald *v.* Lee, 12 La. 435.

Maryland.— Sheppard *v.* Spates, 4 Md. 400. *Compare* Ponsonby *v.* Nicholson, 4 Harr. & M. (Md.) 72.

Mississippi.— Chambliss *v.* Matthews, 57 Miss. 306; Harrison *v.* Crowder, 6 Sm. & M. (Miss.) 464, 45 Am. Dec. 290. *Compare* Harrel *v.* Bixler, Walk. (Miss.) 176.

Missouri.— McCoy *v.* Farmer, 65 Mo. 244; Turk *v.* Stahl, 53 Mo. 437; Blacker *v.* Ryan, 65 Mo. App. 230; Brown *v.* Shock, 27 Mo. App. 351.

New York.— Alexander *v.* Parsons, 3 Lans. (N. Y.) 333; Hogan *v.* Cuyler, 8 Cow. (N. Y.) 203; Griffin *v.* Goff, 12 Johns. (N. Y.) 423.

North Carolina.— State Bank *v.* Smith, 7 N. C. 70.

Pennsylvania.— Coleman *v.* Carpenter, 9 Pa. St. 178, 49 Am. Dec. 552; Thomas *v.* Shoemaker, 6 Watts & S. (Pa.) 179.

Rhode Island.— Cook *v.* Darling, 2 R. I. 385.

Tennessee.— Love *v.* Nelson, Mart. & Y. (Tenn.) 237.

England.— Smith *v.* Kendall, 1 Esp. 231, 6 T. R. 123; Oridge *v.* Sherbone, 7 Jur. 402, 12 L. J. Exch. 313, 11 M. & W. 374; Brown *v.* Harraden, 4 T. R. 148. *Compare* Dexlaux *v.* Hood, Bull. N. P. 274.

The leading case is Brown *v.* Harraden, 4 T. R. 148, decided in England in 1791.

A note payable one day after date is entitled to grace. Chambliss *v.* Matthews, 57 Miss. 306.

20. Thus in McLain *v.* Rutherford, Hempst. (U. S.) 47, 16 Fed. Cas. No. 8,868*a*, it was held that the custom of merchants as to days of grace did not apply as between the maker and payee of a promissory note. And see Cook *v.* Gray, Hempst. (U. S.) 84, 6 Fed. Cas. No. 3,156*a*.

In Illinois it was held that promissory notes in that state were not entitled to grace prior to the act of 1861. Reese *v.* Mitchell, 41 Ill. 365; Elston *v.* Dewes, 28 Ill. 436; Pogue *v.* Clark, 25 Ill. 333. But that act allowed grace. See Collins *v.* Montemy, 3 Ill. App. 182; Bannon *v.* People, 1 Ill. App. 496; McCoy *v.* Babcock, 1 Ill. App. 414. The act, however, has since been repealed and days of grace abolished. Ill. Rev. Stat. (1899), c. 98, § 15.

In Massachusetts also it was held, prior to 1825, that promissory notes were not entitled to grace, unless made payable with grace. Jones *v.* Fales, 4 Mass. 245. See also Barker *v.* Parker, 6 Pick. (Mass.) 80. But a statute was enacted in 1825 allowing grace on "all promissory negotiable notes, orders and drafts, payable at a future day certain, . . . in which there is not an express stipulation to the contrary." Mass. Rev. Stat. c. 33, § 5. Post notes of banks were held to be entitled to grace under this statute. Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13; Staples *v.* Franklin Bank, 1 Metc. (Mass.) 43, 35 Am. Dec. 345; Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483. Grace has since been abolished altogether in Massachusetts, except on sight bills or drafts. Mass. Rev. Laws (1902), c. 73, § 102.

In Ohio it was held that grace was not allowed upon ordinary notes of hand without proof of a custom, but only upon notes payable at a bank. Isham *v.* Fox, 7 Ohio St. 317; Sharp *v.* Ward, 7 Ohio 223. No grace at all is now allowed in Ohio. 2 Bates Anno. Stat. Ohio (1900), § 3175.

In Texas the statute formerly allowed days of grace on negotiable bills and notes which were contracts between merchant and merchant, their factors and agents. Cox *v.* Reinhardt, 41 Tex. 591; Oliphant *v.* Dallas, 15 Tex. 138, 65 Am. Dec. 146; Campbell *v.* Lane, 25 Tex. Suppl. 93; Moore *v.* Hollaman, 25 Tex. Suppl. 81. The present statute, however, allows grace on all negotiable bills and notes except demand notes. Tex. Rev. Stat. art. 276; Brown *v.* Chancellor, 61 Tex. 437; Cox *v.* Reinhardt, 41 Tex. 591.

21. Hartsuff *v.* Hall, 58 Nebr. 417, 78 N. W. 716; Lantry *v.* French, 33 Nebr. 524, 50 N. W. 679; Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9. *Compare* the *dictum* to the contrary in Arents *v.* Com., 18 Gratt. (Va.) 750.

22. *Alabama.*—Sommerville *v.* Williams, 1 Stew. (Ala.) 484.

Connecticut.— Rhodes *v.* Seymour, 36 Conn. 1.

Iowa.— Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639; Luckey *v.* Pepper, Morr. (Iowa) 490.

New York.— Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Misc. (N. Y.) 757, 48 N. Y. Suppl. 148; Pusey *v.* New Jersey West Line R. Co., 14 Abb. Pr. N. S. (N. Y.) 434; Thompson *v.* Ketchum, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332.

South Carolina.— Smith *v.* Blythewood, Rice (S. C.) 245, 33 Am. Dec. 111; Harrison *v.* Cammer, 2 McCord (S. C.) 246.

Texas.— Brown *v.* Chancellor, 61 Tex. 437.

Certificates of indebtedness.— Negotiable certificates of indebtedness issued by a rail-

time.[23] A promissory note in which no time of payment is expressed, being payable on demand,[24] is not entitled to grace in those jurisdictions in which grace is not allowed on demand paper.[25]

(III) *NON-NEGOTIABLE NOTES.* Some courts have held that notes not payable to the order of the payee or to bearer, although not negotiable, are nevertheless entitled to grace.[26] Other courts, however, hold that the statute of Anne and the law merchant have no application to non-negotiable notes, and that the rule allowing grace therefore does not apply to them.[27] Where this doctrine has been recognized, it has been held that a promissory note is not entitled to grace, where it is not payable to order or bearer;[28] where it contains stipulations rendering it non-negotiable;[29] or where it is payable, not in money, but in property or services, or partly in money and partly in property or services.[30]

(IV) *INSTRUMENTS UNDER SEAL.* A single bill or promissory note under seal, other than a note executed by a corporation under the corporate seal, since it is not a negotiable instrument under the law merchant, is not entitled to grace, unless made negotiable by statute.[31] This is true although a statute declares that it may be assigned by indorsement, and that the assignee may sue in his own name, for this does not make such an instrument negotiable and place it upon the footing of bills of exchange.[32] It has been held otherwise, however, where promissory notes under seal or single bills are made negotiable to the same extent as ordinary promissory notes.[33]

(V) *NOTES PAYABLE IN INSTALMENTS.* Where a negotiable promissory note is payable in instalments, it is entitled to grace on each instalment as it becomes due, as if it were so many separate instruments.[34] Grace is to be allowed on a note payable in instalments, with a stipulation that the whole sum shall become due on default in the payment of any instalment.[35]

road company to contractors and payable on demand are not entitled to grace. Pusey *v.* New Jersey West Line R. Co., 14 Abb. Pr. N. S. (N. Y.) 434.

23. Bell *v.* Sackett, 38 Cal. 407, holding that a promissory note payable on demand was entitled to grace under a statute providing that "three days, commonly called days of grace, shall be allowed, except on sight bills or drafts." But in Brown *v.* Chancellor, 61 Tex. 437, after a statute allowing days of grace on "all bills of exchange and promissory notes assignable and negotiable by law," with a proviso limiting its application to contracts between merchant and merchant, their factors and agents, was amended by an act in the same words, except that it omitted the proviso, it was held that a note payable on demand was not entitled to grace, on the ground that the legislature intended the act to apply to such paper only as was entitled to grace under the law merchant.

24. See *supra*, VII, A, 7, a, (III).

25. Davenport First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639; Luckey *v.* Pepper, Morr. (Iowa) 490; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Trask *v.* Martin, 1 E. D. Smith (N. Y.) 505; Harrison *v.* Cammer, 2 McCord (S. C.) 246.

26. *Georgia.*— Reed *v.* Murphy, 1 Ga. 236.
Louisiana.— Dubuys *v.* Farmer, 22 La. Ann. 478.
Maryland.—Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299.
Texas.— Hamilton Gin, etc., Co. *v.* Sinker, 74 Tex. 51, 11 S. W. 1056.
England.— Smith *v.* Kendall, 1 Esp. 231, 6 T. R. 123; Burchell *v.* Slocock, 2 Ld. Raym. 1545.

27. *Connecticut.*— Backus *v.* Danforth, 10 Conn. 297.
Indiana.— Luce *v.* Shoff, 70 Ind. 152.
Iowa.—McCartney *v.* Smalley, 11 Iowa 85; Peddicord *v.* Whittam, 9 Iowa 471.
Mississippi.— Lamkin *v.* Nye, 43 Miss. 241.
New Hampshire.— Fletcher *v.* Thompson, 55 N. H. 308.
Oregon.— McMullan *v.* Abbott, 1 Oreg. 258.
Pennsylvania.— Overton *v.* Tyler, 3 Pa. St. 346, 45 Am. Dec. 645.
United States.— McLain *v.* Rutherford, Hempst. (U. S.) 47, 16 Fed. Cas. No. 8,868*a*.

28. Backus *v.* Danforth, 10 Conn. 297; Luce *v.* Shoff, 70 Ind. 152; McMullan *v.* Abbott, 1 Oreg. 258.

29. Fletcher *v.* Thompson, 55 N. H. 308; Overton *v.* Tyler, 3 Pa. St. 346, 45 Am. Dec. 645.

30. McCartney *v.* Smalley, 11 Iowa 85; Peddicord *v.* Whittam, 9 Iowa 471; Lamkin *v.* Nye, 43 Miss. 241.

31. Lamkin *v.* Nye, 43 Miss. 241; Skidmore *v.* Little, 4 Tex. 301.

32. Lamkin *v.* Nye, 43 Miss. 241.

33. Skinner *v.* Collier, 4 How. (Miss.) 396; Love *v.* Nelson, Mart. & Y. (Tenn.) 237. *Contra*, Fields *v.* Mellett, 10 N. C. 465; Jarvis *v.* McMain, 10 N. C. 10.

34. Coffin *v.* Loring, 5 Allen (Mass.) 153; Oridge *v.* Sherbone, 7 Jur. 402, 12 L. J. Exch. 313, 11 M. & W. 374. And see Macloon *v.* Smith, 49 Wis. 200, 5 N. W. 336.

35. Miller *v.* Biddle, 11 Jur. N. S. 980, 13 L. T. Rep. N. S. 334, 14 Wkly. Rep. 110.

(VI) *DUE-BILLS.* Due-bills are not entitled to grace unless they are in such form as to be in effect negotiable promissory notes payable at a fixed time in the future,[36] in which case they are.[37] A due-bill payable on demand, or expressing no time of payment, in which case it is payable on demand, is not entitled to grace.[38]

d. Interest. Where a note or an instalment of a note bearing interest becomes due on a certain fixed day, both the principal and the interest are payable on the same day, days of grace being allowed for the interest as well as the principal, of which it is an incident.[39] But a mere instalment of interest falling due on a note before the maturity of principal is not entitled to grace,[40] unless it is evidenced by a negotiable interest coupon note, in which case the coupon note is entitled to grace as a promissory note.[41]

e. Stipulation Excluding Grace. Although the law merchant allows days of grace, the parties may stipulate that they shall not be allowed, and if the instrument shows such an intention it will be given effect.[42] In some states the statute in terms allows grace only where the instrument contains no provision or stipulation to the contrary.[43] The mere fact that an instrument or a memorandum thereon states that it is due or payable on a certain day does not exclude grace.[44]

f. Waiver of Grace. Even where there is no stipulation excluding days of grace, the right to grace may be waived by the party bound, as where a tender of payment is made on the day of maturity without grace and is refused on other grounds.[45] But a mere waiver of demand, protest, and notice of dishonor is not a waiver of grace.[46]

5. PERSONS WHO ARE ENTITLED TO GRACE. The right to days of grace exists, not only in favor of the maker of a promissory note[47] and the accepter of a bill of exchange,[48] but also in favor of the drawer of a bill,[49] and of the indorsers of a bill or note.[50]

36. McLain *v.* Rutherford, Hempst. (U. S.) 47, 16 Fed. Cas. No. 8,868*a*.

37. Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 264.

38. Luckey *v.* Pepper, Morr. (Iowa) 490; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180. And see *supra*, VII, B, 4, c, (II).

39. Coffin *v.* Loring, 5 Allen (Mass.) 153.

40. Macloon *v.* Smith, 49 Wis. 200, 5 N. W. 336. See also North America Nat. Bank *v.* Kirby, 108 Mass. 497; Catlin *v.* Lyman, 16 Vt. 44.

41. See *supra*, VII, B, 4, c, (I), note 21.

42. Thus where a note was made payable "on the first day of May next fixed," it was held not to be entitled to grace, as the use of the word "fixed" showed an intention to exclude grace. Durnford *v.* Patterson, 7 Mart. (La.) 460, 12 Am. Dec. 514. And see to the same effect Doyle *v.* Birmingham First Nat. Bank, 131 Ala. 294, 30 So. 880; Steinau *v.* Moody, 100 Ga. 136, 28 S. E. 30; Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Misc. (N. Y.) 757, 48 N. Y. Suppl. 148.

43. See Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483.

44. Where a note payable in a certain time, with interest "until due, and no interest after," had on the margin a memorandum stating that it was "due" on a day named, which was the last day of the time specified for payment, it was held that this was not an express stipulation that no grace should be allowed, within the meaning of a statute (Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483. See also Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13), and where a bill of exchange dated March 4, payable sixty days after sight, and accepted by the drawee as "due 21st May," without any date of acceptance, it is entitled to days of grace and does not mature until May 24. It will not be presumed that the words "due May 21st" were intended to include the days of grace, where it is not shown that the acceptance was sixty-three days before that date (Bell *v.* Chicago First Nat. Bank, 115 U. S. 373, 6 S. Ct. 105, 29 L. ed. 409); but where a bill payable sixty days after sight was accepted under the date of September 12, and as payable November 14, it was held that the days of grace were included in the time specified, and that November 14 was the peremptory day of payment, and not the day from which days of grace were to be reckoned (Kenner *v.* His Creditors, 8 Mart. N. S. (La.) 36. See also Kenner *v.* Their Creditors, 1 La. 120).

45. Wyckoff *v.* Anthony, 90 N. Y. 442.

46. Steinau *v.* Moody, 100 Ga. 136, 28 S. E. 30.

47. Pickard *v.* Valentine, 13 Me. 412; Hogan *v.* Cuyler, 8 Cow. (N. Y.) 203. And see *supra*, VII, B, 4, c.

48. Cook *v.* Renick, 19 Ill. 598; Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; McMurchey *v.* Robinson, 10 Ohio 496; Tassell *v.* Lewis, 1 Ld. Raym. 743. And see *supra*, VII, B, 4, b.

49. Pickard *v.* Valentine, 13 Me. 412.

50. Howe *v.* Bradley, 19 Me. 31; Central Bank *v.* Allen, 16 Me. 41; McDonald *v.* Smith,

6. Presumptions as to Grace. Days of grace have been allowed on negotiable bills and notes so universally and for so long a time that the existence of the custom in other states and in England will be presumed, in the absence of affirmative proof of a custom or statute to the contrary.[51] For the same reason it will be presumed in the absence of proof to the contrary that the number of days is three.[52] The presumption of three days of grace has also been extended to a bill of exchange payable in France.[53]

7. Effect of Special Custom or Usage. If a statute expressly allows a certain number of days of grace on commercial paper, the right thereto cannot be defeated by showing a local custom or usage to the contrary, for such a custom or usage would be void as contrary to law.[54] But where the right to grace depends solely upon the law merchant, which is itself custom or usage, a local custom or usage not to allow grace, or to allow a greater or less number than three days, if known to the parties, or so general and well established that knowledge will be presumed, may be shown and will control;[55] and a local custom or usage may entitle a party to days of grace on paper which is not entitled to grace by the law merchant.[56]

8. Effect of Days of Grace — a. In General. Where days of grace are allowed on an instrument, the allowance is now a matter of right and not as formerly a matter of grace. The allowance enters into and forms a part of the contract, and the instrument does not become due in fact or in law until the last day of grace.[57]

b. Presentment, Protest, and Notice. Since paper does not mature until the last day of grace, it must, to charge the drawer or indorsers, be presented for payment on that day and not before or after,[58] unless the rule is changed by a

14 Me. 99; Pickard *v.* Valentine, 13 Me. 412; Brown *v.* Harraden, 4 T. R. 148.

51. Wood *v.* Corl, 4 Metc. (Mass.) 203; Reed *v.* Wilson, 41 N. J. L. 29; Trask *v.* Martin, 1 E. D. Smith (N. Y.) 505; Cook *v.* Darling, 2 R. I. 385.

52. Trask *v.* Martin, 1 E. D. Smith (N. Y.) 505. See also Wood *v.* Corl, 4 Metc. (Mass.) 203; Reed *v.* Wilson, 41 N. J. L. 29.

53. Dollfus *v.* Frosch, 1 Den. (N. Y.) 367.

54. Thus where a statute provides that days of grace shall be allowed on all promissory notes payable at a future day certain, a usage of banks that bank post notes payable at a future day certain are not entitled to grace is void. Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13; Staples *v.* Franklin Bank, 1 Metc. (Mass.) 43, 35 Am. Dec. 345; Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483. *Compare*, however, Haddock *v.* Citizens' Nat. Bank, 53 Iowa 542, 5 N. W. 766.

55. *Kentucky.*—Goddin *v.* Shipley, 7 B. Mon. (Ky.) 575.

Maryland.— Bank of Columbia *v.* Fitzhugh, 1 Harr. & G. (Md.) 239; Raborg *v.* Columbia Bank, 1 Harr. & G. (Md.) 231; Columbia Bank *v.* Magruder, 6 Harr. & J. (Md.) 172, 14 Am. Dec. 271; Jackson *v.* Union Bank, 6 Harr. & J. (Md.) 146.

New York.—Trask *v.* Martin, 1 E. D. Smith (N. Y.) 505; Osborne *v.* Smith, 14 Conn. 366, note (an otherwise unreported New York case). *Compare* Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673.

Virginia.— Jackson *v.* Henderson, 3 Leigh (Va.) 196.

United States.— Cookendorfer *v.* Preston, 4 How. (U. S.) 317, 11 L. ed. 992; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Mills *v.* U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. ed. 512; Runer *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166; Hill *v.* Norvell, 3 McLean (U. S.) 583, 12 Fed. Cas. No. 6,497.

Proof of custom.— The special custom, however, must be clearly proved. It is not enough to show three or four instances in two years, all of which were confined to a particular bank. Adams *v.* Otterback, 15 How. (U. S.) 539, 14 L. ed. 805.

56. Trask *v.* Martin, 1 E. D. Smith (N. Y.) 505.

57. In Blacker *v.* Ryan, 65 Mo. App. 230, 241 [*citing* 1 Daniel Neg. Instr. § 614] it was said: "Formerly, 'days of grace' were days extended to the drawee of a bill or payor of a note, in the way of a favor from the holder; they were gratuitous merely, dependent on the pleasure of the holder of the bill or note and could not be claimed by the drawee or payor as a matter of right. By custom, however, they became universally recognized; and though still termed 'days of grace,' they are now considered wherever the law merchant prevails as entering into the constitution of every bill of exchange and negotiable note, both in England and the United States, and form so completely a part of it that the instrument is not due in fact or in law until the last day of grace." See also Cook *v.* Renick, 19 Ill. 598; State Bank *v.* Smith, 7 N. C. 70; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37.

58. *Alabama.*— Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Hart *v.* Smith, 15 Ala.

valid custom in the particular place.[59] The last day of grace is also the day of maturity for the purpose of determining the time for protest and for giving notice of dishonor.[60]

c. Accrual of Cause of Action. From the fact that a bill or note does not become payable until the last day of grace, it also follows that an action on the first or second day of grace, or, according to the weight of authority, even on the third day of grace, is premature, for the party is entitled to the whole of the third day of grace in which to pay.[61] The statute of limitations therefore does not

807, 50 Am. Dec. 161; Brown *v.* Turner, 11 Ala. 752; Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Arkansas.— Craig *v.* Price, 23 Ark. 633.

California.— McFarland *v.* Pico, 8 Cal. 626.

Connecticut.— Norton *v.* Lewis, 2 Conn. 478.

Indiana.— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Piatt *v.* Eads, 1 Blackf. (Ind.) 81.

Iowa.— Edgar *v.* Greer, 8 Iowa 394, 74 Am. Dec. 316.

Kentucky.—Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168.

Maryland.—Sheppard *v.* Spates, 4 Md. 400.

Massachusetts.— Jones *v.* Fales, 4 Mass. 245.

Mississippi.— Harrison *v.* Crowder, 6 Sm. & M. (Miss.) 464, 45 Am. Dec. 290.

New Hampshire.—Leavitt *v.* Simes, 3 N. H. 14.

New York.— Griffin *v.* Goff, 12 Johns. (N. Y.) 423.

Ohio.— McMurchey *v.* Robinson, 10 Ohio 496.

Pennsylvania.— Coleman *v.* Carpenter, 9 Pa. St. 178, 49 Am. Dec. 552.

Rhode Island.— Cook *v.* Darling, 2 R. I. 385.

South Carolina.— Wartenburgh *v.* Lovel, 1 Nott & M. (S. C.) 83.

Tennessee.—Broddie *v.* Searcy, Peck (Tenn.) 183.

Vermont.— Ripley *v.* Greenleaf, 2 Vt. 129.

United States.— Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Lindenberger *v.* Beall, 6 Wheat. (U. S.) 104, 5 L. ed. 216; Bussard *v.* Levering, 6 Wheat. (U. S.) 102, 5 L. ed. 215; Hill *v.* Norvell, 3 McLean (U. S.) 583, 12 Fed. Cas. No. 6,497.

England.— Wiffen *v.* Roberts, 1 Esp. 261, 5 Rev. Rep. 737.

59. Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37. And see *supra*, VII, B, 7.

60. *Alabama.*— Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Indiana.— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Louisiana.—Dubuys *v.* Farmer, 22 La. Ann. 478.

Maine.— King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560.

Massachusetts.— Pierce *v.* Cate, 12 Cush. (Mass.) 190, 59 Am. Dec. 176; Boston Bank *v.* Hodges, 9 Pick. (Mass.) 420; Blanchard *v.* Hilliard, 11 Mass. 85.

New Hampshire.— Dennie *v.* Walker, 7 N. H. 199.

New York.—Corp *v.* McComb, 1 Johns. Cas. (N. Y.) 328.

Pennsylvania.—Coleman *v.* Carpenter, 9 Pa. St. 178, 49 Am. Dec. 552.

West Virginia.— Thornburg *v.* Emmons, 23 W. Va. 325.

United States.— Bell *v.* Chicago First Nat. Bank, 115 U. S. 373, 6 S. Ct. 105, 29 L. ed. 409.

England.— Leftley *v.* Mills, 4 T. R. 170.

61. *California.*— Bell *v.* Sackett, 38 Cal. 407; Wilcombe *v.* Dodge, 3 Cal. 260, 58 Am. Dec. 411.

Illinois.— Roberts *v.* Corby, 86 Ill. 182; Collins *v.* Montemy, 3 Ill. App. 182; McCoy *v.* Babcock, 1 Ill. App. 414.

Indiana.— Benson *v.* Adams, 69 Ind. 353, 35 Am. Rep. 220.

Iowa.— Seaton *v.* Hinneman, 50 Iowa 395; Hudson *v.* Matthews, Morr. (Iowa) 94.

Kansas.— Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

Michigan.— Wiesinger *v.* Benton Harbor First Nat. Bank, 106 Mich. 291, 64 N. W. 59.

Mississippi.— Wiggle *v.* Thomason, 11 Sm. & M. (Miss.) 452.

Missouri.— McCoy *v.* Farmer, 65 Mo. 244; Turk *v.* Stahl, 53 Mo. 437.

Nebraska.— Hartsuff *v.* Hall, 58 Nebr. 417, 78 N. W. 716.

New Jersey.— Sutcliffe *v.* Humphreys, 58 N. J. L. 42, 32 Atl. 706.

New York.— Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Smith *v.* Aylesworth, 40 Barb. (N. Y.) 104; Osborn *v.* Moncure, 3 Wend. (N. Y.) 170; Hogan *v.* Cuyler, 8 Cow. (N. Y.) 203.

Ohio.— Lewis *v.* Moon, 1 Ohio Cir. Ct. 211.

Pennsylvania.— Thomas *v.* Shoemaker, 6 Watts & S. (Pa.) 179; Bevan *v.* Eldridge, 2 Miles (Pa.) 353.

Tennessee.— Love *v.* Nelson, Mart. & Y. (Tenn.) 237.

Texas.— Hamilton Gin, etc., Co. *v.* Sinker, 74 Tex. 51, 11 S. W. 1056; Watkins *v.* Willis, 58 Tex. 521; Cox *v.* Reinhardt, 41 Tex. 591; Moore *v.* Hollaman, 25 Tex. Suppl. 81; McDowell *v.* Nicholson, 2 Tex. App. Civ. Cas. § 268.

Washington.—Joergenson *v.* Joergenson, 28 Wash. 477, 68 Pac. 913.

England.— Kennedy *v.* Thomas, [1894] 2 Q. B. 759, 63 L. J. Q. B. 761, 71 L. T. Rep. N. S. 144, 9 Reports 564, 42 Wkly. Rep. 641; Fergusson *v.* Douglas, 6 Bro. P. C. 276, 2 Eng. Reprint 1078; Gaskin *v.* Davis, 2 F. & F. 294; Brown *v.* Harraden, 4 T. R. 148.

Canada.— Dupuis *v.* Hudon, 12 Quebec Su-

begin to run until expiration of the last day of grace.[62] This is true, by the weight of authority, even though the paper is payable at a bank.[63]

d. Confession of Judgment. Under a power of attorney in a note to enter an appearance and confess judgment on its maturity, entry of an appearance and confession of judgment before the expiration of the last day of grace confers no jurisdiction, and the judgment is a nullity.[64]

e. Transfer Before Maturity. The last day of grace is also the time of maturity of a bill or note for the purposes of transfer. One therefore who purchases and takes a transfer of negotiable paper on the first or second day of grace, or, by the weight of authority, at any time on the third day of grace, is entitled to claim the rights of a purchaser before maturity.[65]

f. Interest "From Maturity." It has been held that where a note is payable with interest "from maturity," interest begins from the time of payment specified and not from the end of the days of grace, and that the holder is entitled to interest for the days of grace.[66]

9. Computation of Days of Grace — a. In Absence of Statute. In computing days of grace the day upon which the paper becomes nominally due and payable is not to be counted. The following day is the first day of grace.[67] Ordinarily three days of grace are allowed, but if the third day falls on Sunday or a legal holiday only two days are allowed, unless it is otherwise provided by statute, the last day of grace in such case being Saturday or the day preceding

per. Ct. 227; Demers *v.* Rousseau, 1 Quebec Super. Ct. 440; Hill *v.* Lott, 13 U. C. Q. B. 463.

And see *supra*, VII, A, 3, f, (IV), (B).

Decisions to the contrary.— Some courts, however, have held that an action may be brought on the last day of grace after a demand and refusal to pay, although not without such demand and refusal.

Arkansas.—Heise *v.* Bumpass, 40 Ark. 545; Holland *v.* Clark, 32 Ark. 697.

Maine.— Vandesande *v.* Chapman, 48 Me. 262; Veazie Bank *v.* Winn, 40 Me. 62; Greeley *v.* Thurston, 4 Me. 479, 16 Am. Dec. 285.

Massachusetts.— Estes *v.* Tower, 102 Mass. 65, 3 Am. Rep. 439; Gordon *v.* Parmelee, 15 Gray (Mass.) 413; Staples *v.* Franklin Bank, 1 Metc. (Mass.) 43, 35 Am. Dec. 345; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209. But see Butler *v.* Kimball, 5 Metc. (Mass.) 94.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

South Carolina.— McKenzie *v.* Durant, 9 Rich. (S. C.) 61; Wilson *v.* Williman, 1 Nott & M. (S. C.) 440; Furnan *v.* Harman, 2 McCord (S. C.) 436 (holding that when the third day of grace falls on Sunday, a suit on a note may be commenced on the second day of grace after demand).

Tennessee.— Coleman *v.* Ewing, 4 Humphr. (Tenn.) 241.

Canada.— Ontario Bank *v.* Foster, 6 Montreal Leg. N. 398; Sinclair *v.* Robson, 16 U. C. Q. B. 211. *Contra*, Demers *v.* Rousseau, 1 Quebec Super. Ct. 440.

And see *supra*, VII, A, 3, f, (IV), (B).

62. See the cases in the note preceding.

63. Benson *v.* Adams, 69 Ind. 353, 35 Am. Rep. 220; Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863; Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Smith *v.* Aylesworth, 40 Barb. (N. Y.) 104.

64. Bannon *v.* People, 1 Ill. App. 496.

65. *Connecticut.*— New Haven Sav. Bank *v.* Bates, 8 Conn. 505.

Georgia.— Haug *v.* Riley, 101 Ga. 372, 29 S. E. 44, 40 L. R. A. 244.

Illinois.— Walter *v.* Kirk, 14 Ill. 55.

Iowa.— Goodpaster *v.* Voris, 8 Iowa 334, 74 Am. Dec. 313.

Kansas.— Fox *v.* Kansas City Bank, 30 Kan. 441, 1 Pac. 789.

Louisiana.— Holton *v.* Hubbard, 49 La. Ann. 715, 22 So. 338.

New Hampshire.— Crosby *v.* Grant, 36 N. H. 273.

New York.— Continental Nat. Bank *v.* Townsend, 87 N. Y. 8; Evertson *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Herman *v.* Bencke, 8 N. Y. St. 345.

Pennsylvania.— Dillworth *v.* Ackley, 1 Walk. (Pa.) 180, 31 Leg. Int. (Pa.) 373.

Texas.— First Nat. Bank *v.* Beck, 2 Tex. App. Civ. Cas. § 832.

Contra, Pine *v.* Smith, 11 Gray (Mass.) 38.

Compare supra, VII, A, 3, f, (IV), (B).

Although a statute authorizes a full defense to a bill or note indorsed "after the day on which it is made payable," yet where another statute provides that bills and notes shall have three days' grace, the ordinary rule of the law merchant prevails, that a bill or note transferred before the end of the days of grace is transferred before maturity. Fox *v.* Kansas City Bank, 30 Kan. 441, 1 Pac. 789.

66. Letchford *v.* Starns, 16 La. Ann. 252; Weems *v.* Ventress, 14 La. Ann. 267.

67. Bell *v.* Sackett, 38 Cal. 407; Serrell *v.* Rothstein, 49 N. J. Eq. 385, 24 Atl. 369.

the holiday.[68] If the nominal day of maturity falls on Sunday or on a legal holiday the paper is nevertheless entitled to three days of grace, and three only, beginning with the day following.[69]

b. Under Statutes. In some jurisdictions, by express statutory provision, where paper falls due on Sunday or a legal holiday, whether it is entitled to grace or not, the following day is the day of maturity,[70] while under other statutes the preceding day is the day of maturity.[71]

VIII. EXTENSION, MODIFICATION, AND LACHES.

A. Extension and Renewal — 1. In General. The time of payment of a bill or note may be extended by taking a new bill or note, when it becomes due,

68. *Alabama.*— Wooley *v.* Clements, 11 Ala. 220; Sanders *v.* Ochiltree, 5 Port. (Ala.) 73, 30 Am. Dec. 551.

Connecticut.— Kilgore *v.* Bulkley, 14 Conn. 362; Shepard *v.* Hall, 1 Conn. 329. See also Barlow *v.* Gregory, 31 Conn. 261.

Kentucky.— Offut *v.* Stout, 4 J. J. Marsh. (Ky.) 332.

Maine.— Homes *v.* Smith, 20 Me. 264.

Maryland.— Sheppard *v.* Spates, 4 Md. 400.

Massachusetts.— Staples *v.* Franklin Bank, 1 Metc. (Mass.) 43, 47, 35 Am. Dec. 345; Barker *v.* Parker, 6 Pick. (Mass.) 80; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Farnum *v.* Fowle, 12 Mass. 89, 7 Am. Dec. 35.

Minnesota.— Roberts *v.* Wold, 61 Minn. 291, 63 N. W. 739.

Mississippi.— Barlow *v.* Planters' Bank, 7 How. (Miss.) 129; Fleming *v.* Fulton, 6 How. (Miss.) 473.

Missouri.— Kuntz *v.* Tempel, 48 Mo. 71.

Nebraska.— Capital Nat. Bank *v.* American Exch. Nat. Bank, 51 Nebr. 707, 71 N. W. 743.

New Jersey.— Reed *v.* Wilson, 41 N. J. L. 29; Ferris *v.* Saxton, 4 N. J. L. 1.

New York.— Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; Ransom *v.* Mack, 2 Hill (N. Y.) 587, 38 Am. Dec. 602; Mechanics', etc., Bank *v.* Gibson, 7 Wend. (N. Y.) 460; Ontario Bank *v.* Petrie, 3 Wend. (N. Y.) 456; Johnson *v.* Haight, 13 Johns. (N. Y.) 470; Griffin *v.* Goff, 12 Johns. (N. Y.) 423; Jackson *v.* Richards, 2 Cai. (N. Y.) 343; Lewis *v.* Burr, 2 Cai. Cas. (N. Y.) 195; Osborne *v.* Smith, 14 Conn. 366 (an otherwise unreported New York case).

Tennessee.— Colms *v.* State Bank, 4 Baxt. (Tenn.) 422.

United States.— Adams *v.* Otterback, 15 How. (U. S.) 539, 14 L. ed. 805; Bussard *v.* Levering, 6 Wheat. (U. S.) 102, 5 L. ed. 215; Mandeville *v.* Rumney, 3 Cranch C. C. (U. S.) 424, 16 Fed. Cas. No. 9,016; McElroy *v.* English, 2 Cranch C. C. (U. S.) 528, 16 Fed. Cas. No. 8,782; Irwin *v.* Brown, 2 Cranch C. C. (U. S.) 314, 13 Fed. Cas. No. 7,080.

England.— Tassell *v.* Lewis, 1 Ld. Raym. 743; Morris *v.* Richards, 46 J. P. 37, 45 L. T. Rep. N. S. 210; Bynner *v.* Russell, 1 Bing. 23, 7 Moore C. P. 267, 8 E. C. L. 383.

Statute of limitations.— It has been held that when the last day of grace falls on Sunday, so that a note becomes due and payable on Saturday, the statute of limitations runs from the latter day. Morris *v.* Richards, 45 L. T. Rep. N. S. 210.

Holiday created after execution of note.— Where a statute creating a legal holiday is enacted after the execution of a note, the last day of grace for the payment of which falls on the holiday so created, the note is subject to the rule established by the law merchant or by a statute that where the last day of grace falls on a holiday paper shall be payable on the next secular day preceding. To so hold does not violate the constitutional prohibition of laws impairing the obligation of contracts. Barlow *v.* Gregory, 31 Conn. 261.

69. Wooley *v.* Clements, 11 Ala. 220.

70. See Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893. But the rule that where the last day of grace on a bill or note falls on Sunday it matures on the preceding day is not abrogated by the Nebraska statute (Nebr. Gen. Stat. c. 32, § 8), which specifies certain days as legal holidays, and declares that they shall be treated as Sunday for the purposes of presentment of commercial paper, and of protest, notice, etc., and that when any of such days shall occur on Monday a bill or note which but for the act would fall due on such Monday shall become due on the day thereafter. Capital Nat. Bank *v.* American Exch. Nat. Bank, 51 Nebr. 707, 71 N. W. 743 [*overruling* Hastings First Nat. Bank *v.* McAllister, 33 Nebr. 646, 50 N. W. 1040].

71. Bartlett *v.* Leathers, 84 Me. 241, 24 Atl. 842.

Statutes construed.— A statute providing that paper falling due on Sunday or a legal holiday shall be payable on the preceding day has reference, when days of grace are allowed on the paper, not merely to the nominal day of maturity, but to the last day of grace falling on Sunday or a holiday, and where paper is nominally due on Sunday, but with days of grace on Wednesday, it is due, under such a statute, on Wednesday and not on Tuesday. Bartlett *v.* Leathers, 84 Me. 241, 24 Atl. 842. And where a statute makes paper due on Sunday or a holiday payable on the following day, a note nominally due on Sunday but entitled to grace becomes due on Wednesday and not on Thursday. Roberts *v.* Wold, 61 Minn. 291, 63 N. W. 739, construing

payable at a later day,[72] or simply by entering into a valid contract based upon a sufficient consideration not to require payment for a certain time,[73] and a note may by its own terms provide for its renewal or extension.[74] When a note is given, or afterward if there is a consideration, the parties may agree that the maker shall have the privilege of renewing the note at maturity.[75] If there is an agreement for renewal at the holder's option the exercise of the option must be proved by one who alleges an extension thereby,[76] and he must show performance of all conditions.[77] Some courts have held that an agreement to renew cannot be set up to defeat an action on a note if there has been no renewal.[78]

2. Effect of Extension or Renewal as Between Parties — a. Accrual of Cause of Action. Renewal of a bill or note or extension of the time of payment by a valid agreement between the maker or accepter and the holder postpones the

a Dakota statute. See also Morris *v.* Bailey, 10 S. D. 507, 74 N. W. 443.

72. Gates *v.* Union Bank, 12 Heisk. (Tenn.) 325.

What constitutes renewal see *infra*, VIII, A, 4.

73. Contracts extending time of payment see *infra*, VIII, A, 4.

A covenant by the holder of a note that no action shall be taken by him thereon, and that he shall not be at liberty to prosecute it until the maker thereof shall make default in a certain payment, which by the terms of the agreement containing the covenant is made payable on a day subsequent and fixed, is a covenant to extend the payment of the note until that day. Stein *v.* Steindler, 1 Misc. (N. Y.) 414, 20 N. Y. Suppl. 839, 49 N. Y. St. 450.

74. Kleinsorge *v.* Kleinsorge, 133 Cal. 412, 65 Pac. 876, where a secured note provided: "If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder, until paid; and during such year the maker shall not have the right to pay the same."

75. Cooper *v.* Indian Territory Bank, 4 Okla. 632, 46 Pac. 475; Citizens' Nat. Bank *v.* Piollet, 126 Pa. St. 194, 17 Atl. 603, 12 Am. St. Rep. 860, 4 L. R. A. 190; Solenberger *v.* Gilbert, 86 Va. 778, 11 S. E. 789; Elmore *v.* Hoffman, 6 Wis. 68.

A collateral writing whereby the payee agreed to let the note run until the happening of a certain contingency is admissible to defeat a premature action, as it is part of the original contract. Elmore *v.* Hoffman, 6 Wis. 68.

That an oral contemporaneous promise to renew a note cannot be shown see *infra*, XIV, E [8 Cyc.].

76. California State Bank *v.* Webber, 110 Cal. 538, 42 Pac. 1066. And see Upper Canada Bank *v.* Jones, 1 Ont. Pr. 185; Harper *v.* Paterson, 14 U. C. C. P. 538.

Time of exercising option.— Where there is an agreement to renew on request of the debtor, the request is in time if made before the note matures, suit not having been brought thereon. Hart *v.* Pennsylvania Germicide Co., 19 Phila. (Pa.) 425, 44 Leg. Int. (Pa.) 90.

77. Conditions.— Where the maker of a note before its maturity deposits with the holder the note of a third person as collateral, and it is agreed that his note, when it matures, will be renewed, in the absence of a stipulation as to time of payment of the renewal note, defendant must prove the time fixed and must tender the renewal note, although the holder has previously declared he will not receive it. Glapion *v.* Montamat, 10 La. Ann. 768.

Giving notice.— Under the provision of a note that at its maturity the maker should have the privilege of extending the time of its payment by giving the holder written notice of his intention, the giving of the notice at that time is essential to the right of extension. Houston *v.* Newsome, 82 Tex. 75, 17 S. W. 603.

Time of tender of renewal note.— Where the maker of a note has the privilege of renewing the same at its maturity, he is obliged, if he wishes to avail himself of the privilege, to tender a renewal note at the date of maturity. A tender three weeks after the maturity of the previous note is too late to entitle him to avail himself of the right of renewal. White *v.* Sabiston, 12 Quebec Super. Ct. 345.

Payment of interest.—A promissory note, payable in one year, with interest at four per cent a month, containing the following words after the signature: "With privilege of two years by paying interest annually at four per cent. per month," is for one year, with the right in the maker, in case he pays interest at the end of the first year, to retain the money for the second year, and if he fails so to do, the note becomes due at the end of the first year. Chapin *v.* Murphy, 5 Minn. 474. But where the holder of a note, by a written instrument, agreed that the note should be renewed for a certain length of time if the maker should need that time in which to pay it, and the instrument also stipulated that the interest was to be paid by the maker at every renewal, it was held that the agreement to renew was not conditioned on the payment of the interest by the maker. Solenberger *v.* Gilbert, 86 Va. 778, 11 S. E. 789.

78. Bond *v.* Worley, 26 Mo. 253; Fleury *v.* Roget, 5 Sandf. (N. Y.) 646; Webb *v.* Spicer, 13 Q. B. 886, 7 D. & L. 324, 14 Jur. 33, 19 L. J. Q. B. 34, 66 E. C. L. 886; Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur.

right of action and the commencement of the running of the statute of limitations until expiration of the period for which the extension is granted.[79]

b. Renewal Does Not Extinguish or Change Debt. Where a note is given merely in renewal of another note and not in payment the renewal does not extinguish the original debt or in any way change the debt except by postponing the time of payment, and as a general rule therefore the holder of a renewal note is entitled to the same remedies as if he were proceeding upon the original note.[80] But if a new note is taken in payment the original debt is extinguished and a new

310, 17 L. J. Q. B. 114, 63 E. C. L. 852; Upper Canada Bank *v.* Jones, 1 Ont. Pr. 185.

79. *Alabama.*— Ferguson *v.* Hill, 3 Stew. (Ala.) 485, 21 Am. Dec. 641.

California.— Koutz *v.* Vanclief, 55 Cal. 345, holding that where the maker of a promissory note indorsed upon it: "I hereby renew the within note, and promise to pay the same within two years from this date. The object being to prevent a bar . . . within the next two years," the effect of the renewal was to extend the time of payment two years from the date of such indorsement.

Georgia.— Rodgers *v.* Rosser, 57 Ga. 319.

Illinois.— Culver *v.* Johnson, 90 Ill. 91.

Indiana.— Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316.

Iowa.— Cox *v.* Carrell, 6 Iowa 350.

Kansas.— Royal *v.* Lindsay, 15 Kan. 591; Wellington Nat. Bank *v.* Thomson, 9 Kan. App. 667, 59 Pac. 178.

Maine.— Warren Academy *v.* Starrett, 15 Me. 443. See also Flanders *v.* Barstow, 18 Me. 357, holding that where a mortgage of chattels was conditioned for the payment of two notes at different times, an agreement "to extend the mortgage fifteen or twenty days" gave an extension of the time of payment of each note for the term of twenty days beyond the time they respectively became payable and no further.

Michigan.— Morgan *v.* Butterfield, 3 Mich. 615, holding that an agreement by the payee of a promissory note not to sue the maker until he had exhausted his remedy on certain collaterals is a modification of the contract, and is available by the maker in defense to an action on the note brought by the payee without first having exhausted the collaterals.

New York.—Pearl *v.* Wells, 6 Wend. (N. Y.) 291, 21 Am. Dec. 328, holding that, where the holder of an overdue note, for a valid consideration, agrees not to sue the debtor for a limited time, and in violation of such agreement commences a suit on the note before the expiration of the time agreed on, the debtor cannot sustain an independent action for a violation of such agreement.

Texas.— Dalton *v.* Rainey, 75 Tex. 516, 13 S. W. 34, holding that where the maker, after stating the amount due to date on his overdue note, promised to pay an increased rate of interest if the holder would "extend time for payment of this balance for one year," the extension was for one year from the date of the agreement.

Vermont.— Paddock *v.* Jones, 40 Vt. 474.

Washington.— Commercial Bank *v.* Hart, 10 Wash. 303, 38 Pac. 1114.

England.— Kendrick *v.* Lomax, 2 Cr. & J. 405, 1 L. J. Exch. 145, 2 Tyrw. 438.

Canada.— Britton *v.* Fisher, 26 U. C. Q. B. 338.

Statute of limitations.—An indorsement on a note, payable with interest, made several years after its maturity, stating that the maker renews the promise, is a renewal against an action on which the statute of limitations commences to run at the date of the indorsement. Warren Academy *v.* Starrett, 15 Me. 443.

80. *Kentucky.*— Bank of America *v.* McNeil, 10 Bush (Ky.) 54; Lowry *v.* Fisher, 2 Bush (Ky.) 70, 92 Am. Dec. 475. See also Bright *v.* First Nat. Bank, 106 Ky. 702, 21 Ky. L. Rep. 313, 51 S. W. 442, holding that where two out of the three makers of a note, when sued thereon, set up as a defense that the principals signed their names thereto as sureties, without authority, in renewal of a note which they admit signing, plaintiff may amend his petition so as to declare on the original note and take judgment thereon.

Maine.— Miller *v.* Hilton, 88 Me. 429, 34 Atl. 266; Howard *v.* Hinckley, etc., Iron Co., 64 Me. 93.

Minnesota.— Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

Mississippi.— Wade *v.* Thrasher, 10 Sm. & M. (Miss.) 358.

Missouri.— Christian *v.* Newberry, 61 Mo. 446.

New Mexico.— Albuquerque First Nat. Bank *v.* Lesser, 9 N. M. 604, 58 Pac. 345.

New York.— Jagger Iron Co. *v.* Walker, 76 N. Y. 521; Twelfth Ward Bank *v.* Samuels, 71 N. Y. App. Div. 168, 75 N. Y. Suppl. 561; Holland Trust Co. *v.* Waddell, 75 Hun (N. Y.) 104, 26 N. Y. Suppl. 980, 56 N. Y. St. 868.

North Carolina.— Kidder *v.* McIlhenny, 81 N. C. 123.

Pennsylvania.— Lytle's Appeal, 36 Pa. St. 131.

United States.— McLaughlin *v.* Potomac Bank, 7 How. (U. S.) 220, 12 L. ed. 675.

Canada.— Noad *v.* Bouchard, 10 L. C. Rep. 476; Brown *v.* Mailloux, 9 L. C. Rep. 252. See also Commercial Bank *v.* Williston, 12 N. Brunsw. 283. *Compare* Brewster *v.* Chapman, 19 L. C. Jur. 301.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 355, 357.

Where the indorser of a note, on the representations of the maker that it has been paid, indorses another note jointly with him, which is turned over to the bank discounting the first note for an extension of the amount

debt created.[81] Whether a note is paid by the taking of a new note or merely renewed depends upon the intention.[82]

e. Conditional Agreement For Extension. If an agreement extending the time of payment of paper is conditional it is no defense in an action on the instrument at maturity, unless the condition is performed or fulfilled.[83] Where a note payable at a fixed time provides in an indorsement thereon that the maker may use the principal after maturity by payment of interest semiannually, it becomes due and payable whenever the maker fails to pay the semiannual interest.[84]

d. On Negotiability. If a note is renewed at or after its maturity by giving a new note payable at a future day, a transferee of the renewal note before the day fixed for payment is a transferee before maturity.[85] If, however, a note is extended by a mere indorsement thereon after its maturity, the indorsement does not have the effect of renewing it so as to invest it with the negotiability it possessed before its original maturity.[86]

e. Effect of Stipulations. Where a note by its terms provides for its own renewal on certain conditions, and such conditions arise, so that it becomes renewed, the renewal also renews stipulations therein, as a stipulation that the

remaining due on the first note, in whose retention by the bank such indorser afterward acquiesces, the second note does not extinguish his liability on the first, but he remains bound on both. Woods *v.* Halsey, 42 La. Ann. 245, 7 So. 451.

Renewal after dissolution of partnership.— In an action against the indorser of a promissory note, made in the name of a firm, it is not material that the partnership of the makers had been dissolved before the making of the note, it being the renewal of a note given during the existence of the partnership. Greatrake *v.* Brown, 2 Cranch C. C. (U. S.) 541, 10 Fed. Cas. No. 5,743.

81. Smith *v.* Bynum, 92 N. C. 108; Merriman *v.* Social Mfg. Co., 12 R. I. 175; Williams *v.* Hart, 2 Hill (S. C.) 483.

Payment by negotiable instrument see PAYMENT.

82. Flanagin *v.* Hambleton, 54 Md. 222; McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232.

Payment or renewal see *infra*, VIII, A, 4.

83. Costello *v.* Wilhelm, 13 Kan. 229, holding that in an action on a note by the payee against the maker an answer alleging an agreement by plaintiff that the time of payment at maturity should be extended if payment at maturity should not be convenient and practicable, without alleging that payment at maturity was either inconvenient or impracticable, did not state facts sufficient to constitute a defense. And see *infra*, VIII, A, 3, c.

Payment of interest and giving security.— Where it is agreed that the time of payment of a draft shall be extended if the interest is paid in advance, and the draft secured, a mere letter in response to a notice to pay, stating that the debtor is relying on the agreement for an extension of time, and is ready to comply with its terms, without any payment of the interest or giving of security, is not sufficient to entitle the debtor to the extension. Williams *v.* Wright, 69 Ga. 759.

Provision for giving mortgage.—A contract to extend the time of payment of notes upon giving other notes secured by mortgage on good real estate is no defense to a suit on the original notes, where the mortgage was refused when tendered on the ground that the land was of no value, and that there was no title in the mortgagor, and these objections are not shown to have been unfounded. Nispel *v.* Laparle, 74 Ill. 306.

Where notes have been given for a patent right a subsequent independent oral agreement to extend the time of payment of the notes until the grantee can make the money out of the patent right is a defense in an action on the note, only upon proof by the grantee that he has used due diligence to make the money or that such diligence would be useless. Ockington *v.* Law, 66 Me. 551.

Parol evidence is not admissible to show that an extension or renewal of a note by a written indorsement thereon containing no condition was in fact conditional. Warren Academy *v.* Starrett, 15 Me. 443.

84. Oskaloosa College *v.* Hickok, 46 Iowa 237, holding also that if after such default the maker pays the interest, he is not for that reason entitled to an extension of the time of payment, the payment being merely a partial payment of the note.

85. Davenport *v.* Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467; Buchanan *v.* Drovers' Nat. Bank, 55 Fed. 223, 6 U. S. App. 566, 5 C. C. A. 83.

86. A purchaser of such a note therefore after its original maturity, although before the time to which it is extended by the indorsement, is a purchaser after maturity, and takes subject to equities between the prior parties. Sagory *v.* Metropolitan Bank, 42 La. Ann. 627, 7 So. 633; Marcal *v.* Melliet, 18 La. Ann. 223.

Extension indorsed before maturity.— It is otherwise if an indorsement extending the time of payment of a note is made thereon before its maturity. An indorsement on a note before its day of payment postponing its maturity must be considered as incorporated into it and made part of it, so as to make the

payee may declare the principal due on default in the payment of interest;[87] and where a note is extended by a new agreement, a stipulation as to maturity on default in the payment of interest applies during the new term, unless excluded by the agreement.[88] The validity and effect of provisions contained in a renewal note, and not in the original note, is to be determined as of the time when the renewal note is given.[89]

f. Effect as to Securities and Liens. Extension of the time of payment of a note or the surrender of a note at maturity and the taking of a new note, not in payment but in renewal merely, since it does not extinguish the original debt, does not release collateral security pledged for the payment of the original debt[90] or affect the holder's right to the benefit of a deed of trust or real-estate or chattel mortgage given to secure the debt,[91] a vendor's lien on land for the price of which

note payable at the date fixed by the indorsement, as though the date had been originally written in the note. Sagory *v.* Metropolitan Bank, 42 La. Ann. 627, 7 So. 633. See also Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418.

Effect on negotiability of provisions for extension or renewal see *supra*, I, C, 1, f, (I), (D).

87. Stipulation for maturity on non-payment of interest.— Where a note secured by a mortgage provided that if the interest should not be paid as stipulated in the note the whole note might at the option of the holder be treated as due and collectable, and also provided: "If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder, until paid, and during such year the maker shall not have the right to pay the same," it was held that renewal of the note by its terms renewed the stipulation allowing the holder to declare the whole due for non-payment of interest, and that where interest was in default before the expiration of the renewed term, an action might be brought by the payee to foreclose the mortgage. Kleinsorge *v.* Kleinsorge, 133 Cal. 412, 65 Pac. 876.

88. Heath *v.* Achey, 96 Ga. 438, 23 S. E. 396. In this case it appeared that before the maturity of a note the maker signed an application to a third person to obtain an extension, the application identifying the note, and that after the granting of the extension the maker gave the payee other notes for the annual interest to accrue, which also identified the main note. It was held that the main note was renewed and the maker's original liability thereon extended on the terms therein expressed, one of which was that upon default in the payment of any of the interest notes within thirty days after maturity, the principal should become due at the option of the holder.

89. A note stipulating for attorney's fees given in renewal of a note for the purchase-price of property containing no such stipulation, and after such property has been set aside as the homestead of the purchaser, creates no lien on the property for such fees, although it would have been otherwise if such a stipulation had been inserted in the original note. Bullard *v.* Mayne, (Tex. Civ. App. 1899) 49 S. W. 522.

90. *Kentucky.*— Bank of America *v.* McNeil, 10 Bush (Ky.) 54.

Maryland.— Flanagin *v.* Hambleton, 54 Md. 222, holding also that whether a note is paid or merely renewed depends upon the intention.

Minnesota.— Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

New York.— Twelfth Ward Bank *v.* Samuels, 71 N. Y. App. Div. 168, 75 N. Y. Suppl. 561; Holland Trust Co. *v.* Waddell, 75 Hun (N. Y.) 104, 26 N. Y. Suppl. 980, 66 N. Y. St. 868.

South Carolina.— Allston *v.* Allston, 2 Hill (S. C.) 362.

91. *California.*— California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38.

Colorado.— Collins *v.* Dawley, 4 Colo. 138, 34 Am. Rep. 72.

District of Columbia.— McNamara *v.* Condon, 2 MacArthur (D. C.) 364.

Kentucky.— Moore *v.* Thompson, 100 Ky. 231, 18 Ky. L. Rep. 681, 37 S. W. 1042; Burdett *v.* Clay, 8 B. Mon. (Ky.) 287. And see Funk *v.* Proctor, 22 Ky. L. Rep. 1728, 61 S. W. 286, holding that the mortgagee has the burden of proving that the note was given in renewal.

Louisiana.— Aillet *v.* Woods, 24 La. Ann. 193.

Maine.— Buck *v.* Wood, 85 Me. 204, 27 Atl. 103.

Michigan.— McMorran *v.* Murphy, 68 Mich. 246, 36 N. W. 60.

Mississippi.— Cansler *v.* Sallis, 54 Miss. 446; Howell *v.* Bush, 54 Miss. 437.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96; Christian *v.* Newberry, 61 Mo. 446; Lippold *v.* Held, 58 Mo. 213.

North Carolina.— Barrington *v.* Skinner, 117 N. C. 47, 23 S. E. 90; Kidder *v.* McIlhenny, 81 N. C. 123; Hyman *v.* Devereux, 63 N. C. 624.

Rhode Island.— Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531.

South Carolina.— Allston *v.* Allston, 2 Hill (S. C.) 362.

See 7 Cent. Dig. tit. "Bills and Notes," § 357.

Novation.— It is otherwise of course where there is a novation and a distinct relinquishment of the security, by taking a new note and mortgage. Smith *v.* Bynum, 92 N. C. 108.

the original note was given,[92] or a seller's reservation of title until payment on a conditional sale of goods.[93]

g. Right to Attack Fraudulent Conveyances. The holder of a renewal note is entitled to the same remedies against a fraudulent conveyance of property by the debtor as if he were proceeding upon the original note.[94]

h. Defenses Against Renewal Notes — (i) *In General.* As between the original parties, and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which touch the consideration of the original note,[95] as want or failure of consideration,[96] fraud,[97] usury, or other illegality.[98] This does not apply, however, where a note is taken in payment and

92. Honore *v.* Bakewell, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; Dalton *v.* Rainey, 75 Tex. 516, 13 S. W. 34. See also Vendor and Purchaser.

93. Barrington *v.* Skinner, 117 N. C. 47, 23 S. E. 90, holding that where a person sells goods conditionally, taking "rent" notes in payment, and reserving title until payment in full, the agreement being properly registered as required by statute, the seller does not lose the security given him by the reservation of title by renewing the notes, but "the new notes retain the same security as the old ones." *Compare* McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232. See also Sales.

94. In other words a fraudulent transfer of property by the debtor after the making and delivery of a note may be attacked and the property reached to satisfy a renewal note given after the transfer.

Alabama.— Moore *v.* Spence, 6 Ala. 506.

Indiana.— Stout *v.* Stout, 77 Ind. 537.

Iowa.— See Gardner *v.* Baker, 25 Iowa 343.

Kentucky.— Lowry *v.* Fisher, 2 Bush (Ky.) 70, 92 Am. Dec. 475; Buffington *v.* Mosby, 17 Ky. L. Rep. 1307, 34 S. W. 704.

Maine.— Miller *v.* Hilton, 88 Me. 429, 34 Atl. 266.

Mississippi.— Thomson *v.* Hester, 55 Miss. 656.

New Mexico.— Albuquerque First Nat. Bank *v.* McClellan, 9 N. M. 636, 58 Pac. 347; Albuquerque First Nat. Bank *v.* Lesser, 9 N. M. 604, 58 Pac. 345.

Tennessee.— Trezevant *v.* Terrell, 96 Tenn. 528, 33 S. W. 109.

United States.— McLaughlin *v.* Potomac Bank, 7 How. (U. S.) 220, 12 L. ed. 675; Lee *v.* Hollister, 5 Fed. 752.

And see Fraudulent Conveyances.

95. Highbaugh *v.* Hubbard, 6 Ky. L. Rep. 511.

Renewal of note given for patent right.— Where a note given for the purchase-price of a patent right, and bearing the words "given for a patent right," is afterward surrendered and new notes taken in lieu thereof not bearing such words, the new notes are within a statute (2 Bates Anno. Stat. Ohio (1900), § 3178) providing that a promissory note, the consideration for which consists in whole or in part of the right to make, use, or vend a patent invention, shall have written or printed thereon the words "given for a patent right," and shall be subject to defenses in the hands of purchasers, and that it shall be so subject in the hands of a purchaser with knowledge of its consideration, although such words are omitted. Dulong *v.* Barnes, 45 Ohio St. 237, 12 N. E. 735.

Material alteration.— A note given in renewal of a prior note, which had been avoided by a material alteration thereof without the consent of the makers, some of whom were sureties, is invalid as to such sureties, where there is no consideration to them for the making of the second note. Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624.

96. *Georgia.*— Dalton First Nat. Bank *v.* Black, 108 Ga. 538, 34 S. E. 143.

Massachusetts.— Hooker *v.* Hubbard, 102 Mass. 239; Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21.

Michigan.— Hunt *v.* Rumsey, 83 Mich. 136, 47 N. W. 105, 9 L. R. A. 674.

Missouri.— Murphy *v.* Gay, 37 Mo. 535.

New York.— Earle *v.* Robinson, 91 Hun (N. Y.) 363, 36 N. Y. Suppl. 178, 70 N. Y. St. 831.

Rhode Island.— Mason *v.* Jordan, 13 R. I. 193.

West Virginia.— Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

New consideration.— This does not apply of course where there is a new consideration. Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21.

97. Kelly *v.* Allen, 34 Ala. 663; Hunt *v.* Rumsey, 83 Mich. 136, 47 N. W. 105, 9 L. R. A. 674; Brown *v.* James, 2 N. Y. App. Div. 105, 37 N. Y. Suppl. 529, 73 N. Y. St. 144; Strickland *v.* Braybill, 97 Va. 602, 34 S. E. 475. And see Sawyer *v.* Wiswell, 9 Allen (Mass.) 39.

98. Wegner *v.* Biering, 65 Tex. 506, note given in consideration of an agreement not to prosecute for a crime.

Usury.— *Alabama.*— Masterson *v.* Grubbs, 70 Ala. 406; Eslava *v.* Crampton, 61 Ala. 507; King *v.* Perry Ins., etc., Co., 57 Ala. 118.

Kentucky.— Sydner *v.* Mt. Sterling Nat. Bank, 94 Ky. 231, 15 Ky. L. Rep. 4, 21 S. W. 1050.

Massachusetts.— Dewey *v.* Bell, 5 Allen (Mass.) 165.

Mississippi.— Union Nat. Bank *v.* Fraser, 63 Miss. 231.

Nebraska.— Farmers' Bank *v.* Oliver, 55 Nebr. 774, 76 N. W. 449; McDonald *v.* Beer, 42 Nebr. 437, 60 N. W. 868; McDonald *v.* Aufdengarten, 41 Nebr. 40, 59 N. W. 762.

not in renewal.[99] Nor does it apply in the case of a renewal, where the defense is such that it can be and is cured by the renewal.[1]

(II) *Bona Fide Holders.* Where commercial paper is usurious or other-

New York.— Auburn Nat. Bank *v.* Lewis, 75 N. Y. 516, 31 Am. Rep. 484 [*reversing* 10 Hun (N. Y.) 468]; Feldman *v.* McGraw, 1 N. Y. App. Div. 574, 37 N. Y. Suppl. 434.

Pennsylvania.— Schutt *v.* Evans, 109 Pa. St. 625, 1 Atl. 76.

See also USURY.

Gambling consideration.— Kuhl *v.* M. Gally Universal Press Co., 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135; Kain *v.* Bare, 4 Ind. App. 440, 31 N. E. 205; Martin *v.* Terrell, 12 Sm. & M. (Miss.) 571; Seeligson *v.* Lewis, 65 Tex. 215, 57 Am. Rep. 593. And see Swinney *v.* Edwards, 8 Wyo. 54, 55 Pac. 306, 80 Am. St. Rep. 916. And see, generally, GAMING.

Note for intoxicating liquors sold in violation of law. Holden *v.* Cosgrove, 12 Gray (Mass.) 216.

Note for Confederate money.— Scudder *v.* Thomas, 35 Ga. 364, 21 Fed. Cas. No. 12,567.

99. Dewey *v.* Bell, 5 Allen (Mass.) 165, holding that where the indorser of a note which had been discounted at a bank assisted the maker to raise money to pay it at its maturity by indorsing a new note and disposing of it for him, and delivered to him the money so raised, which was applied in payment of the first note, the second note was not a renewal of the first and was not affected by usury reserved or taken upon the first by the indorser. See also Fitzpatrick *v.* Apperson, 79 Ky. 272; Hinkson *v.* Wigglesworth, 20 Ky. L. Rep. 1161, 48 S. W. 1079.

1. **Knowledge of defense at the time of renewal.**— One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or false representations by the payee, etc., waives such defense, and cannot set it up to defeat or reduce a recovery on the renewal note.

Alabama.— Cameron *v.* Nall, 3 Ala. 158.

Arkansas.— Tenny *v.* Porter, 61 Ark. 329, 33 S. W. 211.

Georgia.— Hogan *v.* Brown, 112 Ga. 662, 37 S. E. 880, holding that one who executed and delivered a note in renewal of a balance due upon a like note previously given for the price of certain property, and who at the time of giving the second note knew that the property was, when purchased, defective or worthless, could not set up a failure of consideration in an action on the renewal notes. See also Atlanta Consol. Bottling Co. *v.* Hutchinson, 109 Ga. 550, 35 S. E. 124; Mortford *v.* American Guano Co., 108 Ga. 12, 33 S. E. 636; American Car Co. *v.* Atlanta St. R. Co., 100 Ga. 254, 28 S. E. 40. *Compare* Pearson *v.* Brown, 105 Ga. 802, 31 S. E. 746.

Idaho.— Smith *v.* Smith, (Ida. 1894) 35 Pac. 697.

Indiana.— Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 18 N. E. 56; Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360 (holding, however, that where the holder of a note gratuitously permits it to run some time after maturity witnout attempting to collect it, and then agrees with the maker "to wait" until the latter can collect money to satisfy it, but does not receive any co ideration therefor and does not change his position in any way, the maker is not thereby estopped from setting up any defense then existing or thereafter arising); Doherty *v.* Bell, 55 Ind. 205; Jaqua *v.* Montgomery, 33 Ind. 36, 5 Am. Rep. 168; McCormick Harvesting Mach. Co. *v.* Yoeman, 26 Ind. App. 415, 59 N. E. 1069; Long *v.* Johnson, 15 Ind. App. 498, 44 N. E. 552.

Iowa.— Keyes *v.* Mann, 63 Iowa 560, 19 N. W. 666.

Kansas.— Calvin *v.* Sterritt, 41 Kan. 215, 21 Pac. 103.

Massachusetts.— Sawyer *v.* Wiswell, 9 Allen (Mass.) 39.

South Carolina.— Grier *v.* Wallace, 7 S. C. 182.

Tennessee.— Griffith *v.* Trabue, 11 Heisk. (Tenn.) 645; Gill *v.* Morris, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744; Torbett *v.* Worthy, 1 Heisk. (Tenn.) 107.

Virginia.— Keckley *v.* Union Bank, 79 Va. 458.

See 7 Cent. Dig. tit. "Bills and Notes," § 356.

Fraud not waived.— But the maker and surety on a note given for a patent right do not waive the defense that the note was induced by false representations of the payee, by giving a renewal note, where it is given in expectation that the payee is about to sell the patent right to a corporation and thus relieve them. Strickland *v.* Graybill, 97 Va. 602, 34 S. E. 475.

Where a note of a corporation for a valid consideration is invalid by reason of a defect in its execution, or for want of authority of the officer executing it, such invalidity does not attach to regularly executed notes given in renewal thereof. Smith *v.* New Hartford Water Co., 73 Conn. 626, 48 Atl. 754. And where a note of a corporation is invalid because the authority of the persons authorizing its execution, as directors, to act in such capacity is defective, a subsequent renewal of the note by a regularly organized board is a ratification of the former note. Smith *v.* New Hartford Water Co., 73 Conn. 626, 48 Atl. 754.

Usury.— Where the statute in a particular jurisdiction does not render a note absolutely void for usury, but provides that a usurious contract cannot be enforced except as to the principal, the illegal taint of usury in a note may be eliminated by a renewal of the note after it had passed into the hands of a *bona fide* purchaser or by a reformation of the contract between the original parties, remitting the usury and retaining only legal interest. Masterson *v.* Grubbs, 70 Ala. 406.

wise illegal, or subject to the defense of fraud or want or failure of consideration, or other defenses, but has come into the hands of a *bona fide* purchaser for value, new paper executed to him in renewal of the same is valid.[2] Where renewal paper issued to the original payee is transferred before maturity to a *bona fide* purchaser for value it is not subject to defenses which might have been set up against the original payee.[3]

3. Effect of Extension or Renewal as Discharge of Other Parties — a. In General. A definite and binding agreement between the holder and the maker or accepter of commercial paper extending the time of payment will discharge a surety thereon,[4] including a joint maker who is in fact a surety or accommodation

2. *Alabama.*— Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522; Mitchell *v.* McCullough, 59 Ala. 179.

Kentucky.— Wooldridge *v.* Cates, 2 J. J. Marsh. (Ky.) 221.

Maryland.— Hopkins *v.* Boyd, 11 Md. 107.

New York.— Goodwin *v.* Conklin, 85 N. Y. 21; Seventh Ward Nat. Bank *v.* Newbold, 2 N. Y. City Ct. 125.

North Carolina.— Calvert *v.* Williams, 64 N. C. 168.

Tennessee.— Torbett *v.* Worthy, 1 Heisk. (Tenn.) 107.

Virginia.— Drake *v.* Chandler, 18 Gratt. (Va.) 909, 98 Am. Dec. 762.

England.— Cuthbert *v.* Haley, 8 T. R. 390.

Unauthorized note executed by partner.— One who discounts a note of a firm before maturity for value, without notice that it was made by one of two partners without his copartner's knowledge, and for a private transaction, and who, after receiving notice of these facts from the maker, and at his request, takes new notes signed in the firm-name in renewal of this note, which is thereupon surrendered, takes a good title by his first note, which is not injured by the renewal. Hopkins *v.* Boyd, 11 Md. 107.

3. Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522; Davenport *v.* Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467 (holding that where a note accepted by a bank in renewal of a former note is rediscounted for it by others, the latter are *bona fide* holders thereof, although the original note was not surrendered and the new note was not entered on the books of the bank); Buchanan *v.* Drovers' Nat. Bank, 55 Fed. 223, 6 U. S. App. 566, 5 C. C. A. 83.

Defenses against bona fide purchasers see, generally, *infra*, XIV, B [8 Cyc.].

4. *Alabama.*— Haden *v.* Brown, 18 Ala. 641; Inge *v.* Mobile Branch Bank, 8 Port. (Ala.) 108.

Arkansas.— Ferguson *v.* State Bank, 8 Ark. 416.

Georgia.— Parmelee *v.* Williams, 72 Ga. 42.

Illinois.— Crossman *v.* Wohlleben, 90 Ill. 537; Myers *v.* Fairbury First Nat. Bank, 78 Ill. 257; Flynn *v.* Mudd, 27 Ill. 323; Warner *v.* Campbell, 26 Ill. 282; Waters *v.* Simpson, 7 Ill. 570; Reynolds *v.* Barnard, 36 Ill. App. 218.

Indiana.— Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Pierce *v.* Goldsberry, 31 Ind. 52.

Iowa.— Citizens' Bank *v.* Barnes, 70 Iowa 412, 30 N. W. 857; Lambert *v.* Shittler, 62 Iowa 72, 17 N. W. 187.

Kansas.— Horton Bank *v.* Brooks, 64 Kan. 285, 67 Pac. 860; Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

Kentucky.—Alley *v.* Hopkins, 98 Ky. 668, 17 Ky. L. Rep. 1227, 34 S. W. 13, 56 Am. St. Rep. 382; Norton *v.* Roberts, 4 T. B. Mon. (Ky.) 491.

Maine.— Berry *v.* Pullen, 69 Me. 101, 31 Am. Rep. 248; Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673; Mariners' Bank *v.* Abbott, 28 Me. 280; Kennebec Bank *v.* Tuckerman, 5 Me. 130, 17 Am. Dec. 209.

Massachusetts.— Brooks *v.* Wright, 13 Allen (Mass.) 72; Gifford *v.* Allen, 3 Metc. (Mass.) 255; Greely *v.* Dow, 2 Metc. (Mass.) 176.

Michigan.— Barron *v.* Cady, 40 Mich. 259; Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504.

Minnesota.— Campion *v.* Whitney, 30 Minn. 177, 14 N. W. 806; Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666.

Mississippi.— Brown *v.* Prophit, 53 Miss. 649.

Missouri.— St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Commercial Bank *v.* Wood, 56 Mo. App. 214.

Montana.— Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

New Hampshire.—Wright *v.* Bartlett, 43 N. H. 548; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

New York.— Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874; Hubbard *v.* Gurney, 64 N. Y. 457; Scoville *v.* Landon, 50 N. Y. 686.

North Carolina.— Canton Chemical Co. *v.* Pegram, 112 N. C. 614, 17 S. E. 298; Forbes *v.* Sheppard, 98 N. C. 111, 3 S. E. 817.

Ohio.— McComb *v.* Kittridge, 14 Ohio 348.

Pennsylvania.— Calvert *v.* Good, 95 Pa. St. 65; Henderson *v.* Ardley, 36 Pa. St. 449.

Tennessee.— Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301; White *v.* Summers, 1 Baxt. (Tenn.) 154; Lea *v.* Dozier, 10 Humphr. (Tenn.) 447.

Texas.— Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118.

Vermont.— People's Bank *v.* Pearsons, 30 Vt. 711.

Virginia.—Armistead *v.* Ward, 2 Patt. & H. (Va.) 504.

maker, to the knowledge of the holder,[5] or a guarantor,[6] unless he consents to the extension or is estopped,[7] or waives his right to set up a discharge by a binding agreement after the extension.[8] Subject to the same qualifications, extension of the time of payment of a bill or note will operate as a discharge of indorsers who do not consent,[9] whether the indorsement was merely for accommodation or for

Wyoming.—Lawrence *v.* Thorn, 9 Wyo. 414, 64 Pac. 339.

England.— Oriental Financial Corp. *v.* Overend, L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813; Philpot *v.* Briant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754, 29 Rev. Rep. 710.

Canada.— Ryan *v.* McKerrall, 15 Ont. 460; Devanney *v.* Brownlee, 8 Ont. App. 355; Shepley *v.* Hurd, 3 Ont. App. 549; Upper Canada Bank *v.* Ockerman, 15 U. C. C. P. 363 (holding that an accommodation maker of a note, known to be such by the holder, is discharged by an extension of time granted to an indorser who was the real principal debtor); Perley *v.* Loney, 17 U. C. Q. B. 279.

And see PRINCIPAL AND SURETY.

5. *Georgia.*— Hall *v.* Capital Bank, 71 Ga. 715.

Michigan.—McInerney *v.* Lindsay, 97 Mich. 238, 56 N. W. 603; Barron *v.* Cady, 40 Mich. 259.

Montana.— Smith *v.* Taylor, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

New Hampshire.—Wright *v.* Bartlett, 43 N. H. 548.

Tennessee.— Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301.

Virginia.— Bennett *v.* Maule, Gilm. (Va.) 305.

United States.— Gordon *v.* Chattanooga Third Nat. Bank, 144 U. S. 97, 12 S. Ct. 657, 36 L. ed. 360; American, etc., Mortg., etc., Corp. *v.* Marquam, 62 Fed. 960; *In re* Goodwin, 5 Dill. (U. S.) 140, 10 Fed. Cas. No. 5,549, 17 Nat. Bankr. Reg. 257.

England.— Laxton *v.* Peat, 2 Campb. 185. But see Fentum *v.* Pocock, 1 Marsh. 14, 5 Taunt. 192, 1 E. C. L. 105.

Canada.— Perley *v.* Loney, 17 U. C. Q. B. 279. But see Upper Canada Bank *v.* Thomas, 11 U. C. C. P. 515; Nafis *v.* Soules, 2 U. C. C. P. 412; Davidson *v.* Bartlett, 1 U. C. Q. B. 50.

See 7 Cent. Dig. tit. "Bills and Notes," § 358.

Knowledge of suretyship.— In order that a person signing a note, apparently as a joint maker and principal, but in reality as a surety, may be discharged by an agreement between the holder and the other maker extending the time of payment, it is essential that the holder shall know that he occupies the position of surety, or facts which will charge him with such knowledge. Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677. See also Merchants' Trust, etc., Co. *v.* Jones, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412; Clopper *v.* Union Bank, 7 Harr. & J. (Md.) 92, 16 Am. Dec. 294; Anthony *v.* Fritts, 45 N. J. L. 1; Delaware County Trust, etc., Ins. Co. *v.* Haser, 199 Pa. St. 17, 48 Atl. 694, 85 Am. St. Rep. 763. But it has been held that when a person takes a mortgage on the separate property of a married woman to secure a note executed by her and her husband, knowing that she is married and that the property is her separate property, he is bound to inquire as to the consideration, and unless misled by her is chargeable with knowledge that she is merely surety for her husband. Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

6. Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504; Hart *v.* Hudson, 6 Duer (N. Y.) 294; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484. And see, generally, GUARANTY.

7. See *infra*, VIII, A, 3, f.

8. See *infra*, VIII, A, 3, g.

9. *Alabama.*—Inge *v.* Mobile Branch Bank, 8 Port. (Ala.) 108.

Arkansas.— Hazard *v.* White, 26 Ark. 155.

California.— Smith *v.* Pearson, 52 Cal. 339.

Connecticut.— Lockwood *v.* Crawford, 18 Conn. 361.

Delaware.— McDowell *v.* Wilmington, etc., Bank, 1 Harr. (Del.) 369.

Florida.— Fridenberg *v.* Robinson, 14 Fla. 130.

Georgia.— Tanner *v.* Gude, 100 Ga. 157, 27 S. E. 938; Randolph *v.* Fleming, 59 Ga. 776; Rhodes *v.* Hart, 51 Ga. 320; Scott *v.* Saffold, 37 Ga. 384; Stallings *v.* Johnson, 27 Ga. 564.

Indiana.— State Bank *v.* Wymond, 7 Blackf. (Ind.) 363.

Kansas.— Horton Bank *v.* Brooks, 64 Kan. 285, 67 Pac. 860.

Louisiana.— Shaw *v.* Nolan, 8 La. Ann. 25; Freeman *v.* Profilet, 11 Rob. (La.) 33; Gustine *v.* Union Bank, 10 Rob. (La.) 412; McGuire *v.* Woolridge, 6 Rob. (La.) 47; Calliham *v.* Tanner, 3 Rob. (La.) 299; Hine *v.* Bailey, 16 La. 213, 35 Am. Dec. 214; Nolte *v.* His Creditors, 7 Mart. N. S. (La.) 16; Millaudon *v.* Arnous, 3 Mart. N. S. (La.) 596. *Compare* Williams *v.* Theodore, 34 La. Ann. 89, which is apparently to the contrary, but which was probably a case of mere indulgence without any binding agreement for delay.

Maine.— Pierce *v.* Whitney, 22 Me. 113. *Compare*, however, Merchants' Trust, etc., Co. *v.* Jones, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412, holding that the rule does not apply to one who signs a note by indorsement at its inception and who is therefore liable as a maker and not merely as indorser.

Massachusetts.— Veazie *v.* Carr, 3 Allen (Mass.) 14.

Minnesota.— Moore *v.* Folsom, 14 Minn. 340, 100 Am. Dec. 227.

Mississippi.— Rupert *v.* Grant, 6 Sm. & M.

value, for in either case they are in the position of sureties.[10] An extension of the time of payment of a draft or bill of exchange will discharge the drawer if he does not consent.[11] The general rule is that granting time to any of the

(Miss.) 433. See also Timberlake *v.* Thayer, 71 Miss. 279, 14 So. 446, 24 L. R. A. 231, holding that where the purchaser of an outstanding note contracts with the maker that the latter shall render personal service for a specified time in payment, an extension being thus granted, an indorser not consenting thereto is released, and that the subsequent breach of such contract of service cannot revive the obligation of the indorser.

Missouri.— St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517; Globe Mut. Ins. Co. *v.* Carson, 31 Mo. 218; Smith *v.* Warren, 88 Mo. App. 285; Noll *v.* Oberhillmann, 20 Mo. App. 336.

Nebraska.— Kittle *v.* Wilson, 7 Nebr. 76.

New Hampshire.— Perry *v.* Armstrong, 39 N. H. 583; Woodman *v.* Eastman, 10 N. H. 359.

New Jersey.— Gregory *v.* Solomon, 19 N. J. L. 112; Martin *v.* Bell, 18 N. J. L. 167.

New York.—Greene *v.* Bates, 74 N. Y. 333; Pomeroy *v.* Tanner, 70 N. Y. 547; Cary *v.* White, 52 N. Y. 138; Scoville *v.* Landon, 50 N. Y. 686; Parmelee *v.* Thompson, 45 N. Y. 58, 6 Am. Rep. 33; Place *v.* McIlvain, 38 N. Y. 96, 97 Am. Dec. 777 [*affirming* 1 Daly (N. Y.) 266]; Beard *v.* Root, 4 Hun (N. Y.) 356; Dorlon *v.* Christie, 39 Barb. (N. Y.) 610; Eisner *v.* Keller, 3 Daly (N. Y.) 485; Stein *v.* Steindler, 1 Misc. (N. Y.) 414, 20 N. Y. Suppl. 839, 49 N. Y. St. 450; Myers *v.* Welles, 5 Hill (N. Y.) 463; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194; Hubbly *v.* Brown, 16 Johns. (N. Y.) 70.

North Carolina.— Charlotte First Nat. Bank *v.* Limeburger, 83 N. C. 454, 35 Am. Rep. 582.

Ohio.— Duble *v.* Cincinnati, etc., R. Co., 3 Ohio Dec. (Reprint) 346.

Pennsylvania.— *In re* Bishop, 195 Pa. St. 85, 45 Atl. 582; Siebeneck *v.* Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; Hagey *v.* Hill, 75 Pa. St. 108, 15 Am. Rep. 583; Walters *v.* Swallow, 6 Whart. (Pa.) 446; Okie *v.* Spencer, 2 Whart. (Pa.) 253, 30 Am. Dec. 251; Slaymaker *v.* Gundacker, 10 Serg. & R. (Pa.) 75; Robertson *v.* Vogle, 1 Dall. (Pa.) 252, 1 L. ed. 123.

Rhode Island.— Bacon *v.* Harris, 15 R. I. 599, 10 Atl. 647.

South Carolina.— Sharpe *v.* Bingley, 1 Mill (S. C.) 373, 12 Am. Dec. 643; Moodie *v.* Morrall, 1 Mill (S. C.) 367; Kiddell *v.* Ford, 2 Treadw. (S. C.) 678; Fiddy *v.* Campbell, 2 Brev. (S. C.) 21; Shirtliffe *v.* Davidson, 1 Bay (S. C.) 466; Scarborough *v.* Harris, 1 Bay (S. C.) 177, 1 Am. Dec. 609.

Tennessee.— Robertson *v.* Allen, 3 Baxt. (Tenn.) 233; Union Bank *v.* McClung, 9 Humphr. (Tenn.) 98; Hill *v.* Bostick, 10 Yerg. (Tenn.) 410.

Vermont.— Morse *v.* Huntington, 40 Vt. 488.

Virginia.— State Sav. Bank *v.* Baker, 93 Va. 510, 25 S. E. 550; Stuart *v.* Lancaster, 84 Va. 772, 6 S. E. 139; Dey *v.* Martin, 78 Va. 1.

West Virginia.— Shields *v.* Reynolds, 9 W. Va. 483.

Wisconsin.— Hamilton *v.* Pasuty, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866.

United States.— Eldrege *v.* Chacon, Crabbe (U. S.) 296, 8 Fed. Cas. No. 4,329; White *v.* Burns, 5 Cranch C. C. (U. S.) 123, 29 Fed. Cas. No. 17,539; Cope *v.* Huntt, 4 Cranch C. C. (U. S.) 293, 6 Fed. Cas. No. 3,206; U. S. Bank *v.* Lee, 3 Cranch C. C. (U. S.) 288, 2 Fed. Cas. No. 921; Cooper *v.* Gibbs, 4 McLean (U. S.) 396, 6 Fed. Cas. No. 3,194; McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888; Low *v.* Underhill, 3 McLean (U. S.) 376, 15 Fed. Cas. No. 8,561, 2 West. L. J. 360; Morgan *v.* Tipton, 3 McLean (U. S.) 339, 17 Fed. Cas. No. 9,809; U. S. Bank *v.* Hatch, 1 McLean (U. S.) 90, 2 Fed. Cas. No. 918 [*affirmed* in 6 Pet. (U. S.) 250, 8 L. ed. 387]; Seventh Ward Bank *v.* Hanrick, 2 Story (U. S.) 416, 21 Fed. Cas. No. 12,678.

England.— Hall *v.* Cole, 4 A. & E. 577, 1 Hurl. & W. 723, 5 L. J. K. B. 100, 6 N. & M. 124, 31 E. C. L. 259; English *v.* Darley, 2 B. & P. 62, 3 Esp. 49, 5 Rev. Rep. 543; Gould *v.* Robson, 8 East 576, 9 Rev. Rep. 498; Smith *v.* Knox, 3 Esp. 46; Badnall *v.* Samuel, 3 Price 521.

Canada.—Vankoughnet *v.* Mills, 5 Grant Ch. (U. C.) 653; Farrell *v.* Oshawa Mfg. Co., 9 U. C. C. P. 239; Arthur *v.* Lier, 8 U. C. C. P. 180; Commercial Bank *v.* Johnston, 2 U. C. Q. B. 126.

See 7 Cent. Dig. tit. "Bills and Notes," § 582.

One day's extension.— A binding agreement extending the time of payment for one day only has this effect. Shaw *v.* Nolan, 8 La. Ann. 25; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484.

Extension for period sufficient to obtain judgment.— It has been said that there is no general rule that giving time to the maker of a note for a period only equal to that sufficient to obtain a judgment does not discharge an indorser or surety; that such a rule has only been applied in cases where the giving of time occurred after an action had been commenced on the note, and has reference to an arrangement in the ordinary course of proceeding in an action, by which judgment is rather expedited than delayed, and does not apply where the time is given by contract, before any action has been commenced. Raught *v.* Black, 2 Disn. (Ohio) 477. *Compare*, however, Ferguson *v.* Childress, 9 Humphr. (Tenn.) 382.

10. Tanner *v.* Gude, 100 Ga. 157, 27 S. E. 938, and other cases cited in the note preceding.

11. *Florida.*— Fridenberg *v.* Robinson, 14 Fla. 130.

parties to a note or bill is a discharge of every other party who upon paying it would be entitled to sue the party to whom the extension is granted.[12] An extension to the first and last indorsers will discharge intermediate indorsers,[13] but an earlier party will not be discharged by giving an extension of time to a subsequent one, for he cannot be prejudiced thereby.[14] If there is a binding agreement for extension it is immaterial whether it is made before or after maturity of the paper,[15] or whether the note extended be the principal debt or merely collateral to it.[16] Where two or more notes are secured by the same mortgage, even though they have been indorsed by the payee to the same person, extension of the time of payment of one of them does not discharge indorsers or sureties on the others.[17]

b. Extension After Indorser's Liability Is Fixed. It has been held both in England and in the United States, that an extension of the time of payment of a bill or note, granted to the maker or accepter by the holder, does not discharge an indorser, if his liability has already become fixed by a valid judgment against him.[18] There are, however, several decisions to the contrary.[19] Some courts have held that he is not discharged if his liability has become fixed by demand, protest,

Georgia.— Parmelee *v.* Williams, 72 Ga. 42; High *v.* Cox, 55 Ga. 662.

Louisiana.— Hine *v.* Bailey, 16 La. 213, 35 Am. Dec. 214; Burthe *v.* Donaldson, 15 La. 382.

Massachusetts.—Veazie *v.* Carr, 3 Allen (Mass.) 14.

New York.— Mottram *v.* Mills, 2 Sandf. (N. Y.) 189.

Pennsylvania.— Maples *v.* Hicks, Brightly (Pa.) 56, 3 Pa. L. J. Rep. 244.

Texas.— Garcia *v.* Gray, 67 Tex. 282, 3 S. W. 42.

Wisconsin.— Racine County Bank *v.* Lathrop, 12 Wis. 466.

England.— Philpot *v.* Briant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754, 29 Rev. Rep. 710; Frazer *v.* Jordan, 8 E. & B. 303, 8 Jur. N. S. 1054, 26 L. J. Q. B. 288, 5 Wkly. Rep. 819, 92 E. C. L. 303.

See 7 Cent. Dig. tit. "Bills and Notes," § 358.

12. Calliham *v.* Tanner, 3 Rob. (La.) 299.

13. Hall *v.* Cole, 4 A. & E. 577, 1 Hurl. & W. 723, 5 L. J. K. B. 100, 6 N. & M. 124, 31 E. C. L. 259.

14. Whiting *v.* Western Stage Co., 20 Iowa 554 (holding that extension of time to an indorser of a note does not discharge the maker); Smith *v.* Knox, 3 Esp. 46 (holding that discharge of the drawer of a bill did not discharge the accepter, who was first liable); Claridge *v.* Dalton, 4 M. & S. 226, 16 Rev. Rep. 440 (holding that an extension of time given by an indorsee of a bill to the payee does not discharge the drawer).

15. *Illinois.*— Warner *v.* Campbell, 26 Ill. 282.

Massachusetts.— Veazie *v.* Carr, 3 Allen (Mass.) 14.

Minnesota.—Moor *v.* Folsom, 14 Minn. 340, 100 Am. Dec. 227.

New York.— Hubbly *v.* Brown, 16 Johns. (N. Y.) 70.

Wisconsin.— Hamilton *v.* Prouty, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866.

And see other cases cited *supra*, note 9.

16. Pomeroy *v.* Tanner, 70 N. Y. 547; Myers *v.* Welles, 5 Hill (N. Y.) 463. See also Nassau Bank *v.* Campbell, 63 Hun (N. Y.) 229, 17 N. Y. Suppl. 737, 44 N. Y. St. 191, 74 Hun (N. Y.) 616, 26 N. Y. Suppl. 831, 57 N. Y. St. 202 [*reversed* in 147 N. Y. 694, 41 N. E. 502, without deciding this point]. But *compare* Hawkins *v.* Gibson, 74 Ga. 405.

Discharge of indorser of collateral note.— Where a note indorsed by the payee for accommodation of the maker is pledged by the maker, without consent of the indorser, as collateral to his own note for the same amount, given at the same time and payable at the same time, a renewal of the principal note without the consent of the indorser of the collateral note releases him from liability. State Sav. Bank *v.* Baker, 93 Va. 510, 25 S. E. 550. Where a debtor gave his note to his creditor, and as collateral security therefor gave another note, indorsed by a third party for his accommodation, and at maturity the first note was taken up and paid by the maker by his giving a new note with other security, it was held that the indorser of the collateral note was discharged from liability. Huse *v.* Alexander, 2 Metc. (Mass.) 157.

17. Hopkins *v.* Gray, 51 Iowa 340, 1 N. W. 637; Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154 (holding that it can make no difference that both notes have matured by the terms of the mortgage because of default in the payment of one).

18. Louisiana State Bank *v.* Haralson, 2 La. Ann. 456; King *v.* Thompson, 3 Cranch C. C. (U. S.) 146, 14 Fed. Cas. No. 7,807; Pole *v.* Ford, 2 Chit. 125, 18 E. C. L. 545; Braine *v.* Monson, 5 Jur. 635, 10 L. J. Exch. 468, 8 M. & W. 668.

19. McDowell *v.* Wilmington, etc., Bank, 1 Harr. (Del.) 369; Calliham *v.* Tanner, 3 Rob. (La.) 299; Shields *v.* Reynolds, 9 W. Va. 483; Vankoughnet *v.* Mills, 5 Grant Ch. (U. C.) 653.

and notice of dishonor,[20] but the weight of authority is to the contrary.[21] As we shall see he is not discharged in the absence of a statute by mere delay in suing, unless for the period fixed by the statute of limitations,[22] but this is very different from an extension.

c. Conditional Agreement For Extension. If an agreement for extension is conditional, and the condition is not performed, so that the holder is at no time prevented from suing on the instrument, an indorser or surety is not discharged.[23]

d. Reservation of Rights Against Indorsers or Sureties. If the holder of a note, in agreeing with the maker to extend the time of payment, expressly stipulates as a part of the agreement that the delay shall not affect his rights against the indorsers or sureties, the agreement does not prejudice the indorsers or sureties and they are not discharged.[24]

20. U. S. Bank *v.* McDonald, 4 Cranch C. C. (U. S.) 624, 2 Fed. Cas. No. 925; U. S. Bank *v.* Abbott, 3 Cranch C. C. (U. S.) 94, 2 Fed. Cas. No. 906. See also Lenox *v.* Prout, 3 Wheat. (U. S.) 520, 4 L. ed. 449.

21. Veazie *v.* Carr, 3 Allen (Mass.) 14; Dorlon *v.* Christie, 39 Barb. (N. Y.) 610; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194; Hubbly *v.* Brown, 16 Johns. (N. Y.) 70; State Bank *v.* Wilson, 12 N. C. 484; Union Bank *v.* McClung, 9 Humphr. (Tenn.) 98. And see the cases cited *supra*, VIII, A, 3, a, note 9.

22. See *infra*, VIII, B.

23. *Kansas.*—Costello *v.* Wilhelm, 13 Kan. 229.

Louisiana.— Lamayer *v.* Uter, 22 La. Ann. 45.

Maryland.— Gray *v.* Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518; Williams *v.* Hall, 9 Gill (Md.) 347.

New Jersey.—Herbert *v.* Servin, 41 N. J. L. 225.

England.— Badnall *v.* Samuel, 3 Price 521. See also *supra*, VIII, A, 2, c.

Consent of other creditors.— An indorser on a note is not discharged by an agreement on the part of the holder with the maker to give the latter an extension, if all his creditors will do likewise, where such condition is not fulfilled. Lamayer *v.* Uter, 22 La. Ann. 45. But a condition in an agreement by the maker of a note and certain of his creditors for an extension of the time of payment, that a certain other creditor shall execute the agreement, is performed where the agreement is executed by the other creditor's assignee for the benefit of creditors, the assignment having been made prior to the agreement. Gifford *v.* Allen, 3 Metc. (Mass.) 255.

Condition that indorser consent.—A holder of a note, agreeing to an extension of the time of payment on condition that the indorser consents, does not thereby release the indorser. Winfree *v.* Lexington First Nat. Bank, 97 Va. 83, 33 S. E. 375.

Consent of indorser see *infra*, VIII, A, 3, f.

Procurement of surety.—An agreement to renew a note by taking a new note, provided it shall be signed by the surety on the old note, does not extend the latter where the surety does not sign. This is true although a discount may be paid in anticipation of the surety's signing. Miller *v.* McCallen, 69 Iowa 681, 29 N. W. 942.

Tender of unstamped paper.—An indorser is not discharged by an agreement to extend the time of payment of a note on receipt of a draft duly accepted, where the draft sent to the holder is not stamped as required by statute, and is returned by him for that reason. Williams *v.* Hall, 9 Gill (Md.) 347.

24. *Louisiana.*—Hine *v.* Bailey, 16 La. 213, 35 Am. Dec. 214. *Compare*, however, Gustine *v.* Union Bank, 10 Rob. (La.) 412.

Massachusetts.— Hutchins *v.* Nichols, 10 Cush. (Mass.) 299 (holding that an agreement by the holder of a negotiable promissory note never to sue the maker thereon, and not to call on the indorser for a period of nine months, suspends, but does not destroy, the claim against such indorser); Sohier *v.* Loring, 6 Cush. (Mass.) 537.

Michigan.— Big Rapids Nat. Bank *v.* Peters, 120 Mich. 518, 79 N. W. 891.

New York.— Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51; Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130; Morgan *v.* Smith, 70 N. Y. 537; Bailey *v.* Baldwin, 7 Wend. (N. Y.) 289.

North Carolina.— Charlotte First Nat. Bank *v.* Lineberger, 83 N. C. 454, 35 Am. Rep. 582.

Pennsylvania.— Hagey *v.* Hill, 75 Pa. St. 108, 15 Am. Rep. 583.

Vermont.— Morse *v.* Huntington, 40 Vt. 488.

United States.— Eldrege *v.* Chacon, Crabbe (U. S.) 296, 8 Fed. Cas. No. 4,329.

England.—Oriental Financial Corp. *v.* Overend, L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813; Nichol *v.* Norris, 3 B. & Ad. 41, 23 E. C. L. 28; Boaler *v.* Mayor, 19 C. B. N. S. 76, 11 Jur. N. S. 565, 34 L. J. C. P. 230, 12 L. T. Rep. N. S. 457, 13 Wkly. Rep. 775, 115 E. C. L. 76; Price *v.* Barker, 3 C. L. R. 927, 4 E. & B. 760, 1 Jur. N. S. 775, 24 L. J. Q. B. 130, 82 E. C. L. 760; Pooley *v.* Harradine, 7 E. & B. 431, 90 E. C. L. 431; Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128.

Canada.— Bell *v.* Manning, 11 Grant Ch. (U. C.) 142; Wood *v.* Brett, 9 Grant Ch. (U. C.) 452; Canadian Bank of Commerce *v.* Northwood, 14 Ont. 207; Upper Canada Bank *v.* Jardine, 9 U. C. C. P. 332. And see Piric *v.* Wyld, 11 Ont. 422.

e. Reservation of Right to Sue at Request of Indorsers. Indorsers are not discharged by an agreement on the part of the holder of paper to extend the time of payment, where it is stipulated that he may sue at any time at the request of any party secondarily liable on the paper.[25]

f. Consent of Indorser or Surety. In order that an agreement for extension of the time of payment of a bill or note may discharge an indorser or surety, it must be without his consent, express or implied.[26] His assent may be presumed from proof of an established usage as to extensions.[27] The consent of an indorser or surety to extensions of the time of payment cannot be extended beyond its terms.[28]

g. Waiver of Discharge and Estoppel. An indorser or surety on a note, who

Reason for rule.— In Hagey *v.* Hill, 75 Pa. St. 108, 111, 15 Am. Rep. 583, it was said: "The ground upon which an agreement to give time to the maker, made by the holder without the consent of the endorsers, upon a valid consideration, is held to be a discharge of the endorsers, is solely this, that the holder thereby impliedly stipulates not to pursue the endorsers, or to seek satisfaction from them in the intermediate period. It can never apply to any case where a contrary stipulation exists between the parties. Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the endorsers, it will not discharge the latter. In such case the very ground of the objection is removed, for their rights are not postponed against the maker, if they should take up the note."

Burden of proving reservation.—A stipulation in an agreement extending the time of payment of a note, reserving the holder's rights against an indorser, so as to prevent his discharge, must be proved when set up by the holder. It will not be implied. Stein *v.* Steindler, 1 Misc. (N. Y.) 414, 20 N. Y. Suppl. 839, 49 N. Y. St. 450.

Agreement between maker and subsequent indorser.— In Hill *v.* Bostick, 10 Yerg. (Tenn.) 410, it was held that the renewal of a note discharges the indorser on the original note, although the maker and an indorser on the renewal agreed that the former indorser, who knew nothing of the agreement, should still be liable on the original note.

25. Prout *v.* Decatur Branch Bank, 6 Ala. 309.

26. *Louisiana.*— Gordon *v.* Dreux, 6 Rob. (La.) 399; Frazier *v.* Dick, 5 Rob. (La.) 249; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

New Hampshire.— Pine River Bank *v.* Swazey, 47 N. H. 154; Crosby *v.* Wyatt, 10 N. H. 318.

New Jersey.— Solomon *v.* Gregory, 19 N. J. L. 112.

New York.— East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543; Moyer *v.* Urtel, 9 N. Y. St. 667; Chenango Bank *v.* Curtiss, 19 Johns. (N. Y.) 326.

Tennessee.— Cherry *v.* Miller, 7 Lea (Tenn.) 305; East Tennessee Bank *v.* Hooke, 1 Coldw. (Tenn.) 156.

Virginia.— Winfree *v.* Lexington First Nat. Bank, (Va. 1899) 33 S. E. 375.

Washington.— Guarantee L. & T. Co. *v.* Galliher, 12 Wash. 507, 41 Pac. 887.

Wisconsin.— Black River Falls First Nat. Bank *v.* Jones, 92 Wis. 36, 65 N. W. 861, holding that an extension of the time for payment of a renewal note without the knowledge or consent of one of the makers does not discharge him, although he was merely an accommodation maker of the original note, where the renewal note was accepted at his sole request and for his accommodation and benefit alone.

United States.— Eldrege *v.* Chacon, Crabbe (U. S.) 296, 8 Fed. Cas. No. 4,329.

Burden of proof.— The holder of a note has the burden of proving that an indorser assented to an extension of the time of payment. Siebeneck *v.* Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485.

The assent of one surety to a contract for delay will not bind a cosurety, and one surety may be discharged by such contract while the other continues liable. Crosby *v.* Wyatt, 10 N. H. 318.

Consent to prior extension.— If the holder of a note has, without the consent of the surety, and for a valuable consideration, contracted with the principal to enlarge the time of payment, the surety's defense of release will not be defeated by proof of an earlier contract of the same kind, made with the consent of the surety. Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673. See also PRINCIPAL AND SURETY.

27. **Usage of bank as to extension.**— If a note is made payable to a bank, where a regular usage exists to receive payment by instalments, at regular intervals, with the interest on the balance in advance, there is presumptive evidence of the assent of a surety that payment may be delayed and received by instalments, according to such usage, until the contrary is shown. But this principle cannot be held to apply to any delay beyond such regular usage; and no assent to any other course can be presumed. Crosby *v.* Wyatt, 10 N. H. 318.

28. Matchett *v.* Anderson Foundry, etc., Works, (Ind. App. 1902) 64 N. E. 229, holding that an indefinite extension of the time of payment or more than one extension is not justified by a provision in a note waiving all defenses of the extension of the time of payment given the drawers or indorsers.

Construction of consent.—A joint and sev-

has been discharged from liability by an extension of time granted to the maker, may waive his discharge, and he does so by a new promise given after the discharge and with full knowledge of the facts.[29] A judgment foreclosing a mortgage given to secure a note on extension of the time of payment does not estop an indorser or surety on the note from claiming a discharge by reason of the extension, if he was not a party to the suit.[30]

4. WHAT AMOUNTS TO AN EXTENSION OR RENEWAL — a. In General. To constitute a renewal or extension of the time of payment of a bill or note, so as to prevent a suit to discharge indorsers or sureties, there must be a definite and binding agreement postponing the time for payment.[31] Mere indulgence by the

eral promissory note providing: "We, the makers, sureties, guarantors, and indorsers hereon, agree to extensions of this note without notice, hereby ratifying such extensions, and binding ourselves for payment hereof as if no extension of time for or forbearance of payment has been granted or made," contemplates an actual extension of the time of payment and an actual forbearance to sue, resting upon a positive agreement therefor, and not merely delay or indulgence without any binding extension. Wellington Nat. Bank *v.* Thomson, 9 Kan. App. 667, 59 Pac. 178.

Consent of joint makers necessary.—An agreement by an accommodation indorser of a note that the payment thereof may be extended, means an extension with the consent of the makers; and where an extension is made with the consent of only one of two makers of the note, so as to discharge the other and thereby increase the liabilities of the indorser without his consent, the indorser is discharged. Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485.

Consent conditioned on reduction of debt. — Where the indorser of a note protested for non-payment signed an agreement reciting that the drawer was about making an arrangement with the holder for the renewal of the note, "which is to be reduced from five to ten per cent. every sixty days," and consenting that the protested note be held as collateral security, and stipulating to take no advantage of any delay given, it was held that the holder, having accepted the renewal without always exacting the reduction, had given time to the drawer without consent of the indorser, and could not recover on the original indorsement. Dundas *v.* Sterling, 4 Pa. St. 73.

29. Hazard *v.* White, 26 Ark. 155; Black River Falls First Nat. Bank *v.* Jones, 92 Wis. 36, 65 N. W. 861 (holding that if, after learning of an extension of the time for payment of a note, a surety recognizes his liability thereon by giving a collateral note for the debt or in any other way amounting to a promise to pay the same, he remains liable notwithstanding such extension). But see Walters *v.* Swallow, 6 Whart. (Pa.) 446.

Acts or admissions in ignorance of discharge.— An indorser who executes a deed of trust to secure the note, in ignorance of the fact that the holder has released him by extending the time of payment, does not waive such defense. Dey *v.* Martin, 78 Va. 1. And admissions in letters by a surety of his liability on a note, made before he had knowledge of an extension of time of payment, will not estop him from asserting his release because of such extension. Fay *v.* Tower, 58 Wis. 286, 16 N. W. 558.

Surety's waiver of discharge see, generally, PRINCIPAL AND SURETY.

30. Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

31. *Alabama.*— Abercrombie *v.* Knox, 3 Ala. 728, 37 Am. Dec. 721.

Illinois.— Booth *v.* Wiley, 102 Ill. 84, holding that an assurance by the holder of a note secured by a deed of trust, or by his agent, to a purchaser from the mortgagor that if the latter would keep the interest paid there would be no sale of the property, the person to whom such assurance was given assuming no express liability to pay the interest, and there being no agreement on behalf of the holder of the note to extend the time of payment for any definite period, did not amount to a contract to extend the time of payment.

Indiana.— Jemison *v.* Walsh, 30 Ind. 167, holding that a written agreement by the parties, three days after the execution of a note that, in consideration of a sale then made of a stock of goods to the maker, he should first pay two other notes issued at the date of the agreement to the same payee, due six and twelve months after date, the same to be paid off with the proceeds of the goods, and that after they should be so paid the first note should be paid, did not extend the time at which the notes last executed became due, but did extend the time for the payment of the first note one year from the date of the agreement.

Kentucky.— Alley *v.* Hopkins, 98 Ky. 668, 17 Ky. L. Rep. 1227, 34 S. W. 13, 56 Am. St. Rep. 382.

Louisiana.— Fortineau *v.* Boissiere, 18 La. 470; Hefford *v.* Morton, 11 La. 115.

Maine.— Mariners' Bank *v.* Abbott, 28 Me. 280.

Maryland.— Gray *v.* Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518.

Massachusetts.—Agricultural Bank *v.* Bishop, 6 Gray (Mass.) 317.

Mississippi.— Brown *v.* Prophit, 53 Miss. 649.

Nebraska.—Parker *v.* Taylor, (Nebr. 1902) 91 N. W. 537, holding that where the holder of a note sells the same and extends the time in which the purchaser is to pay him therefor

holder to the maker or accepter, and forbearance to sue, is not an extension, where there is no agreement to such effect.[32] Mere delay, however, will operate beyond the day when the note becomes due, this does not extend the time for payment of the note.

New York.— Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194, holding that where the holder of a note agreed with the maker to sue the indorser and, if he failed to collect the debt, then to receive security from the maker at two years, the agreement did not take away the holder's right to sue the maker, or discharge the indorser.

Ohio.— Edwards *v.* Bedford Chair Co., 41 Ohio St. 17; Jones *v.* Brown, 11 Ohio St. 601; Tinan *v.* Wayne, 1 Disn. (Ohio) 148, 12 Ohio Dec. (Reprint) 541; Thompson *v.* Marshall, 2 Ohio Dec. (Reprint) 506, 3 West. L. Month. 386.

Pennsylvania.— Siebeneck *v.* Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; People's Bank *v.* Legrand, 103 Pa. St. 309, 49 Am. Rep. 126. Where a note was payable one year after its date, and several months after its date the maker agreed with the payee to sell the latter certain real estate and to pay all debts of the firm of which the parties were members within one year from the date of the agreement, in consideration of which the payee agreed to surrender the note as soon as the maker had paid such debts and conveyed the real estate, it was held to constitute an extension of time of payment. Henderson *v.* Ardery, 36 Pa. St. 449.

South Carolina.— Ehrick *v.* Haslett, 1 Nott & M. (S. C.) 116, holding that notice to the maker of a note on the last day of grace to pay his note "by nine o'clock to-morrow" does not discharge the indorser.

Texas.— Frois *v.* Mayfield, 33 Tex. 801.

Wisconsin.— Racine County Bank *v.* Lathrop, 12 Wis. 466, where the payee and indorser of an acceptance, after the same had been protested for non-payment, assigned to the accepters an account against the holder, to be used by them as a set-off against the draft; and, in consideration of the assignment, the payee took the accepters' note, payable one day after date, under an agreement that the note was not to be enforced unless the set-off was allowed. The draft afterward came back into the payee's hands, and an action was brought against the drawer. It was held that the transaction amounted to an extension of time.

United States.— Gordon *v.* Chattanooga Third Nat. Bank, 144 U. S. 97, 12 S. Ct. 657, 36 L. ed. 360; Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485; *Ex p.* Balch, 2 Lowell (U. S.) 440, 2 Fed. Cas. No. 789, 13 Nat. Bankr. Reg. 160; Low *v.* Underhill, 3 McLean (U. S.) 376, 15 Fed. Cas. No. 8,561, 2 West. L. J. 360.

Canada.— Thompson *v.* McDonald, 17 U. C. Q. B. 304.

See 7 Cent. Dig. tit. "Bills and Notes," § 582.

An indorsement on a note made by the maker several years after maturity, stating that he renewed the promise, constitutes a renewal. Warren Academy *v.* Starrett, 15 Me. 443. Indorsements on a promissory note of the words "Received, Renewed," bearing successive dates, all subsequent to the maturity of the note, are equivalent in each case to, "Received the interest for a renewal of the note, in its original terms, from this date," and show renewals. Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673.

Failure to return note sent as renewal.— In an action on a note where defendant pleads that he had sent in a renewal to plaintiffs and that they never returned it, and plaintiffs reply that they had refused to accept the note as a renewal, defendant will be held to have been bound, on such refusal, to call and take away the note he had so sent in renewal; and that the mere fact of plaintiffs not returning it will not be construed into an agreement to renew. Lyman *v.* Chamard, 1 L. C. Jur. 285.

Usage of bank to renew.— Where, according to the usage of a bank, a note of principal and surety payable in sixty days was renewable by the payment of twenty-five per cent at the expiration of that time without a new note being given, and if the principal aided the operations of the bank in a certain manner, the credit was continued from time to time on his paying the interest in advance, it being understood that if the banks should want money the note might be collected before the expiration of the credit thus obtained, it was held that such enlargement of the debt did not discharge a surety, as the bank did not disable itself to sue the principal at any time. Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 129.

Change of articles of loan association.— If a loan association, whose articles authorize loans, which are required to be repaid in monthly instalments, amend them so as to allow the borrower to omit repayment of any part of the principal until his note becomes due, and a borrower acts on such amendment, it constitutes an extension of time on the monthly instalments and discharges a surety. Byers *v.* Hussey, 4 Colo. 515.

The consent of the payee of a sight draft to its being accepted at four months is an extension of the time of payment. Burthe *v.* Donaldson, 15 La. 382.

Demanding payment by a certain time, as where the maker of a note given in consideration of the use of certain property writes to the holder after maturity that he will rescind the contract if the note is not paid by a certain time, is not an extension of the time for payment of the note. Hurst *v.* Trow Printing, etc., Co., 2 Misc. (N. Y.) 361, 22 N. Y. Suppl. 371, 51 N. Y. St. 206, 30 Abb. N. Cas. (N. Y.) 1.

32. *Connecticut.*— Lockwood *v.* Crawford, 18 Conn. 361.

Kentucky.— Higgins *v.* Morrison, 4 Dana (Ky.) 100.

as a discharge in some jurisdictions.[33] There is no extension where the drawee of a check writes the word "accepted" thereon and makes a partial payment only, there being no agreement for delay.[34]

b. Receiving Payment of Interest. No doubt all of the courts agree that proof that the holder of a bill or note, at or after its maturity, received interest in advance for a period beyond its maturity, is not conclusive evidence of an agreement extending the time of payment.[35] Some courts have held that it is *prima facie* evidence of such an agreement,[36] while others have held that it is

Louisiana.— Moore *v.* Britton, 22 La. Ann. 64; Buckner *v.* Watt, 19 La. 211; Boutte *v.* Martin, 16 La. 133 (holding that mere consent of the holder of a note to the maker's going to another city to procure the money with which to pay the note was not an extension of time).

Massachusetts.—Way *v.* Dunham, 166 Mass. 263, 44 N. E. 220.

Missouri.—Warrensburg Co-operative Bldg. Assoc. *v.* Zoll, 83 Mo. 94; Globe Mut. Ins. Co. *v.* Carson, 31 Mo. 218.

New York.— Utica Bank *v.* Ives, 17 Wend. (N. Y.) 501; Powell *v.* Waters, 17 Johns. (N. Y.) 176.

North Carolina.— State Bank *v.* Wilson, 12 N. C. 484.

Tennessee.— Cherry *v.* Miller, 7 Lea (Tenn.) 305.

United States.— Ross *v.* Jones, 22 Wall. (U. S.) 576, 22 L. ed. 730; McLemore *v.* Powell, 12 Wheat. (U. S.) 554, 6 L. ed. 726.

Canada.— Thompson *v.* McDonald, 17 U. C. Q. B. 304.

Failure of the holder to sue on a note will not justify the inference that he consented to extend the time of payment, in the face of positive testimony to the contrary. New Orleans Mut. Nat. Bank *v.* Coco, 107 La. 268, 31 So. 628.

33. See *infra*, VIII, B.

34. Warrensburg Co-operative Bldg. Assoc. *v.* Zoll, 83 Mo. 94.

35. *Arizona.*— McGlassen *v.* Tyrrell, (Ariz. 1896) 44 Pac. 1088.

California.— Hellier *v.* Russell, 136 Cal. 143, 68 Pac. 581.

Maine.— Mariners' Bank *v.* Abbott, 28 Me. 280; Freeman's Bank *v.* Rollins, 13 Me. 202.

Massachusetts.— Haydenville Sav. Bank *v.* Parsons, 138 Mass. 53; Oxford Bank *v.* Lewis, 8 Pick. (Mass.) 458.

Mississippi.— Brown *v.* Prophit, 53 Miss. 649.

Missouri.— St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Springfield First Nat. Bank *v.* Leavitt, 65 Mo. 562; Hosea *v.* Rowley, 57 Mo. 357; American Nat. Bank *v.* Love, 62 Mo. App. 378; Nevada First Nat. Bank *v.* Gardner, 57 Mo. App. 268; Citizens' Bank *v.* Norman, 38 Mo. App. 484; Russell *v.* Brown, 21 Mo. App. 51.

New Hampshire.— Crosby *v.* Wyatt, 10 N. H. 318.

Ohio.— Denison University *v.* Manning, 65 Ohio St. 138, 61 N. E. 706; Gard *v.* Neff, 39 Ohio St. 607.

Texas.—Maddox *v.* Lewis, 12 Tex. Civ. App. 424, 34 S. W. 647.

United States.—Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485, where the holder of a note agreed to extend credit on renewal notes made by the same parties, and the maker paid interest for an extended time, and prior thereto the surety had died, which fact was then unknown to the holder, and the renewal notes were never executed. It was held that no agreement to extend time of payment could be inferred from the mere payment of the interest under the circumstances.

See 7 Cent. Dig. tit. "Bills and Notes," § 336.

36. *Connecticut.*— Skelly *v.* Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474, 38 Am. St. Rep. 340, 19 L. R. A. 599.

Georgia.— Randolph *v.* Fleming, 59 Ga. 776; Scott *v.* Saffold, 37 Ga. 384. See also Heath *v.* Achey, 96 Ga. 438, 23 S. E. 396. *Compare* Williams *v.* Wright, 69 Ga. 759.

Illinois.— Warner *v.* Camphell, 26 Ill. 282.

Indiana.— Mennet *v.* Grisard, 79 Ind. 222; Woodburn *v.* Carter, 50 Ind. 376. *Compare* Cheek *v.* Glass, 3 Ind. 286.

Minnesota.— St. Paul Trust Co. *v.* St. Paul Chamber of Commerce, 64 Minn. 439, 67 N. W. 350.

New Hampshire.— New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685; New Hampshire Sav. Bank *v.* Ela, 11 N. H. 335; Crosby *v.* Wyatt, 10 N. H. 318.

North Carolina.— Hollingsworth *v.* Tomlinson, 108 N. C. 245, 12 S. E. 989.

Ohio.— Atkinson *v.* Talbott, 1 Disn. (Ohio) 111, 12 Ohio Dec. (Reprint) 518. See also Gard *v.* Neff, 39 Ohio St. 607. *Compare* Jones *v.* Brown, 11 Ohio St. 601.

Oregon.— Lazelle *v.* Miller, 40 Oreg. 549, 67 Pac. 307, holding that an indorsement on the note reciting the receipt of a certain sum as interest to a certain future date, although the sum is insufficient to cover the interest to the designated time, is *prima facie* evidence that the payment was received as interest to such time.

Pennsylvania.— Siebeneck *v.* Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; Walters *v.* Swallow, 6 Wheat. (Pa.) 446.

Texas.— Maddox *v.* Lewis, 12 Tex. Civ. App. 424, 34 S. W. 647.

Vermont.— People's Bank *v.* Pearsons, 30 Vt. 711. *Compare* Middlebury Bank *v.* Bingham, 33 Vt. 621.

Wisconsin.— See Black River Falls First Nat. Bank *v.* Jones, 92 Wis. 36, 65 N. W. 861.

Canada.— Ryan *v.* McKerral, 15 Ont. 460.

See 7 Cent. Dig. tit. "Bills and Notes," § 336.

neither *prima facie* nor sufficient evidence,[37] although it may be sufficient with other circumstances to take the case to the jury.[38] Indorsements upon a note payable on a certain day, showing merely that interest has been paid annually on the note for several years since its maturity, are no proof that an extension has been agreed upon.[39]

c. Taking New Notes or Other Securities — (1) *In General.* If the holder of a bill or note takes from the maker a new bill or note payable at a future time in the place of it, whether he surrenders the old bill or note or not, and does not take the same merely as collateral and without any agreement for delay, there is an extension of the time of payment which will preclude him from suing until the new bill or note matures, and will release indorsers or sureties on the old bill or note who do not consent.[40] The same is true where the holder of commercial

Unperformed condition.— An agreement for extension of time of payment of a note cannot be inferred from the mere payment of interest, where the holder never agreed to extend payment except upon receiving a new note signed by both makers of the old one, which was never given. Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485.

37. Mariners' Bank *v.* Abbott, 28 Me. 280; Crosby *v.* Wyatt, 23 Me. 156; Freeman's Bank *v.* Rollins, 13 Me. 202; Haydenville Sav. Bank *v.* Parsons, 138 Mass. 53; Agricultural Bank *v.* Bishop, 6 Gray (Mass.) 317; Central Bank *v.* Willard, 17 Pick. (Mass.) 150, 28 Am. Dec. 284; Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 129; Oxford Bank *v.* Lewis, 8 Pick. (Mass.) 458; Springfield First Nat. Bank *v.* Leavitt, 65 Mo. 562; Hosea *v.* Rowley, 57 Mo. 357; American Nat. Bank *v.* Love, 62 Mo. App. 378; Nevada First Nat. Bank *v.* Gardner, 57 Mo. App. 268; Citizens' Bank *v.* Moorman, 38 Mo. App. 484; Russell *v.* Brown, 21 Mo. App. 51; Peuterman *v.* Dorman, 8 Ohio Dec. (Reprint) 391, 7 Cinc. L. Bul. 281.

Payment of interest to day of payment. — The payment of interest on a note up to the day of such payment at a greater rate than the party is legally bound to pay is not sufficient, without any other proof to show an agreement to extend the time of payment. Stearns *v.* Sweet, 78 Ill. 446. See also Amberg *v.* Nachtway, 92 Ill. App. 608. Where the maker of a promissory note previous to its maturity sent the holder a letter containing a draft, and stating that he hoped to be able to pay the note soon, in which case the amount of the draft was to be applied in part payment, but that if he could do so the holder should take that sum as interest in advance for three months after the maturity of the note; and the holder made no reply to the letter, but procured the draft to be cashed, and held the proceeds without making any application thereof upon the note until the expiration of three months after the maturity of the note, when he indorsed it as three months' interest thereon, it was held that these facts did not import a binding contract to delay the payment of the note. Middlebury Bank *v.* Bingham, 33 Vt. 621.

38. Russell *v.* Brown, 21 Mo. App. 51. See Lawrence *v.* Thom, 9 Wyo. 414, 64 Pac. 339.

Indorsement of interest "for a renewal," etc.— But it has been held that the indorsement of interest for a stipulated time upon a matured note, with the words "for a renewal," or "to renew the balance," or "balance renewed," is sufficient to authorize the jury to find an agreement for an extension of the time of payment. Mariners' Bank *v.* Abbott, 28 Me. 280.

Indorsement on wrapper.— But where a bank after a promissory note discounted by it had become due, and upon the application of the promisor for a renewal, indorsed on the wrapper of the note the words, "renewed for three months" and the promisor paid the interest in advance, but the note was retained by the bank and no new note was given, it was held that the indorsement did not become a part of the note, and that the bank was not thereby disabled from commencing an action upon the note before the expiration of three months. Central Bank *v.* Willard, 17 Pick. (Mass.) 150, 28 Am. Dec. 284.

39. Dyar *v.* Shenkberg, 93 Iowa 154, 61 N. W. 403; Alley *v.* Hopkins, 98 Ky. 668, 17 Ky. L. Rep. 1227, 34 S. W. 13, 56 Am. St. Rep. 382 (holding that the mere fact that at the maturity of a note, and at the end of each year for two years thereafter, the maker paid to the holder interest for the year past, whether at a legal or a usurious rate, does not show an agreement for a definite extension of time in consideration of such payments). See also Fortineau *v.* Boissiere, 18 La. 470.

40. *Georgia.*— Rhodes *v.* Hart, 51 Ga. 320.

Kansas.— Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

Kentucky.— Norton *v.* Roberts, 4 T. B. Mon. (Ky.) 491.

Louisiana.— Shaw *v.* Nolan, 8 La. Ann. 25.

Michigan.— Sage *v.* Walker, 12 Mich. 425, where the holder of a promissory note wrote to the indorsers, requesting them to give a new note in renewal; and a new note was accordingly made and indorsed by the same parties and sent to the holder with a request for the return of the old note. No notice was taken of this request, nor were the indorsers notified when the new note fell due and remained unpaid. It was held that these facts discharged the liability of the indorsers on the old note.

Mississippi.— Green *v.* Skinner, 72 Miss. 254, 16 So. 378.

paper, at or after maturity, takes time drafts or acceptances[41] or a postdated check.[42] Some courts, but not all, have held that an agreement to extend the time of payment is to be implied from the mere taking of the new paper payable at a future day, unless it is affirmatively shown that it was taken merely as collateral security, as is elsewhere explained.[43] The taking of a new note is

Missouri.— Springfield First Nat. Bank *v.* Leavitt, 65 Mo. 562.

New York.— Hubbard *v.* Gurney, 64 N. Y. 457 [*distinguishing* Cary *v.* White, 52 N. Y. 138]; Hart *v.* Hudson, 6 Duer (N. Y.) 294; Eisner *v.* Keller, 3 Daly (N. Y.) 485; Platt *v.* Stark, 2 Hilt. (N. Y.) 399; Kelty *v.* Jenkins, 1 Hilt. (N. Y.) 73; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484; Myers *v.* Welles, 5 Hill (N. Y.) 463. *Compare* Newburgh Nat. Bank *v.* Bigler, 18 Hun (N. Y.) 400. Where the maker and indorser of a note agree to the execution of a new note in renewal and the maker takes the new note to the bank holding the old one and the bank discounts the former by crediting the maker therewith, and the maker then draws his check, which is accepted by the bank, and the old note surrendered up, the transaction is a renewal of the old note. Moyer *v.* Urtel, 9 N. Y. St. 667.

North Carolina.— Canton Chemical Co. *v.* Pegram, 112 N. C. 614, 17 S. E. 298.

Pennsylvania.— Slaymaker *v.* Gundacker, 10 Serg. & R. (Pa.) 75; Maples *v.* Hicks, Brightly (Pa.) 56, 3 Pa. L. J. Rep. 17, 244.

Tennessee.— Hill *v.* Bostick, 10 Yerg. (Tenn.) 410.

Vermont.—Michigan State Bank *v.* Leavenworth, 28 Vt. 209. *Compare* Ripley *v.* Greenleaf, 2 Vt. 129.

Virginia.— State Sav. Bank *v.* Baker, 93 Va. 510, 25 S. E. 550; Stuart *v.* Lancaster, 84 Va. 772, 6 S. E. 139; Callaway *v.* Price, 32 Gratt. (Va.) 1; Armistead *v.* Ward, 2 Patt. & H. (Va.) 504.

Washington.— Seattle First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

Wisconsin.— Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

United States.— McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888.

England.— Walton *v.* Maskell, 2 D. & L. 410, 14 L. J. Exch. 54, 13 M. & W. 452.

Canada.— Shepley *v.* Hurd, 3 Ont. App. 549.

Compare Merchants' Trust, etc., Co. *v.* Jones, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 337, 584.

Taking note payable one day after date.— Where the maker of an overdue note gives a new note payable one day after date for the balance of the former note, it constitutes an extension of time of payment, which will discharge indorsers or sureties, although the holder retains the original note. Shaw *v.* Nolan, 8 La. Ann. 25; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484.

Where one of two accommodation indorsers of an overdue note gives his own note in renewal of the old note, with collaterals to secure the same, without the knowledge of the other indorser, the latter is thereby discharged. Kelty *v.* Jenkins, 1 Hilt. (N. Y.) 73.

Redelivery of old note to hold indorser.— When an indorser on a note is discharged by the taking of a renewal note and surrender of the old note, thereby extending the time of payment, he cannot be made liable by a redelivery of the old note for the purpose of holding him thereon. Green *v.* Skinner, 72 Miss. 254, 16 So. 378.

41. *Mississippi.*— Rupert *v.* Grant, 6 Sm. & M. (Miss.) 433.

New Hampshire.— Woodman *v.* Eastman, 10 N. H. 359.

New York.— Pomeroy *v.* Tanner, 70 N. Y. 547.

Ohio.— Atkinson *v.* Talbott, 1 Disn. (Ohio) 111, 12 Ohio Dec. (Reprint) 518.

United States.— Cooper *v.* Gibbs, 4 McLean (U. S.) 396, 6 Fed. Cas. No. 3,194; Seventh Ward Bank *v.* Hanrick, 2 Story (U. S.) 416, 21 Fed. Cas. No. 12,678.

England.— Kendrick *v.* Lomax, 2 Cr. & J. 405, 1 L. J. Exch. 145, 2 Tyrw. 438; Gould *v.* Robson, 8 East 576, 9 Rev. Rep. 498.

Taking a draft fraudulently diverted from the purpose for which it was drawn, in payment of a preëxisting debt evidenced by notes or drafts, is not an extension of the time of payment of the debt, so as to make the holder a holder for value. Moore *v.* Ryder, 65 N. Y. 438.

42. Place *v.* McIlvain, 38 N. Y. 96, 97 Am. Dec. 777 [*affirming* 1 Daly (N. Y.) 266]; Okie *v.* Spencer, 2 Whart. (Pa.) 253, 30 Am. Dec. 251 [*affirming* 1 Miles (Pa.) 299].

43. *Louisiana.*— Shaw *v.* Nolan, 8 La. Ann. 25.

New York.— Hubbard *v.* Gurney, 64 N. Y. 457 [*distinguishing* Cary *v.* White, 52 N. Y. 138]; Hart *v.* Hudson, 6 Duer (N. Y.) 294; Eisner *v.* Keller, 3 Daly (N. Y.) 485; Platt *v.* Stark, 2 Hilt. (N. Y.) 399; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484; Myers *v.* Welles, 5 Hill (N. Y.) 463. *Contra,* Taylor *v.* Allen, 36 Barb. (N. Y.) 294.

Tennessee.— Hill *v.* Bostick, 10 Yerg. (Tenn.) 410.

Vermont.— Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

Virginia.— Stuart *v.* Lancaster, 84 Va. 772, 6 S. E. 139; Callaway *v.* Price, 32 Gratt. (Va.) 1; Armistead *v.* Ward, 2 Patt. & H. (Va.) 504.

Washington.— Seattle First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

Wisconsin.— Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

not conclusive evidence of an extension.[44] The holder of a note may be estopped to deny that it was taken in renewal of another note[45] and in like manner the maker may be estopped.[46]

(II) *Whether Renewal or Payment.* Where the holder of a bill or note, at or after maturity, takes a new bill or note, the transaction may constitute a mere renewal of the old debt,[47] or it may be a payment so as to extinguish the original debt and create a new debt.[48] Whether the transaction constitutes the

England.— Kendrick *v.* Lomax, 2 Cr. & J. 405, 1 L. J. Exch. 145, 2 Tyrw. 438; Walton *v.* Maskell, 2 D. & L. 410, 14 L. J. Exch. 54, 13 M. & W. 452. *Contra*, Pring *v.* Clarkson, 1 B. & C. 14, 2 D. & R. 78, 1 L. J. K. B. O. S. 24, 8 E. C. L. 7.

Contra, Weakly *v.* Bell, 9 Watts (Pa.) 273, 36 Am. Dec. 116.

44. Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Armistead *v.* Ward, 2 Patt. & H. (Va.) 504.

Taking new note as collateral see *infra*, VIII, A, 4, c, (III).

45. Hooker *v.* Hubbard, 97 Mass. 175, where the indorsee of a note bought of the maker a like second note for a separate consideration, knowing that the indorser had delivered it to the maker only for the purpose of renewal or payment of the first, and on its maturity brought suit on it against the indorser. It was held, in an action also brought by him against the indorser on the first note, that he was estopped to say that he did not accept it for the purpose for which it was made. See also Dewey *v.* Bell, 5 Allen (Mass.) 165, holding that if the maker of a note at its maturity delivers to an agent another note to be used in renewal thereof, and the holder refuses to accept the same in renewal, but takes it as collateral, and then uses it as his own by procuring it to be discounted, he is estopped to say that he did not accept it for the purpose for which it was given; and after paying the same he may maintain an action upon it, although he has afterward refused to deliver up the original note to the maker.

46. Hooker *v.* Hubbard, 102 Mass. 239, holding that a defendant who, in an action against him on a promissory note, has availed himself by plea and proof of a subsequent note for the same amount as given in renewal thereof, and has prevailed on that defense, is estopped to set up, in defense against an action by the same plaintiff on the second note, that he gave it upon a condition which never was fulfilled although he is not estopped to set up a total or partial failure or want of consideration in the original note.

47. *Maryland.*—Flanagin *v.* Hambleton, 54 Md. 222.

Michigan.—McMorran *v.* Murphy, 68 Mich. 246, 36 N. W. 60.

Missouri.— Christian *v.* Newberry, 61 Mo. 446, holding that one note may be considered as a renewal of another, so as to retain a lien, where it is given to and accepted by the payee as a renewal, in anticipation of a purchase by him of the original note, and such purchase is accordingly effected.

Ohio.— Cadiz Bank *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364, where a bank holding two matured notes against one maker computed the balance of the principal on one of them, with interest on such balance, and the principal of the other with interest thereon, for which aggregate amount the bank took a note. It was held that the transaction constituted an extension of time on the original loan, although the bank called it a loan.

Rhode Island.— Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Dec. 531.

Tennessee.— Gates *v.* Union Bank, 12 Heisk. (Tenn.) 325.

United States.— Lee *v.* Hollister, 5 Fed. 752. And see McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232, where there was an agreement between the vendor and vendee that notes given for the price might be renewed, and subsequently, in order to maintain the purchaser's credit, the purchaser paid the first notes by check, and gave new ones of similar amount to the vendor, who procured their discount and forwarded the proceeds to the purchaser. It was held that the transaction constituted a renewal of the first notes.

A note with security may as well be a renewal of a former note as one without security. Crumbaugh *v.* Kugler, 3 Ohio St. 544. In this case a father had taken into partnership with him his son, who brought nothing in, and on the dissolution of the partnership took nothing out. During the partnership some of the father's creditors took the notes of the firm for the amounts due them, and some of these notes, after the dissolution, were given up, and the father's notes again taken. It was held that this transaction was intended simply as a renewal of their notes, the son being regarded as a security.

48. Horne *v.* Young, 40 Ga. 193 (holding that where the holder of a promissory note surrendered it, released the surety, and took in lieu thereof a new note with new sureties, to be paid in different currency, the transaction constituted a new contract and not merely a renewal); Dewey *v.* Bell, 5 Allen (Mass.) 165 (holding that if the indorser of note which has been discounted at a bank assists the maker to raise the money to pay it at its maturity by indorsing a new note and disposing of it for him, and delivers to him the money so raised, which is applied in payment of the first note, the second note is not a renewal of the first, and is not affected by usury reserved or taken upon the first by the indorser); Hartley *v.* Kirlin, 45 Pa. St. 49 (holding that where a note discounted at bank is taken up at maturity and paid by funds not the proceeds of a new note discounted, the new note

one or the other depends upon the intention of the parties[49] and may be a question for the jury.[50]

(III) *Taking as Collateral Security.* There is no extension of a bill or note, so as to postpone suit or so as to discharge indorsers or sureties, where another bill or note or a bond, either of the maker or a third person, is taken merely as collateral or additional security, and there is no agreement postponing the remedy, although indulgence may in fact be granted;[51] but it is otherwise of course if there is an agreement for delay.[52] There is an extension discharging indorsers or sureties, where the holder of overdue paper takes the note, bond, or acceptance of a third person payable at a future day and agrees to hold the

is not a renewal of the first or a continuance of the same debt).

49. Flanagin *v.* Hambleton, 54 Md. 222; Spooner *v.* Roberts, 180 Mass. 191, 62 N. E. 4; Taft *v.* Boyd, 13 Allen (Mass.) 84; Cadiz Bank *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364; Gates *v.* Union Bank, 12 Heisk. (Tenn.) 325.

50. Spooner *v.* Roberts, 180 Mass. 191, 62 N. E. 4; Taft *v.* Boyd, 13 Allen (Mass.) 84.

51. *Colorado.*— Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440.

Connecticut.— Continental L. Ins. Co. *v.* Barber, 50 Conn. 567. *Compare* Auffmordt *v.* Stevens, 46 Conn. 411.

Georgia.— Pennington *v.* Watson, Dudley (Ga.) 97.

Kentucky.— Sparks *v.* Hall, 4 J. J. Marsh. (Ky.) 35; Norton *v.* Roberts, 4 T. B. Mon. (Ky.) 491.

Louisiana.—Shaw *v.* Nolan, 8 La. Ann. 25; Buckner *v.* Watt, 19 La. 211.

Maryland.—Brengle *v.* Bushey, 40 Md. 141, 17 Am. Rep. 586.

Massachusetts.— Sigourney *v.* Wetherell, 6 Metc. (Mass.) 553; Hurd *v.* Little, 12 Mass. 502.

Michigan.— Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504.

Mississippi.— Wade *v.* Staunton, 5 How. (Miss.) 631.

Missouri.— Globe Mut. Ins. Co. *v.* Carson, 31 Mo. 218; Noll *v.* Oberhellmann, 20 Mo. App. 336.

New York.— Cary *v.* White, 52 N. Y. 138; Remsen *v.* Graves, 41 N. Y. 471; State Nat. Bank *v.* Coykendall, 58 Hun (N. Y.) 205, 12 N. Y. Suppl. 334, 34 N. Y. St. 432; Taylor *v.* Allen, 36 Barb. (N. Y.) 294; Williams *v.* Townsend, 1 Bosw. (N. Y.) 411; Albany County Bank *v.* Scott, 4 N. Y. St. 768; Utica Bank *v.* Ives, 17 Wend. (N. Y.) 501; Mohawk Bank *v.* Van Horne, 7 Wend. (N. Y.) 117.

Ohio.— Edwards *v.* Bedford Chair Co., 41 Ohio St. 17.

Pennsylvania.— Kemmerer's Appeal, 102 Pa. St. 558; Weakly *v.* Bell, 9 Watts (Pa.) 273, 36 Am. Dec. 116; Okie *v.* Spencer, 1 Whart. (Pa.) 253, 30 Am. Dec. 251 [*affirming* 1 Miles (Pa.) 299]; Maples *v.* Hicks, Brightly (Pa.) 56, 3 Pa. L. J. Rep. 244.

Vermont.— Austin *v.* Curtis, 31 Vt. 64 [*overruling*, in so far as they are inconsistent, Michigan State Bank *v.* Leavenworth, 28 Vt. 209; Atkinson *v.* Brooks, 26 Vt. 569, 62 Am. Dec. 592].

Virginia.— Bacon *v.* Bacon, 94 Va. 686, 27 S. E. 576.

Washington.— Seattle First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

United States.— Cooper *v.* Gibbs, 4 McLean (U. S.) 396, 6 Fed. Cas. No. 3,194.

England.— Pring *v.* Clarkson, 1 B. & C. 14, 2 D. & R. 78, 1 L. J. K. B. O. S. 24, 8 E. C. L. 7.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 337, 584.

Extension and not taking as collateral.— Where an indorser of a mortgage note wrote to the payee, when it was overdue, proposing that the sum be divided into four parts, and new notes made for the same, payable in six, twelve, eighteen, and twenty-four months, with interest, and the payee accepted the proposition, with the provision that the mortgage security was not to be affected, it was held that the new notes were not to be regarded as merely collateral security to the original note, but as an extension of time. Auffmordt *v.* Stevens, 46 Conn. 411. But where a note was left with an attorney for collection of the maker, who left with the attorney other notes as collateral security, for which the attorney gave a receipt, stating that he was to hold them as collateral security for the other note, and agreeing as soon as he should collect enough of them to pay such secured note to deliver it to the maker, with any balance there might be due him, it was held that this was not an agreement not to sue until the securities could be collected. Pennington *v.* Watson, Dudley (Ga.) 97. Taking a renewal note and interest thereon till maturity in advance from the maker of the original note, although the latter is not marked "paid" or "surrendered," is not a taking of collateral security for payment of the original note, but an extension of time of payment of the note. Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

52. Martin *v.* Bell, 18 N. J. L. 167; Dorlon *v.* Christie, 39 Barb. (N. Y.) 610; Hastings First Nat. Bank *v.* Lamont, 5 N. D. 393, 67 N. W. 145.

As evidence of extension.— It has been held that an agreement to extend the time of payment of an overdue bill or note will not be implied from the mere taking by the holder, as collateral security, of the note

original paper until maturity of the new paper.[53] Taking as additional security for a matured note a new note payable on demand is not an extension.[54]

(IV) *TAKING MORTGAGE AS SECURITY.* The receipt of a real-estate or chattel mortgage merely as security for overdue paper or for new paper taken as collateral does not extend the time of payment, where the mortgage is taken merely as collateral security and without any agreement for an extension; and it can make no difference that the mortgage cannot be enforced until a definite time in the future.[55] It is otherwise, however, if there is an express or implied agreement for an extension.[56]

or acceptance of a third person payable at a future day. Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440; Buckner *v.* Watt, 19 La. 211.

Parol evidence to identify paper.— Upon production and proof of a writing stating: "Received from Geo. W. Tyson & Co. a note [specifying it] . . . as collateral security for certain notes we hold of theirs, and on which, we agree to extend the time, until," etc., parol evidence is admissible to identify the notes extended. Martin *v.* Bell, 18 N. J. L. 167.

53. Greene *v.* Bates, 74 N. Y. 333; Dorlon *v.* Christie, 39 Barb. (N. Y.) 610; Eisner *v.* Keller, 3 Daly (N. Y.) 485; Robertson *v.* Allen, 3 Baxt. (Tenn.) 233; Stuart *v.* Lancaster, 84 Va. 772, 6 S. E. 139.

Taking an assignment of a bond and mortgage, with six months to run, and agreeing that an overdue note shall be paid out of the proceeds of the bond and mortgage, or shall be reduced in amount if the maker pays it sooner, is an extension of the time of payment of the note and releases an indorser. Beard *v.* Root, 4 Hun (N. Y.) 356.

54. Continental L. Ins. Co. *v.* Barber, 50 Conn. 567; Peninsular Sav. Bank *v.* Hosie, 112 Mich. 351, 70 N. W. 890 (where the new note was payable "on demand and after date").

55. *Colorado.*— Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440.

Connecticut.— Continental L. Ins. Co. *v.* Barber, 50 Conn. 567.

Maine.— Norton *v.* Eastman, 4 Me. 521.

New York.— Cary *v.* White, 52 N. Y. 138; Wood *v.* Robinson, 22 N. Y. 564; Fallkill Nat. Bank *v.* Sleight, 1 N. Y. App. Div. 189, 37 N. Y. Suppl. 155, 72 N. Y. St. 557; Williams *v.* Townsend, 1 Bosw. (N. Y.) 411.

Tennessee.— Miller *v.* Knight, 6 Baxt. (Tenn.) 503.

Texas.— Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102. But see Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118, holding that where, after the maturity of a note and the mortgage securing the same, a new mortgage was given maturing at a subsequent date, there was an extension of time for payment, although the new mortgage was given because the old one had not been sufficiently recorded.

Vermont.— Ripley *v.* Greenleaf, 2 Vt. 129, where the holder of a note, having advanced other sums to the maker, took a new note for less than the former one, but exceeding the amount subsequently advanced and a mortgage, which new note and mortgage were to secure both the old note and the subsequent advance, nothing being said as to the holder not suing on the old note. It was held that the transaction did not suspend the holder's right to sue on the old note.

United States.— U. S. *v.* Hodge, 6 How. (U. S.) 279, 12 L. ed. 437.

56. *Georgia.*— Rhodes *v.* Hart, 51 Ga. 320.

New York.— Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

North Carolina.—Harshaw *v.* McKesson, 65 N. C. 688.

North Dakota.— Hastings First Nat. Bank *v.* Lamont, 5 N. D. 393, 67 N. W. 145.

Tennessee.— Lea *v.* Dozier, 10 Humphr. (Tenn.) 447, holding that where the maker of a note executes a deed of his property to the payee, which recites that as the latter is willing to wait a certain period on having his debt secured the property is assigned to him in trust to sell if the note is not paid within the period stated the agreement of the payee to wait such time is necessarily implied.

Evidence of extension.—Some of the courts have held that an agreement to extend the time of payment of overdue paper will be implied from the taking of a mortgage which cannot be enforced until a future day, as security, either for the original paper or for new paper given as collateral. Harshaw *v.* McKesson, 65 N. C. 688. See also Rhodes *v.* Hart, 51 Ga. 320; Hastings First Nat. Bank *v.* Lamont, 5 N. D. 393, 67 N. W. 145. Other decisions, however, are to the contrary. Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440; Fallkill Nat. Bank *v.* Sleight, 1 N. Y. App. Div. 189, 37 N. Y. Suppl. 155, 72 N. Y. St. 557; Miller *v.* Knight, 6 Baxt. (Tenn.) 503.

Demand note secured by mortgage.— In Continental L. Ins. Co. *v.* Barber, 50 Conn. 567, it was held that an agreement extending the time of payment of an overdue note could not be implied from the fact that the holder took as additional security a demand note secured by a mortgage although the note provided for interest payable semiannually. And in Fallkill Nat. Bank *v.* Sleight, 1 N. Y. App. Div. 189, 37 N. Y. Suppl. 155, 72 N. Y. St. 557, it was held that taking a chattel mortgage to secure an overdue note, the time of payment of which was extended thirty days, and also to secure the payment of several demand notes already secured by a real-estate mortgage, was no ground for implying an agreement to extend the time

d. Taking Confession of Judgment or Power of Attorney to Confess Judgment. If the holder of a note receives a bond and warrant of attorney from the maker, for the purpose of entering judgment thereon and increasing his security, or a confession of judgment, the bond and warrant on the judgment will be considered only as collateral security and the indorser will not be thereby discharged.[57] But it is otherwise if there is a binding agreement not to exercise the power or enforce the judgment for a period beyond the maturity of the note.[58]

e. Agreement to Renew. A mere agreement to renew a note when it shall mature, or to renew from time to time, may give the holder a right of action for its breach, but it is not of itself an extension of the time of payment, and therefore it does not prevent a suit on the note at maturity or discharge indorsers or sureties.[59]

f. Extension of Collateral Notes. Evidence that notes deposited as collateral security for the payment of other notes were renewed from time to time, interest thereon collected in advance, and the time of payment extended, will not of itself support a finding that the holder of the original notes extended the time of payment of the latter.[60]

g. Stipulations or Agreements in Legal Proceedings. There is no extension of the time of payment of a note where the holder merely extends the time for the maker to answer in an action thereon.[61] Nor will any other stipulation or agreement in the course of legal proceedings on a bill or note discharge an indorser, if it does not amount to a binding agreement to extend the time of payment.[62] Causing the arrest of the maker of a note and taking a bond as pro-

of payment of the demand notes, although the chattel mortgage could not be enforced until a definite time in the future.

Option in holder.— Where the holder of commercial paper secured by a real-estate mortgage takes a chattel mortgage as additional security and agrees to extend the time of payment of the debt, the fact that a clause in the chattel mortgage allows him, at his option, to foreclose either mortgage does not prevent the extension from discharging securities on the paper, as they have no option to defeat the extension. Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

Provision for foreclosure if deemed insecure.— Where in consideration of an agreement on the part of the holder of commercial paper secured by a real estate mortgage to extend the time of payment of the debt, the mortgagor gives a chattel mortgage as additional security, the operation of the extension as a release of sureties is not affected by a clause in the chattel mortgage that the holder may take possession and sell the mortgaged chattels at any time if he deems himself insecure. Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

57. Sizer *v.* Heacock, 23 Wend. (N. Y.) 81; Mohawk Bank *v.* Van Horne, 7 Wend. (N. Y.) 117; Day *v.* Leal, 14 Johns. (N. Y.) 404; Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Guarantee Trust, etc., Co. *v.* Craig, 155 Pa. St. 343, 26 Atl. 703. See also Ferguson *v.* Childress, 9 Humphr. (Tenn.) 382.

58. Moodie *v.* Morrall, 1 Mill (S. C.) 367, holding that the holder of a note discharges the indorser by taking from the maker a confession of judgment to be paid, one half in six months and the balance in two years.

59. Bond *v.* Worley, 26 Mo. 253; Oswego Second Nat. Bank *v.* Poucher, 56 N. Y. 348.

Agreement to "carry" note.—An agreement on the part of a bank to carry a note is not an agreement to suspend the right of action upon and to extend the time of payment of the note itself; but simply that it will from time to time, according to the mode of discounting paper, discount a like note, which it will accept in place of one then held, if presented when the latter becomes due, and the discount paid; and, in case of failure of the parties to the note to present a new note when the one held becomes due, the latter becomes payable according to its terms, and all parties thereto are at once liable for its payment. Such an agreement therefore does not discharge indorsers. Oswego Second Nat. Bank *v.* Poucher, 56 N. Y. 348.

60. Benton *v.* German-American Nat. Bank, 45 Nebr. 850, 64 N. W. 227.

61. Ducker *v.* Rapp, 67 N. Y. 464; German-American Bank *v.* Niagara Cycle Fittings Co., 13 N. Y. App. Div. 450, 43 N. Y. Suppl. 602; Harlem Bank *v.* Falconer, 1 N. Y. City Ct. 43. See also Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929, 34 N. Y. St. 138; Ross *v.* Ferris, 18 Hun (N. Y.) 210.

62. Lowney *v.* Perham, 20 Me. 235, where, in an action by the holder against the accepter of a bill, it was agreed between the parties that defendant should be defaulted at the next term of the court, and if a stipulated sum should be paid before that time the cause should be continued one term more for judgment; if not paid judgment was to be rendered on the default. It was held that the first clause of the agreement, by which defendant was to be defaulted, could not be considered as giving time, so as to discharge

vided by statute does not discharge the indorser;[63] but an indorser will be discharged if, after recovery of a judgment against him and the maker, a stay of execution is entered for a definite period.[64]

h. Taking Cognovit and Staying Execution. Taking the maker's or accepter's *cognovit*, entering a judgment by confession, and a stay of execution for a definite time, is an extension releasing indorsers,[65] unless the stay is for a period not exceeding the time it would take to obtain a judgment and issue execution in the ordinary course of the law.[66]

i. Agreements With Creditors. A composition deed or other agreement between the maker of a note and his creditors, including the holder, by which the holder and other creditors agree to receive a certain percentage of all debts due from the maker in full discharge of the same, to be paid at a time beyond the maturity of the note, operates as an extension of the time of payment and discharges an indorser who does not consent.[67] There is, however, no extension by an agreement between the holder of a note and other creditors, to which the maker is not a party.[68]

5. Sufficiency of Agreement For Extension or Renewal — a. In General. An extension of the time for payment of a bill or note, to preclude the holder from suing at maturity[69] or to discharge sureties or indorsers must be for a definite time,[70] and it is essential that the agreement for the extension shall constitute a

an indorser, and that he was not discharged by the agreement for further continuance on payment, if not performed, as it was merely a conditional contract to give time.

63. Lane *v.* Steward, 20 Me. 98.

64. Shields *v.* Reynolds, 9 W. Va. 483, holding also that in such a case a court of equity will enjoin enforcement of the judgment against the indorser. *Compare* the cases in notes 65, 66, *infra*.

65. State Bank *v.* Wymond, 7 Blackf. (Ind.) 363; Bower *v.* Tiermann, 3 Den. (N. Y.) 378; Orleans Bank *v.* Barry, 1 Den. (N. Y.) 116; Hall *v.* Cole, 4 A. & E. 577, 1 Hurl. & W. 723, 5 L. J. K. B. 100, 6 N. & M. 124, 31 E. C. L. 259.

66. Sizer *v.* Heacock, 23 Wend. (N. Y.) 81; Upington *v.* May, 40 Ohio St. 247; Ferguson *v.* Childress, 9 Humphr. (Tenn.) 382.

67. Lambert *v.* Shitler, 62 Iowa 72, 17 N. W. 187; Perry *v.* Armstrong, 39 N. H. 583.

In Louisiana where, at a meeting of the creditors of an insolvent debtor, the maker of a note, a respite is granted to him for the payment of all his debts, the holder of the note voting for the same, there is such an extension of time for payment of the note as discharges an indorser or surety. Picquet *v.* Deinitry, 6 La. 120; Molte *v.* His Creditors, 7 Mart. N. S. (La.) 9. And the fact that the respite would have been granted even if the holder of the note had refused to vote is immaterial. Nolte *v.* His Creditors, 7 Mart. N. S. (La.) 16. But consent by the holder of a note to a credit sale of property of the maker who has made a *cessio bonorum* does not constitute an extension of time. Leger *v.* Arcenaux, 5 Rob. (La.) 513.

68. Hebbard *v.* Morton, 11 La. 115.

69. See Allen *v.* Breusing, 32 Ill. 505.

70. *Alabama.*— David *v.* Malone, 48 Ala. 428. *Compare* Cox *v.* Mobile, etc., R. Co., 37 Ala. 320.

Georgia.— Alston *v.* Wingfield, 53 Ga. 18, holding that an indorsement by the maker across the face of a note after maturity, "I agree to pay ten per cent. on this bill till paid," does not extend the time of payment, and that parol evidence is not admissible to show that extension for a definite time was agreed upon.

Illinois.— Booth *v.* Wiley, 102 Ill. 84; Allen *v.* Breusing, 32 Ill. 505.

Indiana.— Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360; Tracy *v.* Quillen, 65 Ind. 249; Bucklen *v.* Huff, 53 Ind. 474; Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270 (holding that extensions of the time of payment "until the summer," and afterward "until the fall," were extensions for a definite time, until June 1 and September 1).

Iowa.— Morgan *v.* Thompson, 60 Iowa 280, 14 N. W. 306.

Kentucky.— Alley *v.* Hopkins, 98 Ky. 668, 17 Ky. L. Rep. 1227, 34 S. W. 13, 56 Am. St. Rep. 382; Robinson *v.* Miller, 2 Bush (Ky.) 179.

Maine.— Derby Line Nat. Bank *v.* Dow, 79 Me. 275, 9 Atl. 730, holding a promise by the holder of an overdue note, on payment of overdue interest, to hold it for thirty or sixty days, "if nothing materially transpires to change the status of the security," too indefinite to discharge indorsers.

Mississippi.— Brown *v.* Prophit, 53 Miss. 649; Rupert *v.* Grant, 6 Sm. & M. (Miss.) 433 (holding that an extension granted to the accepter of a bill "until the drawer could be heard from" was sufficiently definite to discharge an indorser).

Montana.— Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

Ohio.— Edwards *v.* Bedford Chair Co., 41 Ohio St. 17 (holding a promise by the holder of a note to show "reasonable favor" on the maker's promising to give drafts on his cus-

valid and binding contract between the holder and the other party, precluding him from enforcing payment.[71] A renewal obtained by fraud may be repudiated by the holder, and indorsers or sureties will not be discharged.[72] It is not necessary that there shall be an express agreement extending time, but it is sufficient if such is the necessary effect of the agreement.[73]

b. Parol Agreement. It is well settled that the time of payment of a bill or note may be extended by an oral agreement, as this does not in any way violate the rule excluding parol evidence to contradict, add to, or vary a written contract, the evidence not being admitted for this purpose, but to prove a new agreement.[74]

tomers too indefinite to discharge indorsers); Ward *v.* Wick, 17 Ohio St. 159; Jenkins *v.* Clarkson, 7 Ohio 72.

Oregon.— Findley *v.* Hill, 8 Oreg. 247, 34 Am. Rep. 578, holding that an agreement to extend payment of a note until after harvest is void for uncertainty.

Pennsylvania.— Siebeneck *v.* Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; People's Bank *v.* Legrand, 103 Pa. St. 309, 49 Am. Rep. 126; Miller *v.* Stem, 2 Pa. St. 286 (holding that an agreement by the holder of a note to wait for payment "until some time in the summer" was invalid, because it was for an indefinite period).

South Carolina.— Parnell *v.* Price, 3 Rich. (S. C.) 121.

Tennessee.—Cherry *v.* Miller, 7 Lea (Tenn.) 305.

Texas.— Aiken *v.* Posey, 13 Tex. Civ. App. 607, 35 S. W. 732, holding that a contract to extend the time of payment of a note until action thereon is necessary to prevent the bar of the statute of limitations is sufficiently definite as to time.

Wisconsin.— Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621 (holding that an agreement to extend the time of payment of a note "until after threshing," is sufficiently definite to discharge a surety); Hamilton *v.* Prouty, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866 (holding that an extension of a note "for twenty or thirty days" is sufficiently definite to discharge an indorser).

United States.— Varnum *v.* Bellamy, 4 McLean (U. S.) 87, 28 Fed. Cas. No. 16,886.

See 7 Cent. Dig. tit. "Bills and Notes," § 334.

Reasonable time.— It has been held, at least as between the parties, that an agreement by the payee of a note, after maturity, to forbear suit thereon, in consideration of the signing of the note by a third person, no time of forbearance being agreed upon, binds the payee to forbear suit for a reasonable time. Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506.

71. *Alabama.*— Kyle *v.* Bostick, 10 Ala. 589.

Illinois.— Crossman *v.* Wohlleben, 90 Ill. 537.

Iowa.— Miller *v.* McCallen, 69 Iowa 681, 29 N. W. 942.

Kansas.— Costello *v.* Wilhelm, 13 Kan. 229.

Kentucky.— Anderson *v.* Mannon, 7 B. Mon. (Ky.) 217.

Massachusetts.— Veazie *v.* Carr, 3 Allen (Mass.) 14.

Missouri.— Russell *v.* Brown, 21 Mo. App. 51.

New York.— Vilas *v.* Jones, 1 N. Y. 274.

Tennessee.—Wilson *v.* Langford, 5 Humphr. (Tenn.) 320.

Wisconsin.— Meiswinkle *v.* Jung, 30 Wis. 361, 11 Am. Rep. 572.

United States.— McLemore *v.* Powell, 12 Wheat. (U. S.) 554, 6 L. ed. 726; *Ex p.* Balch, 2 Lowell (U. S.) 440, 2 Fed. Cas. No. 789, 13 Nat. Bankr. Reg. 160.

England.— Philpot *v.* Briant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754, 29 Rev. Rep. 710.

"**By a valid agreement** to give time is meant an agreement for the breach of which the maker or the acceptor has a remedy either at law or in equity." Veazie *v.* Carr, 3 Allen (Mass.) 14, 15. See also Greely *v.* Dow, 2 Metc. (Mass.) 176.

Action at law need not lie.—An agreement to give time to the maker of a note, sufficient to discharge an indorser, need be such only as will prevent the indorsee from proceeding against him, and need not be such "that the maker of said note could sustain an action against the indorsee if he violates it." Pierce *v.* Whitney, 22 Me. 113.

Signature of agreement.—An agreement extending the time of payment of a note secured by a deed of trust, and signed by the maker (also the grantor), is binding although not signed by the trustee or holder, where the holder has allowed the note and deed to remain in the trustee's possession, and the trustee has indorsed the extension on the note and received interest for the period of extension. Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239.

72. Where the holder of a note is induced to accept a renewal thereof by the false representation that the signature of the surety thereto is genuine, there is no valid extension of time, and the surety on the original note is not discharged. Lovinger *v.* Madison First Nat. Bank, 81 Ind. 354. See also McDougall *v.* Walling, 15 Wash. 78, 45 Pac. 668, 55 Am. St. Rep. 871.

73. Lambert *v.* Shitler, 62 Iowa 72, 17 N. W. 187; Brooks *v.* Wright, 13 Allen (Mass.) 72; Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301; Union Bank *v.* McClung, 9 Humphr. (Tenn.) 98.

74. *Alabama.*— Ferguson *v.* Hill, 3 Stew. (Ala.) 485, 21 Am. Dec. 641.

Illinois.— Myers *v.* Fairbury First Nat. Bank, 78 Ill. 257; Danforth *v.* Semple, 73 Ill.

Most of the courts have held that such an agreement is binding, whether the consideration for the extension is executed, as by the payment of interest in advance, or is a mere executory oral promise to pay.[75]

c. **Consideration** — (I) *Necessity For.* An agreement for extension of the time of payment of a bill or note involves a promise by the holder to forbear, and this, like other promises, is not binding unless it is supported by a consideration. If there is no consideration therefore the agreement does not prevent the holder from suing on the paper at any time or discharge indorsers or sureties.[76]

170; Pierce *v.* Hasbrouck, 49 Ill. 23; Flynn *v.* Mudd, 27 Ill. 323; Warner *v.* Campbell, 26 Ill. 282; Reynolds *v.* Barnard, 36 Ill. App. 218.

Indiana.— Pierce *v.* Goldsberry, 31 Ind. 52.

Iowa.— Cox *v.* Carrell, 6 Iowa 350.

Maine.— Flanders *v.* Barstow, 18 Me. 357.

New Hampshire.— Bailey *v.* Adams, 10 N. H. 162; Wheat *v.* Kendall, 6 N. H. 504; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

New York.— Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

North Dakota.— Foster *v.* Furlong, 8 N. D. 282, 78 N. W. 986.

Ohio.— Thompson *v.* Marshall, 2 Ohio Dec. (Reprint) 506, 3 West. L. Month. 386.

Vermont.— Morse *v.* Huntington, 40 Vt. 488; Dunham *v.* Downer, 31 Vt. 249; People's Bank *v.* Pearsons, 30 Vt. 711.

Wisconsin.— Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751.

United States.— Cooper *v.* Gibbs, 4 McLean (U. S.) 396, 6 Fed. Cas. No. 3,194.

See 7 Cent. Dig. tit. "Bills and Notes," § 334.

Paper secured by mortgage.—The fact that commercial paper is secured by a real-estate or chattel mortgage does not prevent the time of payment from being extended by parol agreement. Flanders *v.* Barstow, 18 Me. 357; Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

75. Bailey *v.* Adams, 10 N. H. 162; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566; Thompson *v.* Marshall, 2 Ohio Dec. (Reprint) 506, 3 West. L. Month. 386. And see the other cases cited in the note preceding. Some courts, however, have held that an oral promise extending the time of payment of a note is not binding when it is based only upon an oral promise to pay interest or other consideration for the extension. Berry *v.* Pullen, 69 Me. 101, 31 Am. Rep. 248.

Statutes.— In some jurisdictions there are statutes on the subject. Thus in North Dakota it is provided that "a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise." N. D. Rev. Codes (1899), § 3936. Under this section the time of payment of a promissory note may be extended by parol agreement, where the consideration is the actual payment of interest in advance, or other executed consideration, but not where the consideration is an oral promise to pay interest. Foster *v.* Furlong, 8 N. D. 282, 78 N. W. 986.

76. *Alabama.*— Huntsville Branch Bank *v.* Steele, 10 Ala. 915.

Arkansas.— Hazard *v.* White, 26 Ark. 155.

California.— Peachy *v.* Witter, 131 Cal. 316, 63 Pac. 468; McCann *v.* Lewis, 9 Cal. 246.

District of Columbia.— Gross *v.* Steinle, 20 D. C. 339.

Florida.— Fridenberg *v.* Robinson, 14 Fla. 130.

Georgia.— Bonner *v.* Nelson, 57 Ga. 433; Goodwyn *v.* Hightower, 30 Ga. 249; Stallings *v.* Johnson, 27 Ga. 564.

Illinois.— Crossman *v.* Wohlleben, 90 Ill. 537; Waters *v.* Simpson, 7 Ill. 570.

Indiana.— Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360; Holmes *v.* Boyd, 90 Ind. 332; Hogshead *v.* Williams, 55 Ind. 145; Rigsbee *v.* Bowler, 17 Ind. 167; Harter *v.* Moore, 5 Blackf. (Ind.) 367; Bugh *v.* Crum, 26 Ind. App. 465, 59 N. E. 1076, 84 Am. St. Rep. 307.

Iowa.— Marshall Field Co. *v.* Oren Ruffcorn Co., (Iowa 1902) 90 N. W. 618; Hensler *v.* Watts, 113 Iowa 741, 84 N. W. 666; Roberts *v.* Richardson, 39 Iowa 290.

Kansas.— Ingels *v.* Sutliff, 36 Kan. 444, 13 Pac. 828; Costello *v.* Wilhelm, 13 Kan. 229; Eaton *v.* Whitmore, 3 Kan. App. 760, 45 Pac. 450; Conklin *v.* Lonnier, 10 Kan. App. 550, 63 Pac. 23.

Kentucky.—Anderson *v.* Mannon, 7 B. Mon. (Ky.) 217.

Louisiana.— Frazier *v.* Dick, 5 Rob. (La.) 249; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

Maine.— Williams *v.* Smith, 48 Me. 135; Bagley *v.* Buzzell, 19 Me. 88.

Maryland.— Ives *v.* Bosley, 35 Md. 262, 6 Am. Rep. 411; Hoffman *v.* Coombs, 9 Gill (Md.) 284; Planters' Bank *v.* Sellman, 2 Gill & J. (Md.) 230.

Massachusetts.— Wilson *v.* Powers, 130 Mass. 127; Jennings *v.* Chase, 10 Allen (Mass.) 526.

Michigan.— McInerney *v.* Lindsay, 97 Mich. 238, 56 N. W. 603.

Mississippi.— Roberts *v.* Stewart, 31 Miss. 664; Wadlington *v.* Gary, 7 Sm. & M. (Miss.) 522; Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24.

Missouri.— Wiley *v.* Hight, 39 Mo. 130; Marks *v.* State Bank, 8 Mo. 316; Nichols *v.* Douglass, 8 Mo. 49; Smith *v.* Warren, 88 Mo. App. 285.

Montana.— Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

(II) *Sufficiency of Consideration.* Since a promise to do nothing more than one is already legally bound to do is no consideration for a promise given in return, there is no consideration for an extension of the time of payment of a bill or note, which involves a promise to forbear, where the only consideration is the debtor's promise to pay the debt at the extended time of payment, without anything more,[77] his promise to pay in instalments[78] or to pay other matured notes on which he is indebted,[79] or his actual payment of a part of the debt at or after maturity.[80] There is a consideration, however, if the debtor does or promises to do anything further or different from what he is bound to do, and which is of detriment to him or benefit to the holder,[81] as where he pays part of the debt

New Hampshire.— Bailey *v.* Adams, 10 N. H. 162.

New Jersey.— Meginnis *v.* Nightingale, 34 N. J. L. 461; Grover *v.* Hoppock, 26 N. J. L. 191.

New York.—Parmelee *v.* Thompson, 45 N. Y. 58, 6 Am. Rep. 33; O'Hara *v.* Robinson, 63 Hun (N. Y.) 569, 18 N. Y. Suppl. 541, 45 N. Y. St. 460; Van Rensselaer *v.* Kirkpatrick, 46 Barb. (N. Y.) 194; New Berlin First Nat. Bank *v.* Church, 3 Thomps. & C. (N. Y.) 10; Manchester *v.* Van Brunt, 2 Misc. (N. Y.) 228, 22 N. Y. Suppl. 362, 50 N. Y. St. 588 [*affirming* 19 N. Y. Suppl. 685, 46 N. Y. St. 566]; Miller *v.* Holbrook, 1 Wend. (N. Y.) 317.

North Carolina.— Charlotte First Nat. Bank *v.* Lineberger, 83 N. C. 454, 35 Am. Rep. 582.

Ohio.— Turnbull *v.* Brock, 31 Ohio St. 649; Ward *v.* Wick, 17 Ohio St. 159; Farmers' Bank *v.* Raynolds, 13 Ohio 84; Jenkins *v.* Clarkson, 7 Ohio 72.

Oregon.— Findley *v.* Hill, 8 Oreg. 247, 34 Am. Rep. 578; Schlussel *v.* Warren, 2 Oreg. 17.

Pennsylvania.— Siebeneck *v.* Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; Hartman *v.* Danner, 74 Pa. St. 36; Zane *v.* Kennedy, 73 Pa. St. 182; Ashton *v.* Sproule, 35 Pa. St. 492.

Tennessee.— Sully *v.* Childress, 106 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875; Cherry *v.* Miller, 7 Lea (Tenn.) 305; Howell *v.* Sevier, 1 Lea (Tenn.) 360, 27 Am. Rep. 771; East Tennessee Bank *v.* Hooke, 1 Coldw. (Tenn.) 156.

Texas.— Austin Real Estate, etc., Co. *v.* Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430; Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855; Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861.

Vermont.— Joslyn *v.* Smith, 13 Vt. 353.

Washington.— Price *v.* Mitchell, 23 Wash. 742, 63 Pac. 514.

Wisconsin.— Meiswinkle *v.* Jung, 30 Wis. 361, 11 Am. Rep. 572.

United States.— McLemore *v.* Powell, 12 Wheat. (U. S.) 554, 6 L. ed. 726; Varnum *v.* Bellamy, 4 McLean (U. S.) 87, 28 Fed. Cas. No. 16,886; Corbett *v.* Woodward, 5 Sawy. (U. S.) 403, 6 Fed. Cas. No. 3,223, 11 Chic. Leg. N. 246.

England.— Philpot *v.* Briant, 4 Bing. 717, 720, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754, 29 Rev. Rep. 710, where it was said: "The time of payment must be given by a contract that is binding on the holder of the bill; a contract, without consideration, is not binding on him; the delay in suing is, under such a contract, gratuitous; notwithstanding such contract, he may proceed against the acceptor when he pleases, or receive the amount of the bill from the drawer or endorsers. As the drawer and endorsers are not prevented from taking up the bill by such delay, their liability is not discharged by it; to hold them discharged under such circumstances, would be to absolve them from their engagement without any reason for so doing."

See also *supra*, III, B, 5, a; and 7 Cent. Dig. tit. "Bills and Notes," §§ 341–354.

77. *Alabama.*— Huntsville Branch Bank *v.* State, 10 Ala. 915.

Illinois.— Booth *v.* Wiley, 102 Ill. 84; Stuber *v.* Schack, 83 Ill. 191; Waters *v.* Simpson, 7 Ill. 570.

Kansas.— Royal *v.* Lindsay, 15 Kan. 591; Costello *v.* Wilhelm, 13 Kan. 229.

Maine.— Bagley *v.* Buzzell, 19 Me. 88.

Maryland.— Planters' Bank *v.* Sellman, 2 Gill & J. (Md.) 230.

New Hampshire.— Russ *v.* Hobbs, 61 N. H. 93.

New York.—Van Rensselaer *v.* Kirkpatrick, 46 Barb. (N. Y.) 194; New Berlin First Nat. Bank *v.* Church, 3 Thomps. & C. (N. Y.) 10.

Ohio.— Turnbull *v.* Brock, 31 Ohio St. 649.

Washington.— Price *v.* Mitchell, 23 Wash. 742, 63 Pac. 514.

See also *supra*, III, B, 5, b, (III), note 52.

A promise to pay the interest due on a note is no consideration for an extension. Price *v.* Mitchell, 23 Wash. 742, 63 Pac. 514.

78. Planters' Bank *v.* Sellman, 2 Gill & J. (Md.) 230; Van Rensselaer *v.* Kirkpatrick, 46 Barb. (N. Y.) 194.

79. Juchter *v.* Boehm, 63 Ga. 71; Jennings *v.* Chase, 10 Allen (Mass.) 526. See also *supra*, III, B, 5, b, (I), note 42.

80. See *supra*, III, B, 5, b, (I), note 43.

81. Stallings *v.* Johnson, 27 Ga. 564; Royal *v.* Lindsay, 15 Kan. 591.

Entering into contract with third person. — If the maker of a note, at the instance of the holder, who promises an extension of time, enters into a contract with a third person for the benefit of the holder, the maker's liability to respond in damages for breach of such contract is sufficient consideration for the holder's promise of extension, al-

before it is due,[82] promises to pay in a different medium than is required by his contract, as in government bonds[83] or property,[84] gives collateral security or a mortgage,[85] pays interest in advance for the period of extension,[86] or money as a bonus, premium, or otherwise,[87] or gives a note therefor,[88] or promises either orally or in writing to pay interest monthly instead of annually as provided in the note,[89] or at a greater rate,[90] or, by the weight of authority, even at the same

though the contract may be one which cannot be specifically enforced. Horton Bank *v.* Brooks, 64 Kan. 285, 67 Pac. 860.

The obtaining by a creditor of the assets of a firm in payment of the private indebtness of one of its members, if legally acquired by the consent of all of the members of the firm, furnishes a valuable consideration for a promise of further extension. Provines *v.* Wilder, 87 Mo. App. 162.

82. Cox *v.* Carrell, 6 Iowa 350; Hartman *v.* Danner, 74 Pa. St. 36. See also Buck *v.* Smiley, 64 Ind. 431; and *supra*, III, B, 5, b, (I), note 39.

Part payment during days of grace.— It has been held that a payment made on a note on or after the date when it became due by its terms, although before the expiration of the days of grace, is not made before maturity, so as to support an agreement for an extension. McKamy *v.* McNabb, 97 Tenn. 236, 36 S. W. 1091.

Crediting payment before maturity.— Where the holder of a note agreed with the maker that if he would pay a certain amount cash he might have ninety days longer on the balance, and the maker remitted the cash to the bank where the note was held for collection, it was held that the fact that the bank credited the payment on the note the day before maturity, contrary to the intent of the parties, who only intended a payment at maturity, did not establish an agreement for extension, as the payment made, being only intended as a payment at maturity, which was only the maker's duty under his contract, was no consideration for the promise to extend the time of payment. Sully *v.* Childress, 106 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875.

83. See Huntsville Branch Bank *v.* Steele, 10 Ala. 915.

Option to pay in bonds.— But there must be a promise, and not a mere option, and where the maker of an overdue note proposes to pay it at a future date in state bonds, and the holder agrees to the proposition, but the maker does not promise or bind himself to pay in bonds, there is no consideration for a promise by the holder to extend the time of payment on the note, since both parties must be bound or neither is bound. The agreement therefore does not discharge indorsers. Huntsville Branch Bank *v.* Steele, 10 Ala. 915.

84. Millaudon *v.* Arnous, 3 Mart. N. S. (La.) 596, holding that where the holder of a matured note agrees to purchase property from the maker, to be delivered on a certain date in settlement of the note, such agreement constitutes an extension of time of payment.

85. Trayser *v.* Indiana Asbury University, 39 Ind. 556; Gates *v.* Hamilton, 12 Iowa 50; Martin *v.* Bell, 18 N. J. L. 167; Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874; Kelty *v.* Jenkins, 1 Hilt. (N. Y.) 73. See also *supra*, III, B, 5, b, (II).

86. *Georgia.*— Randolph *v.* Fleming, 59 Ga. 776.

Illinois.— Crossman *v.* Wohlleben, 90 Ill. 537.

Indiana.— Starret *v.* Burkhalter, 70 Ind. 285.

Kansas.— Royal *v.* Lindsay, 15 Kan. 591.

Missouri.— Hosea *v.* Rowley, 57 Mo. 357; American Nat. Bank *v.* Love, 62 Mo. App. 378; Nevada First Nat. Bank *v.* Gardner, 57 Mo. App. 268; Commercial Bank *v.* Wood, 56 Mo. App. 214.

Nebraska.— Kittle *v.* Wilson, 7 Nebr. 76.

New Hampshire.— Wright *v.* Bartlett, 43 N. H. 548.

New York.— Billington *v.* Wagoner, 33 N. Y. 31; Gloversville Nat. Bank *v.* Place, 15 Hun (N. Y.) 564.

Pennsylvania.— *In re* Bishop, 195 Pa. St. 85, 45 Atl. 582.

Tennessee.— Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301.

Vermont.— People's Bank *v.* Pearsons, 30 Vt. 711.

See also *supra*, III, B, 5, b, (I), note 40; and 7 Cent. Dig. tit. "Bills and Notes," § 348.

87. Hamilton *v.* Prouty, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866. See also *supra*, III, B, 5, b, (I), note 38.

88. McComb *v.* Kittridge, 14 Ohio 348; Walters *v.* Swallow, 6 Whart. (Pa.) 446. *Compare supra*, III, B, 5, b, (I), note 38.

89. Royal *v.* Lindsay, 15 Kan. 591.

90. *California.*— Smith *v.* Pearson, 52 Cal. 339.

Indiana.— Huff *v.* Cole, 45 Ind. 300.

Kansas.— Royal *v.* Lindsay, 15 Kan. 591.

Louisiana.— Shaw *v.* Nolan, 8 La. Ann. 25; Calliham *v.* Tanner, 3 Rob. (La.) 299.

Nebraska.— Kittle *v.* Wilson, 7 Nebr. 76.

Canada.— Farrell *v.* Oshawa Mfg. Co., 9 U. C. C. P. 239; Arthur *v.* Lier, 8 U. C. C. P. 180.

See also *supra*, III, B, 5, b, (III), note 49; and 7 Cent. Dig. tit. "Bills and Notes," § 345.

Giving note for interest due.— An extension of time of payment of a note, in consideration of the principal making a note bearing interest from date for the interest due, is valid, as the agreement to pay such compound interest is a sufficient consideration for the extension. Bugh *v.* Crum, 26 Ind. App. 465, 59 N. E. 1076, 84 Am. St. Rep. 307.

or a less rate, for his promise to keep the money and pay interest for the period of the extension is either a detriment to him or a benefit to the holder or both.[91] An absolute promise by an indorser to pay a note is such a consideration for the holder's agreement to extend as to discharge a subsequent indorser.[92] An oral promise within the statute of frauds has been held to be no consideration for an extension,[93] but as to this there is a conflict in the decisions.[94]

(III) *Renewal.* A bill or note given in renewal is supported by the consideration of the original bill or note.[95]

(IV) *Usurious Consideration*—(A) *Promise to Pay Usury.* Where the consideration for a promise to extend the time of payment of a note or bill is a promise to pay usurious interest, and the agreement is wholly executory on both sides and is void under the statute against usury, there is no consideration at all, and the agreement therefor neither precludes a suit by the holder nor discharges

91. *Illinois.*— Dodgson *v.* Henderson, 113 Ill. 360; Reynolds *v.* Barnard, 36 Ill. App. 218. *Compare* Booth *v.* Wiley, 102 Ill. 84.

Indiana.—Pierce *v.* Goldsberry, 31 Ind. 52.

Kansas.— Eaton *v.* Whitmore, 3 Kan. App. 760, 45 Pac. 450.

Kentucky.— Alley *v.* Hopkins, 98 Ky. 668, 17 Ky. L. Rep. 1227, 34 S. W. 13, 56 Am. St. Rep. 382; Robinson *v.* Miller, 2 Bush (Ky.) 179.

Maine.— Chute *v.* Pattee, 37 Me. 102; Warren Academy *v.* Starrett, 15 Me. 443.

Montana.— Hale *v.* Forbis, 3 Mont. 395.

New Hampshire. — Bailey *v.* Adams, 10 N. H. 162; Wheat *v.* Kendall, 6 N. H. 504; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

Ohio.— Fawcett *v.* Freshwater, 31 Ohio St. 637; McComb *v.* Kittridge, 14 Ohio 348.

Texas.— Benson *v.* Phipps, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128; Aiken *v.* Posey, 13 Tex. Civ. App. 607, 35 S. W. 732.

See also *supra*, III, B, 5, b, (III), note 49; and 7 Cent. Dig. tit. "Bills and Notes," § 344.

Parol agreement.— In some jurisdictions the time of payment of a note cannot be extended by a parol agreement, where the consideration is an executory oral promise to pay interest. See *supra*, VIII, A, 5, b, note 75.

Binding promise by debtor necessary.— There must, however, be a binding promise on the part of the debtor. Crossman *v.* Wohlleben, 90 Ill. 537; Bailey *v.* Adams, 10 N. H. 162. It has been held therefore that a mere indorsement by the holder upon a note that the time of payment is extended to a given day and that interest has been paid to such date at the same rate specified in the note, without any proof or showing that the interest was paid in advance, there being no date to such indorsement and no evidence that the principal debtor bound himself to keep the money or pay interest for the time of such extension, will not discharge the surety. It is essential in such cases that both parties shall be bound by the agreement, or that it have mutuality, in order to discharge the surety not assenting to the extension. Crossman *v.* Wohlleben, 90 Ill. 537.

Promise by creditor necessary.—A promise by the debtor to pay interest is not sufficient as a contract extending the time of payment, unless there is also a promise of forbearance on the part of the holder. Tinan *v.* Wayne, 1 Disn. (Ohio) 148, 12 Ohio Dec. (Reprint) 541.

Interest already due.— Of course a promise by the maker of a note to pay interest for which he is already liable is no consideration for a promise of forbearance by the holder. Booth *v.* Wiley, 102 Ill. 84; Crossman *v.* Wohlleben, 90 Ill. 537; Stuber *v.* Schack, 83 Ill. 191; Waters *v.* Simpson, 7 Ill. 570; Edmonds *v.* Thomas, 41 Ill. App. 505; Dennis *v.* Piper, 21 Ill. App. 169; Holmes *v.* Boyd, 90 Ind. 332; Starret *v.* Burkhalter, 70 Ind. 285; Halstead *v.* Brown, 17 Ind. 202; Russ *v.* Hobbs, 61 N. H. 93; Andrews *v.* Hagadon, 54 Tex. 571; Helms *v.* Crane, 4 Tex. Civ. App. 89, 23 S. W. 392.

92. Stallings *v.* Johnson, 27 Ga. 564.

93. Agee *v.* Steele, 8 Ala. 948 (holding an oral promise within the clause of the statute of frauds as to contracts for the sale of an interest in land to be no consideration for a promise of extension); Philpot *v.* Briant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754, 29 Rev. Rep. 710 (holding that an oral promise by an executrix to pay a note or acceptance of her testator out of her own estate was void under the statute of frauds, and no consideration for a promise by the holder of the paper to extend the time of payment).

94. See Frauds, Statute of.

95. Dunn *v.* Weston, 71 Me. 270, 36 Am. Rep. 310; Dockray *v.* Dunn, 37 Me. 442; Plimpton *v.* Goodell, 126 Mass. 119; Gates *v.* Union Bank, 12 Heisk. (Tenn.) 325. This is clearly so where the new note is discounted, and the money obtained thereon. Hubbard *v.* Gurney, 64 N. Y. 457 [*distinguishing* Halliday *v.* Hart, 30 N. Y. 474].

Settlement.— If the maker and holder of notes have a settlement of accounts between them, including the indebtedness remaining due on the notes, and the old notes are surrendered and renewal notes executed, the renewal notes are supported by a sufficient consideration. Canton Chemical Co. *v.* Pegram, 112 N. C. 614, 17 S. E. 298.

indorsers or sureties.[96] It is otherwise, however, if the promise to pay usury is not void under the statute, or is void only as to the excess,[97] or if there is some other valid consideration in addition to the promise.[98]

(B) *Actual Payment of Usury.* If usurious interest is not merely promised but actually paid in advance, in whole or in part, it is held in most jurisdictions that the holder having received the same is estopped to set up the usury, and that the payment therefore is a sufficient consideration for the extension.[99] This does not apply, however, where the statute against usury is construed as rendering all contracts based upon a usurious consideration void, whether wholly executory or executed in part by payment of the usury.[1] If the statute against usury merely causes a forfeiture of all interest and renders the payment of usury a payment *pro tanto* of the principal, actual payment of usurious interest in advance is no consideration for an agreement to forbear, since it is only paying what the debtor is already bound to pay.[2]

6. Parties to Agreement — a. In General. An agreement for extension, to discharge indorsers, must be made by the holder with the maker or accepter.[3] An agreement for forbearance between the holder of a note and a creditor of the maker, to which the maker is not a party, will not discharge an indorser;[4] and

96. *Indiana.*— Lemmon *v.* Whitman, 75 Ind. 318, 39 Am. Rep. 150; Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270.

Kentucky.— Duncan *v.* Reed, 8 B. Mon. (Ky.) 382.

Maine.— Williams *v.* Smith, 48 Me. 135.

Missouri.— Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517; Wiley *v.* Hight, 39 Mo. 130; Moore *v.* Macon Sav. Bank, 22 Mo. App. 684.

North Carolina.— Charlotte First Nat. Bank *v.* Lineberger, 83 N. C. 454, 35 Am. Rep. 582.

Pennsylvania.— Dushane *v.* Allen, 2 Walk. (Pa.) 348.

See also *supra*, III, B, 5, b, (III), note 51; and 7 Cent. Dig. tit. "Bills and Notes," § 347.

Void renewal note.—Where, upon the maturity of a promissory note, a renewal note is given therefor under a usurious agreement, an indorser upon both notes is not discharged from his liability on the first because of the usurious agreement in regard to the renewal note, where the usury invalidates the latter note. Leary *v.* Miller, 61 N. Y. 488.

97. *Georgia.*— Parmelee *v.* Williams, 72 Ga. 42; Stallings *v.* Johnson, 27 Ga. 564.

Mississippi.— Brown *v.* Prophit, 53 Miss. 649.

New Hampshire.— Wheat *v.* Kendall, 6 N. H. 504; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

New York.— Fernan *v.* Doubleday, 3 Lans. (N. Y.) 216.

Ohio.— Wood *v.* Newkirk, 15 Ohio St. 295; McComb *v.* Kittridge, 14 Ohio 348.

98. Stallings *v.* Johnson, 27 Ga. 564; Washington *v.* Tait, 3 Humphr. (Tenn.) 503 [as *construed* in Wilson *v.* Langford, 5 Humphr. (Tenn.) 320].

99. *Alabama.*— Kyle *v.* Bostick, 10 Ala. 589.

California.— Smith *v.* Pearson, 52 Cal. 339.

District of Columbia.— Green *v.* Lake, 2 Mackey (D. C.) 162.

Indiana.— White *v.* Whitney, 51 Ind. 124. *Compare* Shaw *v.* Binkard, 10 Ind. 227.

Kentucky.— Duncan *v.* Reed, 8 B. Mon. (Ky.) 382.

New Hampshire.— Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

New York.— Billington *v.* Wagoner, 33 N. Y. 31; Gloversville Nat. Bank *v.* Place, 15 Hun (N. Y.) 564; Draper *v.* Trescott, 29 Barb. (N. Y.) 401; Wies *v.* Sultzer, 1 N. Y. City Ct. 1. And see La Farge *v.* Herter, 9 N. Y. 241.

North Carolina.— Hollingsworth *v.* Tomlinson, 108 N. C. 245, 12 S. E. 989.

Virginia.— Armistead *v.* Ward, 2 Patt. & H. (Va.) 504.

Wisconsin.— Fay *v.* Tower, 58 Wis. 286, 16 N. W. 558; Riley *v.* Gregg, 16 Wis. 666.

See also *supra*, III, B, 5, b, (I), notes 41, 45; and 7 Cent. Dig. tit. "Bills and Notes," § 348.

1. Vilas *v.* Jones, 1 N. Y. 274.

2. Polkinghorne *v.* Hendricks, 61 Miss. 366; Meginnis *v.* Nightingale, 34 N. J. L. 461; Calvert *v.* Good, 95 Pa. St. 65; Shaffer *v.* Clark, 90 Pa. St. 94; Hartman *v.* Danner, 74 Pa. St. 36; Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301; McKamy *v.* McNabb, 97 Tenn. 236, 36 S. W. 1091; Howell *v.* Sevier, 1 Lea (Tenn.) 360, 27 Am. Rep. 771. See Chadwick *v.* Menard, 104 La. 38, 28 So. 933.

3. Herbert *v.* Servin, 41 N. J. L. 225.

Indorsement of receipt of interest.—An indorsement on a matured note made by the holder, acknowledging the receipt of interest up to a certain date, and agreeing that the note shall stand until that time without suit, is insufficient to show an agreement to extend the time made with the principal maker, as the indorsement does not show by whom the interest was paid. Cheek *v.* Glass, 3 Ind. 286.

4. Hefford *v.* Morton, 11 La. 115; Herbert *v.* Servin, 41 N. J. L. 225.

Evidence of maker's assent.— Where the

an agreement between indorser and indorsee, without the privity of the maker or accepter, will not discharge other indorsers.[5]

b. Agents. If an agreement extending the time of payment of a bill or note is made by an agent without authority, express or implied, it does not postpone the right of action or discharge indorsers or sureties.[6]

B. Laches — 1. Effect in Absence of Statute — a. In General. In the absence of statute[7] or special agreement[8] an ordinary indorser of a negotiable bill or note is not discharged from liability by mere delay or refusal on the part of the holder to commence or prosecute a suit against the maker or accepter for any period short of that fixed by the statute of limitations, where the indorser's liability has been duly fixed by demand, protest, and notice,[9] although the maker or accepter may become insolvent during such delay,[10] if there is no agreement

holder of a note and other creditors of the maker agreed to extend the time for payment of their claims, the maker's acceptance thereto will not be presumed, where he was bound by the terms thereof to pay a greater interest than he otherwise would have to pay. And in an action against an indorser of such note, the mere fact that the original of the agreement extending the time of payment of claims is not produced at the trial — a copy only being produced — will not justify the inference that the maker accepted the agreement. Hefford *v.* Morton, 11 La. 115.

Alteration by extension without maker's consent.— The extension of the time of payment of a note by the holder by an indorsement thereon, without the knowledge or consent of the maker, is a material alteration and ineffectual, so that one taking the note and the mortgage securing it, after the original, but before the extended, time of payment has expired, takes them subject to payments made to the assignor not indorsed on the note. Avirett *v.* Barnhart, 86 Md. 545, 39 Atl. 532.

5. Bagley *v.* Buzzell, 19 Me. 88; Wright *v.* Independence Nat. Bank, 96 Va. 728, 32 S. E. 459, 70 Am. St. Rep. 889; Frazer *v.* Jordan, 8 E. & B. 303, 8 Jur. N. S. 1054, 26 L. J. Q. B. 288, 5 Wkly. Rep. 819, 92 E. C. L. 303.

6. Lawrence *v.* Johnson, 64 Ill. 351; Ritch *v.* Smith, 82 N. Y. 627.

An agent having authority merely to collect commercial paper when due has no authority to bind the holder by granting an extension of time or taking paper in renewal. Lawrence *v.* Johnson, 64 Ill. 351; Chappel *v.* Raymond, 20 La. Ann. 277; Woodbury *v.* Larned, 5 Minn. 339; Ritch *v.* Smith, 82 N. Y. 627; Hutchings *v.* Munger, 41 N. Y. 155; Hart *v.* Hudson, 6 Duer (N. Y.) 294. See also Banks and Banking, 5 Cyc. 505, notes 71, 72; and Principal and Agent.

Extension by cashier of bank.— Wakefield Bank *v.* Truesdell, 55 Barb. (N. Y.) 602; East Tennessee Bank *v.* Hooke, 1 Coldw. (Tenn.) 156.

Implied authority.—Authority to extend the time of payment of a bill or note may be implied. Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874, holding that where the holder of commercial paper secured by a real-estate mortgage authorizes an agent to procure additional security, leaving it to his judgment to make the best arrangement he can for that purpose, the agent has authority to bind the holder by an agreement for a reasonable extension of the time of payment, in consideration of the debtor's giving a chattel mortgage as additional security.

Estoppel.— And the holder of a bill or note may be estopped to deny his agent's authority to extend the time of payment by clothing him with apparent authority. Kransz *v.* Uedelhofen, 193 Ill. 477, 62 N. E. 239 (holding that where the holder of a note secured by a deed of trust permits the trustee to hold possession of the note and deed and collect the interest he thereby holds him out to the grantors as his agent, and is bound by an extension of the time of payment granted by the trustee); Scoville *v.* Landon, 50 N. Y. 686 (holding that one who has the possession of a negotiable note, with all the evidence of ownership, by the owner's consent, may agree with the maker for an extension of the time of payment, and the owner will be bound thereby and indorsees discharged).

Ratification.— The unauthorized act of an agent in extending the time of payment may be ratified by his principal, in which case the ratification will have the same effect as original authority. Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874, holding that where an agent of the owner of commercial paper takes, without authority, a chattel mortgage as collateral security, after maturity of the paper, and agrees to extend the time of payment, his act is ratified by the holder's taking, holding, and foreclosing the mortgage, with knowledge of the facts.

7. See *infra*, VIII, B, 2.

8. See *infra*, VIII, B, 1, b.

9. **Laches in presentment or demand** see *infra*, X.

Laches in giving notice of dishonor see *infra*, XIII.

10. *Alabama.*— Abercrombie *v.* Knox, 3 Ala. 728, 37 Am. Dec. 721; Inge *v.* Mobile Branch Bank, 8 Port. (Ala.) 108.

Arkansas.—Ashley *v.* Gunton, 15 Ark. 415; Jones *v.* Robinson, 8 Ark. 484.

Connecticut.—Glazier *v.* Douglass, 32 Conn. 393; Lockwood *v.* Crawford, 18 Conn. 361.

Louisiana.— Moore *v.* Britton, 22 La. Ann. 64; Fortineau *v.* Boissiere, 18 La. 470; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

extending the time of payment and postponing the remedy, as elsewhere explained.[11] In such a case the remedy of the indorser is to pay the debt himself and then enforce his rights against the principal debtor.[12] This does not apply, however, in most states, where the indorsement is merely as guarantor, but in such a case due diligence in proceeding against the maker is necessary;[13] and diligence against the maker is necessary to charge the indorser or assignor of a non-negotiable note, whose liability is that of a guarantor of the solvency of the maker.[14] The drawer of a bill is not discharged, in the absence of a statute or

Maine.— Mariners' Bank *v.* Abbott, 28 Me. 280; Bagley *v.* Buzzell, 19 Me. 88; Page *v.* Webster, 15 Me. 249, 33 Am. Dec. 608; Freeman's Bank *v.* Rollins, 13 Me. 202.

Massachusetts.—Way *v.* Dunham, 166 Mass. 263, 44 N. E. 220.

Mississippi.— Bullit *v.* Thatcher, 5 How. (Miss.) 689, 37 Am. Dec. 175.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327; Miller *v.* Mellier, 59 Mo. 388; Schlatter *v.* Rector, 1 Mo. 286; Block *v.* O'Hara, 1 Mo. 145; Hunter *v.* Hempstead, 1 Mo. 67, 13 Am. Dec. 468; Coalter *v.* Price, 1 Mo. 54; Hunter *v.* Price, 1 Mo. 53.

Nebraska.— Gibson *v.* Parlin, 13 Nebr. 292, 13 N. W. 405. *Compare* Moffat *v.* Griswold, 1 Nebr. 415.

New York.— Smith *v.* Erwin, 77 N. Y. 466; Converse *v.* Cook, 31 Hun (N. Y.) 417; Taylor *v.* Allen, 36 Barb. (N. Y.) 294; Powers *v.* Silberstein, 51 N. Y. Super. Ct. 321; East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543; Hurst *v.* Trow Printing, etc., Co., 2 Misc. (N. Y.) 361, 22 N. Y. Suppl. 371, 51 N. Y. St. 206, 30 Abb. N. Cas. (N. Y.) 1; Utica Bank *v.* Ives, 17 Wend. (N. Y.) 501; Powell *v.* Waters, 17 Johns. (N. Y.) 176; Trimble *v.* Thorne, 16 Johns. (N. Y.) 152, 8 Am. Dec. 302; White *v.* Gardiner, 4 Redf. Surr. (N. Y.) 71.

North Carolina.— State Bank *v.* Wilson, 12 N. C. 484.

Pennsylvania.— Ashton *v.* Sproule, 35 Pa. St. 492; Day *v.* Ridgway, 17 Pa. St. 303; Beebe *v.* West Branch Bank, 7 Watts & S. (Pa.) 375; Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179; Gray *v.* McDonald, 6 Wkly. Notes Cas. (Pa.) 94; Philadelphia Bank *v.* Wilson, 2 Pa. L. J. 347.

South Carolina.— State Bank *v.* Myers, 1 Bailey (S. C.) 412; Fiddy *v.* Campbell, 2 Brev. (S. C.) 21.

Tennessee.— Cherry *v.* Miller, 7 Lea (Tenn.) 305.

United States.— Ross *v.* Jones, 22 Wall. (U. S.) 576, 22 L. ed. 730; Lenox *v.* Prout, 3 Wheat. (U. S.) 520, 4 L. ed. 449.

Canada.— Thompson *v.* McDonald, 17 U. C. Q. B. 304.

Failure to file claim against estate of deceased maker.— It is no defense for indorsers of a bill of exchange, who have had notice of demand and non-payment, that the indorsee failed, after notice, to file a claim against the insolvent estate of the deceased maker. Lawson *v.* Watson, 8 Baxt. (Tenn.) 72.

11. See *supra*, VIII, A, 3.

12. East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543; and other cases above cited.

13. When a note is indorsed by a person as guarantor, or an indorsement is construed as having such effect, some courts have held that to charge the indorser it is necessary to use reasonable diligence in suing the maker, unless he is insolvent or has left the state having no known property that can be reached by process. Clayton *v.* Coburn, 42 Conn. 348; Holbrook *v.* Camp, 38 Conn. 23; Rhodes *v.* Seymour, 36 Conn. 1; Withers *v.* Berry, 25 Kan. 373; Kearnes *v.* Montgomery, 4 W. Va. 29. *Contra*, San Diego First Nat. Bank *v.* Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; Parkhurst *v.* Vail, 73 Ill. 343. And see GUARANTY.

14. *Alabama.*— Jordan *v.* Garnett, 3 Ala. 610.

Connecticut.— Gillespie *v.* Wheeler, 46 Conn. 410; Holbrook *v.* Camp, 38 Conn. 23; Ranson *v.* Sherwood, 26 Conn. 437; Castle *v.* Candee, 16 Conn. 223; Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282; Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52; Welton *v.* Scott, 4 Conn. 527; Huntington *v.* Harvey, 4 Conn. 124; Williams *v.* Granger, 4 Day (Conn.) 444; Bradly *v.* Phelps, 2 Root (Conn.) 325.

Delaware.— Pyle *v.* McMonagle, 2 Harr. (Del.) 468.

Iowa.— Voorhies *v.* Atlee, 29 Iowa 49.

Kentucky.— Francis *v.* Gant, 80 Ky. 190; Williams *v.* Obst, 12 Bush (Ky.) 266; Roberts *v.* Atwood, 8 B. Mon. (Ky.) 209; Levi *v.* Evans, 7 B. Mon. (Ky.) 115; Clair *v.* Barr, 2 A. K. Marsh. (Ky.) 255, 12 Am. Dec. 391; Hogan *v.* Vance, 2 Bibb (Ky.) 34; Spratt *v.* McKinney, 1 Bibb (Ky.) 595.

Virginia.—Mackie *v.* Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482. And see Thompson *v.* Govan, 9 Gratt. (Va.) 695; McLaughlin *v.* Duffield, 5 Gratt. (Va.) 133; Drane *v.* Scholfield, 6 Leigh (Va.) 386; Caton *v.* Lenox, 5 Rand. (Va.) 31; Goodall *v.* Stuart, 2 Hen. & M. (Va.) 105; Bronaugh *v.* Scott, 5 Call (Va.) 78; Lee *v.* Love, 1 Call (Va.) 497.

West Virginia.— Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828; Morrison *v.* Lovell, 4 W. Va. 346; Nichols *v.* Porter, 2 W. Va. 13, 94 Am. Dec. 500.

United States.— U. S. Bank *v.* Tyler, 4 Pet. (U. S.) 366, 7 L. ed. 888; U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 331, 481, 7 L. ed. 441, 492; Dulany *v.* Hodgkin, 5 Cranch (U. S.) 333, 3 L. ed. 117; Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61; Yeaton *v.* Alexandria Bank, 5 Cranch (U. S.) 49, 3

special agreement, by the holder's delay in proceeding against the accepter.[15] Nor, by the weight of authority, is a surety on a note discharged by the holder's mere failure to proceed against the principal.[16] The liability of a guarantor, how-

L. ed. 33; Dean *v.* Marsteller, 2 Cranch C. C. (U. S.) 121, 7 Fed. Cas. No. 3,710; McIver *v.* Kennedy, 1 Cranch C. C. (U. S.) 424, 16 Fed. Cas. No. 8,830; Alexandria Bank *v.* Wilson, 1 Cranch C. C. (U. S.) 168, 2 Fed. Cas. No. 855; Mandeville *v.* Mackenzie, 1 Cranch C. C. (U. S.) 23, 16 Fed. Cas. No. 9,014; Lemmons *v.* Choteau, Hempst. (U. S.) 85, 15 Fed. Cas. No. 8,239*a*; Dent *v.* Ashley, Hempst. (U. S.) 55, 7 Fed. Cas. No. 3,809*b*.

Under statutes see *infra*, VIII, B, 2.

Judgment note.— Where judgment on a note might have been entered on Septemher 13, 1848, and execution might have been issued March 13, 1849, it was held that the assignor thereof was not liable to the assignee for the amount thereof, where no proceeding was taken to collect the note until after the maker's death on January 12, 1850, where the maker was not insolvent as late as October, 1849. Bennett *v.* Moore, 5 Harr. (Del.) 350.

Injury to indorser.— Where the holder of a non-negotiable note, indorsed in blank, has without excuse neglected until long after maturity to bring suit, it is not necessary for the indorser, insisting upon the laches of the holder as a discharge from liability, to show that he has sustained actual damage. Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52.

That the maker of a note is a transient and unsettled person is not sufficient to excuse the holder from using due diligence. Lemmons *v.* Choteau, Hempst. (U. S.) 85, 15 Fed. Cas. No. 8,239*a*.

Where exchange notes have been given between the maker and assignor of a note as a consideration for each other, and the note given by the assignor has never been paid by him or sued upon, the assignee need not bring suit against the maker in order to charge the assignor. Caton *v.* Lenox, 5 Rand. (Va.) 31.

An assignee of an invalid, non-negotiable draft, who relies on its invalidity as excusing him from attempting by suit to collect the money, must notify the assignor of his reason for not suing and offer to return the instrument to him; and if he is guilty of negligence therein, to the assignor's damage, he cannot recover the consideration of the assignment. Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828.

In an action by a transferee of a forged note against the transferrer it is not necessary that plaintiff should prove that he has instituted suits against the maker and indorser of the note and failed to recover. Semmes *v.* Wilson, 5 Cranch C. C. (U. S.) 285, 21 Fed. Cas. No. 12,658.

Removal of maker from state.— Where the maker of a note was a resident of the state at the time the note was made or at the time it was assigned and afterward removed to an adjoining state, whether he is bound to pursue the maker in the adjoining state or not, if he elects to do so, and fails to commence or prosecute his suit against the maker with due diligence, he has no recourse against the assignor. Drane *v.* Scholfield, 6 Leigh (Va.) 386.

Waiver.— Where the holder of a bond assigned it by indorsing thereon, "I assign the within bond to H. O. Middleton, and agree not to take any legal advantage of said Middleton, in the indulgence he may give," and a few days after Middleton assigned the bond to one McLaughlin, who delayed to bring suit against the maker until he became insolvent, it was held that the assignor was liable to McLaughlin on his assignment. McLaughlin *v.* Duffield, 5 Gratt. (Va.) 133. Where an indorser, however, after he had become discharged by the laches of the holder, wrote a letter to the holder, who had arrested the body of the maker, advising him not to commit the debtor to prison, as it would answer no good purpose, it was held no waiver of diligence, so as to affect the indorser's liability. Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52. So where an indorser, after he had become discharged by the laches of the holder, took an assignment of property from the maker as security or indemnity for indorsements and liabilities on the maker's account, and it appeared that he was under indorsements and liabilities for the assignor to the full amount of the property conveyed, aside from the note in question, it was held that the taking of such assignment was not a waiver of diligence, so as to revive the extinguished liability of the indorser. Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52.

15. Motte *v.* Kennedy, 3 McCord (S. C.) 13.

16. *California.*— Humphreys *v.* Crane, 5 Cal. 173.

Indiana.— May *v.* Reed, 125 Ind. 199, 25 N. E. 216.

Kentucky.— Tudor *v.* Goodloe, 1 B. Mon. (Ky.) 322.

Louisiana.— Boutte *v.* Martin, 16 La. 133; Cooley *v.* Lawrence, 4 Mart. (La.) 639.

Maryland.— Gray *v.* Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518.

Massachusetts.— Allen *v.* Brown, 124 Mass. 77; Agricultural Bank *v.* Bishop, 6 Gray (Mass.) 317; Oxford Bank *v.* Lewis, 8 Pick. (Mass.) 458; Bellows *v.* Lovell, 5 Pick. (Mass.) 307; Hunt *v.* Bridgham, 2 Pick. (Mass.) 581, 13 Am. Dec. 458.

Montana.— Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

Nebraska.— Sheldon *v.* Williams, 11 Nebr. 272, 9 N. W. 86.

New Jersey.—Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

Pennsylvania.— Shaffstall *v.* McDaniel, 152 Pa. St. 598, 31 Wkly. Notes Cas. (Pa.) 394, 25 Atl. 576; Ashton *v.* Sproule, 35 Pa. St. 492.

ever, is different, and most courts hold that he will be discharged if the holder of the paper does not use reasonable diligence to collect the same from the principal debtor.[17]

b. Special Agreement Requiring Diligence Against Maker. The general rule that an indorser is not discharged by mere failure of the holder to sue the maker or accepter does not apply where there is a special agreement requiring the holder to use diligence against the maker or accepter before resorting to the liability of the indorser,[18] as where it is stipulated that the indorser is to pay in case the maker or accepter proves insolvent[19] or where there is a mere guaranty of the collectability of the paper by due process of law.[20]

c. What Constitutes Due Diligence. Where diligence in proceeding against the maker of a note is necessary suit should be brought at the first term after his default in the absence of sufficient excuse.[21] Due diligence, however, does not

Tennessee.—Cherry *v.* Miller, 7 Lea (Tenn.) 305.

Texas.— Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181.

Wisconsin.— Harris *v.* Newell, 42 Wis. 687.

Canada.—Guy *v.* Paré, 1 Quebec Super. Ct. 443; Meikle *v.* Dorion, 1 Quebec Super. Ct. 72.

See also PRINCIPAL AND SURETY.

17. See, generally, GUARANTY.

18. Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705. See also Pittman *v.* Chisolm, 43 Ga. 442 (where a note was indorsed "to be liable only in the second instance"); Arnold *v.* Waters, 8 Rich. (S. C.) 433; Williams *v.* Miller, 2 Lea (Tenn.) 405; Garey *v.* Union Bank, 3 Cranch C. C. 233, 10 Fed. Cas. No. 5,241*a*.

19. Campbell *v.* Leach, 3 N. C. 413 (holding that where an indorser of a note agrees to pay in case the maker proves insolvent, the fact that in an action on the note the maker is arrested on a capias ad satisfaciendum, gives security for prison bounds, and forfeits his bond will not render the indorser liable); Wilson *v.* Miller, Harp. (S. C.) 437 (holding that in an action by the assignee of a sealed note against the assignor, who has indorsed thereon, "If not good, I promise to make good," it is necessary to establish the maker's insolvency). See also Wilson *v.* Mullen, 3 McCord (S. C.) 236.

20. Forest *v.* Stewart, 14 Ohio St. 246; Timmerman *v.* Howell, 2 Ohio Cir. Ct. 27; Sylvester *v.* Donner, 18 Vt. 32; Wheeler *v.* Lewis, 11 Vt. 265; Russell *v.* Buck, 11 Vt. 166; Foster *v.* Barney, 3 Vt. 60 (holding that an indorsement of a note by the payee, with the words, "I warrant the within note due and collectable," gives the indorsee no action against him, except in failure of an action against the maker). And see GUARANTY.

21. Pyle *v.* McMonagle, 2 Harr. (Del.) 468; Clark *v.* Trueblood, 16 Ind. App. 98, 44 N. E. 679. And see *infra*, VIII, B, 2.

Demand note.— On a note due on demand, indorsed by the payee twenty-three days after date, he cannot impute laches to the indorsee for not suing it till five or six days after the indorsement. Foster *v.* Barney, 3 Vt. 60.

Appeal.— Although an assignee is bound to use due diligence and proper means to recover on an assigned note he is not bound, after a full trial and judgment in one court having jurisdiction, to appeal to another. Prettyman *v.* Short, 5 Harr. (Del.) 360.

Necessity to sue out attachment.— Where the payee of a note transfers the same before maturity, by indorsement, with a special guaranty of its collectability by due process of law, the assignee of the note is bound ordinarily only to employ the usual process of law in endeavoring to enforce the collection and is not chargeable with negligence for failing to sue out an attachment, unless it appear that he knew or in the use of proper diligence could have ascertained such facts as would authorize extraordinary process. Forest *v.* Stewart, 14 Ohio St. 246.

Failure to levy on real estate.— Where a note was indorsed, "I warrant the within note due and collectable," it was held that the due diligence against the maker required on the part of the holder did not make it necessary for him to attach the real estate of the maker or to take it on execution. Foster *v.* Barney, 3 Vt. 60.

Issue of capias.— On a note past due, in the spring of 1827, the payee made the following indorsement: "I endorse the within note for value received on condition the holder first tries the within named Nix [the maker]; if the money cannot be had before Christmas, then I hold myself responsible for the money to the holder." Nix was sued by the holder, and judgment recovered against him at fall term, 1827. Fieri facias was issued and returned *nulla bona*. In an action against the indorser, it was held that it was not necessary to show that a capias ad satisfaciendum had been issued and that the holder had failed to get the money under it, and that it was not necessary to prove the insolvency of the maker. Arnold *v.* Waters, 8 Rich. (S. C.) 433. See also Wilson *v.* Miller, Harp. (S. C.) 437.

Suit unsuccessful for informality.— In order to charge the assignor of a promissory note, the assignee must bring an effectual suit. A suit which fails on account of informality in the proceedings is not a sufficient suit. Bronaugh *v.* Scott, 5 Call (Va.) 78.

Suit brought in wrong name.— Where a special indorsement on a note imposes the obligation of trying to collect the amount from

require suit against the maker or accepter where he is notoriously insolvent, so that a suit would be ineffectual.[22] The prosecution to a judgment of a suit against the maker or accepter and the return of an execution *nulla bona* has always been regarded as showing due diligence.[23]

one of the makers as a prerequisite to the liability of the indorser, the obligation is fulfilled by a suit brought by the indorsee against such maker within a reasonable time in the state where he resided, although by mistake the suit is not brought in the proper name. Brown *v.* Johnson, 42 Ala. 208.

Effect of allowance of set-off in favor of maker.— Where the indorser of a note stipulates that the holder shall use due and reasonable diligence to collect it from the maker and prior indorsers the fact that the holder fails to obtain a judgment against the maker for the whole amount of the note, in consequence of the allowance of a set-off as between the maker and one of the prior indorsers, is no bar to a full recovery against the last indorser, provided the holder has been guilty of no negligence. Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705.

22. *Connecticut.*— Gillespie *v.* Wheeler, 46 Conn. 410; Rhodes *v.* Seymour, 36 Conn. 1; Ranson *v.* Sherwood, 26 Conn. 437; Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52; Welton *v.* Scott, 4 Conn. 527; Sheldon *v.* Ackley, 4 Day (Conn.) 458 (holding that if the indorsee of a note, in attempting to enforce it by suit against the maker, does not order the attachment or execution to be levied upon property notoriously of less value than the debt he does not thereby lose his claim upon the indorser to that amount). *Compare* Holbrook *v.* Camp, 38 Conn. 23, holding that the exercise of due diligence requires of the holder of a note the immediate institution of a suit by attachment against the maker if he is possessed of attachable property sufficient to pay the note, and that neither the insolvency of the maker nor the fact that the holder is ignorant that he is possessed of such property is a sufficient excuse for a neglect to institute such suit.

Delaware.— Pyle *v.* McMonagle, 2 Harr. (Del.) 468, holding that after suit has been brought by the assignee of a note against the maker, a failure to hold defendant to bail is not a discharge of the assignor, if the maker is insolvent.

Georgia.— Pittman *v.* Chisolm, 43 Ga. 442.

South Carolina.—Arnold *v.* Waters, 8 Rich. (S. C.) 433.

Virginia.— Brown *v.* Ross, 6 Munf. (Va.) 391; Saunders *v.* Marshall, 4 Hen. & M. (Va.) 455; Goodall *v.* Stuart, 2 Hen. & M. (Va.) 105.

West Virginia.— Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828; Morrison *v.* Lovell, 4 W. Va. 346.

United States.— Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705; U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 331, 481, 7 L. ed. 441, 492; Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61 [*affirming* 1 Cranch C. C. (U. S.) 463, 18 Fed. Cas. No. 10,839]; Yeaton *v.* Alexandria Bank, 5 Cranch (U. S.) 49, 3 L. ed. 33; Janney *v.* Geiger, 1 Cranch C. C. (U. S.) 547, 13 Fed. Cas. No. 7,212; McIver *v.* Kennedy, 1 Cranch C. C. (U. S.) 424, 16 Fed. Cas. No. 8,830.

Contra, Francis *v.* Gant, 80 Ky. 190; Spratt *v.* McKinney, 1 Bibb (Ky.) 595; Smallwood *v.* Woods, 1 Bibb (Ky.) 542. *Compare* Clair *v.* Barr, 2 A. K. Marsh. (Ky.) 255, 12 Am. Dec. 391.

Evidence of insolvency.— In a suit brought by the holder of a note against an indorser the mere fact that the maker of the note provided no funds to pay it at the time and place of payment, but suffered it to be protested for non-payment, does not furnish *prima facie* proof that the maker was insolvent when the note fell due. Ranson *v.* Sherwood, 26 Conn. 437.

Discharged in bankruptcy or insolvency.— A suit against the maker of a note is not necessary to entitle the holder to sue the assignor, where the maker has been discharged in bankruptcy (Roberts *v.* Atwood, 8 B. Mon. 209) or taken the oath of insolvency under a state statute (Bryan *v.* Perry, 5 T. B. Mon. (Ky.) 275; Stapp *v.* Anderson, 1 A. K. Marsh. (Ky.) 535).

23. Arnold *v.* Waters, 8 Rich. (S. C.) 433; Wilson *v.* Miller, Harp. (S. C.) 437; Wilson *v.* Mullen, 3 McCord (S. C.) 236; Caton *v.* Lenox, 5 Rand. (Va.) 31; Goodall *v.* Stuart, 2 Hen. & M. (Va.) 105; Mackie *v.* Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482; Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705. And see Pyle *v.* McMonagle, 2 Harr. (Del.) 468, holding that suit brought to the next term by the assignee of a note against the maker, and so prosecuted as to show the latter's insolvency, is due diligence, entitling the assignee to recover from the assignor. *Compare* Levi *v.* Evans, 7 B. Mon. (Ky.) 115, holding that a return of *nulla bona* on an execution in a suit by the assignee of a note against the maker is only *prima facie* evidence of the insolvency of defendant and that if it appears that property was seized and replevied by a third person and that no defense was made to the replevin suit, and does not appear that the property was not liable to the execution, this is not sufficient to charge the assignor, although the execution was returned *nulla bona.* See also Hogan *v.* Vance, 2 Bibb (Ky.) 34, holding that a return upon an execution that the maker of a note had no property in the county and was not an inhabitant of the county did not show sufficient diligence against the maker to entitle the assignee to collect the amount of the assignor.

Failure to pursue equitable assets.— It has been held that failure of the assignee of a note to endeavor to reach and subject equitable assets of the maker to the satisfaction of

d. Failure to Enforce Set-Off. It has been held, on the ground that a creditor is under no obligation toward a surety of active diligence to collect the debt from the principal, that the holder of a note does not discharge an accommodation indorser by failing to enforce the note as a set-off against a debt due from him to the maker.[24]

e. Failure of Bank to Apply Deposits. But it has been held that where a bank is the holder of a note payable at the bank, and upon its maturity the maker has a cash deposit in the bank sufficient to pay it, not specially applicable to a particular purpose, the bank is bound to apply the deposit in payment of the note and if it fails so to do an indorser will be discharged.[25] The rule does not apply, however, where the deposit is a special one or has been specifically appropriated to some other purpose by agreement between the bank and the depositor.[26]

f. Failure to Prove Debt Against Bankrupt Estate. An indorser or surety on a note is not discharged from liability by the holder's failure, on the bankruptcy of the maker, to prove the debt against the bankrupt estate, the remedy of the indorser or surety being to take up the note himself and then participate in the distribution of the estate.[27]

g. Failure to Issue or Enforce Execution. Since the holder of a note, in the absence of a statute,[28] owes the indorser or surety no duty of active diligence against the maker,[29] he does not discharge the indorser or surety, after having

the debt is such a want of diligence as will preclude him from recovering from the assignor. Barker *v.* Curd, 1 Metc. (Ky.) 641. But in McFadden *v.* Finnell, 3 B. Mon. (Ky.) 121, it was held that an assignee of a note, after judgment against the maker and return of execution *nulla bona*, could sue the remote and immediate assignors without first proceeding in equity to discover choses in action belonging to the maker; and in Iles *v.* Watson, 76 Ind. 359, it was held that the assignee of a note may sue the assignor without suing in equity to reach and subject property conveyed by the maker for the purpose of defrauding creditors.

24. Glazier *v.* Douglass, 32 Conn. 393, where plaintiff held a promissory note indorsed by defendant for the accommodation of the makers, which had been protested for non-payment, the makers having become and still remaining insolvent. A firm of which plaintiff was a member owed the makers a larger sum than the amount of the note, against which if sued they could by statute have set off the claim held by plaintiff. Without requiring such application the firm paid the makers the amount owed them, with full knowledge on the part of plaintiff of all the facts. It was held, in an action brought against defendant on his indorsement, that he was not discharged by the neglect of plaintiff to secure an application of the debt of the firm to the payment of the note.

25. McDowell *v.* Wilmington, etc., Bank, 1 Harr. (Del.) 369; Rochester Cent. Bank *v.* Thein, 76 Hun (N. Y.) 571, 28 N. Y. Suppl. 232, 58 N. Y. St. 239. German Nat. Bank *v.* Foreman, 138 Pa. St. 474, 21 Atl. 20, 21 Am. St. Rep. 908; Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496. See also BANKS AND BANKING, 5 Cyc. 550, 554, note 73.

Note payable elsewhere.— A bank which has discounted a note made by one of its depositors but payable elsewhere does not relieve the indorser from responsibility by not applying the maker's deposit to the payment of the note. Sieger *v.* Second Nat. Bank, 132 Pa. St. 307, 19 Atl. 217.

26. National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368; Fishkill Nat. Bank *v.* Speight, 47 N. Y. 668; German Nat. Bank *v.* Foreman, 138 Pa. St. 474, 21 Atl. 20, 21 Am. St. Rep. 908; Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496. See also BANKS AND BANKING, 5 Cyc. 552.

The duty which a bank holding a note owes to an indorser thereon to appropriate a deposit in the bank to payment of the note exists only where the maker of the note, at its maturity, has a deposit sufficient to pay it, and not previously appropriated to any other purpose, and does not apply to a deposit made after the maturity of the note or to a deposit by a prior indorser, although he be in fact the principal debtor and the maker be an accommodation maker. Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832. See also Martin *v.* Mechanics' Bank, 6 Harr. & J. (Md.) 235.

Where there are other notes.— A bank is not bound to apply a deposit of the maker to the satisfaction of a note held by it, so as to relieve an indorser, where it has other notes of the maker which are overdue and which have a prior or even an equal equity to such application. Huckestein *v.* Hermann, 1 Walk. (Pa.) 92.

27. South Reading Nat. Bank *v.* Sawyer, 177 Mass. 490, 59 N. E. 76, 83 Am. St. Rep. 292; Clopton *v.* Spratt, 52 Miss. 251; Streeter *v.* Jefferson County Nat. Bank, 147 U. S. 36, 13 S. Ct. 236, 37 L. ed. 68.

28. See *infra*, VIII, B, 2.

29. Smith *v.* Erwin, 77 N. Y. 466. And see *supra*, VIII, B, I, a.

obtained a judgment against the maker, by mere failure to issue or levy an execution and thereby secure a lien on property of the maker, although there is an opportunity so to do,[30] or by staying or withdrawing an execution after its issue, if there is no binding extension of time to the maker, and if the execution has not become a lien on property of the maker.[31] But after an execution has become a lien a release of the lien by the holder will operate to discharge the indorser or surety,[32] unless it is shown that he has not been injured thereby.[33]

h. Failure to Enforce Security. Since the holder of a note, in the absence of a statute or special agreement, owes an indorser or surety no duty to exercise diligence to collect the debt from the maker, it has been held that in the absence of special circumstances making prompt action a duty mere laches in not enforcing collateral security or a mortgage given to secure the debt, short of such as will cause a bar under the statute of limitations, will not release an indorser or surety.[34]

30. *Alabama.*— Summerhill *v.* Tapp, 52 Ala. 227.

Georgia.— Lumsden *v.* Leonard, 55 Ga. 374. And see Wakefield *v.* Limbert, R. M. Charlt. (Ga.) 13.

New York.— Smith *v.* Erwin, 77 N. Y. 466.

North Carolina.— Thornton *v.* Thornton, 63 N. C. 211.

Virginia.— Humphrey *v.* Hitt, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

31. Summerhill *v.* Tapp, 52 Ala. 227; Hetherington *v.* Mobile Branch Bank, 14 Ala. 68; Smith *v.* Erwin, 77 N. Y. 466; Humphrey *v.* Hitt, 6 Gratt. (Va.) 509, 52 Am. Dec. 133; Lenox *v.* Prout, 3 Wheat. (U. S.) 520, 4 L. ed. 449.

Lien not acquired.— In an action on a promissory note against the maker and the accommodation indorser, judgment was entered against the maker by default and an execution was issued and delivered to the sheriff with directions not to act upon it or make any levy until further orders. During the life of the execution the maker had in his open and visible possession personal property sufficient to satisfy it, but when plaintiff directed a levy no property could be found. It was held that no lien was acquired upon the property of the maker by the issuing of the execution, that plaintiff was under no obligation to the indorser to secure such a lien, and therefore that the facts constituted no defense as to him. Smith *v.* Erwin, 77 N. Y. 466.

Binding extension of time.— This does not apply where execution is stayed for a definite time so as to constitute a binding extension of the time of payment and prevent the holder of the paper from proceeding against the maker. Shields *v.* Reynolds, 9 W. Va. 483; Vankoughnet *v.* Mills, 5 Grant Ch. (U. S.) 653. And see *supra*, VIII, A, 4, h.

32. *Alabama.*— State Bank *v.* Edwards, 20 Ala. 512.

California.— Morley *v.* Dickinson, 12 Cal. 561.

Delaware.— Houston *v.* Hurley, 2 Del. Ch. 247.

Georgia.— Lumsden *v.* Leonard, 55 Ga. 374.

Ohio.— Dixon *v.* Ewing, 3 Ohio 280, 17 Am. Dec. 590.

Tennessee.— Lee *v.* Shanks, (Tenn. Ch. 1898) 52 S. W. 1091, holding that where a judgment is recovered against the principal and sureties on a note, and property of the principal sufficient to satisfy the judgment is levied on, its subsequent release in an injunction suit by the principal to which the sureties are not parties, will discharge the sureties from further liability.

Virginia.— Shannon *v.* McMullin, 25 Gratt. (Va.) 211.

Consent of indorser or surety.— If an indorser or surety consents to the release of an execution against the maker by the holder there is no discharge. Gregory *v.* Solomon, 19 N. J. L. 112.

Sale prevented by interpleader.— Where an execution against the maker of a note is levied upon property of the holder, but a sale of the property is prevented by an interpleader issued at the instance of a claimant who gives bond, and the goods are surrendered to him by the sheriff, an indorser is not discharged. Rice *v.* Groff, 58 Pa. St. 116.

A stay of execution required by statute after a levy does not discharge an indorser or surety. Houston *v.* Hurley, 2 Del. Ch. 247.

33. Young *v.* Cleveland, 33 Mo. 126, 82 Am. Dec. 155; Commercial Bank *v.* Western Reserve Bank, 11 Ohio 444, 38 Am. Dec. 739; Adams *v.* Logan, 27 Gratt. (Va.) 201. And see Parker *v.* Nations, 33 Tex. 210.

34. *Georgia.*— Mauck *v.* Atlanta Trust, etc., Co., 113 Ga. 242, 38 S. E. 845.

Indiana.— Brown *v.* Nichols, 123 Ind. 492, 24 N. E. 339; Willson *v.* Binford, 81 Ind. 588; Cheek *v.* Morton, 2 Ind. 321.

Mississippi.— Clopton *v.* Spratt, 52 Miss. 251.

New York.— Buffalo First Nat. Bank *v.* Wood, 71 N. Y. 405, 27 Am. Rep. 66; Malone Third Nat. Bank *v.* Shields, 55 Hun (N. Y.) 274, 8 N. Y. Suppl. 298; Corning *v.* Pond, 29 Hun (N. Y.) 129.

Ohio.— Cleveland Second Nat. Bank *v.* Morrison, 3 Ohio Dec. (Reprint) 534.

Pennsylvania.— McCamant *v.* Miners' Trust Co. Bank, 15 Wkly. Notes Cas. (Pa.) 122.

Tennessee.— Cherry *v.* Miller, 7 Lea (Tenn.) 305.

Wisconsin.— Hoover *v.* McCormick, 84 Wis. 215, 54 N. W. 505.

This does not apply, however, where the holder releases the security or does anything to impair the same to the injury of the indorser or surety.[35]

2. Statutory Provisions — a. In General. In a number of states statutes have been enacted for the protection of indorsers and assignors of commercial paper or generally of indorsers, sureties, and guarantors, by requiring the holder of paper to use diligence to collect the debt from the maker or accepter as a condition precedent to liability on the part of the indorser, assignor, surety, or guarantor. These statutes vary in the different states.[36]

In Alabama the statute[37] provides that in the absence of a waiver or of facts constituting an excuse, as provided in the statute,[38] on all contracts assigned by writing which are not governed by the commercial law, when the amount due exceeds one hundred dollars, to charge the indorser or assignor, suit must be brought against the maker to the first court to which suit can properly be brought after making the indorsement or assignment; and if the amount due does not exceed one hundred dollars suit must be brought against the maker within thirty days after suit can properly be brought; and in either case if judgment is obtained execution must be issued as authorized by law and the inability of the maker to pay such judgment proved by the return of "no property."[39] The statute applies

United States.— Alexandria Bank *v.* Wilson, 2 Cranch C. C. (U. S.) 5, 2 Fed. Cas. No. 856.

Compare, however, St. Louis State Bank *v.* Bartle, 114 Mo. 276, 21 S. W. 816.

See also Principal and Surety.

Failure to enforce vendor's lien.— Sayre *v.* McEwen, 41 Ind. 109; Levy *v.* Wagner, (Tex. 1902) 69 S. W. 112; Nesmith *v.* McLemore, 23 Tex. 442.

35. See *infra*, XI, G, 2, f.

36. Diligence to charge surety see Principal and Surety.

Diligence to charge guarantor see Guaranty.

37. Ala. Civ. Code (1896), § 892.

38. See *infra*, VIII, B, 2, b.

39. If the statute is not complied with an indorser or assignor of paper not governed by the law merchant is not liable to the holder. See under this and earlier statutes Cole *v.* Tuck, 108 Ala. 227, 19 So. 377 (holding that in an action to recover from an indorser on a note, where it is admitted that no action was brought against the maker within thirty days after maturity, as required by statute, and plaintiff's testimony leaves it in doubt as to whether or not such action was waived by defendant, while defendant's testimony denies a waiver, a judgment for plaintiff will be reversed); Mobile Sav. Bank *v.* McDonnell, 83 Ala. 595, 4 So. 346; Thomason *v.* Cooper, 57 Ala. 560; Cook *v.* Mutual Ins. Co., 53 Ala. 37; Sugg *v.* Winston, 49 Ala. 586; McDougald *v.* Rutherford, 30 Ala. 253; Fulford *v.* Johnson, 15 Ala. 385; Schaefer *v.* Adler, 14 Ala. 723; Bradford *v.* Bishop, 14 Ala. 517; Weed *v.* Brown, 13 Ala. 449; Bradford *v.* Haggerthy, 11 Ala. 698 (holding that the fact that an indorser of a note was previously liable to the one to whom he indorsed it does not entitle the latter to recover against the indorser without showing that he brought suit against the maker in the first court to which suit could be brought, which was necessary to charge an indorser); Miller *v.* McIntyre, 9 Ala. 638; Hagerthy *v.* Bradford, 9 Ala. 567; Murphy *v.* Gee, 9 Ala. 276; Litchfield *v.* Allen, 7 Ala. 779; Bates *v.* Ryland, 6 Ala. 668; Howze *v.* Perkins, 5 Ala. 286; Hammett *v.* Smith, 5 Ala. 156; Ryland *v.* Bates, 4 Ala. 342; Hall *v.* Chilton, 3 Ala. 633; Pearson *v.* Mitchell, 2 Ala. 736; Reese *v.* White, 2 Ala. 306; Riddle *v.* Rourke, 1 Ala. 394; Rathbone *v.* Bradford, 1 Ala. 312; Bristow *v.* Jones, 1 Ala. 159; Woodward *v.* Harbin, 1 Ala. 104; Ivey *v.* Sanderson, 6 Port. (Ala.) 420; Cavanaugh *v.* Tatum, 4 Stew. & P. (Ala.) 204; Chapman *v.* Arrington, 3 Stew. (Ala.) 480.

Note payable on demand.— Under Ala. Code (1876), §§ 2112, 2116, providing that to charge an indorser of certain instruments suit must be brought against the maker at the first court after making the indorsement to which suit can be brought, it was held that to hold an indorser on a note payable "at call," which by custom meant on demand, suit must be brought at the first court after the indorsement, not the first court after demand for payment. Mobile Sav. Bank *v.* McDonnell, 83 Ala. 595, 4 So. 346.

Where the judge of the county court was assignor of a note, it was held sufficient to charge him if the assignee brought suit against the maker at the first term of the circuit court after maturity. Holt *v.* Moore, 4 Ala. 394.

Effect of continuance.— After suit begun by the holder against the maker to the first term of court after the note falls due, the continuance of the cause by consent or other legal delay of the trial is not such an improper suspension of the remedy against the maker as will discharge the indorser. Hays *v.* Myrick, 47 Ala. 335.

Dismissal and new suit.— In Pearson *v.* Mitchell, 2 Ala. 736, where the action was brought to the county court, being the first court held, the writ was returned not found, and plaintiff then dismissed his suit and commenced anew to the next circuit court, it was

to all assignments or indorsements in writing of contracts which are not governed by the commercial law, whether regular or irregular, unless the contrary clearly appears from such assignment or indorsement.[40]

In Arkansas the statute requires prosecution of a suit against the principal debtor on the written request of "a person bound as surety,"[41] but it has been held that the second suit was regularly instituted, as it would stand for judgment sooner than if an alias writ had been issued from the county court.

Suing out new writ.— Where a suit is commenced and a writ is sued out by the holder of a note against the maker at the first term after the note becomes due, and it is returned "not found," it is sufficient in order to hold the indorser to sue out a new writ at the next term, and the old writ need not be kept alive, under the statute. Pearson *v.* Mitchell, 2 Ala. 736.

Waiver of irregularities in suit against maker.— Where the maker of a note in the suit against him yields to the jurisdiction it is a waiver of any irregularities which may exist; and the indorser of the note, when sued on his indorsement, cannot take advantage of it. Schaefer *v.* Adler, 14 Ala. 723.

Effect of judgment.— Where an indorsee sues the maker of an indorsed note and notifies the indorser of the pendency of the suit or advises him of any defense interposed, this will make the judgment conclusive against the indorser, if the maker is discharged, and it cannot be controverted when the indorser is sued. Hagerthy *v.* Bradford, 9 Ala. 567.

Judgment on the merits necessary.—Where the suit against the maker of a note has been determined in his favor, it must appear in order to hold the indorser that the judgment was upon the merits. Murphy *v.* Gee, 9 Ala. 276. And see Hagerthy *v.* Bradford, 9 Ala. 567.

Record as proof of suit against maker.— In a suit against the assignor of a note by the assignee, the allegation that plaintiff commenced a suit against the maker, to the first court to which suit could be brought, etc., is sustained by the production of the record of a suit, commenced in the name of the payee, for the use of plaintiff, if the judgment is still in force unreversed. Kain *v.* Walke, 12 Ala. 184.

Return of "no property."— The liability of an indorser is not fixed by commencing suit against the maker and recovering judgment, but the return of the sheriff, "no property," on the execution issued on the judgment is a condition precedent to the indorser's right of action. Reese *v.* White, 2 Ala. 306; Woodward *v.* Harbin, 1 Ala. 104. And the return must be made before the commencement of the suit against the indorser, and not before judgment merely. Riddle *v.* Rourke, 1 Ala. 394. Such return is conclusive to fix the liability of the indorser, where the other requirements of the statute have been complied with. Reese *v.* White, 2 Ala. 306. Although the statute makes the return of "no property found" conclusive evidence of the insolvency of the maker, a return that "there are no goods or chattels, lands or tenements of the defendant, to be found in his county," is equivalent and sufficient. Hammett *v.* Smith, 5 Ala. 156. But a return "*nulla bona*" is not sufficient, as these words import a want of "goods" only. Woodward *v.* Harbin, 1 Ala. 104.

Failure to issue alias execution.— The omission by an indorsee for nearly two years to sue out an alias execution upon a judgment obtained by him against the maker, the sheriff having failed to return the original execution, in the absence of any excuse for such neglect, discharges the indorser from liability. Bradford *v.* Bishop, 14 Ala. 517.

Costs.— Under the Alabama statute the holder of paper may recover in his suit against an assignor or indorser the costs of his suit against the maker brought as required by the statute. Ala. Civ. Code (1896), § 896. See Hammett *v.* Smith, 5 Ala. 156.

40. Ala. Civ. Code (1896), § 895.

Paper indorsed before passage of statute.— Such a statute affects the nature of the contract, and not the remedy upon it merely, and therefore does not apply to a note indorsed prior to its passage. Bloodgood *v.* Cammack, 5 Stew. & P. (Ala.) 276. See also Woodcock *v.* Campbell, 2 Port. (Ala.) 456.

A note payable "at call" is not embraced in the statutory exceptions in Ala. Code (1876), § 2112, providing that "on all contracts assigned by writing, except bills of exchange, or other instruments, and notes payable in money at a bank, or private banking-house, or a certain place of payment therein designated . . . to charge the indorser, or assignor, suit must be brought against the maker . . . to the first court to which suit can properly be brought." Mobile Sav. Bank *v.* McDonnell, 83 Ala. 595, 4 So. 346.

A note not indorsed by the payee, but indorsed by a person not a party thereto, and transferred by him to another, was not within the Alabama statute of 1828, defining the liability of indorsers and requiring suit to be brought against the maker to the first term. Jordan *v.* Garnett, 3 Ala. 610.

A guaranty in these words, "I bind myself to pay this note if T. M. Likens [the maker] does not," made upon the back of the note by one who is not a party to it, was not within the statute. Nesbit *v.* Bradford, 6 Ala. 746.

An irregular indorsement on paper not negotiable was not embraced by the act of 1828, and the liability thereby created was that the indorser would pay it if by the use of proper diligence the money could not be collected from the maker. Fulford *v.* Johnson, 15 Ala. 385.

41. Sandels & H. Dig. Ark. (1894), § 7310.

held that the provisions of this statute do not apply to indorsers of commercial paper.[42]

In Colorado the assignor of a bill or note was formerly liable to an action by the assignee, if the latter used due diligence, by the institution and prosecution of a suit against the maker, but not otherwise, unless such suit would have been unavailing or the maker had absconded or left the state when the paper became due.[43]

In Georgia any surety, guarantor, or indorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor, his agent, or any person having possession or control of the obligation, to proceed to collect the same out of the principal, and if the creditor or holder refuses or fails to commence an action for three months after such notice, the principal being within the jurisdiction of the state, the indorser, guarantor, or surety giving the notice and all subsequent indorsers and all cosureties are discharged.[44] The notice must state the county of the principal's residence.[45]

In Illinois the statute declares that the rights of the holders of promissory notes payable in money and the liability of all parties to or upon the same shall be the same as that of like parties to inland bills of exchange according to the custom of merchants. But the assignor of other notes, bonds, bills, or other instruments in writing, whereby a person agrees to pay any sum of money in personal property or articles of personal property, etc., is liable to an action by the assignee or holder, if the latter shall have used due diligence by the institution and prosecution of a suit against the maker for the recovery of the money or property due thereon, or damages in lieu thereof, but not otherwise,[46] unless the

42. Ross *v.* Jones, 22 Wall. (U. S.) 576, 22 L. ed. 730.

43. Lowe *v.* Farnham, 22 Colo. 307, 44 Pac. 507; Castagno *v.* Carpenter, 14 Colo. 524, 24 Pac. 392; Watson *v.* Hahn, 1 Colo. 385; Chicago Invest. Co. *v.* Harrison, 1 Colo. App. 466, 29 Pac. 462.

44. Ga. Civ. Code (1895), § 2974. See Ware *v.* Macon City Bank, 59 Ga. 840; Denson *v.* Miller, 33 Ga. 275; Vanzant *v.* Arnold, 31 Ga. 210 (holding that the statute applies to an indorsement containing a guaranty and waiver of demand and notice); Carhart *v.* Wynn, 22 Ga. 24; Prior *v.* Gentry, 11 Ga. 300; St. Marys Bank *v.* Mumford, 6 Ga. 44; Howard *v.* Brown, 3 Ga. 523 (holding that the holder of a note has the whole of the three months after notice in which to sue the maker); Holt *v.* Salmon, Rice (S. C.) 91 (construing the Georgia statute).

Dormant partner of maker.— Under the statute the holder of a note is bound to sue a dormant partner of the makers, when notified so to do by the indorser. Howard *v.* Brown, 3 Ga. 523.

To whom notice should be given.— Under the statute of 1831 notice to sue given by an indorser to an agent holding a note merely for collection, with authority only to receive the amount due, was held insufficient to protect the indorser having notice of the facts. Carhart *v.* Wynn, 22 Ga. 24. Where a bank is the holder of a note, notice to sue given to the cashier is sufficient. St. Marys Bank *v.* Mumford, 6 Ga. 44.

Death of principal debtor.— It is no defense to an action on a promissory note brought against an indorser subsequently to the death of the principal debtor that after the note became due the indorser notified plaintiffs that they must proceed by suit against the estate of the principal debtor and that plaintiffs agreed so to do. Brown *v.* Flanders, 80 Ga. 209, 5 S. E. 92.

Effect of receivership in federal court.— Where the maker and indorser of a promissory note are sued thereon in a state court and thereafter the property of the maker passes into the hands of a receiver appointed by the United States circuit court, the payee of the note is under no obligation, upon the demand of the indorser, to file an intervention in the United States court, although by so doing he may recover the amount of his note from the assets of the maker, and a failure so to do will not relieve the indorser from liability. James *v.* Southern Electrical Works, 108 Ga. 746, 34 S. E. 140.

45. The notice to sue given by an indorser to the holder as provided in the statute describing the parties to be sued as "of Macon, Georgia," is insufficient, there being both a county and city of Macon. The notice must clearly state the county in which the debtor resides. Ware *v.* Macon City Bank, 59 Ga. 840.

46. Ill. Rev. Stat. (1899), c. 98, § 7.

Formerly the Illinois statute provided that every assignor of every promissory note, bond, bill, or other instrument in writing should be liable to an action by the assignee, if the assignee should use due diligence, by the institution and prosecution of a suit against the maker, etc. See Springer *v.* Puttkamer, 159 Ill. 567, 42 N. E. 876 [*affirming* 58 Ill. App. 675]; Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573 [*affirming* 31 Ill. App. 441]; Finley *v.* Green, 85 Ill. 535; Kayser *v.* Hall,

institution of such suit would have been unavailing or the maker had absconded, etc.[47]

In Indiana the statute, in allowing action by the assignee against the assignor or indorser or a remote indorser of a promissory note, bond, or other instrument in writing, etc., expressly requires that in the case of notes not payable to order or bearer in a bank in the state, bonds, etc., he shall have "used diligence in the premises;"[48] and therefore the indorsee of a note not payable in a bank cannot recover from the indorser, unless he has used due diligence to collect the note from the maker.[49] The statute provides that this provision shall not alter the

85 Ill. 511, 28 Am. Rep. 624; Clayes *v.* White, 83 Ill. 540; Kelly *v.* Graves, 74 Ill. 423; Shufeldt *v.* Sutphen, 52 Ill. 255; Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286; Judson *v.* Gookwin, 37 Ill. 286; White *v.* Clayes, 32 Ill. 325; Rives *v.* Kumler, 27 Ill. 291; Robinson *v.* Olcott, 27 Ill. 181 (holding that if the indorsee of a note desires to hold the indorser liable he must proceed to judgment against the maker at the earliest opportunity); Chalmers *v.* Moore, 22 Ill. 359 (holding that action must be brought against the maker at the first following term of any court having jurisdiction, although there may not be ten days between the time the note falls due and the commencement of the term); Hamlin *v.* Reynolds, 22 Ill. 207; Nixon *v.* Weyhrich, 20 Ill. 600; Allison *v.* Smith, 20 Ill. 104 (holding that suing the maker in the circuit court, where he could not obtain a judgment for a year or more, instead of suing in a justice's court, is not prosecuting with due diligence); Roberts *v.* Haskell, 20 Ill. 59; Curtis *v.* Gorman, 19 Ill. 141; Crouch *v.* Hall, 15 Ill. 263; Bestor *v.* Walker, 9 Ill. 3 (holding that suit by an indorsee against the maker of a note, in order to hold the indorser, must be instituted in the county in which the maker resides if known to him; but if not known it may be brought in the county in which the note was made, if the maker can be found there so as to make service on him at the first term of the court after the maturity of the note); Brown *v.* Pease, 8 Ill. 191; Bledsoe *v.* Graves, 5 Ill. 382; Hilborn *v.* Artus, 4 Ill. 344; Raplee *v.* Morgan, 3 Ill. 561; Saunders *v.* O'Briant, 3 Ill. 369; Mason *v.* Wash, 1 Ill. 39, 12 Am. Dec. 138; Delamater *v.* Kearns, 35 Ill. App. 634; Temple *v.* People, 6 Ill. App. 378; Windheim *v.* Ohlendorf, 3 Ill App. 436; Wills *v.* Claflin, 92 U. S. 135, 23 L. ed. 490.

Obtaining judgment.— The indorsee of a note, in order to hold the indorser, must not only institute suit thereon against the maker at the first term after it becomes due, but if he can he must obtain judgment at that term and use ordinary diligence in enforcing execution. But if a failure to obtain judgment at the first term is not the result of his own negligence, it will not affect the rights of the indorsee. Bestor *v.* Walker, 9 Ill. 3.

Issue of execution.— In order to charge an indorser on a note after judgment against the principal obligor, diligence in following the remedy against such obligor requires the issue of an execution in the county where the judgment was rendered. Chalmers *v.* Moore, 22 Ill. 359. And see Bestor *v.* Walker, 9 Ill. 3.

Delay in issuing execution.— A delay by the assignee of a promissory note in issuing execution against the maker and having his property sold to satisfy the same does not release the assignor from liability, where he is not injured by such delay. Gay *v.* Rainey, 89 Ill. 221, 31 Am. Rep. 76. It is otherwise, however, if the assignor is injured by the delay. Rives *v.* Kumler, 27 Ill. 291.

Bills of exchange.— The Illinois statute relating to suits against the assignors of promissory notes has no application to bills or drafts, which are governed by the law merchant. The liability of the drawer of a bill of exchange therefore is fixed by presenting the same on the day of its maturity and giving notice of its dishonor, and the holder is not bound to prosecute the accepter to insolvency before he can resort to the drawer for payment. Wood *v.* Surrells, 89 Ill. 107.

47. See *infra*, VIII, B, 2, h.

48. Ind. Rev. Stat. (1897), §§ 7901, 7903.

49. Mitchell *v.* St. Mary, 148 Ind. 111, 47 N. E. 224; Thompson *v.* Campbell, 121 Ind. 398, 23 N. E. 267; Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145; Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510; Huston *v.* Centerville First Nat. Bank, 85 Ind. 21; Gwin *v.* Moore, 79 Ind. 103; Iles *v.* Watson, 76 Ind. 359; Binford *v.* Willson, 65 Ind. 70; Patterson *v.* Carrell, 60 Ind. 128; Willson *v.* Binford, 54 Ind. 569; Holton *v.* McCormick, 45 Ind. 411; Miller *v.* Deaver, 30 Ind. 371; Litterer *v.* Page, 22 Ind. 337; Bernitz *v.* Stratford, 22 Ind. 320; Rose *v.* Park Bank, 20 Ind. 94, 83 Am. Dec. 306; Walker *v.* Ocean Bank, 19 Ind. 247; Mix *v.* State Bank, 13 Ind. 521; Marshall *v.* Pyeatt, 13 Ind. 255; Dugdale *v.* Marine, 11 Ind. 194; Sering *v.* Findlay, 7 Ind. 247; Dole *v.* Watson, 2 Ind. 177; Hopper *v.* Sisk, Smith (Ind.) 102; Spears *v.* Clark, 7 Blackf. (Ind.) 283; Kelsey *v.* Ross, 6 Blackf. (Ind.) 536; Foresman *v.* Marsh, 6 Blackf. (Ind.) 285 (holding that in a suit on the assignment of a sealed note, a judgment of a justice of the peace against the maker of the note, and an execution returned "No goods or chattels," did not show sufficient diligence against the maker to charge the assignor); Bishop *v.* Yeazle, 6 Blackf. (Ind.) 127; Treadway *v.* Drybread, 4 Blackf. (Ind.) 20; Merriman *v.* Maple, 2 Blackf. (Ind.) 350; Odam *v.* Beard, 1 Blackf. (Ind.) 191; Hanna *v.* Pegg, 1 Blackf. (Ind.) 181; Matchett *v.* Anderson Foundry, etc., Works, (Ind. App. 1902) 64 N. E. 229; Clark *v.*

law relative to bills of exchange,[50] and notes payable to order or bearer in a bank in the state are put on the same footing as inland bills of exchange.[51]

In Missouri the assignee of a bond or non-negotiable note, in order that he may maintain an action against the assignor, must have used due diligence in instituting and prosecuting a suit against the obligor or maker, unless the latter was insolvent or a non-resident of the state, so that a suit would be unavailing or

Trueblood, 16 Ind. App. 98, 44 N. E. 679; Mott *v.* Wright, 4 Biss. (U. S.) 53, 17 Fed. Cas. No. 9,883; Morgan *v.* Tipton, 3 McLean (U. S.) 339, 17 Fed. Cas. No. 9,809.

Due diligence, under the statute, requires suit to be brought against the maker of a note at the next term after the note becomes due, unless there is good excuse for not suing. Thompson *v.* Campbell, 121 Ind. 398, 23 N. E. 267 (holding that the holder of a note cannot recover against the indorser, where the latter notifies him, after maturity, that the maker is in failing circumstances, is disposing of his property, and is being sued by his other creditors, and requests him to sue on the note, which he fails to do until the fourth day of the next term of court); Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145; Roberts *v.* Masters, 40 Ind. 461; Herald *v.* Scott, 2 Ind. 55; Merriman *v.* Maple, 2 Blackf. (Ind.) 350; Matchett *v.* Anderson Foundry, etc., Works, (Ind. App. 1902) 64 N. E. 229. *Compare* Dorsey *v.* Hadlock, 7 Blackf. (Ind.) 113. The assignor of a promissory note cannot complain that the assignee's suit against the maker was not commenced in time, if judgment was obtained on the note at the first term of the court after the assignment. Spears *v.* Clark, 7 Blackf. (Ind.) 283. Where the assignee commenced his suit on the note against the maker in proper time, in the court first to sit after the maturity of the note, and the legislature, after the suit was brought, postponed the term of the court in which it was pending until after the sitting of another court, it was held that the assignee was not bound to dismiss that suit and commence in the other court. Miller *v.* Deaver, 30 Ind. 371.

Judgment and execution.— The assignee must, in the absence of good excuse, prosecute the suit to judgment and execution returned "no property found." Gwin *v.* Moore, 79 Ind. 103; Willson *v.* Binford, 54 Ind. 569; Macy *v.* Hollingsworth, 7 Blackf. (Ind.) 349; Bishop *v.* Yeazle, 6 Blackf. (Ind.) 127 (holding that where an assignee of a promissory note obtained judgment in time against the maker, and, after a delay of more than six months, took out a fieri facias on the judgment, which was returned *nulla bona,* the delay in issuing the execution, unexplained by the assignee, discharged the assignor from his liability on the assignment); Hanna *v.* Pegg, 1 Blackf. (Ind.) 181. *Compare* Miller *v.* Deaver, 30 Ind. 371; Spears *v.* Clark, 3 Ind. 296 (holding that the assignor will not be held to be discharged by the laches of the assignee, if upon a judgment obtained in due time against the maker, the issuing of an execution was delayed till a reasonable time after the adjournment of the term of the court at which judgment was rendered, unless some special cause be shown to exist, making it the duty of the party to issue it earlier); Clark *v.* Spears, 8 Blackf. (Ind.) 302; Nance *v.* Dunlavy, 7 Blackf. (Ind.) 172 (holding that where an assignee of a note obtained judgment on it against the maker on the 15th of March, he could not be charged by the assignor with laches for not having taken out execution during that month); Dorsey *v.* Hadlock, 7 Blackf. (Ind.) 113.

Defects in pleading causing delay.—Where the assignee of a note failed to recover satisfaction against the maker because of a delay in recovering judgment, caused by a defect in his declaration, during which the maker became insolvent, it was held that the assignor was thereby discharged from liability. Odam *v.* Beard, 1 Blackf. (Ind.) 191.

Negligence or fraud in prosecuting action. — It has been held that it is no defense to an action by the assignee of a note, against his assignor, that plaintiff prosecuted his action against the maker in a careless and negligent manner, whereby the maker had fraudulently recovered, or that plaintiff in his action against the maker failed to make defendant a party thereto, to answer as to his interest in such note, and so prosecuted the same as to defraud defendant. White *v.* Webster, 58 Ind. 233.

Record as evidence.— In an action on a note by the assignee, where plaintiff put in evidence a judgment recovered by him against the maker, and a summons showing the commencement of the suit which resulted in the judgment, but omitted to introduce any other part of the record, it was held that as this did not show that the judgment introduced was on the note in suit the evidence was insufficient to bind the assignor. Miller *v.* Deaver, 30 Ind. 371.

Diligence against remote indorser.— The assignee of a note is not bound to exhaust the property of a remote indorser before he can have his action against his immediate indorser. Pennington *v.* Hamilton, 50 Ind. 397.

Necessity of exhausting mortgage security. — Under the provision of the Indiana statute giving the indorsee a right of action against the indorser after having used due diligence to obtain the money, the indorsee of a note secured by a mortgage on lands in another state need not first exhaust such security. Swiggett *v.* Seymour, 4 Biss. (U. S.) 220, 23 Fed. Cas. No. 13,701.

50. Ind. Rev. Stat. (1897), § 7902.

51. Ind. Rev. Stat. (1897), § 7903. The statute therefore does not apply to them (Sohn *v.* Morton, 92 Ind. 170) unless they are otherwise non-negotiable (Mitchell *v.* St. Mary, 148 Ind. 111, 47 N. E. 224).

could not be instituted.[52] A statute also provides that a surety on a bond, bill, or note may, in writing, require the creditor to sue the principal debtor and that the surety shall be discharged if within thirty days after the notice to sue an action is not commenced and proceeded in with due diligence to judgment and execution.[53]

In Tennessee the assignor of a bond, bill, or note may give the holder notice in writing to sue the maker or obligor and will be discharged from liability unless the holder within thirty days after such notice commences an action and proceeds with due diligence in the ordinary course of law to recover judgment and make the amount due by execution.[54] There is a similar provision as to sureties.[55]

In Texas the holder of a negotiable bill or note may fix the liability of drawer or indorser, without protest or notice, by instituting suit against the accepter or maker before the first term of the district or county court to which suit can be brought after the right of action shall accrue or by instituting suit before the second term of such court after the right of action shall accrue and showing good cause why suit was not instituted before the first term.[56] When the amount

52. Mo. Rev. Stat. (1899), § 2391. See under this and earlier statutes Bailey *v.* Smock, 61 Mo. 213; Labadie *v.* Chouteau, 37 Mo. 413; Baker *v.* Blades, 23 Mo. 405; Stone *v.* Corbett, 20 Mo. 350; Clemens *v.* Collins, 14 Mo. 604; O'Fallon *v.* Kerr, 10 Mo. 553; Ricketson *v.* Wood, 10 Mo. 547; Jacobs *v.* McDonald, 8 Mo. 565; Pillard *v.* Darst, 6 Mo. 358; Myers *v.* Miller, 3 Mo. 586; Harris *v.* Harman, 3 Mo. 450; Schlatter *v.* Rector, 1 Mo. 286; Lowenstein *v.* Knopf, 4 Mo. App. 594.

53. Mo. Rev. Stat. (1899), §§ 4500, 4501. See, generally, PRINCIPAL AND SURETY.

Indorsers.— This statute does not apply to indorsers. Faulkner *v.* Faulkner, 73 Mo. 327; Freligh *v.* Ames, 31 Mo. 253; Clark *v.* Barrett, 19 Mo. 39; Boatmen's Sav. Bank *v.* Johnson, 24 Mo. App. 316.

54. Tenn. Anno. Code (1896), § 3520. See Rice *v.* Simpson, 9 Heisk. (Tenn.) 809; Boyd *v.* Titzer, 6 Coldw. (Tenn.) 568; Faris *v.* Green, 4 Humphr. (Tenn.) 377; Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670; Thompson *v.* Watson, 10 Yerg. (Tenn.) 362; Bell *v.* Johnson, 4 Yerg. (Tenn.) 194.

Negotiable notes.— The statute, although using the word "assignors," has been held to apply to indorsers of negotiable notes. Faris *v.* Green, 4 Humphr. (Tenn.) 377.

Bills of exchange.— The statute does not apply to indorsers of bills of exchange. See McGuire *v.* Union Bank, 9 Humphr. (Tenn.) 438; Burrow *v.* State Bank, 6 Humphr. (Tenn.) 440.

To whom notice may be given.— Where a note was indorsed in blank and deposited in bank for collection, the legal interest was transferred to the bank, and notice given by the indorser to the bank to sue was held a valid notice, and in accordance with the third section of the act of 1801. Faris *v.* Green, 4 Humphr. (Tenn.) 377. It must appear that the person notified held the note at the time of the service of the notice. Boyd *v.* Titzer, 6 Coldw. (Tenn.) 568.

55. Tenn. Anno. Code (1896), § 3517. See, generally, PRINCIPAL AND SURETY.

Sufficiency of notice to sue.— A letter from an indorser to the holder saying, "I wish you would come up, and do something with it," adding that the maker "has plenty of property now to make your money," was held not a notice to sue forthwith, within the statute authorizing the surety, in case he apprehended that his principal was likely to become insolvent, to require the creditor to forthwith put the note in suit, and discharging the surety in case the creditor should not commence suit within thirty days. Rice *v.* Simpson, 9 Heisk. (Tenn.) 809.

56. Sayles Civ. Stat. Tex. art. 304. See Smith *v.* T. M. Richardson Lumber Co., 92 Tex. 448, 49 S. W. 574; Hanrick *v.* Alexander, 51 Tex. 494; McGary *v.* McKenzie, 38 Tex. 216; Stratton *v.* Johnston, 36 Tex. 90; Shepard *v.* Phears, 35 Tex. 763; Davidson *v.* Peticolas, 34 Tex. 27; Brooks *v.* Breeding, 32 Tex. 752; Porter *v.* Buckholts, 32 Tex. 487; Smith *v.* Dunlavy, 31 Tex. 693; Hoffman *v.* Cage, 31 Tex. 595; Griffith *v.* Gary, 31 Tex. 163; McClelland *v.* Slauter, 30 Tex. 497; Perry *v.* Shropshire, 23 Tex. 153; Fisher *v.* Phelps, 21 Tex. 551; Elliott *v.* Wiggins, 16 Tex. 596; Griffin *v.* Chubb, 16 Tex. 219; Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181; Texas Sav., etc., Assoc. *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 380; Caldwell *v.* Byrne, (Tex. Civ. App. 1895) 30 S. W. 836.

Where, at the second term after a promissory note having several indorsers became due, a suit was brought thereon against the maker and several of the indorsers, and no reason was alleged why the suit was not brought at the first term, judgment was rendered against the maker only. Elliott *v.* Wiggins, 16 Tex. 596.

Excuse for not suing at first term see Bailey *v.* Heald, 14 Tex. 226; Campbell *v.* Wilson, 6 Tex. 379.

Suppression of process.— Under the statute providing that the liability of the indorser on a promissory note is fixed by bringing suit on the note to the first term of the court, the commencement of suit, with a suppression of process, does not fix the indorser's liability. Hoffman *v.* Cage, 31 Tex. 595.

Presumption as to time of indorsement.— If a note is sued more than two terms after

of the bill or note is within the jurisdiction of a justice of the peace, the suit against the accepter or maker is required to be brought within sixty days after accrual of the right of action.[57] To render the assignor of a non-negotiable instrument liable to the assignee it is required that the assignee shall use due diligence to collect the same.[58]

b. Excuses For Failure to Sue — (i) *In General.* In many of the statutes requiring the holder of a promissory note or other paper to use due diligence to collect the same from the maker in order to render an assignor, indorser, or drawer liable it is expressly provided that suit is not necessary if there is sufficient excuse for not bringing it, and even where there is no such provision it would seem clear that it should be implied. As a general rule suit need not be brought against the maker if it would be unavailing or if it is impossible.[59]

(ii) *Successful Defense or Set-Off.* In Alabama it is expressly provided that the holder of indorsed or assigned paper is excused from bringing suit against the maker, obtaining judgment, and issuing execution thereof, when a

its maturity, it has been held that it will be presumed, in the absence of special averment to the contrary, that a blank indorsement was made within the two terms, and that the indorser was therefore not discharged by lapse of time before suit brought. Belcher *v.* Ross, 33 Tex. 12.

Where drawer is primarily liable.— The diligence required by the statute to fix the liability of the drawer of a bill or draft need not be observed where the circumstances are such that the drawer would not be entitled to notice of dishonor under the law merchant, as in the case where he has no funds in the hands of the drawee or reasonable ground to expect that his bill will be accepted. When the drawee refuses to accept, the drawer is immediately and primarily liable for the payment of the bill or draft and it is not necessary to sue to fix his liability. Wood *v.* McMeans, 23 Tex. 481.

Joint suit against maker and indorser.— Under Sayles Civ. Stat. Tex. arts. 304, 312, providing that the holder of a note may secure and fix the liability of the indorser thereof, without protest or notice, by instituting suit against the maker after the right of action accrues, and that an indorser may be jointly sued with the principal obligor, the holder of a negotiable note, when the indorser and maker are about to dispose of their property to defraud their creditors, may immediately assert his demand against the indorser as a joint defendant with the maker. Smith *v.* Pickham, 8 Tex. Civ. App. 326, 28 S. W. 565.

57. Sayles Civ. Stat. Tex. art. 305.

58. Sayles Civ. Stat. Tex. art. 309. See Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310; Thompson *v.* Payne, 21 Tex. 621 (holding that "due diligence" means bringing suit at the first term after the accrual of the cause of action, and if not at the first then at the second term, showing good cause why it was not brought at the first). See also Burke *v.* Ward, (Tex. Civ. App. 1895) 32 S. W. 1047; McKenzie *v.* Harris, 2 Tex. Unrep. Cas. 180.

59. See Ala. Civ. Code (1896), § 894, subs. 5; Ill. Rev. Stat. (1899), c. 98, § 7.

If the maker of a note be not liable to pay it no positive acts of diligence need be performed by the holder. Bernitz *v.* Stratford, 22 Ind. 320.

Want or failure of consideration.— The assignee of a promissory note, given without consideration, may sue the assignor at any time, and without having previously sued the maker. Fosdick *v.* Starbuck, 4 Blackf. (Ind.) 417; Howell *v.* Wilson, 2 Blackf. (Ind.) 418. The same is true where the consideration has failed. Marshall *v.* Pyeatt, 13 Ind. 255.

Infancy of maker.— The assignee of a promissory note made by an infant may bring a suit thereon against the assignor without first suing the maker. Henderson *v.* Fox, 5 Ind. 489.

Coverture of the maker of a note is sufficient excuse for not suing here, where the note is for that reason void. Huston *v.* Centerville First Nat. Bank, 85 Ind. 21.

Usury.— The assignee of a note, in order to exercise such diligence for its collection as is required upon assigned notes not payable in bank, need not sue to recover a part of the note which is usurious, even though the assignee knew when he received the assignment that such part was usurious. Johnson *v.* Blake, 3 Ind. 542.

Forged note.— In an action for damages for the assignment by defendant to plaintiff of a forged note it is not necessary for plaintiff to show diligence in an effort to collect it to entitle him to recover, even if defendant is sued as an indorser. Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

Infancy of holders.— In an action on notes by the widow and heirs of the holder, the minority of the heirs does not exempt them from due diligence by suit in order to fix an indorser's liability under the Texas statute. Hanrick *v.* Alexander, 51 Tex. 494.

Civil war as an excuse for delay in suing see McGary *v.* McKenzie, 38 Tex. 216; Shepard *v.* Phears, 35 Tex. 763; Davidson *v.* Peticolas, 34 Tex. 27; Brooks *v.* Breeding, 32 Tex. 752; Porter *v.* Buckholts, 32 Tex. 487; Smith *v.* Harbert, 30 Tex. 669; McClelland *v.* Slauter, 30 Tex. 497.

judgment against the maker has been defeated in whole or in part by a defense to the merits of such contract or writing, by a set-off against any other than the indorsee or assignee, or when any defense except a set-off to the merits of such contract or writing exists which would prevent a judgment for all or any portion of the sum due or the value of the thing payable by such contract or writing.[60]

(III) *Death of Maker or Accepter.* In Alabama the statute expressly provides that the holder is excused from bringing suit, obtaining judgment, and issuing execution against the maker, when the maker dies before the time expires for bringing suit, or if after suit brought his estate is declared insolvent.[61] In the absence of such a provision the holder of a note, after death of the maker, does not exercise due diligence unless he proceeds against the maker's estate, if there is any.[62]

(IV) *Non-Residence or Absence* — (A) *Of Maker or Accepter.* In Alabama it is expressly provided that the holder of indorsed or assigned paper is excused from bringing suit against the maker, obtaining judgment, and issuing execution thereon, when the maker has no known place of residence in the state, when by the use of ordinary diligence such residence cannot be ascertained, or when a suit has been commenced in the county of the residence of the maker and a summons to the first and next succeeding court returned not found by the proper officer.[63] In Illinois the statute makes the assignor of a note liable without suit against the maker, if the maker had absconded or resided without or left the state when the instrument became due.[64] Even where there is no such provision it has been held that suit against the maker is not necessary where, because of absence from the state or absconding since the execution or assignment of the note, it is impossible or impracticable to sue.[65] In such a case it is not necessary that the

60. Ala. Civ. Code (1896), § 894, subs. 4, 5. The mere circumstance that the maker of a note not negotiable has a set-off against the payee does not dispense with the necessity for the indorsee to sue to the first court, in order to charge an indorser who is not the payee. Hagerthy *v.* Bradford, 9 Ala. 567.

61. Ala. Civ. Code (1896), § 894, subs. 6. See Walker *v.* Wigginton, 50 Ala. 579; Kain *v.* Walke, 12 Ala. 184; Bates *v.* Kyland, 6 Ala. 668.

62. Litterer *v.* Page, 22 Ind. 337 (holding that where the maker of a note dies before its maturity, and the note is then duly filed as a claim against his estate, and then his administrator resigns and no other is appointed, due diligence requires that the claimant on the note in order to retain the liability of the assignor should apply for the appointment of another administrator or institute an action against the heirs of the estate and procure an order subjecting the property inherited by them to the payment of the note); Bernitz *v.* Stratford, 22 Ind. 320; Hume *v.* Long, 6 T. B. Mon. (Ky.) 116.

63. Ala. Civ. Code (1896), § 894, subs. 1–3. See Bradley *v.* Patton, 51 Ala. 108.

64. Ill. Rev. Stat. (1899), c. 98, § 7. See Barber *v.* Bell, 77 Ill. 490; Aldrich *v.* Goodell, 75 Ill. 452; Mason *v.* Burton, 54 Ill. 349 (holding also that where an assignor is sought to be held liable on his indorsement because the maker left the state at the maturity of the note and was a resident of another state at that time, it is no defense that after maturity the maker was frequently in the state and purchased goods there which could have been attached by the holder and his debt thereby collected); Schuttler *v.* Platt, 12 Ill. 417 (holding also that it was immaterial that the holder knew of the maker's non-residence when he took the note); Hilborn *v.* Artus, 4 Ill. 344; Edwards *v.* Shields, 7 Ill. App. 70 (holding that the fact that a note is dated in another state raises no presumption that the maker resided there at maturity, so as to relieve the holder from proof of diligence in proceeding against the maker).

Continuance of non-residence.— Under the Illinois statute absence of the maker, in order to excuse the institution and prosecution of suit against him, must not only exist at the time of the maturity of the note, but it is necessary to show a continuance of it up to the time suit is instituted against the assignor. Bledsoe *v.* Graves, 5 Ill. 382. See also Hilborn *v.* Artus, 4 Ill. 344.

65. *Alabama.*— Goggins *v.* Smith, 35 Ala. 683 (holding that under the former Alabama statute providing that the holder of a note must sue the principal before he can hold the indorser, no suit need be brought against a maker who has no known place of residence within the state, even though occasionally he is within the state on a visit); Woodcock *v.* Campbell, 2 Port. (Ala.) 456; Roberts *v.* Kilpatrick, 5 Stew. & P. (Ala.) 96.

Georgia.— Howard *v.* Brown, 3 Ga. 523.

Indiana.— Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145; Stevens *v.* Alexander, 82 Ind. 407; Titus *v.* Seward, 68 Ind. 456 (holding also that temporary visits of the maker to the state with property in his possession were immaterial); Patterson *v.* Carrell, 60 Ind. 128; Holton *v.* McCormick, 45 Ind. 411;

holder of the note shall bring attachment to reach property of the maker within the state[66] or enforce a vendor's lien.[67] If the maker was a non-resident at the time of the assignment, to the knowledge of the assignee, he must show in some states, but not in others, that he has pursued the maker with due diligence or that such pursuit would have been unavailing.[68] Statutes sometimes require the holder to sue the maker in the county of his residence.[69]

Sayre *v.* McEwen, 41 Ind. 109; Sims *v.* Parks, 32 Ind. 363; Bernitz *v.* Stratford, 22 Ind. 320; Watson *v.* Robinson, 8 Blackf. (Ind.) 386 (holding that where three months before the maturity of a note the maker left the state, taking his property with him, and returned to the state eleven months after the maturity of the note, was sued on the day following his return, and regularly prosecuted to judgment and execution, there was sufficient diligence on the part of the holder to charge the indorser).

Kentucky.— Latham *v.* Western, 8 B. Mon. (Ky.) 297; Stapp *v.* Bacon, 1 A. K. Marsh. (Ky.) 535.

Tennessee.— Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670.

Texas.— Campbell *v.* Wilson, 6 Tex. 379; Texarkana First Nat. Bank *v.* De Morse, (Tex. Civ. App. 1894) 26 S. W. 417.

Temporary absence is not enough to excuse suit. Hilborn *v.* Artus, 4 Ill. 344; Holton *v.* McCormick, 45 Ind. 411; Brinker *v.* Perry, 5 Litt. (Ky.) 194.

Absence from county.— The mere absence of the maker from the county will not excuse the prosecution of a suit against him to a return of *nulla bona*, in order to charge the indorser, if he has a known residence in any part of the state. Roberts *v.* Kilpatrick, 5 Stew. & P. (Ala.) 96. And see Hogan *v.* Vance, 2 Bibb (Ky.) 34; Spratt *v.* McKinney, 1 Bibb (Ky.) 595.

The return of non est inventus by a constable on a warrant against the maker of a promissory note, the same day on which it is issued, is not sufficient to charge an indorser, under a statute requiring the holder of a promissory note to sue the maker within thirty days after it becomes due, and use due diligence to recover the amount of him, in order to charge the indorser. Cavanaugh *v.* Tatum, 4 Stew. & P. (Ala.) 204.

66. Barber *v.* Bell, 77 Ill. 490; Titus *v.* Seward, 68 Ind. 456; Sims *v.* Parks, 32 Ind. 363; Bernitz *v.* Stratford, 22 Ind. 320.

67. Sayre *v.* McEwen, 41 Ind. 109.

68. Bristow *v.* Jones, 1 Ala. 159 (holding also that in an action against the indorser of a note which was indorsed while the maker was a non-resident, if plaintiff allege that the maker is a non-resident as an excuse for not suing him the court will not presume that plaintiff was ignorant of the maker's place of residence at the time of indorsement); Ivey *v.* Sanderson, 6 Port. (Ala.) 420; Stevens *v.* Alexander, 82 Ind. 407; Citizens' Nat. Bank *v.* Hubbert, 97 Ky. 768, 17 Ky. L. Rep. 515, 31 S. W. 735 (holding that an assignee of a note could not hold an assignor without suing the maker, a corporation of another state, having its chief place of business and all its property therein, in such other state, although it was insolvent and its property was in the hands of a receiver, it not appearing that he was in any way prevented from bringing suit in such state; and that a suit against the president of the corporation outside such other state was insufficient); Simpson *v.* Daniel, 1 B. Mon. (Ky.) 250 (holding that the assignor of a note, one of the makers of which was a non-resident at the time of the assignment, was not responsible on the assignment without suit and return of *nulla bona* against such obligor in the state and place of his residence; and a return of *nulla bona* on a judgment recovered in Kentucky, against an obligor on a promissory note residing in another state, and only temporarily in Kentucky, did not render the assignor responsible); Myers *v.* Miller, 3 Mo. 586 (holding that if one of the makers of a joint note reside in the state of New York at the time of making the note, the assignee cannot maintain his action against the assignor in Missouri before he sues the makers, unless he show that the suit would have been unavailing in New York). *Compare*, however, Bradley *v.* Patton, 51 Ala. 108; Miller *v.* McIntyre, 9 Ala. 638 (where the maker was not only a non-resident, but also notoriously insolvent).

In Georgia an indorser of a note is not discharged because the holder on request neglected to proceed against the principals until the note was barred by the statute of limitations as to them, where the maker resided out of the state, although he may have been a non-resident of the state at the time the note was executed, if there was no offer of indemnity to the holder against the consequences of risk, delay, and expense. Prior *v.* Gentry, 11 Ga. 300.

In Illinois under the statute making an assignor of a note indorsed by him in the state liable without suit against the maker, if the maker had absconded or resided without or had left the state when the note became due, it has been held that it is only necessary that the maker shall be outside the state at the maturity of the note and that the fact that he resided in another state when he executed the note is immaterial. Barber *v.* Bell, 77 Ill. 490; Mason *v.* Burton, 54 Ill. 349; Schuttler *v.* Piatt, 12 Ill. 417.

In Tennessee the statute discharging an indorser of a bill of exchange, if upon due notice the holder refuses to sue, does not apply to cases where the drawer resides out of the state. Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670.

69. Where a writ is properly sued out against the maker of a note, and execution issued on the judgment in the cause returned

(B) *Of Holder.* The absence of the holder of a note from the state is no excuse for his failure to sue the maker to the first term of court, as required by a statute, in order to charge an assignor or indorser.[70]

(V) *INSOLVENCY OF MAKER OR ACCEPTER.* By express provision of the statute in some jurisdictions, and even in the absence of express provision to such effect, the insolvency of the maker of a note or other paper will excuse the bringing of suit against him in order to charge an indorser or assignor,[71] unless there is

nulla bona, it is sufficient to charge the indorsers, although after the institution of the suit the maker removed to another county. But where the maker of a note removed from the county a few days before suit was brought, and it did not appear that such removal was open and notorious, was known to plaintiff, or that the maker became a freeholder in the county to which he removed, or exempt from suit in the county in which the action was brought, the suing out of a writ of attachment in the county from which the removal was made and a return thereof of *nulla bona* was sufficient to charge an indorser. Weed *v.* Brown, 13 Ala. 449. If the holder of a promissory note not negotiable in bank is ignorant of the residence of the maker, and cannot by diligent inquiry ascertain it in time to sue to the first court, it is a sufficient excuse for his failure to do so and the indorser will not be discharged. Lindsay *v.* Williams, 17 Ala. 229.

70. Rathbone *v.* Bradford, 1 Ala. 312.

71. *Alabama.*— Miller *v.* McIntyre, 9 Ala. 638.

Colorado.— Castagno *v.* Carpenter, 14 Colo. 524, 24 Pac. 392.

Illinois.— Babcock *v.* Blanchard, 86 Ill. 165; Kelly *v.* Graves, 74 Ill. 423; Hawkinson *v.* Olson, 48 Ill. 277.

Indiana.— Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145; Schmied *v.* Frank, 86 Ind. 250; Huston *v.* Centerville First Nat. Bank, 85 Ind. 21; Dick *v.* Hitt, 82 Ind. 92; Willson *v.* Binford, 81 Ind. 588; Gwin *v.* Moore, 79 Ind. 103; Iles *v.* Watson, 76 Ind. 359; Williams *v.* Osbon, 75 Ind. 280; Couch *v.* Thorntown First Nat. Bank, 64 Ind. 92; Kestner *v.* Spath, 53 Ind. 288; Markel *v.* Evans, 47 Ind. 326; Bernitz *v.* Stratford, 22 Ind. 320; Reynolds *v.* Jones, 19 Ind. 123; Dugdale *v.* Marine, 11 Ind. 194; Bozell *v.* Hauser, 9 Ind. 522; Spears *v.* Clark, 3 Ind. 296; Black *v.* Wilson, 7 Blackf. (Ind.) 532 (holding, however, that the insolvency of the maker was not proved); Foresman *v.* Marsh, 6 Blackf. (Ind.) 285; Youse *v.* McCreary, 2 Blackf. (Ind.) 243; Bullitt *v.* Scribner, 1 Blackf. (Ind.) 14.

Kentucky.— Roberts *v.* Atwood, 8 B. Mon. (Ky.) 209 (where the maker had been declared a bankrupt on his petition in bankruptcy); Bryan *v.* Perry, 5 T. B. Mon. (Ky.) 275; Clair *v.* Barr, 2 A. K. Marsh. (Ky.) 255, 12 Am. Dec. 391.

Missouri.— Baker *v.* Blades, 23 Mo. 405; Clemens *v.* Collins, 14 Mo. 604; Pillard *v.* Darst, 6 Mo. 358; Lowenstein *v.* Knopf, 4 Mo. App. 594. And see Bailey *v.* Smock, 61 Mo. 213.

Texas.— Smith *v.* T. M. Richardson Lumber Co., 92 Tex. 448, 49 S. W. 574 (holding that the question of insolvency was for the jury); Fisher *v.* Phelps, 21 Tex. 551; Insall *v.* Robson, 16 Tex. 128; Oglesby *v.* North Dallas Imp. Co., (Tex. Civ. App. 1894) 28 S. W. 1016 (holding that the burden of showing the maker's insolvency was on the holder); Hunt *v.* Wiley, 1 Tex. App. Civ. Cas. § 1214; Johnson *v.* McDaniel, 1 Tex. App. Civ. Cas. § 1012 (holding, however, that reputed insolvency is not enough to excuse suit).

United States.—Wills *v.* Claflin, 92 U. S. 135, 23 L. ed. 490; Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705.

Time of insolvency.—An averment that at the time of the indorsement of a promissory note the maker was insolvent is not sufficient to hold the indorser. It must also be shown that, at the earliest opportunity the suit could have been brought, he had no property subject to execution. Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145. See also Fisher *v.* Phelps, 21 Tex. 551.

Real estate.— Where the declaration in an action by the assignee against the assignor of a note avers that the maker is insolvent, a plea that he has real estate in the county of a value sufficient to satisfy the debt is good. Foresman *v.* Marsh, 6 Blackf. (Ind.) 285. See also Jacobs *v.* McDonald, 8 Mo. 565.

Exempt property.— Proof that the maker's property did not exceed what he was entitled to claim as exempt is sufficient proof of insolvency. Bozell *v.* Hauser, 9 Ind. 522. See also Dick *v.* Hitt, 82 Ind. 92; Williams *v.* Osbon, 75 Ind. 280; Campbell *v.* Gould, 17 Ind. 133.

Ability to pay part of debt.—The assignee, when he omits to sue the maker of a note on account of insolvency, must prove, in a suit against the assignor, the maker's inability, from want of property liable to execution, to pay any part of the given debt. Herald *v.* Scott, 2 Ind. 55. See also Somerby *v.* Brown, 73 Ind. 353; Sering *v.* Findlay, 7 Ind. 247; Dole *v.* Watson, 2 Ind. 177; Pillard *v.* Darst, 6 Mo. 358.

Bankruptcy of maker.— It has been held that in a suit on a non-negotiable note by the assignee against indorsers, proof that before the maturity of the note the makers had been adjudicated bankrupts and that the bankruptcy proceedings are still pending is insufficient to excuse failure to proceed against the maker, in the absence of a showing that there are no assets in the hands of an assignee out of which any part of the note could be paid, as due diligence on the part of the assignee of a note requires him

some provision in the statute to the contrary.[72] Where the statute excuses suit against the maker of a note in order to charge an assignor or indorser, if such a suit would be unavailing, the insolvency of the maker is sufficient excuse for not suing.[73] Under such a statute suit against the maker is not excused because only

to file his claim against the bankrupt estate. Somerby *v.* Brown, 73 Ind. 353; Hayne *v.* Fisher, 68 Ind. 158. But in Williams *v.* Nesbit, 65 Ind. 171, it was held that in a suit against an indorser of a note on which a judgment had been obtained with due diligence against the maker, and an execution issued thereon, a return of *nulla bona* was sufficient to fix the liability of the indorser, and it was not competent for him to prove that the estate of the maker in bankruptcy would pay a percentage on his debts. See also Lowenstein *v.* Knopf, 4 Mo. App. 594 (holding that where the maker of a non-negotiable promissory note is, at the maturity thereof, bankrupt, the assignee and holder of the note may at once sue the assignor, without waiting for final distribution of the estate of the bankrupt maker, the bankruptcy of the maker being a breach of the implied warranty of the assignor); National Bank of Commerce *v.* Booth, 5 Biss. (U. S.) 129, 17 Fed. Cas. No. 10,036.

72. In Alabama it is provided that the holder is excused from bringing suit, obtaining judgment, and issuing execution against the maker, if he dies before expiration of the time for suing, or if, after suit brought, his estate is declared insolvent. Ala. Civ. Code (1896), § 894, subs. 6. See also Kain *v.* Walke, 12 Ala. 184; Bates *v.* Ryland, 6 Ala. 668. And it has been held that the insolvency of the maker is not a sufficient excuse for failing to procure a return of "No property" on an execution against him. Bishop *v.* Bradford, 16 Ala. 769.

73. Springer *v.* Puttkamer, 159 Ill. 567, 42 N. E. 876 [*affirming* 58 Ill. App. 675]; Babcock *v.* Blanchard, 86 Ill. 165; Phillips *v.* Webster, 85 Ill. 146; Wickersham *v.* Altom, 77 Ill. 620; Aldrich *v.* Goodell, 75 Ill. 452; Kelly *v.* Graves, 74 Ill. 423; Esty *v.* Brooks, 54 Ill. 379; Shufeldt *v.* Sutphen, 52 Ill. 255 (holding that suit against the maker was not excused, where he had property subject to execution, although he was heavily in debt); Hawkinson *v.* Olson, 48 Ill. 277; White *v.* Clayes, 32 Ill. 325; Hamlin *v.* Reynolds, 22 Ill. 207; Crouch *v.* Hall, 15 Ill. 263; Pierce *v.* Short, 14 Ill. 144; Schuttler *v.* Piatt, 12 Ill. 417; Beston *v.* Walker, 9 Ill. 3; Harmon *v.* Thornton, 3 Ill. 351; Humphreys *v.* Collier, 2 Ill. 47; Lusk *v.* Cook, 1 Ill. 84; Thompson *v.* Armstrong, 1 Ill. 48; Horton *v.* Brown, 45 Ill. App. 171 (holding that in an action against an indorser of a partnership note, evidence that the estate of one of the makers was insolvent, and that an execution issued in a suit against the other was returned unsatisfied, is sufficient to render the indorser liable thereon); Summers *v.* Sheldon, 40 Ill. App. 189 (holding the burden on the indorsee to show the maker's insolvency); Wills *v.* Claflin, 92 U. S. 135, 23 L. ed. 490 (where there was an adjudication of bankruptcy).

Continuance of insolvency.— Where the excuse is that the institution of suit would have been unavailing, it is not sufficient to show such excuse at the time of the maturity of the note, but it is necessary also to show a continuance of it up to the time suit is instituted against the assignor. Bledsoe *v.* Graves, 5 Ill. 382. See also Garrity *v.* Betts, 20 Ill. App. 327.

Presumption.— Where, in a suit by an indorsee of a note against the indorser, it appears that the maker had sufficient property subject to execution to pay the note, it may be presumed that a suit against him would have been availing. Clayes *v.* White, 83 Ill. 540. See also Roberts *v.* Haskell, 20 Ill. 59.

Want of knowledge by an indorsee that the maker had property subject to execution does not excuse him from proper exertions to collect from the maker so as to render the indorser liable. Clayes *v.* White, 83 Ill. 540.

The fact that the maker's property is encumbered does not excuse an indorsee from failure to levy on it, so as to charge the indorser, where it is not shown that the encumbrance was valid and a levy would prove unavailing. Clayes *v.* White, 83 Ill. 540. See also Roberts *v.* Haskell, 20 Ill. 59.

Exempt property.— The mere possibility that a debtor may not insist on his legal right to retain such property as is exempt from execution does not render the prosecution of a suit, and the issuing of an execution, necessary before proceeding against the indorser. Pierce *v.* Short, 14 Ill. 144.

Debts subject to garnishment.— The assignor of a note cannot defeat an action brought against him by the assignee by merely proving that debts were owing to the maker, which might have been reached by trustee process without proving that the assignee knew of those notes. Pierce *v.* Short, 14 Ill. 144.

Suit in equity.— Where it is shown that a suit at law against the maker of a note, at its maturity and since, would have been unavailing, a right of recovery in the assignee against the assignor is established. A resort to a court of equity by the assignee against the maker is not necessary to charge the assignor. Phillips *v.* Webster, 85 Ill. 146.

Solvency of the maker at maturity of the note will not discharge the assignor from liability, unless his solvency continued until a suit against the maker could have been made availing. White *v.* Clayes, 32 Ill. 325.

Assignor not bound to point out property. — The assignor of a promissory note is under no legal obligation to give information of the maker's property when requested by the assignee and his failure to do so will create

a portion of the debt could be collected.[74] It has been held that the prosecution of a suit by the assignee or indorser against the maker of a note to a judgment and the return of an execution "no property found" is sufficient diligence to charge assignors or indorsers;[75] and he is not bound, according to the weight of authority, to pursue extraordinary remedies.[76] Proof of the return of an execution "no property found" is not indispensable in order to establish that a suit against the maker of a note would have been unavailing.[77] There is sufficient diligence where judgment is obtained against the maker of a note and he is arrested on a capias ad satisfaciendum, and then discharged under the insolvent law.[78]

(vi) *Waiver and Estoppel.* Perhaps in all jurisdictions the assignor or indorser of paper may waive his right to insist that diligence shall be used against the maker, as by consenting to delay, etc.,[79] and he may waive his right to claim

no liability. The assignee must ascertain at his peril the fact of the insolvency of the maker. Kelly *v.* Graves, 74 Ill. 423.

Hearsay evidence that the land occupied by the makers was mortgaged is not competent. The mortgages and deeds or copies of the record are the best evidence and should first be produced. Windheim *v.* Ohlendorf, 3 Ill. App. 436.

74. White *v.* Clayes, 32 Ill. 325, but where in an action by an indorsee against the indorser of a note, who seeks to recover on the ground that a suit against the maker would have been unavailing because of his insolvency, it appears that by proper diligence a portion of the debt might have been recovered against the maker, plaintiff may recover against his indorser the residue of the debt which he could not have made by suit against the maker.

75. Judson *v.* Gookwin, 37 Ill. 286; Hamlin *v.* Reynolds, 22 Ill. 207; Cowles *v.* Litchfield, 3 Ill. 356; Iles *v.* Watson, 76 Ind. 359; Williams *v.* Nesbit, 65 Ind. 171. *Compare*, however, Levi *v.* Evans, 7 B. Mon. (Ky.) 115, holding that the return of *nulla bona* on an execution issued in a suit by the assignee of a promissory note against the maker was only *prima facie* evidence of the latter's insolvency.

Fraudulent return of "no property."— In an action against an indorser it was held that a plea that the maker had property liable to execution, which was known to the judgment creditor and the sheriff, and that they fraudulently designed to harass the indorser, and returned an execution "No property found," was not demurrable. Hamlin *v.* Reynolds, 22 Ill. 207.

76. Suit to reach property fraudulently conveyed.— While the assignee of a promissory note is bound to make prompt use of all ordinary legal process to collect from the maker, he is not bound to resort to extraordinary measures to reach property supposed to have been conveyed for the purpose of defrauding creditors. Iles *v.* Watson, 76 Ind. 359.

Suit to discover choses in action.— The assignee of a note may sue the assignor without suing in equity to discover choses in action belonging to the maker. McFadden *v.* Finnell, 3 B. Mon. (Ky.) 121.

Equitable assets.— But in Barker *v.* Curd, 1 Metc. (Ky.) 641, it was held that failure of the assignee of a note to endeavor to reach and subject equitable assets of the maker was want of diligence precluding him from recovering from the assignor.

77. Castagno *v.* Carpenter, 14 Colo. 524, 24 Pac. 392; Springer *v.* Puttkamer, 159 Ill. 567, 42 N. E. 876 [*affirming* 58 Ill. App. 675]; Phillips *v.* Webster, 85 Ill. 146 (holding that in a suit by the assignee against the assignor of a note, an allegation of the insolvency of the maker, as an excuse for want of diligence by suit, is *prima facie* established by the return of executions in other cases against the maker *nulla bona*). *Compare*, however, Francis *v.* Gant, 80 Ky. 190; Spratt *v.* McKinney, 1 Bibb (Ky.) 595.

78. Bullitt *v.* Scribner, 1 Blackf. (Ind.) 14; Bryan *v.* Perry, 5 T. B. Mon. (Ky.) 275.

79. *Alabama.*— Ala. Civ. Code (1896), § 893; Walker *v.* Wigginton, 50 Ala. 579; Lodor *v.* Gayle, 29 Ala. 412; Lockett *v.* Howze, 18 Ala. 613 (holding that where the payee of a note not payable in bank assigned it for value, and bound himself "for the payment of the same until paid," the necessity of suit against the maker at the first court to which the suit could be brought was thereby waived, and his liability was complete whenever the indorsee should exhaust his legal remedy against the maker); Foster *v.* Stafford, 14 Ala. 714; Litchfield *v.* Allen, 7 Ala. 779.

Illinois.— Morgan *v.* Peet, 32 Ill. 281; Telford *v.* Garrells, 31 Ill. App. 441 [*affirmed* in 132 Ill. 550, 24 N. E. 573].

Indiana.— Schmied *v.* Frank, 86 Ind. 250; Huston *v.* Bank, 85 Ind. 21; Lomax *v.* White, 83 Ind. 439 (holding that where an indorser agrees to "stand good six months" from the date of his indorsement, due diligence to collect the amount of the note from the maker need not be exercised for six months); Davis *v.* Leitzman, 70 Ind. 275; Lowther *v.* Share, 44 Ind. 390; Brown *v.* Robbins, 1 Ind. 82; Brown *v.* Robbins, Smith (Ind.) 14 (holding that in a suit by the assignee of a note against the assignor, it was evidence from which a jury might infer that the delay of plaintiff in suing the maker was authorized by defendant, that when he assigned the note he told plaintiff that the maker was an honest man, and by waiting a while he would get

a discharge because of delay prior to the waiver.[80] In some states a waiver is required to be in writing.[81] If the holder of a note is induced to delay suit against the maker by the act, request, or promise of the indorser or assignor, the latter will be estopped to set up such delay as a discharge.[82]

his money); Nance *v.* Dunlavy, 7 Blackf. (Ind.) 172.

Iowa.— Friend *v.* Beebe, 3 Greene (Iowa) 279.

Kentucky.— Stafford *v.* Bruce, 12 Ky. L. Rep. 374, 12 S. W. 280, 14 S. W. 374. See also Cravens *v.* Hopson, 4 Bibb (Ky.) 286, holding, however, that a sealed assignment, reciting that if the obligor of a chose assigned "should not be good, we stand good for him, and responsible for the same," did not excuse the assignee, as a condition precedent to a recovery from the assignor, from showing that he had used due diligence by suit against the obligor.

Texas.— Cummings *v.* Rice, 9 Tex. 527; Hastings First Nat. Bank *v.* Bonner, (Tex. Civ. App. 1894) 27 S. W. 698.

Parol evidence.— Where an indorser of a note wrote on the back of it: "I bind myself, and my representatives, not to take advantage of the statute by which indorsers are released from liability after the first court ensuing the maturity of the note," it was held, in an action against such indorser, that the writing was unambiguous, and that its terms could not be varied by parol proof. Foster *v.* Stafford, 14 Ala. 714.

Consent to delay of suit.—A consent by the indorser to delay suit against the maker is not a waiver of the condition to his liability that the maker shall first be prosecuted to insolvency. Bates *v.* Ryland, 6 Ala. 668. An indorsement, by the payee, of paper not commercial, as follows: "I indorse the within until paid," is a waiver of suit against the maker for an indefinite period but does not dispense with the suit against the maker and render him primarily liable; and the indorser is discharged if suit is not brought against the maker before the statute of limitations bars an action on the note. Thomason *v.* Cooper, 57 Ala. 560. See also Walker *v.* Wigginton, 50 Ala. 579.

Waiver of objection to an extension.—That a non-negotiable note, not governed by the law merchant, waives all defenses of the extension of the time of payment given the drawers or indorsers, does not relieve the holder from the rule requiring diligence against the maker in order to hold an indorser, but when the note falls due after the extension the rule as to diligence applies. Matchett *v.* Anderson Foundry, etc., Works, (Ind. App. 1902) 64 N. E. 229.

Waiver does not prevent suit.— A waiver by the indorser of suit against the maker at the first term of court, which is accepted by the indorsee, does not prevent the indorsee from suing the maker and indorser at the first term. Cummings *v.* Rice, 9 Tex. 527.

80. When an indorser of a promissory note promises to pay the same after such laches on the part of the holder as would operate to release him from his liability, with knowledge of the facts which would constitute such release, he will be held liable on his new promise, regardless of the question of the solvency or insolvency of the maker. Morgan *v.* Peet, 32 Ill. 281, 41 Ill. 347. *Compare*, however, Stafford *v.* Bruce, 12 Ky. L. Rep. 374, 12 S. W. 280, 14 S. W. 374.

Ignorance of facts.— Where the liability of an indorser of a note has been discharged by the failure of the holder to bring suit against the maker in due time, and the holder relies upon a new promise to pay, made by the indorser after such discharge, such new promise to be binding must have been made with knowledge of the facts from which the discharge arose. If, however, the indorser had knowledge of such facts, whether he knew that by the rules of law they would operate to discharge him is immaterial. Morgan *v.* Peet, 41 Ill. 347.

81. In Alabama the statute provides that the time for the bringing of suit on paper not governed by the commercial law, to charge the indorser or assignor, may be extended or waived "by the consent of the indorser or assignor in writing signed by him." Ala. Civ. Code (1896), § 893. See also Litchfield *v.* Allen, 7 Ala. 779, holding that the provision of the act of 1828 requiring the written consent of the indorser, to authorize delay in the indorsee in suing the maker of a note, applied only where the sum due did not exceed fifty dollars, and that in other cases a verbal consent was binding on the indorser.

In Texas the statute provides that parol testimony will be inadmissible to show that the assignor, drawer, or indorser has released the holder from his obligation to use due diligence to collect the same. Sayles Civ. Stat. Tex. art. 310. See also Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310; McKenzie *v.* Harris, 2 Tex. Unrep. Cas. 180.

82. Huston *v.* Centerville First Nat. Bank, 85 Ind. 21; Davis *v.* Leitzman, 70 Ind. 275; Lowther *v.* Share, 44 Ind. 390; Sims *v.* Parks, 32 Ind. 363; Friend *v.* Beebe, 3 Greene (Iowa) 279; Stafford *v.* Bruce, 12 Ky. L. Rep. 374, 12 S. W. 280, 14 S. W. 374.

Revocation of request not to sue.— A failure to prosecute the maker with due diligence after revocation by the indorser of a request not to sue will discharge the indorser. Free *v.* Kierstead, 16 Ind. 91.

In Alabama it is expressly provided that the holder of indorsed or assigned paper is excused from bringing suit against the maker as provided by the statute, when, by any act or promise of the indorser, plaintiff is induced to delay bringing such suit. Ala. Civ. Code (1896), § 894, subs. 7. Under this statute, when by any act or promise of the indorser plaintiff is induced to delay bringing the suit

IX. BONA FIDE HOLDER FOR VALUE.

A. Meaning of Term — 1. IN GENERAL. A *bona fide* holder for value of negotiable paper is one who has acquired title in the usual course of business, for a valuable consideration, in good faith, from one capable of transferring it or from one in possession of the paper with an apparent right to transfer it and without notice or knowledge of defenses or circumstances which should put him on inquiry.[83]

against the maker, an action may be maintained against the indorser without suing the maker at any time. And where the delay was caused by an express promise of the indorser to pay, the promise need not have been in writing. Where a complaint alleges that defendants indorsed a note, which is set out in full, that between its maturity and the next term of court they each requested him not to sue the maker and promised to pay the debt, thereby inducing him to delay the suit, wherefore he now sues to recover of them the amount of the note and the costs of a suit against the maker, with interest, the action is properly against the indorsers as such. Where the holder of a note was induced to delay suit against the maker by a promise of the indorsers to pay, the fact that the holder afterward recovered judgment against the maker was not a waiver of such promise. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584.

Estoppel to deny that suit would have been unavailing.— Where the assignee of a promissory note, shortly after its maturity, informed the assignor that he could find no property of the maker out of which to make the debt, and asked if he should sue him, and the assignor told him he had better "coax it out of him," it was held, in a suit by the assignee against the assignor, that this was sufficient to estop the latter from insisting that suit should have been brought against the maker and a tacit admission that a suit would have been unavailing. Wickersham *v.* Altom, 77 Ill. 620.

83. *Alabama.*—Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314.

Illinois.— Mulford *v.* Shepard, 2 Ill. 583, 33 Am. Dec. 432.

Indiana.— Bremmerman *v.* Jennings, 60 Ind. 175.

Iowa.— Wormer *v.* Waterloo Agricultural Works, 50 Iowa 262.

Kentucky.— Spencers *v.* Briggs, 2 Metc. (Ky.) 123.

New York.— Central Bank *v.* Hammett, 50 N. Y. 158; Belmont Branch State Bank *v.* Hoge, 35 N. Y. 65; Brookman *v.* Metcalf, 32 N. Y. 591 [*affirming* 5 Bosw. (N. Y.) 429]; State Bank *v.* Vanderhorst, 32 N. Y. 553; Bailey *v.* Griswold, 36 N. Y. Super. Ct. 68.

Texas.— Wilson *v.* Denton, 82 Tex. 531, 18 S. W. 620, 27 Am. St. Rep. 908.

Wisconsin.— Burnham *v.* Merchants' Exch. Bank, 92 Wis. 277, 66 N. W. 510.

United States.— Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934.

See also *infra*, IX, A, 3 *et seq.*

Other definitions.— In Smith *v.* Livingston, 111 Mass. 342, a *bona fide* holder was defined as one who takes commercial paper for value, in good faith, in the usual course of business, before its maturity, and in Raphael *v.* Bank of England, 17 C. B. 161, 25 L. J. C. P. 33, 4 Wkly. Rep. 10, 84 E. C. L. 161, "*bona fide*" was defined as meaning really and truly for value.

A bona fide holder for value without notice is a holder for value who, at the time he becomes the holder and gives value, is really and truly without notice of any facts which if known would defeat his title to the bill. Benjamin Chalm. Bills & N. art. 85. See also Whistler *v.* Forster, 14 C. B. N. S. 248, 32 L. J. C. P. 161, 8 L. T. Rep. N. S. 317, 11 Wkly. Rep. 648, 108 E. C. L. 248; Raphael *v.* Bank of England, 17 C. B. 161, 25 L. J. C. P. 33, 4 Wkly. Rep. 10, 84 E. C. L. 161.

"An indorsee in due course" is defined by N. D. Rev. Code, § 4884, as "one who in good faith in the ordinary course of business and for value before its apparent maturity or presumptive dishonor and without knowledge of its actual dishonor acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer, or one other than the payee, who acquires such an instrument of such an indorsee thereof." Porter *v.* Andrus, 10 N. D. 558, 88 N. W. 567; Christianson *v.* Farmers' Warehouse Assoc., 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730; Dunham *v.* Peterson, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.

"An innocent purchaser," as the term is used in Minn. Gen. Stat. (1894), § 2214, means a *bona fide* indorser or bearer within the law merchant. Stephens *v.* Olson, 62 Minn. 295, 64 N. W. 898; Robinson *v.* Smith, 62 Minn. 62, 64 N. W. 90; Fredin *v.* Richards, 61 Minn. 490, 63 N. W. 1031; Rochester First Nat. Bank *v.* Bentley, 27 Minn. 87, 6 N. W. 422.

The payee of a promissory note is not a "holder in due course" within the meaning of Bills Exch. Act, § 29, inasmuch as he is not a person to whom, after its completion, by and as between the immediate parties, the note has been negotiated. Lewis *v.* Clay, 67 L. J. Q. B. 224. But where A, at the instance of B, was induced to give his note to C, the latter surrendering security to B at the time of the transfer, A cannot plead want of con-

2. Usual Course of Business and For Value — a. In General — (I) *Usual Course of Business* — (A) *In General.* While, in order to constitute a person a *bona fide* holder, he must be a purchaser in the usual course of business,[84] it is not easy to lay down a general rule as to what shall be deemed the usual or common course of business, this depending largely upon the circumstances of each particular case.[85]

(B) *Negotiation Before Maturity* — (1) In General. To constitute a person a holder in due course, he must as a rule have acquired the same before

sideration from B as a defense to an action on such paper by C, the latter being regarded in the light of a *bona fide* holder for value. Cagle *v.* Lane, 49 Ark. 465, 5 S. W. 790; South Boston Iron Co. *v.* Brown, 63 Me. 139; Munroe *v.* Bordier, 8 C. B. 862, 19 L. J. C. P. 133, 65 E. C. L. 862; Poirier *v.* Morris, 2 E. & B. 89, 17 Jur. 1116, 22 L. J. Q. B. 313, 1 Wkly. Rep. 349, 75 E. C. L. 89.

Necessity for valuable consideration see *infra*, IX, A, 2 *et seq.*

An assignment made with a view to cutting off defenses of the maker or drawer will not constitute the assignee a *bona fide* holder. Cooper *v.* Nock, 27 Ill. 301.

The motives and interests of the seller are unimportant in determining the rights of the buyer. Only the buyer's good faith is in question. Helmer *v.* Krolick, 36 Mich. 371.

84. *Colorado.*— Kinkel *v.* Harper, 7 Colo. App. 45, 42 Pac. 173.

Connecticut.— Roberts *v.* Hall, 37 Conn. 205, 9 Am. Rep. 308; Olmstead *v.* Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260.

Delaware.— McCready *v.* Cann, 5 Harr. (Del.) 175.

Illinois.— Sturges *v.* Miller, 80 Ill. 241; Harpham *v.* Haynes, 30 Ill. 404.

Iowa.— Moore *v.* Moore, 39 Iowa 461; Iowa College *v.* Hill, 12 Iowa 462.

Kansas.— Cross *v.* Thompson, 50 Kan. 627, 32 Pac. 357.

Kentucky.— Spencers *v.* Briggs, 2 Metc. (Ky.) 123.

Louisiana.— Dupeux *v.* Troxler, 8 La. 92.

Maine.— Kellogg *v.* Curtis, 69 Me. 212, 31 Am. Rep. 273.

Massachusetts.— Merriam *v.* Granite Bank, 8 Gray (Mass.) 254.

Minnesota.— Stephens *v.* Olson, 62 Minn. 295, 64 N. W. 898; Fredin *v.* Richards, 61 Minn. 490, 63 N. W. 1031; Elias *v.* Finnegan, 37 Minn. 144, 33 N. W. 330.

Missouri.— Goodfellow *v.* Landis, 36 Mo. 168; Martindale *v.* Hudson, 25 Mo. 422.

Nebraska.— Helmer *v.* Commercial Bank, 28 Nebr. 474, 44 N. W. 482.

New Hampshire.— Crosby *v.* Grant, 36 N. H. 273.

New York.— Goldsmid *v.* Lewis County Bank, 12 Barb. (N. Y.) 407; Payne *v.* Cutler, 13 Wend. (N. Y.) 605; Bay *v.* Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268.

North Dakota.— Christianson *v.* Farmers' Warehouse Assoc., 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730.

Pennsylvania.— Kuhns *v.* Gettysburg Nat. Bank, 68 Pa. St. 445; National Bank of Republic *v.* Perry, 2 Wkly. Notes Cas. (Pa.) 484 (where a bank, refusing to discount a bill of exchange, although it paid drafts drawn on the faith of it, was held to be a purchaser of the bill in the regular course of business).

Rhode Island.— Millard *v.* Barton, 13 R. I. 601, 43 Am. Rep. 51.

United States.— Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61.

85. Kinkel *v.* Harper, 7 Colo. App. 45, 42 Pac. 173; Merriam *v.* Granite Bank, 8 Gray (Mass.) 254; Johnson *v.* Robarts, L. R. 10 Ch. 505, 44 L. J. Ch. 678, 33 L. T. Rep. N. S. 138, 23 Wkly. Rep. 763 (where the transaction was held to constitute plaintiffs holders in due course). See also Roberts *v.* Hall, 37 Conn. 205, 212, 9 Am. Rep. 308, where Carpenter, J., in discussing the meaning of the phrase, said: "A more definite idea of its meaning may be had, however, by stating the question more specifically. Is negotiable paper ordinarily used in the way and manner in which this was used? Would a business man of ordinary intelligence and capacity receive commercial paper, when offered for the purposes for which this was transferred, as money, and upon its credit part with his property? Or would he at once suspect the integrity of the paper itself, and the credit and standing of the party offering it? A correct answer to these questions must settle conclusively the mercantile character of this transaction."

The words are usually defined to mean "according to the usages and customs of commercial transactions." Tescher *v.* Merea, 118 Ind. 586, 589, 21 N. E. 316 (where the court said: "Its application to the purchase of a mercantile note is not confined to persons engaged habitually in banking or purchasing notes"); Kellogg *v.* Curtis, 69 Me. 212, 214, 31 Am. Rep. 273 [*quoted* in Christianson *v.* Farmers' Warehouse Assoc., 5 N. D. 438, 449, 67 N. W. 300, 32 L. R. A. 730].

The phrase "in due course of trade," as applied to the indorsement of commercial paper, has been defined in Mississippi to mean that the indorsement was for value. Miller *v.* Mayfield, 37 Miss. 688. See also Kimbro *v.* Lytle, 10 Yerg. (Tenn.) 417, 428, 31 Am. Dec. 585 [*quoted* in Nichol *v.* Bate, 10 Yerg. (Tenn.) 429, 433], where a holder "in the due course of commercial transactions" is defined as one "who has given his money for it, his goods or his credit, at the time of receiving it, or who, then, on account of it,

maturity; otherwise he takes it subject to every equity which existed between the original parties at the time of its transfer.[86]

(2) TRANSFER BEFORE ACCEPTANCE. The fact that the holder of a bill of exchange acquires the same before its acceptance does not prevent him from being a holder in the usual course of business.[87]

(c) *Indorsement.* Unless negotiable paper is payable to bearer, in which case title will pass by delivery, indorsement is necessary to constitute the holder of such paper a purchaser in the ordinary course of business; and where he receives the paper from the original payee by assignment or sale instead of indorsement he obtains no title superior to that of the payee.[88]

(d) *Delivery.* In order to constitute a party a *bona fide* holder there should be a delivery or some positive act showing an actual transfer of the paper itself or a parting with the right to dispose of it.[89]

sustained some loss or incurred some liability."

Where a surety received a note to be transferred to a creditor, but did not deliver it to such creditor and afterward sued on the note himself, it was held that he was not a holder in due course and that it was not free from equities existing between the original parties to the note. Robertson *v.* Glenn, 26 Ga. 555.

86. *California.*—Gordon *v.* Wansey, 21 Cal. 77.

Colorado.— Dunn *v.* Ghost, 5 Colo. 134.

Delaware.— McCready *v.* Cann, 5 Harr. (Del.) 175.

Iowa.— Richards *v.* Daily, 34 Iowa 427.

Maine.— Woodman *v.* Churchill, 52 Me. 58.

Missouri.— New Albany Woolen Mills *v.* Meyers, 43 Mo. App. 124.

New Hampshire.— Crosby *v.* Grant, 36 N. H. 273.

New York.— Bacon *v.* Burnham, 37 N. Y. 614; Havens *v.* Huntington, 1 Cow. (N. Y.) 387; Lansing *v.* Lansing, 8 Johns. (N. Y.) 454; O'Callaghan *v.* Sawyer, 5 Johns. (N. Y.) 118; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Sebring *v.* Rathbun, 1 Johns. Cas. (N. Y.) 331; Johnson *v.* Bloodgood, 1 Johns. Cas. (N. Y.) 51, 1 Am. Dec. 93, 2 Cai. Cas. (N. Y.) 303.

Pennsylvania.— Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488; Bower *v.* Hastings, 36 Pa. St. 285; Lancaster Bank *v.* Woodard, 18 Pa. St. 357, 57 Am. Dec. 618; Tams *v.* Way, 13 Pa. St. 222; Snyder *v.* Riley, 6 Pa. St. 164, 47 Am. Dec. 452; Barnet *v.* Offerman, 7 Watts (Pa.) 130; McKinney *v.* Crawford, 8 Serg. & R. (Pa.) 351.

England.— Tinson *v.* Francis, 1 Campb. 19, 10 Rev. Rep. 617; Parr *v.* Jewell, 16 C. B. 684, 81 E. C. L. 684; Taylor *v.* Mather, 3 T. R. 83 note; Brown *v.* Davies, 3 T. R. 80.

See also *supra*, VI, F, 3.

Retransfer to payee.— Where an innocent purchaser for value transfers the paper back to the payee, one who subsequently purchases the note from the payee for value, but after maturity, takes it subject to the equities existing between the original parties. Koehler *v.* Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 518.

Acquiring paper after maturity from bona fide holder before maturity see *infra*, IX, A, 3, a, (I).

87. *Connecticut.*— Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.

Massachusetts.— Ft. Dearborn Nat. Bank *v.* Carter, 152 Mass. 34, 25 N. E. 27; Arpin *v.* Owens, 140 Mass. 144, 3 N. E. 25.

Minnesota.— American Trust, etc., Bank *v.* Gluck, 68 Minn. 129, 70 N. W. 1085.

New York.— Heuertematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657 [*overruling* Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275].

United States.— Hoffman *v.* National City Bank, 12 Wall. (U. S.) 181, 20 L. ed. 366.

88. See *supra*, VI, F, 1, b, (II).

Transfer by indorsement generally see *supra*, VI, C, 1.

Transfer by delivery of paper payable to bearer see *supra*, VI, C, 2.

Effect of unnecessary indorsement.— Indorsement by the actual payee of paper made payable to a designated party or bearer will not affect the character of the indorsee as a holder in good faith in the ordinary course of business, such indorsement being regarded as merely superfluous, since paper of this character will pass by delivery. Smith *v.* Rawson, 61 Ga. 208; Lane *v.* Krekle, 22 Iowa 399.

89. **A verbal pledge** of a negotiable instrument without delivery or absolute transfer will not make the pledgee a *bona fide* holder thereof.

Illinois.— Cooper *v.* Nock, 27 Ill. 301.

Minnesota.— O'Mulcahy *v.* Holley, 28 Minn. 31, 8 N. W. 906, where the note was in possession of the assignor at the time of the alleged assignment.

New York.— Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259 [*affirming* 6 Lans. (N. Y.) 472]; Russell *v.* Scudder, 42 Barb. (N. Y.) 31.

Pennsylvania.— Evans *v.* Smith, 4 Binn. (Pa.) 366.

Texas.—Battle *v.* Cushman, (Tex. Civ. App. 1896) 33 S. W. 1037; Eck *v.* Schuermeyer, (Tex. Civ. App. 1895) 29 S. W. 241. Where the principal maker of a note payable to a person named or bearer delivers it to a person other than the payee, such person is charged with notice of the facts which render it void as to the sureties. Battle *v.* Cushman, (Tex. Civ. App. 1896) 33 S. W. 1037.

Wisconsin.— Burnham *v.* Merchants' Exch.

(E) *Acquisition by Indorser.* The taking up of an instrument at maturity by the indorser himself is a purchase in due course of business.[90]

(F) *Payment by Accepter Before Maturity.* As an accepter's obligation is to pay the bill when due and not before, a payment before maturity would be out of due course and cannot change the relationship of the original parties to it and to each other and thus cut off all equities.[91]

(G) *Transfer on Sunday.* Where the transfer of commercial paper is consummated on Sunday such paper is not taken in the usual course of business and the indorsee will not be protected as *bona fide* holder.[92]

(H) *Transfer by Operation of Law.* The transfer of negotiable paper by operation of law as under a bankrupt or insolvent law[93] or the possession by a receiver appointed by a court, of the paper of a litigant,[94] is not in the usual course of business, and such transferee or assignee acquires no better title to such paper than his transferrer or assignor. This rule likewise applies to a transfer by a payee or holder to a trustee for the benefit of creditors,[95] and to the purchaser of commercial paper at a judicial sale.[96] So a change in the members of a partnership by new members being taken into the firm and pur-

Bank, 92 Wis. 277, 66 N. W. 510; Beard *v.* Dedolph, 29 Wis. 136.

See, however, Grimm *v.* Warner, 45 Iowa 106.

Equitable assignment.— Where a party made a loan on a bill of exchange to arrive by an incoming steamer and took an equitable assignment of it without indorsement or delivery, it was held that he was not to be protected as a *bona fide* holder in due course of business. Muller *v.* Pondir, 55 N. Y. 325, 335, 14 Am. Rep. 259, where the court said: "The evidence of ownership of negotiable bills is their possession, properly indorsed, so as to pass the title to the holder. There is no such thing as a symbolical delivery of negotiable instruments; and the law does not recognize, for commercial purposes, a right of possession as distinct from the actual possession."

90. *Alabama.*— Andrews *v.* Meadow, 133 Ala. 442, 31 So. 971.

Kentucky.— Spencers *v.* Briggs, 2 Metc. (Ky.) 123.

Louisiana.— Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583; Hill *v.* Holmes, 12 La. 96.

Maine.—Breckenridge *v.* Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353. See also Eaton *v.* McKown, 34 Me. 510; Green *v.* Jackson, 15 Me. 136.

Maryland.— Rhinehart *v.* Schall, 69 Md. 352, 16 Atl. 126; Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Wood *v.* Repold, 3 Harr. & J. (Md.) 125.

Massachusetts.— Shaw *v.* Knox, 98 Mass. 214; Clapp *v.* Rice, 13 Gray (Mass.) 403, 64 Am. Dec. 639; Howe *v.* Merrill, 5 Cush. (Mass.) 80; Church *v.* Barlow, 9 Pick. (Mass.) 547.

Missouri.— Glasgow *v.* Switzer, 12 Mo. 395.

Oregon.— Sheahan *v.* Davis, 27 Oreg. 278, 40 Pac. 405, 50 Am. St. Rep. 722, 28 L. R. A. 476.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362.

Reacquisition by innocent holder.— Where the payee has indorsed commercial paper to an innocent indorsee and the latter, after discounting at a bank, upon its maturity takes it up, he occupies, so far as defenses against it are concerned, as good a position as the bank did. Feland *v.* Stirman, 15 Ky. L. Rep. 271. Where, however, a party is not a *bona fide* holder he cannot become such by reacquisition of the paper after it has passed through the hands of a *bona fide* holder. Cline *v.* Templeton, 78 Ky. 550.

Guarantor.— A party who guarantees the payment of a promissory note by the payee and indorser does not, upon paying the note at maturity, thereby constitute himself a *bona fide* holder. Putnam *v.* Tash, 12 Gray (Mass.) 121.

91. Stark *v.* Alford, 49 Tex. 260.

92. Ball *v.* Powers, 62 Ga. 757 [*approved* in Harrison *v.* Powers, 76 Ga. 218]. See, generally, SUNDAY.

93. Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Billings *v.* Collins, 44 Me. 271; King *v.* Nichols, 138 Mass. 18; Platt *v.* Chapin, 49 How. Pr. (N. Y.) 318.

94. Litchfield Bank *v.* Peck, 29 Conn. 384; Briggs *v.* Merrill, 58 Barb. (N. Y.) 389; Hatch *v.* Johnson L. & T. Co., 79 Fed. 828; Fisher *v.* Simons, 64 Fed. 311, 12 C. C. A. 125; Adams *v.* Spokane Drug Co., 57 Fed. 888, 23 L. R. A. 334.

Purchaser from receiver.— This rule applies to a party who purchases all assets in lump from receiver. Kinney *v.* Paine, 68 Miss. 258, 8 So. 747.

95. Roberts *v.* Hall, 37 Conn. 205, 9 Am. Rep. 308; Belohradsky *v.* Kuhn, 69 Ill. 547.

Note levied on by sheriff.— In Iowa, under statute, it was held that the indorsement of a note by the sheriff who had levied upon it had the same effect as if made by the holder himself and that the indorsee was a holder in the usual course of business. Earhart *v.* Gant, 32 Iowa 481.

96. Neale *v.* Head, 133 Cal. 42, 65 Pac. 131, 576; Jones *v.* Wiesen, 50 Nebr. 243, 69 N. W. 762; Finnell *v.* Burt, 2 Handy (Ohio) 202, 12 Ohio Dec. (Reprint) 403; Nichols *v.* Hill, 42 S. C. 28, 19 S. E. 1017.

chasing an interest in the assets of the original firm does not constitute a purchase of commercial paper according to the usual or due course of commercial transactions within the meaning of the law merchant.[97]

(II) *Valuable Consideration*—(A) *Necessity of.* It is as a rule essential, to constitute a holder or purchaser for value in the commercial sense of the term, that the transfer be supported by a valid and valuable consideration.[98] An exception to the above rule arises, however, where the holder acquires the paper from one who is himself a *bona fide* holder for value before maturity, in which case a holder may rely on the title of his vendor and the question of the consideration paid by him is irrelevant.[99]

(B) *Sufficiency of*—(1) In General. It is not necessary that the holder pay for the note in cash, the surrender of any valid or valuable asset being sufficient.[1] Thus the consideration may consist of a surrender by him of stock in the

97. Burrows *v.* Cook, 17 Iowa 436; Stephens *v.* Olson, 62 Minn. 295, 64 N. W. 898.

98. *Illinois.*— Webster *v.* Cobb, 17 Ill. 459.

New Jersey.— Tillou *v.* Britton, 9 N. J. L. 120, holding that a transfer for mere purposes of suit is insufficient to constitute one a holder for value.

New York.— Phœnix Ins. Co. *v.* Church, 81 N. Y. 218, 37 Am. Rep. 494, 59 How. Pr. (N. Y.) 293; Stevens *v.* Corn Exch. Bank, 3 Hun (N. Y.) 147, 5 Thomps. & C. (N. Y.) 283; Leger *v.* Bonnaffe, 2 Barb. (N. Y.) 475 (holding that an assignee for the benefit of creditors was not such a holder); White *v.* Springfield Bank, 1 Barb. (N. Y.) 225; McQuade *v.* Irwin, 39 N. Y. Super. Ct. 396.

Pennsylvania.— Taylor's Appeal, 45 Pa. St. 71.

Virginia.— Norvell *v.* Hudgins, 4 Munf. (Va.) 496.

United States.—Hicks *v.* Jennings, 4 Woods (U. S.) 496, 4 Fed. 855.

If plaintiff is a mere trustee or holder for collection the maker may successfully interpose his defense thereto.

Colorado.— See Kinkel *v.* Harper, 7 Colo. App. 45, 42 Pac. 173.

Illinois.—Belohradsky *v.* Kuhn, 69 Ill. 547; Stricklin *v.* Cunningham, 58 Ill. 293; Ennor *v.* Hodson, 28 Ill. App. 445.

Iowa.— Johnson *v.* Barney, 1 Iowa 531.

Louisiana.— McKown *v.* Mathes, 19 La. 542; West *v.* Wilson, 4 La. 219.

New York.— Vosburgh *v.* Diefendorf, 119 N. Y. 357, 23 N. E. 801, 29 N. Y. St. 448, 16 Am. St. Rep. 836.

Pennsylvania.— Lewisburg Nat. Bank *v.* Broadhead, 2 Kulp (Pa.) 285; Waters *v.* Cooper, 31 Leg. Int. (Pa.) 413.

South Carolina.—Stoney *v.* Josephs, 1 Rich. Eq. (S. C.) 352.

Texas.— Blum *v.* Loggins, 53 Tex. 121; Steagall *v.* Levy, 3 Tex. App. Civ. Cas. § 468.

United States.— Cummings *v.* Mead, 8 Fed. Cas. No. 3,476, 6 Am. L. Reg. 51.

See 7 Cent. Dig. tit. "Bills and Notes," § 900.

99. *Massachusetts.*— Fowler *v.* Strickland, 107 Mass. 552.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

New York.— Sheridan *v.* New York, 68 N. Y. 30.

South Carolina.— Dabney *v.* State Bank, 3 S. C. 124, where the holder purchased bank-bills at a large discount.

United States.— Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431; Douglas County *v.* Bolles, 94 U. S. 109, 24 L. ed. 46; Dudley *v.* Lake County, 80 Fed. 672, 49 U. S. App. 336, 26 C. C. A. 82.

England.— Hunter *v.* Wilson, 7 D. & L. 221, 4 Exch. 489, 19 L. J. Exch. 8.

Canada.— Pichette *v.* Lajoie, 10 Montreal Leg. N. 266; Laforest *v.* Inkeil, 11 Quebec Super. Ct. 534; Wood *v.* Ross, 8 U. C. C. P. 299.

See also Neg. Instr. L. § 97; Bills Exch. Act, § 28.

1. *In re* Great Western Tel. Co., 5 Biss. (U. S.) 363, 10 Fed. Cas. No. 5,740.

A check on the vendor is sufficient. Mayer *v.* Heidelbach, 123 N. Y. 332, 25 N. E. 416, 33 N. Y. St. 610, 9 L. R. A. 850 [*affirming* 56 N. Y. Super. Ct. 595, 4 N. Y. Suppl. 529, 24 N. Y. St. 176], the vendor in this case being a bank which received and charged the check to his account.

The holder's own note is sufficient. Greenwood *v.* Lowe, 7 La. Ann. 197; Mickles *v.* Colvin, 4 Barb. (N. Y.) 304; Bacon *v.* Holloway, 2 E. D. Smith (N. Y.) 159; Howlett *v.* Fitzgibbon, 1 N. Y. Suppl. 321, 16 N. Y. St. 804; Adams *v.* Soule, 33 Vt. 538. See also Lally *v.* Colgate, 42 N. Y. Super. Ct. 544. To constitute a note a valuable consideration for another note, however, it is held that the obligation to pay must be absolute and not contingent, and a note given payable only when the other note for which it was given is collected is not such as will constitute the party a holder for value. Bird *v.* Harville, 33 Ga. 459.

Part cash and part the surrender of other notes or assets is enough. Luke *v.* Fisher, 10 Cush. (Mass.) 271; Mechanics', etc., Nat. Bank *v.* Crow, 60 N. Y. 85; Brown *v.* Leavitt, 31 N. Y. 113; Weems *v.* Shaughnessy, 70 Hun (N. Y.) 175, 24 N. Y. Suppl. 271, 54 N. Y. St. 101.

company constituting his indorser,[2] of notes or other collateral,[3] of a lien,[4] of a right of action and collateral,[5] or of the indorser's own note.[6]

(2) Discounting, Crediting, and Paying. While the authorities are not entirely uniform upon the subject it is fairly well settled that a bank, by discounting negotiable paper, placing the same to the credit of the depositor, and honoring his checks or drafts, surrendering to him securities, or in some other manner making advances and extending its credit on the faith of such deposit, thereby become a holder for value.[7] But the mere discounting and crediting of the amount on the depositor's account, without making payment or incurring any increased obligations or liabilities, is not sufficient.[8]

2. Pond *v.* Waterloo Agricultural Works, 50 Iowa 596; White *v.* Francis, 5 Ohio Dec. (Reprint) 323, 4 Am. L. Rec. 501; Adams *v.* Soule, 33 Vt. 538; King *v.* Doane, 139 U. S. 166, 11 S. Ct. 465, 35 L. ed. 84 [*affirming* 30 Fed. 106.]

3. Rochester First Nat. Bank *v.* Bentley, 27 Minn. 87, 6 N. W. 422; Goodwin *v.* Conklin, 85 N. Y. 21; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 5 Hun (N. Y.) 556]; Mechanics', etc., Nat. Bank *v.* Crow, 60 N. Y. 85; Baldwin *v.* Van Deusen, 37 N. Y. 487; Stettheimer *v.* Meyer, 33 Barb. (N. Y.) 215; Montross *v.* Clark, 2 Sandf. (N. Y.) 115; Bacon *v.* Holloway, 2 E. D. Smith (N. Y.) 159; Willson *v.* Law, 26 N. Y. Wkly. Dig. 509; Wheeler *v.* Allen, 19 Alb. L. J. 402; Lorimer *v.* Stevens, 3 Alb. L. J. 97.

4. Aitken *v.* Meyer, 67 Barb. (N. Y.) 131; Hirt *v.* Vincent, 7 Misc. (N. Y.) 237, 27 N. Y. Suppl. 258, 58 N. Y. St. 36.

5. Tradesmen's Nat. Bank *v.* Looney, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837. See also Stainback *v.* Junk Bros. Lumber, etc., Co., 98 Tenn. 306, 39 S. W. 530.

6. Clary *v.* Surrency, 58 Ga. 83; Grace M. E. Church *v.* Rickards, 16 Mont. 70, 40 Pac. 73; Ward *v.* Howard, 88 N. Y. 74; Pratt *v.* Coman, 37 N. Y. 440; Brown *v.* Leavitt, 31 N. Y. 113; Youngs *v.* Lee, 12 N. Y. 551 [*affirming* 18 Barb. (N. Y.) 187]; Day *v.* Saunders, 1 Abb. Dec. (N. Y.) 495, 3 Keyes (N. Y.) 347, 1 Transcr. App. (N. Y.) 352, 37 How. Pr. (N. Y.) 534; Hand *v.* Dinniny, 85 Hun (N. Y.) 380, 32 N. Y. Suppl. 980, 66 N. Y. St. 464; Bromley *v.* Walker, 51 Barb. (N. Y.) 203; Nickerson *v.* Ruger, 43 N. Y. Super. Ct. 258; Coburn *v.* Baker, 6 Duer (N. Y.) 532; Odell *v.* Greenly, 4 Duer (N. Y.) 358; Dowe *v.* Schutt, 2 Den. (N. Y.) 621; McBride *v.* Dorman, 15 Am. L. Reg. 736.

If the surrendered note is an accommodation note of the indorsers' which the indorsee held in exchange for his own note it would not be sufficient, as he could still sue as principal against the surety should he be compelled to pay the other note. Taylor's Appeal, 45 Pa. St. 71.

7. *Kansas.*—Dreilling *v.* Battle Creek First Nat. Bank, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126; Fox *v.* Kansas City Bank, 30 Kan. 441, 1 Pac. 789.

Massachusetts.— Shawmut Nat. Bank *v.* Manson, 168 Mass. 425, 47 N. E. 196.

New York.— Hatch *v.* New York City Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403, 69 N. Y. St. 534; Mayer *v.* Heidelbach, 123 N. Y. 332, 25 N. E. 416, 33 N. Y. St. 610, 9 L. R. A. 850; Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420; Mechanics', etc., Nat. Bank *v.* Crow, 60 N. Y. 65 [*affirming* 5 Daly (N. Y.) 191]; Platt *v.* Beebe, 57 N. Y. 339; Justh *v.* National Bank, 56 N. Y. 478 [*affirming* 36 N. Y. Super. Ct. 273]; State Bank *v.* Vanderhorst, 32 N. Y. 553; Market Bank *v.* Hartshorne, 3 Abb. Dec. (N. Y.) 173, 3 Keyes (N. Y.) 137; Fulton Bank *v.* Phœnix Bank, 1 Hall (N. Y.) 562; Sandusky Bank *v.* Scoville, 24 Wend. (N. Y.) 115; Salina Bank *v.* Babcock, 21 Wend. (N. Y.) 499; Clots *v.* Bently, 5 Alb. L. J. 286.

North Carolina.— U. S. National Bank *v.* McNair, 114 N. C. 335, 19 S. E. 361.

Ohio.— Parkersburg First Nat. Bank *v.* Crawford, 2 Cinc. Super. Ct. 125.

Pennsylvania.—Erisman *v.* Delaware County Nat. Bank, 1 Pa. Super. Ct. 144, 37 Wkly. Notes Cas. (Pa.) 518.

8. *Alabama.*—Montgomery First Nat. Bank *v.* Nelson, 105 Ala. 180, 16 So. 707.

Kansas.— Dreilling *v.* Battle Creek First Nat. Bank, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126; Mann *v.* Springfield Second Nat. Bank, 30 Kan. 412, 1 Pac. 579.

Maryland.— Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300.

Michigan.— Monroe First Nat. Bank *v.* Wills Creek Coal Co., 110 Mich. 447, 68 N. W. 232; Drovers' Nat. Bank *v.* Blue, 110 Mich. 31, 67 N. W. 1105, 64 Am. St. Rep. 327.

New York.— Scott *v.* Ocean Bank, 23 N. Y. 289; Dykman *v.* Northbridge, 80 Hun (N. Y.) 258, 30 N. Y. Suppl. 164, 61 N. Y. St. 863; Central Nat. Bank *v.* Valentine, 18 Hun (N. Y.) 417; Fulton Bank *v.* Phœnix Bank, 1 Hall (N. Y.) 562; Platt *v.* Chapin, 49 How. Pr. (N. Y.) 318.

Wisconsin.— Manufacturers' Nat. Bank *v.* Newell, 71 Wis. 309, 37 N. W. 420.

United States.— Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 14 S. Ct. 94, 13 L. ed. 1063.

England.— Cranch *v.* White, 1 Bing. N. Cas. 414, 27 E. C. L. 700, 6 C. & P. 767, 25 E. C. L. 679, 4 L. J. C. P. 113.

But see Wheeler *v.* Battle Creek First Nat. Bank, 3 Tex. App. Civ. Cas. § 153; *Ex p.* Richdale, 19 Ch. D. 409, 51 L. J. Ch. 462, 46 L. T. Rep. N. S. 116, 30 Wkly. Rep. 262 [*cited* in Manufacturers' Nat. Bank *v.* Newell, 71 Wis. 309, 37 N. W. 420], in which latter

(c) *Adequacy of.* With regard to the adequacy of considerations no clear or precise rule can be laid down, but it is clear that payment of the full face value of the paper is not required.[9] In fact a note is property which may be sold at any price and the amount paid therefor rarely, if ever, ought of itself to impeach the purchaser's title as a matter of law, although inadequacy is always a fact to be considered by the jury as evidence of bad faith,[10] and may, with suspicious circumstances, authorize a finding of *mala fides.*[11]

b. Transfer as Collateral Security — (i) *For Debt Created at Time of Transfer.* Where a note is taken as collateral security for a debt at that time

case, however, the rights of third parties were involved, as well as the requirements of a bankrupt act.

9. *Alabama.*— Wildsmith *v.* Tracy, 80 Ala. 258.

California.— Schoen *v.* Houghton, 50 Cal. 528.

Connecticut.—Bissell *v.* Dickerson, 64 Conn. 61, 29 Atl. 226.

Illinois.— Murray *v.* Beckwith, 81 Ill. 43 (where a note was taken just before maturity at a small discount); Sherman *v.* Blackman, 24 Ill. 347.

Iowa.— Lay *v.* Wissman, 36 Iowa 305; Sully *v.* Goldsmith, 32 Iowa 397.

Kansas.— Irby *v.* Blain, 31 Kan. 716, 3 Pac. 499.

Louisiana.— Scott *v.* Seelye, 27 La. Ann. 95.

Maryland.— Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477.

Minnesota.— Daniels *v.* Wilson, 21 Minn. 530.

Nebraska.— Citizens' Bank *v.* Ryman, 12 Nebr. 541, 11 N. W. 850; Cannon *v.* Canfield, 11 Nebr. 506, 9 N. W. 693.

New Hampshire.— Pierce *v.* Ricker, 16 N. H. 322, 41 Am. Dec. 728.

New York.— Joy *v.* Diefendorf, 130 N. Y. 6, 28 N. E. 602, 40 N. Y. St. 491, 27 Am. St. Rep. 484; Brown *v.* Penfield, 36 N. Y. 473; Gloversville Nat. Bank *v.* Wells, 15 Hun (N. Y.) 51; Harger *v.* Wilson, 63 Barb. (N. Y.) 237; Montgomery County Bank *v.* Albany City Bank, 8 Barb. (N. Y.) 396; Miller *v.* Crayton, 3 Thomps. & C. (N. Y.) 360 (ten per cent discount).

North Carolina.— U. S. National Bank *v.* McNair, 116 N. C. 550, 21 S. E. 389.

Ohio.— Kitchen *v.* Loudenback, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540 [*affirming* 3 Ohio Cir. Ct. 228]; Tod *v.* Wick, 36 Ohio St. 370 (twelve per cent discount); Rooker *v.* Rooker, 29 Ohio St. 1.

Pennsylvania.— Forepaugh *v.* Baker, 21 Wkly. Notes Cas. (Pa.) 299, 13 Atl. 465; Leib *v.* Lanigan, 2 Leg. Chron. (Pa.) 386; State Bank v. Schreck, 1 Leg. Chron. (Pa.) 65; State Bank *v.* McCoy, 3 Leg. Gaz. (Pa.) 116.

South Carolina.— Dabney *v.* State Bank, 3 S. C. 124.

Virginia.— Cumberland County *v.* Randolph, 89 Va. 614, 16 S. E. 722.

Washington.—McNamara *v.* Jose, 28 Wash. 461, 68 Pac. 903.

United States.— King *v.* Doane, 139 U. S. 166, 11 S. Ct. 465, 35 L. ed. 84; Tilden *v.* Blair, 21 Wall. (U. S.) 241, 22 L. ed. 632.

England.— *Ex p.* Lee, 1 P. Wms. 782.

See 7 Cent. Dig. tit. "Bills and Notes," § 904.

Inadequacy means a price less than the market value of the instrument purchased and not one lower than the face value. Oppenheimer *v.* Farmers', etc., Bank, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, 33 L. R. A. 767.

10. *California.*— Jordan *v.* Grover, 99 Cal. 194, 33 Pac. 889.

Georgia.— Green *v.* Lowry, 38 Ga. 548.

Illinois.— Murray *v.* Beckwith, 48 Ill. 391.

Indiana.— Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380.

Iowa.— Lay *v.* Wissman, 36 Iowa 305.

Nebraska.— Smith *v.* Jansen, 12 Nebr. 125, 10 N. W. 537, 41 Am. Rep. 761.

New York.—Anderson *v.* Nicholas, 28 N. Y. 600; Harger *v.* Wilson, 63 Barb. (N. Y.) 237; Gould *v.* Segee, 5 Duer (N. Y.) 260.

North Dakota.— Knowlton *v.* Schultz, 6 N. D. 417, 71 N. W. 550.

Ohio.— Tod *v.* Wick, 36 Ohio St. 370.

South Dakota.— Dunn *v.* Canton Nat. Bank, (S. D. 1902) 90 N. W. 1045.

Wisconsin.— Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146; De Witt *v.* Perkins, 22 Wis. 473.

England.— Jones *v.* Gordon, 2 App. Cas. 616, 47 L. J. Bankr. 1, 37 L. T. Rep. N. S. 477, 26 Wkly. Rep. 172.

Usurious consideration.— While the purchase of a note at a discount greater than the legal rate of interest is not usury unless intended to cover the usurious loan or to evade the law concerning usury (Capital City Ins. Co. *v.* Quinn, 73 Ala. 558; Moore *v.* Baird, 30 Pa. St. 138; Gaul *v.* Willis, 26 Pa. St. 259), it is well settled that the note, to be subject to this immunity, must be a valid obligation in the hands of the payee, so that it can be enforced between the original parties; and if it does not occupy this position it cannot be rendered valid by a sale to the purchaser at a usurious rate of interest (Sweet *v.* Chapman, 7 Hun (N. Y.) 576; Hall *v.* Wilson, 16 Barb. (N. Y.) 548).

11. *Illinois.*— Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971.

Indiana.— Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

Michigan.— Boyce *v.* Geyer, 2 Mich. N. P. 71.

created and on the faith thereof, there is little or no dissent from the proposition that the consideration is sufficient and the indorsee a purchaser for value, and in due course of business.[12] This is true also of a pledge in block of various bills

Minnesota.— Fuller *v.* Goodnow, 62 Minn. 163, 64 N. W. 161.

Ohio.— Strong *v.* Strauss, 40 Ohio St. 87.

Tennessee.— Hunt *v.* Sandford, 6 Yerg. (Tenn.) 387.

12. *Alabama.*— Miller *v.* Boykin, 70 Ala. 469.

Arkansas.— Estes *v.* German Nat. Bank, 62 Ark. 7, 34 S. W. 85; Winship *v.* Merchants' Nat. Bank, 42 Ark. 22, 24 (where it is said that Bertrand *v.* Barkman, 13 Ark. 150, "decided before our Legislature had adopted the rules of the Law Merchant, concerning negotiable paper, has no application"); Brown *v.* Callaway, 41 Ark. 418.

Georgia.— Partridge *v.* Williams, 72 Ga. 807; Merchants', etc., Nat. Bank *v.* Masonic Hall, 62 Ga. 271; Exchange Bank *v.* Butner, 60 Ga. 654; Bonaud *v.* Genesi, 42 Ga. 639.

Illinois.— Humble *v.* Curtis, 160 Ill. 193, 43 N. E. 749; Gammon *v.* Huse, 9 Ill. App. 557.

Indiana.— Valette *v.* Mason, 1 Ind. 288.

Iowa.— Mahaska County State Bank *v.* Crist, 87 Iowa 415, 54 N. W. 450; Stoots *v.* Byers, 17 Iowa 303; Iowa College *v.* Hill, 12 Iowa 462.

Kansas.— St. Joseph Nat. Bank *v.* Dakin, 54 Kan. 656, 39 Pac. 180, 45 Am. St. Rep. 299; Best *v.* Crall, 23 Kan. 482, 33 Am. Rep. 185; State Sav. Assoc. *v.* Hunt, 17 Kan. 532; Claflin Bank *v.* Rowlinson, 2 Kan. App. 82, 43 Pac. 304.

Louisiana.—Forstall *v.* Fussell, 50 La. Ann. 249, 23 So. 273; Holton *v.* Hubbard, 49 La. Ann. 715, 22 So. 338; McPherson *v.* Bondreau, 48 La. Ann. 431, 19 So. 550; Levy *v.* Ford, 41 La. Ann. 873, 6 So. 671; State Nat. Bank *v.* Cason, 39 La. Ann. 865, 2 So. 881; Mechanics' Bldg. Assoc. *v.* Ferguson, 29 La. Ann. 548; Louisiana State Bank *v.* Gaiennie, 21 La. Ann. 555; Lacroix *v.* Derbigny, 18 La. Ann. 27; Matthews *v.* Rutherford, 7 La. Ann. 225; King *v.* Gayoso, 8 Mart. N. S. (La.) 370.

Maryland.— Williams *v.* Baltimore Nat. Bank, 72 Md. 441, 20 Atl. 191; Gwynn *v.* Lee, 9 Gill (Md.) 137.

Massachusetts.—Lee *v.* Whitney, 149 Mass. 447, 21 N. E. 948; Stoddard *v.* Kimball, 6 Cush. (Mass.) 469; Chicopee Bank *v.* Chapin, 8 Metc. (Mass.) 40.

Michigan.— Crump *v.* Berdan, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345.

Minnesota.— Rochester First Nat. Bank *v.* Bentley, 27 Minn. 87, 6 N. W. 422.

Missouri.— Lee *v.* Turner, 89 Mo. 489, 14 S. W. 505; Deere *v.* Marsden, 88 Mo. 512; Logan *v.* Smith, 62 Mo. 455; Grant *v.* Kidwell, 30 Mo. 455.

Montana.— Yellowstone Nat. Bank *v.* Gagnon, 19 Mont. 402, 48 Pac. 762, 61 Am. St. Rep. 520, 44 L. R. A. 243.

Nebraska.— Connecticut Trust, etc., Co. *v.* Trumbo, (Nebr. 1902) 90 N. W. 216; Connecticut Trust, etc., Co. *v.* Fletcher, 61 Nebr. 166, 85 N. W. 59; Jones *v.* Wiesman, 50 Nebr. 243, 69 N. W. 762; Hayden *v.* Lincoln City Electric R. Co., 43 Nebr. 680, 62 N. W. 73; Koehler *v.* Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 539; Helmer *v.* Commercial Bank, 28 Nebr. 474, 44 N. W. 482.

Nevada.—Haydon *v.* Nicoletti, 18 Nev. 290, 3 Pac. 473.

New Hampshire.— National State Capital Bank *v.* Noyes, 62 N. H. 35.

New Jersey.— Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 170 N. Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640 [*affirming* 42 N. Y. App. Div. 147, 59 N. Y. Suppl. 51]; American Exch. Nat. Bank *v.* New York Belting, etc., Co., 148 N. Y. 698, 43 N. E. 168; Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 48 N. Y. St. 853, 32 Am. St. Rep. 704, 18 L. R. A. 120; Platt *v.* Beebe, 57 N. Y. 339; Brookman *v.* Metcalf, 32 N. Y. 591 [*affirming* 5 Bosw. (N. Y.) 429]; State Bank *v.* Vanderhorst, 32 N. Y. 553 [*affirming* 1 Rob. (N. Y.) 211]; Tompkins County Nat. Bank *v.* Bunnell, etc., Invest. Co., 8 N. Y. App. Div. 90, 40 N. Y. Suppl. 411, 74 N. Y. St. 857; Atlantic Nat. Bank *v.* Franklin, 64 Barb. (N. Y.) 449; Crooke *v.* Mali, 11 Barb. (N. Y.) 205; Scott *v.* Johnson, 5 Bosw. (N. Y.) 213; Watson *v.* Cabot Bank, 5 Sandf. (N. Y.) 423; Fourth Nat. Bank *v.* Snow, 3 Daly (N. Y.) 167; Ferdon *v.* Jones, 2 E. D. Smith (N. Y.) 106; Pearce, etc., Engineering Co. *v.* Brouer, 16 Misc. (N. Y.) 502, 31 N. Y. Suppl. 195, 63 N. Y. St. 621; Mechanics', etc., Bank *v.* Livingston, 4 Misc. (N. Y.) 257, 23 N. Y. Suppl. 813, 53 N. Y. St. 692; Williams *v.* Smith, 2 Hill (N. Y.) 301; Chenango Bank *v.* Hyde, 4 Cow. (N. Y.) 567.

Ohio.— Roxborough *v.* Messick, 6 Ohio St. 448, 67 Am. Dec. 346.

Pennsylvania.— Philler *v.* Jewett, 166 Pa. St. 456, 31 Atl. 204; Miller *v.* Pollock, 99 Pa. St. 202; Smith *v.* Hogeland, 78 Pa. St. 252; Housum *v.* Rogers, 40 Pa. St. 190; Lord *v.* Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Spering's Appeal, 10 Pa. St. 235; Munn *v.* McDonald, 10 Watts (Pa.) 270.

Rhode Island.— Trafford *v.* Hall, 7 R. I. 104, 82 Am. Dec. 589.

South Carolina.— McCrady *v.* Davie, 36 S. C. 136, 15 S. E. 430; Dearman *v.* Trimmer, 26 S. C. 506, 2 S. E. 501.

Tennessee.—Memphis Bethel *v.* Continental Nat. Bank, 101 Tenn. 130, 45 S. W. 1072; Martin *v.* Citizens' Bank, etc., Co., 94 Tenn. 176, 28 S. W. 1097; Chattanooga First Nat. Bank *v.* Stockell, 92 Tenn. 252, 21 S. W. 523; Roach *v.* Woodall, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. Rep. 883; Nichol *v.* Bate, 10 Yerg. (Tenn.) 429.

Texas.— Texas Banking, etc., Co. *v.* Turnley, 61 Tex. 365; Kauffman *v.* Robey, 60 Tex. 308, 48 Am. Rep. 264.

and notes of different makers for one loan;[13] and a bill or note may be transferred in like manner as security for the performance of an executory agreement, for advances to be made on it or for liabilities likely to be incurred, and the taker will be a holder for value to the extent of the advances made or liability incurred.[14]

(II) *For Preëxisting Debt*—(A) *In General.* In the greater number of jurisdictions a party who receives a promissory note merely as collateral security for a preëxisting debt is held to take the same in the usual course of business and is considered a holder for value.[15] In a considerable number of other

Vermont.— Noyes *v.* Landon, 59 Vt. 569, 10 Atl. 342; Griswold *v.* Davis, 31 Vt. 390; Tarbell *v.* Sturtevant, 26 Vt. 513.

Wisconsin.— Bowman *v.* Van Kuren, 29 Wis. 209, 9 Am. Rep. 554; Curtis *v.* Mohr, 18 Wis. 615; Lyon *v.* Ewings, 17 Wis. 61; Crosby *v.* Roub, 16 Wis. 616, 84 Am. Dec. 720; Bond *v.* Wiltse, 12 Wis. 611; Cook *v.* Helms, 5 Wis. 107.

United States.— Pearce *v.* Rice, 142 U. S. 28, 12 S. Ct. 130, 35 L. ed. 925; Greenway *v.* William D. Orthwein Grain Co., 85 Fed. 536, 56 U. S. App. 523, 29 C. C. A. 330; Black *v.* Reno, 59 Fed. 917; Doane *v.* King, 30 Fed. 106; Lanning *v.* Lockett, 10 Fed. 451; *Ex p.* Kelty, 1 Lowell (U. S.) 394, 14 Fed. Cas. No. 7,681.

England.— Collins *v.* Martin, 1 B. & P. 648, 2 Esp. 520, 4 Rev. Rep. 572; Wiffen *v.* Roberts, 1 Esp. 261, 5 Rev. Rep. 737.

See 7 Cent. Dig. tit. "Bills and Notes," § 909.

An agreement for the pledge contemporaneous with the loan is sufficient, although the paper is delivered afterward. Fenby *v.* Pritchard, 2 Sandf. (N. Y.) 151.

New notes afterward substituted for the set that was first pledged are also free from equities. Decatur First Nat. Bank *v.* Johnston, 97 Ala. 655, 11 So. 690.

If the debt secured is afterward paid a pledgee loses his character as a holder for value. Easter *v.* Minard, 26 Ill. 494; Drinkhouse *v.* Surette, 1 Allen (Mass.) 443 note; Roche *v.* Ladd, 1 Allen (Mass.) 436.

13. London Joint Stock Bank *v.* Simmons, [1892] A. C. 201, 56 J. P. 644, 61 L. J. Ch. 723, 66 L. T. Rep. N. S. 625, 41 Wkly. Rep. 108 [*reversing* [1891] 1 Ch. 270].

Taking in pledge to secure fluctuating balances makes the taker a holder for value, whenever there is a balance of indebtedness to be secured. Bank of Metropolis *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115; Woodroffe *v.* Hayne, 1 C. & P. 600, 12 E. C. L. 341; Bolland *v.* Bygrave, R. & M. 271, 21 E. C. L. 750; Atwood *v.* Crowdie, 1 Stark. 483, 2 E. C. L. 185; Bosanquet *v.* Dudman, 1 Stark. 1, 2 E. C. L. 11.

14. *Iowa.*— Stotts *v.* Byers, 17 Iowa 303.

Massachusetts.— Hubbard *v.* Chapin, 2 Allen (Mass.) 328.

Michigan.— Colman *v.* Post, 10 Mich. 422, 82 Am. Dec. 49.

Missouri.— Grant *v.* Kidwell, 30 Mo. 455.

New Jersey.— Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Gordon *v.* Boppe, 55 N. Y. 665; Western Nat. Bank *v.* Wood, 18 N. Y. Suppl. 718, 42 N. Y. St. 675; Continental Nat. Bank *v.* Crosby, 1 N. Y. Suppl. 256, 16 N. Y. St. 226; Williams *v.* Smith, 2 Hill (N. Y.) 301.

North Carolina.— Kerr *v.* Cowen, 17 N. C. 356.

Pennsylvania.— Smith *v.* Hogeland, 78 Pa. St. 252.

England.— Watson *v.* Russell, 3 B. & S. 34, 113 E. C. L. 34.

Where the paper is given to secure advances it may be redeemed by payment or tender of the amount that has been advanced. Key *v.* Flint, 1 Moore C. P. 451, 8 Taunt. 21, 4 E. C. L. 22.

15. *California.*— Sackett *v.* Johnson, 54 Cal. 107; Naglee *v.* Lyman, 14 Cal. 450; Robinson *v.* Smith, 14 Cal. 94; Payne *v.* Bensley, 8 Cal. 260, 68 Am. Dec. 318.

Colorado.—Merchants' Bank *v.* McClelland, 9 Colo. 608, 13 Pac. 723; Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951. See also Haraszthy *v.* Shandel, 1 Colo. App. 137, 27 Pac. 876.

Connecticut.— Rockville Nat. Bank *v.* Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361; Osgood *v.* Thompson Bank, 30 Conn. 27; Bridgeport City Bank *v.* Welch, 29 Conn. 475; Brush *v.* Scribner, 11 Conn. 388, 29 Am. Dec. 303.

District of Columbia.— See Leach *v.* Lewis, 1 MacArthur (D. C.) 112.

Georgia.— Kaiser *v.* U. S. Nat. Bank, 99 Ga. 258, 25 S. E. 620; Laster *v.* Stewart, 89 Ga. 181, 15 S. E. 42; Smith *v.* Jennings, 74 Ga. 551; Partridge *v.* Williams, 72 Ga. 807; Bealle *v.* Southern Bank, 57 Ga. 274; Meadow *v.* Bird, 22 Ga. 246; Gibson *v.* Conner, 3 Ga. 47.

Illinois.— Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955; Mix *v.* Bloomington Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Doolittle *v.* Cook, 75 Ill. 354; Bowman *v.* Millison, 58 Ill. 36; Saylor *v.* Daniels, 37 Ill. 331, 87 Am. Dec. 250; Lull *v.* Stone, 37 Ill. 224; Manning *v.* McClure, 36 Ill. 490; Conkling *v.* Vail, 31 Ill. 166; Mayo *v.* Moore, 28 Ill. 428; Bemis *v.* Horner, 62 Ill. App. 38; Vanliew *v.* Galesburg Second Nat. Bank, 21 Ill. App. 126; Olney First Nat. Bank *v.* Beaird, 3 Ill. App. 239.

Indiana.— Spencer *v.* Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35; Proctor *v.* Baldwin, 82 Ind. 370; Straughan *v.* Fairchild, 80 Ind. 598; Rowe *v.* Haines, 15 Ind. 445, 77

jurisdictions, however, the courts have taken the opposite view and have held such a taking to be neither in due course nor for value.[16]

Am. Dec. 101. *Compare* Peigh *v.* Huffman, 6 Ind. App. 658, 34 N. E. 32.

Kansas.— Best *v.* Crall, 23 Kan. 482, 33 Am. Rep. 185.

Louisiana.— Levy *v.* Ford, 41 La. Ann. 873, 6 So. 671; Giovanovich *v.* Citizens' Bank, 26 La. Ann. 15; Smith *v.* Isaacs, 23 La. Ann. 454; Louisiana State Bank *v.* Gaiennie, 21 La. Ann. 555; Dolhonde's Succession, 21 La. Ann. 3; Citizens' Bank *v.* Payne, 18 La. Ann. 222, 89 Am. Dec. 650; Nott *v.* Watson, 11 La. Ann. 664; Mallard *v.* Aillet, 6 La. Ann. 92.

Maryland.— Buchanan *v.* Mechanics' Loan, etc., Inst., 84 Md. 430, 35 Atl. 1099; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Gwynn *v.* Lee, 9 Gill (Md.) 137.

Massachusetts.— National Revere Bank *v.* Morse, 163 Mass. 383, 40 N. E. 180; Lee *v.* Whitney, 149 Mass. 447, 21 N. E. 948; Lindsay *v.* Chase, 104 Mass. 253; Fisher *v.* Fisher, 98 Mass. 303; Le Breton *v.* Peirce, 2 Allen (Mass.) 8, 1 Am. L. Reg. N. S. 35; Gardner *v.* Gager, 1 Allen (Mass.) 592; Culver *v.* Benedict, 13 Gray (Mass.) 7; Williams *v.* Cheney, 3 Gray (Mass.) 215; Stoddard *v.* Kimball, 4 Cush. (Mass.) 604; Blanchard *v.* Stevens, 3 Cush. (Mass.) 162, 50 Am. Dec. 723; Chicopee Bank *v.* Chapin, 8 Metc. (Mass.) 40. *Compare* Merriam *v.* Granite Bank, 8 Gray (Mass.) 254, where it was held that the paper must be taken as security for a specific debt.

Minnesota.— Haugan *v.* Sunwall, 60 Minn. 367, 62 N. W. 398; Rosemond *v.* Graham, 54 Minn. 323, 56 N. W. 38, 40 Am. St. Rep. 336; St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

Nevada.— Fair *v.* Howard, 6 Nev. 304.

New Jersey.— Armour *v.* Michael, 36 N. J. L. 92; Hamilton *v.* Vought, 34 N. J. L. 187; Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

North Carolina.— Brooks *v.* Sullivan, 129 N. C. 190, 39 S. E. 822. *Contra*, prior to N. C. Acts (1899), c. 733, §§ 25–27. Brooks *v.* Sullivan, 129 N. C. 190, 39 S. E. 822; Potts *v.* Blackwell, 56 N. C. 449; Holderby *v.* Blum, 22 N. C. 51; Harris *v.* Horner, 21 N. C. 455, 30 Am. Dec. 182.

Rhode Island.— Cobb *v.* Doyle, 7 R. I. 550; Bank of Republic *v.* Carrington, 5 R. I. 515, 73 Am. Dec. 83.

South Carolina.—Charleston Bank *v.* Chambers, 11 Rich. (S. C.) 657.

Tennessee.— Gosling *v.* Griffin, 85 Tenn. 737, 3 S. W. 642 [*overruling* Vatterlien *v.* Howell, 5 Sneed (Tenn.) 441]; King *v.* Doolittle, 1 Head (Tenn.) 77; Van Wyck *v.* Norvell, 2 Humphr. (Tenn.) 192; Trigg *v.* Saxton, (Tenn. Ch. 1896) 37 S. W. 567 [*distinguishing* Richardson *v.* Rice, 9 Baxt. (Tenn.) 290, 40 Am. Rep. 92]. But see Woodsen *v.* Owens, (Miss. 1892) 12 So. 207, construing Tennessee law.

Texas.— Wright *v.* Hardie, 88 Tex. 653, 32 S. W. 885; Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Brown *v.* Thompson, 79 Tex. 58, 15 S. W. 168; Texas Banking, etc., Co. *v.* Turnley, 61 Tex. 365; Kauffman *v.* Robey, 60 Tex. 308, 48 Am. Rep. 264; Greneaux *v.* Wheeler, 6 Tex. 515; Bruce *v.* Weatherford First Nat. Bank, (Tex. Civ. App. 1901) 60 S. W. 1006; Alexander *v.* Lebanon Bank, 19 Tex. Civ. App. 620, 47 S. W. 840; Marx *v.* Dreyfus, (Tex. Civ. App. 1894) 26 S. W. 232, 853.

Vermont.— People's Nat. Bank *v.* Clayton, 66 Vt. 541, 29 Atl. 1020; Pinney *v.* Kimpton, 46 Vt. 80; Arnold *v.* Sprague, 34 Vt. 402; Griswold *v.* Davis, 31 Vt. 390; Atkinson *v.* Brooks, 26 Vt. 569, 62 Am. Dec. 592; Sawyer *v.* Cutting, 23 Vt. 486.

Virginia.—Prentice *v.* Zane, 2 Gratt. (Va.) 262.

Washington.— Peters *v.* Gay, 9 Wash. 383, 37 Pac. 325.

West Virginia.— Hotchkiss *v.* Fitzgerald Patent Prepared Plaster Co., 41 W. Va. 357, 23 S. E. 576.

United States.— American File Co. *v.* Garrett, 110 U. S. 288, 4 S. Ct. 90, 28 L. ed. 149; Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61 [*refusing* in a New York case to follow the New York state courts and *affirming* 14 Blatchf. (U. S.) 242, 17 Fed. Cas. No. 10,039]; McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386; Circleville First Nat. Bank *v.* Monroe Bank, 33 Fed. 408; Metropolis Bank *v.* Jersey City First Nat. Bank, 19 Fed. 301; Wood *v.* Seitzinger, 2 Fed. 843; Pugh *v.* Durfee, 1 Blatchf. (U. S.) 412, 20 Fed. Cas. No. 11,460; *In re* Huddell, 12 Fed. Cas. No. 6,825, 8 Wkly. Notes Cas. (Pa.) 407.

England.— Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852; Currie *v.* Misa, L. R. 10 Exch. 153; Misa *v.* Currie, 1 App. Cas. 554, 45 L. J. Exch. 414, 35 L. T. Rep. N. S. 414, 24 Wkly. Rep. 1049; Heywood *v.* Watson, 4 Bing. 496, 6 L. J. C. P. O. S. 72, 1 M. & P. 268, 13 E. C. L. 605; Belshaw *v.* Bush, 11 C. B. 191, 17 Jur. 67, 22 L. J. C. P. 24, 73 E. C. L. 191; Percival *v.* Frampton, 2 C. M. & R. 180, 3 Dowl. P. C. 748, 4 L. J. Exch. 139, 5 Tyrw. 579; Baker *v.* Walker, 3 D. & L. 46, 14 L. J. Exch. 371, 14 M. & W. 465; Poirier *v.* Morriss, 2 E. & B. 89, 17 Jur. 1116, 22 L. J. Q. B. 313, 1 Wkly. Rep. 349, 75 E. C. L. 89; Kearslake *v.* Morgan, 5 T. R. 513.

Canada.— Canadian Bank of Commerce *v.* Gurley, 30 U. C. C. P. 583.

See 7 Cent. Dig. tit. "Bills and Notes," § 913.

16. *Alabama.*— Thompson *v.* Maddux, 117 Ala. 468, 23 So. 157; Vann *v.* Marbury, 100

(B) *Where Accompanied by Other Consideration or Benefit to Debtor.* Where, however, the transfer is accompanied by some other transaction, promise,

Ala. 438, 14 So. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325; Haden *v.* Lehman, 83 Ala. 243, 3 So. 528; Marks *v.* Montgomery First Nat. Bank, 79 Ala. 550, 58 Am. Rep. 620; Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408; Miller *v.* Boykin, 70 Ala. 469; Connerly *v.* Planters', etc., Ins. Co., 66 Ala. 432; Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17; Mobile Bank *v.* Poelnitz, 61 Ala. 147; Wagner *v.* Simmons, 61 Ala. 143; Fenouille *v.* Hamilton, 35 Ala. 319; McKenzie *v.* Montgomery Branch Bank, 28 Ala. 606, 65 Am. Dec. 369; Boyd *v.* McIvor, 11 Ala. 822; Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669; Thompson *v.* Armstrong, 7 Ala. 256; Mobile Bank *v.* Hall, 6 Ala. 639, 41 Am. Dec. 72; Marston *v.* Forward, 5 Ala. 347; Cullum *v.* Mobile Branch Bank, 4 Ala. 21, 37 Am. Dec. 725. See also Wallace *v.* Mobile Branch Bank, 1 Ala. 565.

Arkansas.— Bertrand *v.* Barkman, 13 Ark. 150.

Iowa.— Keokuk County State Bank *v.* Hall, 106 Iowa 540, 76 N. W. 832; Noteboom *v.* Watkins, 103 Iowa 580, 72 N. W. 766; Bone *v.* Tharp, 63 Iowa 223, 18 N. W. 906; Union Nat. Bank *v.* Barber, 56 Iowa 559, 9 N. W. 890; Van Patton *v.* Beals, 46 Iowa 62; Ruddick *v.* Lloyd, 15 Iowa 441, 83 Am. Dec. 423; Ryan *v.* Chew, 13 Iowa 589; Iowa College *v.* Hill, 12 Iowa 462.

Kentucky.— Greenbaum *v.* Megibben, 10 Bush (Ky.) 419; May *v.* Quimby, 3 Bush (Ky.) 96; Alexander *v.* Springfield Bank, 2 Metc. (Ky.) 534; Lee *v.* Smead, 1 Metc. (Ky.) 628, 71 Am. Dec. 494.

Maine.—Smith *v.* Bibber, 82 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464; Nutter *v.* Stover, 48 Me. 163; Bramhall *v.* Beckett, 31 Me. 205 [*distinguishing* Smith *v.* Hiscock, 14 Me. 449 (*followed* in Gowen *v.* Wentworth, 17 Me. 66)].

Michigan.— Maynard *v.* Davis, 127 Mich. 571, 8 Detroit Leg. N. 460, 86 N. W. 1051; Dowagiac City Bank *v.* Dill, 84 Mich. 549, 47 N. W. 1109; Henriques *v.* Ypsilanti Sav. Bank, 84 Mich. 168, 47 N. W. 558.

Mississippi.— Meridian First Nat. Bank *v.* Strauss, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579; Hinds *v.* Pugh, 48 Miss. 268; Perkins *v.* Swank, 43 Miss. 349; McLeod *v.* First Nat. Bank, 42 Miss. 99; Pope *v.* Pope, 40 Miss. 516; Brooks *v.* Whitson, 7 Sm. & M. (Miss.) 513; Harney *v.* Pack, 4 Sm. & M. (Miss.) 229; Holmes *v.* Carman, Freem. Ch. (Miss.) 408.

Missouri.— Loewen *v.* Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489 [*overruling* Grant *v.* Kidwell, 30 Mo. 455 (*followed* in Boatman's Sav. Inst. *v.* Holland, 38 Mo. 49)]; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Deere *v.* Marsden, 88 Mo. 512; Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537; Davis *v.* Carson, 69 Mo. 609; Logan *v.* Smith, 62 Mo. 455; Goodman *v.* Simonds, 19 Mo. 106; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171; Wells *v.* Jones, 41 Mo. App. 1; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Feder *v.* Abrahams, 28 Mo. App. 454; Hodges *v.* Black, 8 Mo. App. 389; Brainard *v.* Reavis, 2 Mo. App. 490; Terry *v.* Hickman, 1 Mo. App. 119.

New Hampshire.— Rice *v.* Raitt, 17 N. H. 116; Fletcher *v.* Chase, 16 N. H. 38; Williams *v.* Little, 11 N. H. 66; Jenness *v.* Bean, 10 N. H. 266, 34 Am. Dec. 152.

New York.—Many of the cases fail to make any distinction between cases where the note is taken in payment of preëxisting indebtedness and as merely collateral security for the same; and while it is impossible to reconcile the different cases to any well stated and definite rule, their general concensus is that mere collateral for a preëxisting debt is not a sufficient consideration. Potts *v.* Mayer, 74 N. Y. 594; Comstock *v.* Hier, 73 N. Y. 269, 29 Am. Rep. 142; Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235 [*reversing* 64 Barb. (N. Y.) 449]; Turner *v.* Treadway, 53 N. Y. 650; Jones *v.* Schreyer, 49 N. Y. 674; Lawrence *v.* Clark, 36 N. Y. 128; Scott *v.* Ocean Bank, 23 N. Y. 289; Larbig *v.* Peck, 69 N. Y. App. Div. 170, 74 N. Y. Suppl. 602; State Nat. Bank *v.* Coykendall, 58 Hun (N. Y.) 205, 12 N. Y. Suppl. 334, 34 N. Y. St. 432; Ayres *v.* Doying, 42 Hun (N. Y.) 620; Lintz *v.* Howard, 18 Hun (N. Y.) 424; Buhrman *v.* Baylis, 14 Hun (N. Y.) 608; American Exch. Bank *v.* Corliss, 46 Barb. (N. Y.) 19; West *v.* American Exch. Bank, 44 Barb. (N. Y.) 175; Traders' Bank *v.* Bradner, 43 Barb. (N. Y.) 379; Chesbrough *v.* Wright, 41 Barb. (N. Y.) 28; Ocean Bank *v.* Dill, 39 Barb. (N. Y.) 577; Cardwell *v.* Hicks, 37 Barb. (N. Y.) 458; Prentiss *v.* Graves, 33 Barb. (N. Y.) 621; Farrington *v.* Frankfort Bank, 24 Barb. (N. Y.) 554; Mickles *v.* Colvin, 4 Barb. (N. Y.) 304; Duncan *v.* Gosche, 8 Bosw (N. Y.) 243, 21 How. Pr. (N. Y.) 344; New York Exch. Co. *v.* De Wolf, 3 Bosw. (N. Y.) 86; White *v.* Springfield Bank, 3 Sandf. (N. Y.) 222; Fenby *v.* Pritchard, 2 Sandf. (N. Y.) 151; Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53; Carlson *v.* Winterson, 3 Misc. (N. Y.) 63, 22 N. Y. Suppl. 553, 51 N. Y. St. 775; Small *v.* Smith, 1 Den. (N. Y.) 583; Scott *v.* Betts, Lalor (N. Y.) 363; Dean *v.* Howell, Lalor (N. Y.) 39; Stalker *v.* McDonald, 6 Hill (N. Y.) 93, 40 Am. Dec. 389; Manhattan Co. *v.* Reynolds, 2 Hill (N. Y.) 140; Ontario Bank *v.* Worthington, 12 Wend. (N. Y.) 593; Hart *v.* Palmer, 12 Wend. (N. Y.) 523; Rosa *v.* Brotherson, 10 Wend. (N. Y.) 85; Wardell *v.* Howell, 9 Wend. (N. Y.) 170. See also Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482, applying New York law.

North Dakota.— Porter *v.* Andrus, 10 N. D. 558, 88 N. W. 567.

Ohio.— Secor *v.* Witter, 39 Ohio St. 218; Pitts *v.* Foglesong, 37 Ohio St. 676, 41 Am. Rep. 540; Copeland *v.* Manton, 22 Ohio St. 398; Gebhart *v.* Sorrels, 9 Ohio St. 461; Reznor *v.* Hatch, 7 Ohio St. 248 [*affirming* 2

or circumstance beneficial to the debtor, it will then constitute a sufficient consideration,[17] although the authorities are not in accord as to just what the additional benefit must be. As a rule an express agreement to extend the time of the original debt,[18] provided the extension be for a definite time,[19] or the release of other collateral at that time[20] is sufficient. *A fortiori* the release of other collateral

Handy (Ohio) 42, 12 Ohio Dec. (Reprint) 320]; Roxborough *v.* Messick, 6 Ohio St. 448, 67 Am. Dec. 346 [*reversing* 1 Handy (Ohio) 348, 12 Ohio Dec. (Reprint) 177]; Riley *v.* Johnson, 8 Ohio 526; Sutton *v.* Kautsman, 6 Ohio Dec. (Reprint) 910, 8 Am. L. Rec. 658.

Pennsylvania.— Altoona Second Nat. Bank *v.* Dunn, 151 Pa. St. 228, 25 Atl. 80, 31 Am. St. Rep. 742; Liggett Spring, etc., Co.'s Appeal, 111 Pa. St. 291, 2 Atl. 684; Carpenter *v.* National Bank of Republic, 106 Pa. St. 170; Maynard *v.* Philadelphia Sixth Nat. Bank, 98 Pa. St. 250; Penn. Bank *v.* Frankish, 91 Pa. St. 339; Bardsley *v.* Delp, 88 Pa. St. 420 [*overruling* 6 Wkly. Notes Cas. (Pa.) 539]; Cummings *v.* Boyd, 83 Pa. St. 372; Royer *v.* Keystone Nat. Bank, 83 Pa. St. 248; Clarion First Nat. Bank *v.* Gregg, 79 Pa. St. 384; Smith *v.* Hogeland, 78 Pa. St. 252; Bronson *v.* Silverman, 77 Pa. St. 94; Lenheim *v.* Wilmarding, 55 Pa. St. 73; Kirkpatrick *v.* Muirhead, 16 Pa. St. 117; Depeau *v.* Waddington, 6 Whart. (Pa.) 220, 36 Am. Dec. 216; Petrie *v.* Clark, 11 Serg. & R. (Pa.) 377, 14 Am. Dec. 636; Jackson *v.* Polack, 2 Miles (Pa.) 362; Oakford *v.* Johnson, 2 Miles (Pa.) 203; Gleason *v.* Crider, 14 Pa. Co. Ct. 670; United States Trust Co. *v.* Hart, 3 Pa. Co. Ct. 270; Boyer *v.* Dickson, 7 Phila. (Pa.) 190; Conrad *v.* Lane, 1 Phila. (Pa.) 73, 7 Leg. Int. (Pa.) 110. See also Union Trust Co. *v.* McClellan, 40 W. Va. 405, 21 S. E. 1025, applying Pennsylvania law.

Virginia.— Prentice *v.* Zane, 2 Gratt. (Va.) 262.

Wisconsin.— Burnham *v.* Merchants' Exch. Bank, 92 Wis. 277, 66 N. W. 510; Black *v.* Tarbell, 89 Wis. 390, 61 N. W. 1106; Knott *v.* Tidyman, 86 Wis. 164, 56 N. W. 632; Body *v.* Jewsen, 33 Wis. 402; Bowman *v.* Van Kuren, 29 Wis. 209, 19 Am. Rep. 554; Jenkins *v.* Schaub, 14 Wis. 1.

See 7 Cent. Dig. tit. "Bills and Notes," § 913.

17. *California.*— Nagee *v.* Lyman, 14 Cal. 450; Payne *v.* Bensley, 8 Cal. 260, 68 Am. Dec. 318.

Connecticut.— Rockville Nat. Bank *v.* Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361.

Louisiana.—McPherson *v.* Doudreau, 48 La. Ann. 431, 19 So. 550.

Missouri.— Fitzgerald *v.* Barker, 96 Mo. 661, 10 S. W. 45, 9 Am. St. Rep. 375.

North Dakota.— Dunham *v.* Peterson, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.

Pennsylvania.— Westinghouse *v.* German Nat. Bank, 196 Pa. St. 249, 46 Atl. 380; Miller *v.* Pollock, 99 Pa. St. 202; Housum *v.* Rogers, 40 Pa. St. 190; Muirhead *v.* Kirkpatrick, 21 Pa. St. 237.

Rhode Island.— Randall *v.* Rhode Island Lumber Co., 20 R. I. 625, 40 Atl. 763.

United States.— Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Metropolis Bank *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115.

18. *Alabama.*— Louisville Banking Co. *v.* Howard, 123 Ala. 380, 26 So. 207, 82 Am. St. Rep. 126; Decatur First Nat. Bank *v.* Johnston, 97 Ala. 655, 11 So. 690.

Arkansas.— Bank of Commerce *v.* Wright, 63 Ark. 604, 40 S. W. 81.

Illinois.— Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602.

Iowa.— Bone *v.* Tharp, 63 Iowa 223, 18 N. W. 906; Wormer *v.* Waterloo Agricultural Works, 50 Iowa 262; Washington Bank *v.* Krum, 15 Iowa 53.

Missouri.— Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Deere *v.* Marsden, 88 Mo. 512.

New York.— Boyd *v.* Cummings, 17 N. Y. 101; Lombard *v.* Central Nat. Bank, 52 Hun (N. Y.) 610, 4 N. Y. Suppl. 740, 22 N. Y. St. 268; Callahan *v.* Bancroft, 28 Hun (N. Y.) 584; Grocers' Bank *v.* Penfield, 7 Hun (N. Y.) 279; Traders' Bank *v.* Bradner, 43 Barb. (N. Y.) 379; Burns *v.* Rowland, 40 Barb. (N. Y.) 368; U. S. National Bank *v.* Ewing, 14 N. Y. Suppl. 662, 38 N. Y. St. 777; Green *v.* Swink, 26 N. Y. Wkly. Dig. 574.

Ohio.— Warren First Nat. Bank *v.* Fowler, 36 Ohio St. 524, 38 Am. Rep. 610; Roxborough *v.* Messick, 6 Ohio St. 448, 67 Am. Dec. 346; Dennison *v.* Jessup, 1 Disn. (Ohio) 580, 12 Ohio Dec. (Reprint) 808.

Pennsylvania.— Depeau *v.* Waddington, 6 Whart. (Pa.) 220, 36 Am. Dec. 216.

Tennessee.— Atlantic Guano Co. *v.* Hunt, 100 Tenn. 89, 42 S. W. 482.

Vermont.— People's Nat. Bank *v.* Clayton, 66 Vt. 541, 29 Atl. 1020.

Wisconsin.— Black *v.* Tarbell, 89 Wis. 390, 61 N. W. 1106; Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

United States.— Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580.

See 7 Cent. Dig. tit. "Bills and Notes," § 914.

Mere forbearance without an agreement or obligation therefor is sufficient. Smith *v.* Bibber, 82 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464.

19. Vann *v.* Marbury, 100 Ala. 438, 14 So. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325; Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235.

20. *Arkansas.*— Bank of Commerce *v.* Wright, 63 Ark. 604, 40 S. W. 81.

Iowa.— Des Moines Nat. Bank *v.* Chisholm, 71 Iowa 675, 33 N. W. 234.

Massachusetts.— Le Breton *v.* Peirce, 2 Allen (Mass.) 8.

Minnesota.— Rochester First Nat. Bank *v.* Bentley, 27 Minn. 87, 6 N. W. 422.

accompanied by forbearance is sufficient to constitute a *bona fide* holder of one who receives paper as collateral for a preëxisting debt.[21]

(c) *Where Instrument Is Given For Accommodation.* Even in those states where one taking commercial paper as collateral security for an antecedent debt is not protected as a *bona fide* holder, an exception to some extent is taken in the case of accommodation paper issued without restriction as to the mode of using it, and the maker or indorser of such paper cannot, as against one to whom it has been transferred as collateral security, successfully resist its enforcement on the ground of want of consideration.[22] In these states, however, the maker or drawer may interpose, as against such paper, every defense except want of consideration.[23]

c. **Transfer as Payment of Preëxisting Debt.** By the great weight of authority the acceptance of a note as payment of a preëxisting debt is taking in due course of business and is supported by a sufficient consideration to constitute the purchaser a holder for value.[24] So it has been held that one who accepts a

Mississippi.— Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385.

New Jersey.— Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Justh *v.* National Bank, 56 N. Y. 478 [*affirming* 45 How. Pr. (N. Y.) 492]; Chrysler *v.* Renois, 43 N. Y. 209; Park Bank *v.* Watson, 42 N. Y. 490, 1 Am. Rep. 573; Pratt *v.* Coman, 37 N. Y. 440; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Youngs *v.* Lee, 12 N. Y. 551 [*affirming* 18 Barb. (N. Y.) 187]; Hand *v.* Dinniny, 85 Hun (N. Y.) 380, 32 N. Y. Suppl. 980, 66 N. Y. St. 464; Lintz *v.* Howard, 18 Hun (N. Y.) 424; Stettheimer *v.* Meyer, 33 Barb. (N. Y.) 215; Ayrault *v.* McQueen, 32 Barb. (N. Y.) 305; Robbins *v.* Richardson, 2 Bosw. (N. Y.) 248; White *v.* Springfield Bank, 3 Sandf. (N. Y.) 222; Mohawk Bank *v.* Corey, 1 Hill (N. Y.) 513; Willson *v.* Law, 26 N. Y. Wkly. Dig. 509.

Ohio.— Kingsland *v.* Pryor, 33 Ohio St. 19; Jasper *v.* Mallon, 9 Ohio Dec. (Reprint) 184, 11 Cinc. L. Bul. 166.

Tennessee.— Nichol *v.* Bate, 10 Yerg. (Tenn.) 429; Newman *v.* Aultman, (Tenn. Ch. 1899) 51 S. W. 198.

Vermont.— Keyes *v.* Wood, 21 Vt. 331.

Wisconsin.— Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146; Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28; Stevens *v.* Campbell, 13 Wis. 375.

21. Bank of Commerce *v.* Wright, 63 Ark. 604, 40 S. W. 81; Western Nat. Bank *v.* Flannagan, 14 Misc. (N. Y.) 317, 35 N. Y. Suppl. 848, 70 N. Y. St. 324; Mohawk Bank *v.* Corey, 1 Hill (N. Y.) 513; Kingsland *v.* Pryor, 33 Ohio St. 19.

22. Continental Nat. Bank *v.* Townsend, 87 N. Y. 8; Freund *v.* Importers', etc., Bank, 76 N. Y. 352; Grocers' Bank *v.* Penfield, 69 N. Y. 502, 25 Am. Rep. 231; Schepp *v.* Carpenter, 51 N. Y. 602; Weaver *v.* Barden, 49 N. Y. 286; Cole *v.* Saulpaugh, 48 Barb. (N. Y.) 104; Leslie *v.* Bassett, 59 N. Y. Super. Ct. 403, 14 N. Y. Suppl. 380, 39 N. Y. St. 146; Lathrop *v.* Morris, 5 Sandf. (N. Y.) 7; Mohawk Bank *v.* Corey, 1 Hill (N. Y.) 513; Rutland Bank *v.* Buck, 5 Wend. (N. Y.) 66; Grandin *v.* Le Roy, 2 Paige (N. Y.) 509; Pitts *v.* Foglesong, 37 Ohio St. 676, 41 Am. Rep. 540 [*distinguishing* Roxborough *v.* Messick, 6 Ohio St. 448, 67 Am. Dec. 346]; Carpenter *v.* National Bank of Republic, 106 Pa. St. 170; Lord *v.* Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Appleton *v.* Donaldson, 3 Pa. St. 381; Walker *v.* Montgomery County Bank, 12 Serg. & R. (Pa.) 382; Twining *v.* Hunt, 7 Wkly. Notes Cas. (Pa.) 223; Gatzmer *v.* Pierce, 6 Wkly. Notes Cas. (Pa.) 433; Kimbro *v.* Lytle, 10 Yerg. (Tenn.) 417, 31 Am. Dec. 585. See also Duncan *v.* Gilbert, 29 N. J. L. 521, applying New York law.

23. Duncan *v.* Gilbert, 29 N. J. L. 521; Grocers' Bank *v.* Penfield, 69 N. Y. 502, 25 Am. Rep. 231; Bacon *v.* Holloway, 2 E. D. Smith (N. Y.) 159; Altoona Second Nat. Bank *v.* Dunn, 151 Pa. St. 228, 25 Atl. 80, 31 Am. St. Rep. 742; Carpenter *v.* National Bank of Republic, 106 Pa. St. 170; Cummings *v.* Boyd, 83 Pa. St. 372; Royer *v.* Keystone Nat. Bank, 83 Pa. St. 248; Stewart *v.* Moore, 12 Phila. (Pa.) 225, 34 Leg. Int. (Pa.) 338.

24. *Alabama.*— Thompson *v.* Maddux, 117 Ala. 468, 23 So. 157; Haden *v.* Lehman, 83 Ala. 243, 3 So. 528; Marks *v.* Montgomery First Nat. Bank, 79 Ala. 550, 58 Am. Rep. 620; Reid *v.* Mobile Bank, 70 Ala. 199; Mayherry *v.* Morris, 62 Ala. 113; Barney *v.* Earle, 13 Ala. 106; Pond *v.* Lockwood, 8 Ala. 669; Mobile Bank *v.* Hall, 6 Ala. 639, 41 Am. Dec. 72.

Arkansas.— Evans *v.* Speer Hardware Co., 65 Ark. 204, 45 S. W. 370, 67 Am. St. Rep. 919; Tahor *v.* Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241; Bertrand *v.* Barkman, 13 Ark. 150.

California.— Sackett *v.* Johnson, 54 Cal. 107; Thorne *v.* Yontz, 4 Cal. 321.

Connecticut.— Rockville Nat. Bank *v.* Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361; Brush *v.* Scribner, 11 Conn. 388, 29 Am. Dec. 303.

Delaware.— Bush *v.* Peckard, 3 Harr. (Del.) 385.

District of Columbia.— Leach *v.* Lewis, 1 MacArthur (D. C.) 112.

Georgia.— Steadwell *v.* Morris, 61 Ga. 97; Bond *v.* Central Bank, 2 Ga. 92.

promissory note in payment of a preëxisting debt in part with new consideration

Illinois.— Mix *v.* Bloomington Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Manning *v.* McClure, 36 Ill. 490; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Conkling *v.* Vail, 31 Ill. 166; Russell *v.* Hadduck, 8 Ill. 233, 44 Am. Dec. 693; Bemis *v.* Horner, 62 Ill. App. 38; Olney First Nat. Bank *v.* Beaird, 3 Ill. App. 239.

Indiana.— Fulton *v.* Loughlin, 118 Ind. 286, 20 N. E. 796; Fetters *v.* Muncie Nat. Bank, 34 Ind. 251, 7 Am. Rep. 225; McKnight *v.* Knisely, 25 Ind. 336, 87 Am. Dec. 364.

Iowa.— Robinson *v.* Lair, 31 Iowa 9; Johnson *v.* Barney, 1 Iowa 531.

Kansas.— Draper *v.* Cowles, 27 Kan. 484.

Kentucky.— Frank *v.* Quast, 86 Ky. 649, 9 Ky. L. Rep. 781, 6 S. W. 909; Smith *v.* Lockridge, 8 Bush (Ky.) 423; May *v.* Quimby, 3 Bush (Ky.) 96; Alexander *v.* Springfield Bank, 2 Metc. (Ky.) 534.

Louisiana.— Citizens' Bank *v.* Payne, 18 La. Ann. 222, 89 Am. Dec. 650.

Maine.— Breckenridge *v.* Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353; Furgeson *v.* Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470; Lee *v.* Kimball, 45 Me. 172; Dudley *v.* Littlefield, 21 Me. 418; Norton *v.* Waite, 20 Me. 175; Hascall *v.* Whitmore, 19 Me. 102, 36 Am. Dec. 738; Lewis *v.* Hodgdon, 17 Me. 267; Homes *v.* Smyth, 16 Me. 177, 33 Am. Dec. 650.

Maryland.— Buchanan *v.* Mechanics' Loan, etc., Inst., 84 Md. 430, 35 Atl. 1099; Cecil Bank *v.* Heald, 25 Md. 562.

Massachusetts.— Woodruff *v.* Hill, 116 Mass. 310; Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236; Blanchard *v.* Stevens, 3 Cush. (Mass.) 162, 50 Am. Dec. 723.

Michigan.— Outhwite *v.* Porter, 13 Mich. 533; Bostwick *v.* Dodge, 1 Dougl. (Mich.) 413, 41 Am. Dec. 584. But see Ingerson *v.* Starkweather, Walk. (Mich.) 346.

Minnesota.— Stevenson *v.* Heyland, 11 Minn. 198.

Mississippi.— Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385; Love *v.* Taylor, 26 Miss. 567; Commercial Bank *v.* Lewis, 13 Sm. & M. (Miss.) 226; Upshaw *v.* Hargrove, 6 Sm. & M. (Miss.) 286.

Missouri.— Fitzgerald *v.* Barker, 96 Mo. 661, 10 S. W. 45, 9 Am. St. Rep. 375; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Hodges *v.* Black, 76 Mo. 537 [*affirming* 8 Mo. App. 389]; Odell *v.* Gray, 15 Mo. 337, 55 Am. Dec. 147; Clark *v.* Loker, 11 Mo. 97; Samuel *v.* Potter, 28 Mo. App. 365.

Montana.— Yellowstone Nat. Bank *v.* Gagnon, 19 Mont. 402, 48 Pac. 762, 61 Am. St. Rep. 520, 44 L. R. A. 243.

Nebraska.— Barker *v.* Litchtenberger, 41 Nebr. 751, 60 N. W. 79.

New Hampshire.— Williams *v.* Little, 11 N. H. 66.

New Jersey.— Armour *v.* Michael, 36 N. J. L. 92; Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

North Carolina.— U. S. Nat. Bank *v.* McNair, 116 N. C. 550, 21 S. E. 389; Reddick *v.* Jones, 28 N. C. 107, 44 Am. Dec. 68.

North Dakota.— Dunham *v.* Peterson, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.

Ohio.— Carlisle *v.* Wishart, 11 Ohio 172; White *v.* Francis, 5 Ohio Dec. (Reprint) 323, 4 Am. L. Rec. 501.

Pennsylvania.— Stedman *v.* Carstairs, 97 Pa. St. 234; Bardsley *v.* Delp, 88 Pa. St. 420, 6 Wkly. Notes Cas. (Pa.) 479 [*reversing* 6 Wkly. Notes Cas. (Pa.) 366]; Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610; Wood *v.* Seitzinger, 14 Phila. (Pa.) 430, 37 Leg. Int. (Pa.) 204.

Rhode Island.— Bank of Republic *v.* Carrington, 5 R. I. 515, 73 Am. Dec. 83.

Texas.— Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Heffron *v.* Cunningham, 76 Tex. 312, 13 S. W. 259; Blum *v.* Loggins, 53 Tex. 121; Greneaux *v.* Wheeler, 6 Tex. 515.

Vermont.— Russel *v.* Splater, 47 Vt. 273; Quinn *v.* Hard, 43 Vt. 375, 5 Am. Rep. 284; Dixon *v.* Dixon, 31 Vt. 450, 76 Am. Dec. 129.

Virginia.— Payne *v.* Zell, 98 Va. 294, 36 S. E. 379.

West Virginia.— Mercantile Bank *v.* Boggs, 48 W. Va. 289, 37 S. E. 587.

Wisconsin.— Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146; Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28; Kellogg *v.* Fancher, 23 Wis. 21, 99 Am. Dec. 96; Stevens *v.* Campbell, 13 Wis. 375; Atchison *v.* Davidson, 2 Pinn. (Wis.) 48.

United States.— Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61; Swift *v.* Tyson, 16 Pet. 1, 10 L. ed. 865; Lanning *v.* Lockett, 10 Fed. 451; Riley *v.* Anderson, 2 McLean (U. S.) 589, 20 Fed. Cas. No. 11,835; Brown *v.* Jackson, 1 Wash. (U. S.) 512, 4 Fed. Cas. No. 2,015; Cummings *v.* Mead, 6 Fed. Cas. No. 3,476, 6 Am. L. Reg. 51. But see Crosby *v.* Lane, 6 Fed. Cas. No. 3,423, 4 Am. L. J. N. S. 333, 14 Law Rep. 452.

England.— McLean *v.* Clydesdale Banking Co., 9 App. Cas. 95, 50 L. T. Rep. N. S. 457; Currie *v.* Misa, L. R. 10 Exch. 153; Percival *v.* Frampton, 2 C. M. & R. 180, 3 Dowl. P. C. 748, 4 L. J. Exch. 139, 5 Tyrw. 579. But see Smith *v.* De Witts, 6 D. & R. 120, 16 E. C. L. 256.

Neg. Instr. L. § 51; Bills Exch. Act, § 27.

Contra, Ferriss *v.* Tavel, 87 Tenn. 386, 11 S. W. 93, 3 L. R. A. 414; Hickerson *v.* Raiguel, 2 Heisk. (Tenn.) 329; Ingram *v.* Morgan, 4 Humphr. (Tenn.) 66, 40 Am. Dec. 626.

See 7 Cent. Dig. tit. "Bills and Notes," § 924.

Crediting the paper purchased on an overdrawn bank account is sufficient. Benton *v.* German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975; Israel *v.* Gale, 77 Fed. 532, 45 U. S. App. 219, 23 C. C. A. 274.

for the balance of the note takes in due course of business and is a holder for value.[25]

3. Notice — a. In General — (i) *When Material.* A party with notice of defects in negotiable paper may still be a *bona fide* holder thereof within the meaning of the law merchant, if he takes it from a *bona fide* indorsee or bearer, who purchased it for value before maturity, as he then obtains all the title and rights of such indorsee or bearer.[26] Thus where a party acquires paper after

In **New York,** while the language of the courts has been by no means uniform and while the leading case of Coddington *v.* Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342, has been cited in many instances where the facts involved were vastly different from those in that case, yet it may be said that it is necessary that there be an express agreement to accept the obligation or security as a satisfaction of the old debt, or that there be a surrender of the evidence of the former indebtedness, to constitute him a holder for value (Skinner Engine Co. *v.* Old Staten Island Dyeing Establishment, 12 Misc. (N. Y.) 71, 33 N. Y. Suppl. 82, 66 N. Y. St. 676), or, as is said in the case of Philbrick *v.* Dallett, 43 How. Pr. (N. Y.) 419, 425: "It is only where a creditor receives a negotiable paper . . . in actual satisfaction and discharge of a prior indebtedness, so that unless such paper is available in his hands, he loses the demand, that this is considered as a parting with value. In such case, the actual discharge of the personal responsibility of the debtor is equivalent to parting with securities or to paying money." See also Phœnix Ins. Co. *v.* Church, 81 N. Y. 218, 37 Am. Rep. 494, 59 How. Pr. (N. Y.) 293 [*reversing* 56 How. Pr. (N. Y.) 493]; Moore *v.* Ryder, 65 N. Y. 438; Turner *v.* Treadway, 53 N. Y. 650; Clothier *v.* Adriance, 51 N. Y. 322; Chrysler *v.* Renois, 43 N. Y. 209; Lawrence *v.* Clark, 36 N. Y. 128; Scott *v.* Ocean Bank, 23 N. Y. 289; Andrews *v.* Hess, 20 N. Y. App. Div. 194, 46 N. Y. Suppl. 796; Vietor *v.* Bauer, 70 Hun (N. Y.) 246, 24 N. Y. Suppl. 428, 53 N. Y. St. 907; Tredwell *v.* Lincoln, 52 Hun (N. Y.) 614, 5 N. Y. Suppl. 341, 24 N. Y. St. 424 [*affirmed* in 127 N. Y. 674, 28 N. E. 255, 38 N. Y. St. 1016]; Rochester Printing Co. *v.* Loomis, 45 Hun (N. Y.) 93; Buhrman *v.* Baylis, 14 Hun (N. Y.) 608; Lindon *v.* Beach, 6 Hun (N. Y.) 200; Coleman *v.* Lansing, 4 Lans. (N. Y.) 70; Gale *v.* Miller, 1 Lans. (N. Y.) 451; Bright *v.* Judson, 47 Barb. (N. Y.) 29; Chesbrough *v.* Wright, 41 Barb. (N. Y.) 28; Cardwell *v.* Hicks, 37 Barb. (N. Y.) 458; Farrington *v.* Frankfort Bank, 24 Barb. (N. Y.) 554; Goldsmid *v.* Lewis County Bank, 12 Barb. (N. Y.) 407; Spear *v.* Myers, 6 Barb. (N. Y.) 445; Mickles *v.* Colvin, 4 Barb. (N. Y.) 304; White *v.* Springfield Bank, 1 Barb. (N. Y.) 225; Howk *v.* Eckert, 4 Thomps. & C. (N. Y.) 300; Lyon *v.* Fitch, 61 N. Y. Super. Ct. 74, 18 N. Y. Suppl. 867, 46 N. Y. St. 541; McQuade *v.* Irwin, 39 N. Y. Super. Ct. 396; New York Exch. Co. *v.* De Wolf, 3 Bosw. (N. Y.) 86; Ayres *v.* Leypoldt, 6 Daly (N. Y.) 91; Fisher *v.* Sharpe, 5 Daly (N. Y.) 214; Uchtmann *v.* Tonyes, 18 N. Y. Suppl. 889, 46 N. Y. St. 364; Bell *v.* McNiece, 17 N. Y. Suppl. 846, 43 N. Y. St. 793; Prince *v.* Never-Rip Jersey Co., 13 N. Y. Suppl. 567, 37 N. Y. St. 677; Ives *v.* Jacobs, 1 N. Y. Suppl. 330, 17 N. Y. St. 843, 21 Abb. N. Cas. (N. Y.) 151; Clark *v.* Gallagher, 20 How. Pr. (N. Y.) 308; Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22; Sandusky Bank *v.* Scoville, 24 Wend. (N. Y.) 115; Payne *v.* Cutler, 13 Wend. (N. Y.) 605; Ontario Bank *v.* Worthington, 12 Wend. (N. Y.) 593; Rosa *v.* Brotherson, 10 Wend. (N. Y.) 85; Bristol *v.* Sprague, 8 Wend. (N. Y.) 423; Clark *v.* Ely, 2 Sandf. Ch. (N. Y.) 166; Green *v.* Swink, 26 N. Y. Wkly. Dig. 574. Where, however, as a result of the new contract the original debt has been actually extinguished and where the paper received has been both transferred and accepted as payment and the debt has been discharged within and by force of the acts and concurring intention of both parties, it is supported by a valuable consideration. Mayer *v.* Heidelbach, 123 N. Y. 332, 25 N. E. 416, 33 N. Y. St. 610, 9 L. R. A. 850 [*affirming* 54 N. Y. Super. Ct. 438]; Willson *v.* Law, 112 N. Y. 536, 20 N. E. 399, 21 N. Y. St. 580; Heuertematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657 [*reversing* 28 Hun (N. Y.) 77]; Magee *v.* Badger, 34 N. Y. 247, 90 Am. Dec. 691 [*affirming* 30 Barb. (N. Y.) 246]; Brown *v.* Leavitt, 31 N. Y. 113; Youngs *v.* Lee, 12 N. Y. 551 [*affirming* 18 Barb. (N. Y.) 187]; Mayer *v.* Mode, 14 Hun (N. Y.) 155; Brookman *v.* Metcalf, 5 Bosw. (N. Y.) 429; Purchase *v.* Mattison, 6 Duer (N. Y.) 587; Gould *v.* Segee, 5 Duer (N. Y.) 260; New York Marbled Iron Works *v.* Smith, 4 Duer (N. Y.) 362; Rosenwald *v.* Goldstein, 57 N. Y. Suppl. 224; McGuire *v.* Sinclair, 47 How. Pr. (N. Y.) 360; Scott *v.* Betts, Lalor (N. Y.) 363; St. Albans Bank *v.* Gilliland, 23 Wend. (N. Y.) 311, 35 Am. Dec. 566; Smith *v.* Van Loan, 16 Wend. (N. Y.) 659; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Farrell *v.* Lovett, 18 Alb. L. J. (N. Y.) 373.

25. Bookheim *v.* Alexander, 64 Hun (N. Y.) 458, 19 N. Y. Suppl. 776, 46 N. Y. St. 200.

26. *Alabama.*— Pearson *v.* Howe, 11 Ala. 370.

California.— Graham *v.* Larimer, 83 Cal. 173, 23 Pac. 286.

Connecticut.— See Olmstead *v.* Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260.

District of Columbia.— Braxton *v.* Braxton, 20 D. C. 355.

Georgia.— Matthews *v.* Poythress, 4 Ga. 287.

Illinois.— Woodworth *v.* Huntoon, 40 Ill.

maturity from a *bona fide* holder, who took it before maturity for a valuable consideration, he is to all intents and purposes himself a *bona fide* holder.[27] This

131, 89 Am. Dec. 340; Rice *v.* Van Ackere, 22 Ill. App. 588.

Indiana.— Thomas *v.* Ruddell, 66 Ind. 326; Riley *v.* Schawacker, 50 Ind. 592; Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380.

Iowa.— Mornyer *v.* Cooper, 35 Iowa 257; Simon *v.* Merritt, 33 Iowa 537.

Kansas.— Hardy *v.* Newton First. Nat. Bank, 56 Kan. 493, 43 Pac. 1125; Bodley *v.* Emporia Nat. Bank, 38 Kan. 59, 16 Pac. 88.

Louisiana.— Cotton *v.* Sterling, 20 La. Ann. 282.

Maine.— Dillingham *v.* Blood, 66 Me. 140; Roberts *v.* Lane, 64 Me. 108, 18 Am. Rep. 242; Woodman *v.* Churchill, 52 Me. 58; Hascall *v.* Whitmore, 19 Me. 102, 36 Am. Dec. 738.

Maryland.— Cover *v.* Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394; Boyd *v.* McCann, 10 Md. 118.

Massachusetts.— Suffolk Sav. Bank *v.* Boston, 149 Mass. 364, 21 N. E. 665, 4 L. R. A. 516; Thompson *v.* Shepherd, 12 Metc. (Mass.) 311, 46 Am. Dec. 676.

Michigan.— Anderson *v.* Northern Nat. Bank, 98 Mich. 543, 57 N. W. 808; Wood *v.* Starling, 48 Mich. 592, 12 N. W. 866.

Minnesota.— Robinson *v.* Smith, 62 Minn. 62, 64 N. W. 90.

Missouri.— Cameron First Nat. Bank *v.* Stanley, 46 Mo. App. 440.

Nebraska.— Jones *v.* Wiesen, 50 Nebr. 243, 69 N. W. 762.

New York.— Benedict *v.* De Groot, 1 Abb. Dec. (N. Y.) 125, 3 Transcr. App. (N. Y.) 66; Coppell *v.* Phillipson, 57 Hun (N. Y.) 592, 10 N. Y. Suppl. 901, 32 N. Y. St. 988; Eckhert *v.* Ellis, 26 Hun (N. Y.) 663; Groh *v.* Schneider, 34 Misc. (N. Y.) 195, 68 N. Y. Suppl. 862; Kruelwitch *v.* Meltsner, 13 Misc. (N. Y.) 342, 34 N. Y. Suppl. 451, 68 N. Y. St. 356. See also Flint *v.* Schomberg, 1 Hilt. (N. Y.) 532.

North Carolina.— Glenn *v.* Farmers' Bank, 70 N. C. 191.

Ohio.— Bassett *v.* Avery, 15 Ohio St. 299.

Texas.— Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Watson *v.* Flanagan, 14 Tex. 354.

Virginia.—Prentice *v.* Zane, 2 Gratt. (Va.) 262.

Wisconsin.— Verbeck *v.* Scott, 71 Wis. 59, 36 N. W. 600; Kinney *v.* Kruse, 28 Wis. 183.

United States.— Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261 [*affirming* 25 Fed. 395, 34 Fed. 208]; Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46; Rollins *v.* Gunnison County, 80 Fed. 692, 49 U. S. App. 399, 26 C. C. A. 91; Butterfield *v.* Ontario, 32 Fed. 891.

England.— London Joint Stock Bank *v.* Simmons, [1892] A. C. 201, 56 J. P. 644, 61 L. J. Ch. 723, 66 L. T. Rep. N. S. 625, 41 Wkly. Rep. 108; Masters *v.* Ibberson, 8 C. B. 100, 18 L. J. C. P. 348, 65 E. C. L. 100; May *v.* Chapman, 16 M. & W. 355.

See 7 Cent. Dig. tit. "Bills and Notes," § 938.

This rule is founded on public policy to prevent stagnation of property, and for the relief of the *bona fide* purchaser, who otherwise might be deprived of the benefit of selling his property for full value; consideration for the subsequent purchaser with knowledge having nothing to do with its adoption. Ketchum *v.* Packer, 65 Conn. 544, 33 Atl. 499.

This rule has been adhered to, even where the indorser was a bank, of which the purchaser was a director, and notwithstanding the facts that the purchaser was the payee's father and that the note was given for illegal margins in stock and therefore void, except in the hands of a *bona fide* holder. Shaw *v.* Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474.

27. *California.*— O'Conor *v.* Clarke, (Cal. 1896) 44 Pac. 482; Eames *v.* Crosier, 101 Cal. 260, 35 Pac. 873; Woodsum *v.* Cole, 69 Cal. 142, 10 Pac. 331; Sonoma County Bank *v.* Gove, 63 Cal. 355, 49 Am. Rep. 92; Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451; Coghlin *v.* May, 17 Cal. 515.

Connecticut.— Bissell *v.* Gowdy, 31 Conn. 47.

Georgia.— Hogan *v.* Moore, 48 Ga. 156; Stamper *v.* Hayes, 25 Ga. 546.

Illinois.— Matson *v.* Alley, 141 Ill. 284, 31 N. E. 419; Reichert *v.* Koerner, 54 Ill. 306; Bradley *v.* Marshall, 54 Ill. 173; Lock *v.* Fulford, 52 Ill. 166; Woodworth *v.* Huntoon, 40 Ill. 131, 89 Am. Dec. 340; Canton First Nat. Bank *v.* McCann, 4 Ill. App. 250.

Indiana.— Thomas *v.* Ruddell, 66 Ind. 326.

Iowa.— Peabody *v.* Rees, 18 Iowa 571. See also Wood *v.* McKean, (Iowa 1883) 16 N. W. 218.

Louisiana.— Levy *v.* Ford, 41 La. Ann. 873, 6 So. 671; Cook *v.* Larkin, 19 La. Ann. 507; Howell *v.* Crane, 12 La. Ann. 126, 68 Am. Dec. 765.

Maine.— Roberts *v.* Lane, 64 Me. 108, 18 Am. Rep. 242; Woodman *v.* Churchill, 52 Me. 58; Smith *v.* Hiscock, 14 Me. 449.

Massachusetts.— Thompson *v.* Shepherd, 12 Metc. (Mass.) 311, 46 Am. Dec. 676.

Missouri.— Kellogg *v.* Schnaake, 56 Mo. 136.

Nebraska.— Jones *v.* Wiesen, 50 Nebr. 243, 69 N. W. 762; Barker *v.* Lichtenberger, 41 Nebr. 751, 60 N. W. 79; Koehler *v.* Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 518; Kittle *v.* De Lamater, 3 Nebr. 325.

New York.— Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; Miller *v.* Talcott, 54 N. Y. 114; Weems *v.* Shaughnessy, 70 Hun (N. Y.) 175, 24 N. Y. Suppl. 271, 54 N. Y. St. 101; Britton *v.* Hall, 1 Hilt. (N. Y.) 528; Mundy *v.*

principle is, however, subject to the exception that where the payee becomes such purchaser he is not a *bona fide* holder and takes the paper subject to all equities and defenses originally existing against it.[28]

(II) *Form of Notice.* To defeat the *bona fide* character of a holder no formal notice is required, but any knowledge of defenses on his part is equivalent to notice.[29] Actual notice is not indispensable,[30] constructive notice arising from

Pritchard, 22 Misc. (N. Y.) 22, 47 N. Y. Suppl. 1073; Beall *v.* General Electric Co., 16 Misc. (N. Y.) 611, 38 N. Y. Suppl. 527, 73 N. Y. St. 594; Kruelwitch *v.* Meltsner, 13 Misc. (N. Y.) 342, 34 N. Y. Suppl. 451, 68 N. Y. St. 356; Benedict *v.* De Groot, 45 How. Pr. (N. Y.) 384.

North Carolina.— Lewis *v.* Long, 102 N. C. 206, 9 S. E. 637, 11 Am. St. Rep. 725.

Ohio.— Perkins *v.* White, 36 Ohio St. 530; Bassett *v.* Avery, 15 Ohio St. 299.

Pennsylvania.— Marsh *v.* Marshall, 53 Pa. St. 396; Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488; Waln *v.* Haldeman, 2 Pearson (Pa.) 26, 1 Leg. Gaz. (Pa.) 62; Riegel *v.* Cunningham, 9 Phila. (Pa.) 177, 31 Leg. Int. (Pa.) 76.

Texas.— Goodson *v.* Johnson, 35 Tex. 622.

Virginia.— Arents *v.* Com., 18 Gratt. (Va.) 750; Davis *v.* Miller, 14 Gratt. (Va.) 1.

Washington.— Donnerberg *v.* Oppenheimer, 15 Wash. 290, 46 Pac. 254.

United States.— Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431; Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46; Texas *v.* White, 10 Wall. (U. S.) 68, 19 L. ed. 839; Dudley *v.* Lake County, 80 Fed. 672, 49 U. S. App. 336, 26 C. C. A. 82. But a delivery of securities which are overdue by a *bona fide* holder to a purchaser who pays off the old note and takes a new note from the maker, with the securities as collateral, does not constitute such purchaser a *bona fide* holder. Reed *v.* Stapp, 52 Fed. 641, 3 C. C. A. 244. And where a certificate was fraudulently issued and was without consideration to the knowledge of the holder, who was found by the court to have been "a knowing and willing party to the fraud" sought to be perpetrated by the issue of the certificate, the party taking the certificate from such holder after dishonor could not be counted an innocent holder. Reed *v.* Stapp, 52 Fed. 641, 3 C. C. A. 244.

England.— Chalmers *v.* Lanion, 1 Campb. 383, 10 Rev. Rep. 709; Fairclough *v.* Pavia, 2 C. L. R. 1099, 9 Exch. 690, 23 L. J. Exch. 215.

See 7 Cent. Dig. tit. "Bills and Notes," § 939.

Knowledge of dishonor.— This has been held to be true, even where the purchaser knew that the paper had been dishonored but was not aware of the defenses existing against it. Markley *v.* Hull, 51 Iowa 109, 49 N. W. 1050.

28. *Connecticut.*— Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.

Georgia.— Boit *v.* Whitehead, 50 Ga. 76.

Massachusetts.— King *v.* Nichols, 138 Mass. 18; Sawyer *v.* Wiswell, 9 Allen (Mass.) 39.

Michigan.— Kost *v.* Bender, 25 Mich. 515. See also Battersbee *v.* Calkins, 128 Mich. 569, 8 Detroit Leg. N. 778, 87 N. W. 760.

Nebraska.— Camp *v.* Sturtevant, 16 Nebr. 693, 21 N. W. 449; Chariton Plow Co. *v.* Davidson, 16 Nebr. 374, 20 N. W. 256; Vorce *v.* Rosenbery, 12 Nebr. 448, 11 N. W. 879. See also Brandhoefer *v.* Bain, 45 Nebr. 781, 64 N. W. 213.

New York.— Eckhert *v.* Ellis, 26 Hun (N. Y.) 663; Devlin *v.* Brady, 32 Barb. (N. Y.) 518.

Ohio.— Tod *v.* Wick, 36 Ohio St. 370.

Pennsylvania.— Erie Boot, etc., Co. *v.* Eichenlaub, 127 Pa. St. 164, 17 Atl. 889.

Rhode Island.—Hoye *v.* Kalashian, 22 R. I. 101, 46 Atl. 271.

Texas.— Elwell *v.* Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434.

Wisconsin.—Andrews *v.* Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870, 54 L. R. A. 673; Verbeck *v.* Scott, 71 Wis. 59, 36 N. W. 600.

United States.— Hatch *v.* Johnson L. & T. Co., 79 Fed. 828. See also Bradshaw *v.* Miners' Bank, 81 Fed. 902, 26 C. C. A. 673; The W. B. Cole, 59 Fed. 182, 16 U. S. App. 334, 8 C. C. A. 78.

Nominal payee.— It has been held, however, that a nominal payee may take as a *bona fide* holder clear of defenses where he takes by discount or purchase from an intermediate party to whom the bill was delivered by the drawer. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747.

Transfer by and retransfer to party with notice.— So a party having full knowledge of the defense which a maker may have to a promissory note at the time he received it may not purge it of an equitable defense by merely assigning the note to a third party and receiving it back from the latter at a subsequent time. Dollarhide *v.* Hopkins, 72 Ill. App. 509.

29. *Indiana.*— Johnson *v.* Amana Lodge No. 82, I. O. O. F., 92 Ind. 150.

Michigan.— Ward *v.* Doane, 77 Mich. 328, 43 N. W. 980.

Minnesota.— Goldsmidt *v.* Worthington First M. E. Church, 25 Minn. 202.

Missouri.— Wagner *v.* Diedrich, 50 Mo. 484.

Nebraska.— Salisbury *v.* Iddings, 29 Nebr. 736, 46 N. W. 267.

Tennessee.— Bristol Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

United States.— Smith *v.* Florida Cent., etc., R. Co., 43 Fed. 731.

30. Greneaux *v.* Wheeler, 6 Tex. 515.

the relationship of the parties or circumstances attending the transaction being sufficient.[31]

(III) *Materiality of Source.* The avenues through which such information may be brought home to a purchaser is as a rule immaterial. It is in some instances imparted to him by a defect or infirmity in the title or transfer of the instrument, appearing on its face at the time of its negotiation;[32] while in other cases the attempt to impeach the title is by showing facts or circumstances *aliunde* the instrument.[33]

(IV) *Necessity of Inquiry by Purchaser* — (A) *In General.* Where there is nothing about the paper itself or the circumstances attending its negotiation to excite suspicion, a purchaser is not called upon to make inquiry concerning the execution thereof or the consideration for which it was given to avert the imputation of bad faith.[34] Nor in the absence of suspicious circumstances is he bound to inquire whether the indorser has performed or will be able to perform the agreement into which he has entered.[35] Purchasers of corporate paper, however,

31. Johnson *v.* Butler, 31 La. Ann. 770; Lapice *v.* Clifton, 17 La. 152; Horton *v.* Bayne, 52 Mo. 531; Greneaux *v.* Wheeler, 6 Tex. 515; Smith *v.* Florida Cent., etc., R. Co., 43 Fed. 731.

32. In which case, inasmuch as a party must be presumed to know the contents and true meaning of a written instrument, the question of whether or not he had notice is in general one of construction, to be determined by the court as a matter of law. Freeman's Nat. Bank *v.* Savery, 127 Mass. 75, 34 Am. Rep. 345; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Fowler *v.* Brantly, 14 Pet. (U. S.) 318, 10 L. ed. 473; Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61.

33. In which case the question of whether the purchaser had sufficient notice to affect his good faith is generally one of fact for the jury. Freeman's Nat. Bank *v.* Savery, 127 Mass. 75, 34 Am. Rep. 345.

Defects appearing on the instrument are not a criterion for the court in formulating an instruction as to the nature of facts and circumstances outside the instrument which will constitute notice. Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934. But the court or jury are not, however, in deciding whether or not a purchaser should be charged with notice, limited to either one of the different manners in which notice may be communicated, but may base its conclusion both upon facts and circumstances connected with the instrument and from extraneous circumstances arising between the parties, if all these concur in a particular case. International Trust Co. *v.* Wilson, 161 Mass. 80, 36 N. E. 589 [*distinguishing* Cutting *v.* Daigneau, 151 Mass. 297, 23 N. E. 839; National Bank *v.* Law, 127 Mass. 72]; Brown *v.* Taber, 5 Wend. (N. Y.) 566.

34. *Illinois.*— Matson *v.* Alley, 141 Ill. 284, 31 N. E. 419; Morris *v.* Preston, 93 Ill. 215; Murray *v.* Beckwith, 81 Ill. 43; Sherwood *v.* Morrison First Nat. Bank, 17 Ill. App. 591.

Indiana.— Citizens' Bank *v.* Leonhart, 126 Ind. 206, 25 N. E. 1099; Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316.

Michigan.— Howry *v.* Eppinger, 34 Mich. 29.

Minnesota.— Cochran *v.* Stewart, 21 Minn. 435.

New York.— Cheever *v.* Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69; Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505 [*affirming* 23 How. Pr. (N. Y.) 74]; Ketcham *v.* Govin, 35 Misc. (N. Y.) 375, 71 N. Y. Suppl. 991. See also Wilson *v.* Metropolitan El. R. Co., 14 Daly (N. Y.) 171, 6 N. Y. St. 234; Union Nut, etc., Co. *v.* Doherty, 32 Misc. (N. Y.) 496, 66 N. Y. Suppl. 405, 8 N. Y. Annot. Cas. 217.

North Dakota.— St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867.

Pennsylvania.— See Ravenswood Bank *v.* Reneker, 18 Pa. Super. Ct. 192.

Vermont.— Bromley *v.* Hawley, 60 Vt. 46, 12 Atl. 220.

Washington.—McNamara *v.* Jose, 28 Wash. 461, 68 Pac. 903.

United States.— *In re* Great Western Tel. Co., 5 Biss. (U. S.) 363, 10 Fed. Cas. No. 5,740.

See 7 Cent. Dig. tit. "Bills and Notes," § 821.

35. *Colorado.*— Kinkel *v.* Harper, 7 Colo. App. 45, 42 Pac. 173.

Maine.— Adams *v.* Smith, 35 Me. 324.

Massachusetts.— Patten *v.* Gleason, 106 Mass. 439.

Michigan.— Miller *v.* Ottaway, 81 Mich. 196, 45 N. W. 665, 21 Am. St. Rep. 513, 8 L. R. A. 428.

New York.— Davis *v.* McCready, 17 N. Y. 230, 72 Am. Dec. 461.

Pennsylvania.— Craig *v.* Sibbett, 15 Pa. St. 238.

Wisconsin.— Bond *v.* Wiltse, 12 Wis. 611.

Caution in purchasing as affected by occupation of purchaser.— In a Louisiana case it is held that a party who makes it his business to buy commercial paper and negotiate transactions in the same is not in the same situation as a bank whose business it is to make payments when paper is presented, as greater caution should be required on the part of the former than the latter. Smith *v.* Mechanics', etc., Bank, 6 La. Ann. 610. See also Bedell *v.* Burlington Nat. Bank, 16 Kan.

are as a rule chargeable with notice of the statutory limitations and power of such corporations in regard to the issue of commercial paper and must make inquiry regarding the extent of such power,[36] especially where the paper is issued by a municipality;[37] and every purchaser of municipal or corporate paper which upon its face refers to the statute or authority under which it was issued is put upon inquiry that the requirements of such statute have been complied with and cannot claim as a *bona fide* holder if he fail to make inquiry regarding such compliance.[38]

(B) *Extent of Inquiry When Required.* Where a certain irregularity is suggested by a particular defect of the paper, or where a purchaser has knowledge of some suspicious circumstance attending its negotiation, he is bound only to make inquiries calculated to relieve the paper of the suspicions suggested by this particular circumstance, and is not bound to investigate the whole field of possible defenses not suggested by the irregularity.[39] So if the purchaser takes the risk of the existence of the particular defense suggested by the irregularity he assumes no greater risk than the burden of proving that which would have protected him had he made diligent inquiry and will not be open to defenses not suggested by the particular circumstance.[40]

(C) *Effect of Inquiry.* If a purchaser having knowledge which excites his suspicions and leads to inquiry receives upon such inquiry information from a supposedly credible source, which would naturally remove his suspicions, he may rightfully act upon the information thus received and claim the position of a *bona fide* holder;[41] but where he has actual notice of outstanding claims he is

130, where it is said that it may be true that a party engaged in dealing in commercial paper may be more familiar with the habits of business men in the making and discounting of such paper, and therefore more chargeable with notice of anything unusual in the form of the paper or the conduct of the holder; but that beyond this he is under no greater obligations than any other purchaser to inquire into and ascertain the true nature of the transaction between the maker and payee.

36. *Illinois.*— Gaddis *v.* Richmond County, 92 Ill. 119.

Louisiana.— Wilson *v.* Shreveport, 29 La. Ann. 673.

Mississippi.— Sykes *v.* Columbus, 55 Miss. 115.

New Jersey.— Morrison *v.* Bernards Tp., 36 N. J. L. 219; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548.

New York.— Gould *v.* Sterling, 23 N. Y. 439; Orleans Bank *v.* Merrill, 2 Hill (N. Y.) 295; Smith *v.* Strong, 2 Hill (N. Y.) 241.

Ohio.— Lee *v.* Hartwell, 3 Ohio Dec. (Reprint) 225.

Virginia.—Silliman *v.* Fredericksburg, etc., R. Co., 27 Gratt. (Va.) 119.

United States.— Mercer County *v.* Provident Life, etc., Co., 72 Fed. 623, 19 C. C. A. 44.

37. Lindsey *v.* Rottaken, 32 Ark. 619; Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562; McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; Clark *v.* Des. Moines, 19 Iowa 199, 87 Am. Dec. 423; Merchants' Exch. Nat. Bank *v.* Bergen County, 115 U. S. 384, 6 S. Ct. 88, 29 L. ed. 430; Ogden *v.* Daviess County, 102 U. S. 634, 26 L. ed. 263; Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005 [*affirming* 4 Dill. (U. S.) 136, 1 Fed. Cas. No. 488, 3 Centr. L. J. 321]; U. S. Trust Co. *v.* Mineral Ridge, 104 Fed. 851, 44 C. C. A. 218.

38. *Alabama.*— Morton *v.* New Orleans, etc., R., etc., Co., 79 Ala. 590.

Indiana.— Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

Kansas.— Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745.

Louisiana.— Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.

North Carolina.— Clayhrook *v.* Rockingham County, 114 N. C. 453, 19 S. E. 593.

Wisconsin.— Veeder *v.* Lima, 19 Wis. 280.

United States.— Bates County *v.* Winters, 97 U. S. 83, 24 L. ed. 933; McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129.

He need not look further than the official record to see if such laws have been complied with. Rathbone *v.* Kiowa County, 83 Fed. 125, 49 U. S. App. 577, 27 C. C. A. 477; West Plains Tp. *v.* Sage, 69 Fed. 943, 32 U. S. App. 725, 16 C. C. A. 553.

39. Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70. See also Lane *v.* Krekle, 22 Iowa 399; Donovan *v.* Fox, 121 Mo. 236, 25 S. W. 915; Weeks *v.* Fox, 3 Thomps. & C. (N. Y.) 354.

40. Wilson *v.* Metropolitan El. R. Co., 120 N. Y. 145, 24 N. E. 384, 30 N. Y. St. 787, 17 Am. St. Rep. 625; Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70.

41. Powell *v.* Franklin, 62 Ga. 171; Belmont Branch Ohio State Bank *v.* Hoge, 35 N. Y. 65 [*affirming* 7 Bosw. (N. Y.) 543]; Williamson *v.* Brown, 15 N. Y. 354; Heist *v.* Hart, 73 Pa. St. 286.

not warranted in heeding statements of parties whose interest it would be to mislead him.[42]

(v) *Necessity of Notice of Particular Defect.* It is sufficient to affect a purchaser with notice that he had knowledge of fraud or illegality in the transaction as a whole, and notice of the specific facts which impeach the validity of the instrument or transaction need not be brought home to him.[43]

(vi) *Necessity of Knowledge of Legal Effect of Notice.* If a party has knowledge of facts or circumstances involved in the negotiation of a note, the legal effect of which would avoid the transfer to him, he cannot claim as a *bona fide* holder, no matter how honestly he may have believed that the law would sustain the transfer.[44]

(vii) *Time of Receiving.* Notice to an indorsee after the completion of a purchase is of course immaterial,[45] but it is essential to his charactor as a *bona fide* holder that the bargain be actually and in good faith concluded and the consideration paid before notice is received.[46] In the application of this rule it is held that an unexecuted agreement to pay is not a payment, and that if the holder receives notice before executing his agreement he cannot do so in good faith.[47] Hence although a check has been credited upon the books of a bank notice before its actual payment would prevent its liquidation in good faith.[48] So in case of partial payment the purchaser is a *bona fide* holder only to the extent of payment made by him before notice,[49] but if one receives a note as payment for personal property a delivery of all such property before notice is not indispensable,[50] and notice before a renewal of the original instrument will not prevent a renewal of the same.[51]

b. Facts or Circumstances Constituting or Implying Notice — (i) *Failure to Make Inquiry Under Suspicious Circumstances* — (a) *Early Rule.* By an early rule,[52] which was itself a departure from a fairly well-established and settled

42. Carter *v.* Lehman, 90 Ala. 126, 7 So. 735.

43. Knapp *v.* Lee, 3 Pick. (Mass.) 452 (holding that knowledge at the time of taking a note that the maker intends to set up in defense a failure of title to the land for the price of which the note was given is sufficient to allow such defense to operate against the indorsee, although he did not know the particular facts invalidating the title); Whaley *v.* Neill, 44 Mo. App. 316; Ormsbee *v.* Howe, 54 Vt. 182, 41 Am. Rep. 841. To a similar effect see Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580 [*modifying* Mayes *v.* Robinson, 93 Mo. 114, 5 S. W. 611].

44. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

45. *Georgia.*— Heard *v.* Shedden, 113 Ga. 162, 38 S. E. 387.

Iowa.— Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301.

New York.— Hoge *v.* Lansing, 35 N. Y. 136; Mickles *v.* Colvin, 4 Barb. (N. Y.) 304.

Ohio.— Perkins *v.* White, 36 Ohio St. 530; Bassett *v.* Avery, 15 Ohio St. 299; Loudenback *v.* Lowry, 4 Ohio Cir. Ct. 65, 2 Ohio Cir. Dec. 422.

England.— Swan *v.* Steele, 7 East 210, 3 Smith K. B. 199, 8 Rev. Rep. 618.

See 7 Cent. Dig. tit. "Bills and Notes," § 812.

46. *Georgia.*— Merchants', etc., Nat. Bank *v.* Masonic Hall, 62 Ga. 271.

Iowa.— Delaware County Bank *v.* Duncombe, 48 Iowa 488.

Michigan.— Haescig *v.* Brown, 34 Mich. 503.

Nebraska.— Brumback *v.* German Nat. Bank, 46 Nebr. 540, 65 N. W. 198; Colby *v.* Parker, 34 Nebr. 510, 42 N. W. 693.

New York.— Crandall *v.* Vickery, 45 Barb. (N. Y.) 156; Watson *v.* Cabot Bank, 5 Sandf. (N. Y.) 423; De Mott *v.* Starkey, 3 Barb. Ch. (N. Y.) 403.

North Carolina.— Kerr *v.* Cowen, 17 N. C. 356.

Virginia.— Norvell *v.* Hudgins, 4 Munf. (Va.) 496.

England.— De la Chaumette *v.* Bank of England, 9 B. & C. 208, 17 E. C. L. 100.

47. Hubbard *v.* Chapin, 2 Allen (Mass.) 328; Dresser *v.* Missouri, etc., R. Constr. Co., 93 U. S. 92, 23 L. ed. 815 [*approved* in Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78].

48. Mann *v.* Springfield Second Nat. Bank, 30 Kan. 412, 1 Pac. 579; Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 14 S. Ct. 94, 37 L. ed. 1063.

49. Hubbard *v.* Chapin, 2 Allen (Mass.) 328. *Compare* Adams *v.* Soule, 33 Vt. 538.

50. Merritt *v.* Bagwell, 70 Ga. 578. See also Spering's Appeal, 10 Pa. St. 235.

51. Hopkins *v.* Boyd, 11 Md. 107; Union Bank *v.* Bulmer, 10 Montreal Leg. N. 361.

52. Modification of rule.— A short time after this rule was laid down it was very

principle,[53] circumstances which ought to excite the suspicions of a prudent and careful man constituted such notice or knowledge to him as an inquiry would have probably disclosed and destroyed his character as a *bona fide* holder.[54] This rule has been recognized and expressly or in substance followed in several American cases,[55] and in some jurisdictions expressly affirmed by statute.[56]

(B) *Modern Rule.* It was, however, but a short time[57] until this rule, both in its original and modified form, was abandoned,[58] and the principle is now well-

materially modified by the establishment of the principle that suspicious circumstances would not of themselves affect the *bona fides* of plaintiff, unless it could be shown that he was guilty of gross negligence in not making inquiry. Crook *v.* Jadis, 5 B. & Ad. 909, 27 E. C. L. 383, 6 C. & P. 191, 25 E. C. L. 388, 3 L. J. K. B. 87, 3 N. & M. 257 [*affirmed* in Backhouse *v.* Harrison, 5 B. & Ad. 1098, 3 N. & M. 188, 27 E. C. L. 461].

53. Grant *v.* Vaughan, 3 Burr. 1516; Miller *v.* Race, 1 Burr. 452; Peacock *v.* Rhodes, Dougl. 611; Lawson *v.* Weston, 4 Esp. 56; Anonymous, 1 Salk. 126 [all *cited* in Hamilton *v.* Marks, 63 Mo. 167; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934]. See also Roth *v.* Colvin, 32 Vt. 125, 135, where it is said: "Previous to the case of Gill *v.* Cubitt, 3 B. & C. 466, 5 D. & R. 324, 3 L. J. K. B. O. S. 48, 10 E. C. L. 215, the rule does not appear to have been very definitely settled in the English courts. The language of judges in different cases seems to vibrate between the two."

For an excellent summary of the evolution of the law on this point see Matthews *v.* Poythress, 4 Ga. 287.

54. Rothschild *v.* Corney, 9 B. & C. 388, 4 M. & R. 411, 17 E. C. L. 178; Gill *v.* Cubitt, 3 B. & C. 466, 5 D. & R. 324, 3 L. J. K. B. O. S. 48, 10 E. C. L. 215 (leading case).

For applications of this rule see Down *v.* Halling, 4 B. & C. 330, 10 E. C. L. 602, 2 C. & P. 11, 12 E. C. L. 423, 6 D. & R. 455, 3 L. J. K. B. O. S. 234; Strange *v.* Wigney, 6 Bing. 677, 4 M. & P. 470, 19 E. C. L. 305; Snow *v.* Peacock, 3 Bing. 406, 11 E. C. L. 201, 2 C. & P. 215, 12 E. C. L. 535, 11 Moore C. P. 286.

55. *Connecticut.*— Hall *v.* Hale, 8 Conn. 336.

Illinois.— Sturges *v.* Metropolitan Nat. Bank, 49 Ill. 220; Murray *v.* Beckwith, 48 Ill. 391; Russell *v.* Hadduck, 8 Ill. 233, 44 Am. Dec. 693.

Iowa.— Ryan *v.* Chew, 13 Iowa 589; Iowa College *v.* Hill, 12 Iowa 462; Kelly *v.* Ford, 4 Iowa 140.

Louisiana.— Littell *v.* Marshall, 1 Rob. (La.) 51; Lapice *v.* Clifton, 17 La. 152; Maurin *v.* Chambers, 16 La. 207; Nicholson *v.* Patton, 13 La. 213; Vairin *v.* Hobson, 8 La. 50, 28 Am. Dec. 125.

Maine.— Nutter *v.* Stover, 48 Me. 163.

Massachusetts.— Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232. See also Cone *v.* Baldwin, 12 Pick. (Mass.) 545.

Missouri.— Greer *v.* Yosti, 56 Mo. 307; Hamilton *v.* Marks, 52 Mo. 78, 14 Am. Rep. 391 [*approved* in Edwards *v.* Thomas, 2 Mo. App. 282]; Buckner *v.* Jones, 1 Mo. App. 538, which cases, however, are *overruled* in Hamilton *v.* Marks, 63 Mo. 167, where the modern English doctrine is adhered to.

New Hampshire.— Bank *v.* Rider, 58 N. H. 512; Warren *v.* Sweet, 31 N. H. 332. But for facts held insufficient to justify the application of this doctrine see Crosby *v.* Grant, 36 N. H. 273.

New York.— Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157; Holbrook *v.* Mix, 1 E. D. Smith (N. Y.) 154; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442.

North Carolina.— Hulbert *v.* Douglas, 94 N. C. 122.

Pennsylvania.— Beltzhoover *v.* Blackstock, 3 Watts (Pa.) 20, 27 Am. Dec. 330. See also Cromwell *v.* Arrott, 1 Serg. & R. (Pa.) 180; Dickson *v.* Primrose, 2 Miles (Pa.) 366.

Tennessee.— Merritt *v.* Duncan, 7 Heisk. (Tenn.) 156, 19 Am. Rep. 612; Ryland *v.* Brown, 2 Head (Tenn.) 270; Van Wyck *v.* Norvell, 2 Humphr. (Tenn.) 192; Hunt *v.* Sandford, 6 Yerg. (Tenn.) 387.

Vermont.— Gould *v.* Stevens, 43 Vt. 125, 5 Am. Rep. 265; Roth *v.* Colvin, 32 Vt. 125; Sandford *v.* Norton, 14 Vt. 228.

56. Phillips *v.* Loyd, 83 Ga. 536, 10 S. E. 232; Gibson *v.* Hawkins, 69 Ga. 354, 47 Am. Rep. 757.

57. The original departure from the rule, both as it was at first announced and as it was subsequently modified, was made by the case of Goodman *v.* Harvey, 4 A. & E. 870, 6 L. J. K. B. 260, 6 N. & M. 372, 31 E. C. L. 381, decided in 1836, twelve years after the original rule was announced in Gill *v.* Cubitt, 3 B. & C. 466, 5 D. & R. 324, 3 L. J. K. B. O. S. 48, 10 E. C. L. 215.

58. The reason for the abandonment of this rule was that experience found it to be inconsistent with true commercial policy, in that it provided nothing like a criterion on which a verdict could be based, and it was therefore uncertain and not uniform. This arose from the fact that suspicions are likely to assert themselves in different ways in different minds. So too what would be considered prudence would be likely to be found to vary with different persons. As one prudent man might suspect what another would not, and the standard of the jury might be higher or lower than that of other men equally prudent in the management of their affairs.

Maryland.— Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477.

Michigan.— Davis *v.* Seeley, 71 Mich. 209, 38 N. W. 901.

Missouri.— Hamilton *v.* Marks, 63 Mo. 167.

New Jersey.— Hamilton *v.* Vought, 34 N. J. L. 187.

New York.— Magee *v.* Badger, 34 N. Y.

established that neither a suspicion or defect of title, knowledge of circumstances which would excite such suspicion in the mind of a prudent man or put him on inquiry,[59] nor even gross negligence on the part of the taker[60] will affect his right unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith.[61] In other words the question is now one of

247, 90 Am. Dec. 691 [*affirming* 30 Barb. (N. Y.) 246].

Oregon.— Bowman *v.* Metzger, 27 Oreg. 23, 39 Pac. 3, 44 Pac. 1090.

59. *Alabama.*— Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590; Spence *v.* Mobile, etc., R. Co., 79 Ala. 576.

California.— Sinkler *v.* Siljan, 136 Cal. 356, 68 Pac. 1024.

Colorado.— Merchants' Bank *v.* McClelland, 9 Colo. 608, 13 Pac. 723.

Georgia.— Matthews *v.* Poythress, 4 Ga. 287.

Illinois.— Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246 [*affirming* 93 Ill. App. 613]; Fidler *v.* Paxton, 101 Ill. App. 107; Metcalf *v.* Draper, 98 Ill. App. 399; Thayer *v.* Richard, 44 Ill. App. 195; Hopkins *v.* Withrow, 42 Ill. App. 584.

Iowa.— Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301; Cook *v.* Wierman, 51 Iowa 561, 2 N. W. 386; Lane *v.* Evans, 49 Iowa 156; Earhart *v.* Gant, 32 Iowa 481; Lake *v.* Reed, 29 Iowa 258, 4 Am. Rep. 209.

Kansas.— Fox *v.* Kansas City Bank, 30 Kan. 441, 1 Pac. 789.

Kentucky.— Montgomery *v.* Citizens' Nat. Bank, 16 Ky. L. Rep. 445.

Maryland.— Citizens' Nat. Bank *v.* Hooper, 47 Md. 88.

Massachusetts.— Smith *v.* Livingston, 111 Mass. 342.

Michigan.— Helms *v.* Douglass, 81 Mich. 442, 50 N. W. 1009; Davis *v.* Seeley, 71 Mich. 209, 38 N. W. 901.

Missouri.— Jennings *v.* Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373; Wright Invest. Co. *v.* Fillingham, 85 Mo. App. 534; Cameron First Nat. Bank *v.* Stanley, 46 Mo. App. 440; Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 4 Mo. App. 276.

Nebraska.— Martin *v.* Johnston, 34 Nebr. 797, 52 N. W. 819; Dobbins *v.* Oberman, 17 Nebr. 163, 22 N. W. 356.

New Jersey.— National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.— Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Belmont Branch Ohio State Bank *v.* Hoge, 35 N. Y. 65 [*affirming* 7 Bosw. (N. Y.) 543]. See also Tumblety *v.* O'Connor, 13 Daly (N. Y.) 177.

Ohio.— Kitchen *v.* Loudenback, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540 [*affirming* 3 Ohio Cir. Ct. 228, 2 Ohio Cir. Dec. 129]; Johnson *v.* Way, 27 Ohio St. 374.

Pennsylvania.— Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 30 Atl. 957, 44 Am. St. Rep. 652, 35 Wkly. Notes Cas. (Pa.) 484; McSparran *v.* Neeley, 91 Pa. St. 17; Phelan *v.* Moss, 67 Pa. St. 59, 5 Am. Rep. 402; Saylor *v.* Merchants' Exch. Bank, 1 Walk. (Pa.) 328.

South Carolina.— Walker *v.* Kee, 14 S. C. 142.

Virginia.— De Voss *v.* Richmond, 18 Gratt. (Va.) 338, 98 Am. Dec. 647.

United States.—Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Atlas Nat. Bank *v.* Holm, 71 Fed. 489, 34 U. S. App. 472, 19 C. C. A. 94; Clark *v.* Evans, 66 Fed. 263, 27 U. S. App. 640, 13 C. C. A. 433; Sherman Bank *v.* Apperson, 4 Fed. 25; *Ex p.* Estabrook, 2 Lowell (U. S.) 547, 8 Fed. Cas. No. 4,534, 15 Alb. L. J. 271, 24 Pittsb. Leg. J. (Pa.) 152.

England.— Jones *v.* Gordon, 2 App. Cas. 616, 47 L. J. Bankr. 1, 37 L. T. Rep. N. S. 477, 26 Wkly. Rep. 172.

60. *Colorado.*— Merchants' Bank *v.* McClelland, 9 Colo. 608, 13 Pac. 723.

Connecticut.— Craft's Appeal, 42 Conn. 146.

Delaware.— Mears *v.* Waples, 4 Houst. (Del.) 62.

Georgia.— Matthews *v.* Poythress, 4 Ga. 287.

Illinois.— Shreeves *v.* Allen, 79 Ill. 553; Comstock *v.* Hannah, 76 Ill. 530; Lampson *v.* Illinois Trust, etc., Bank, 62 Ill. App. 371; Webber *v.* Indiana Nat. Bank, 49 Ill. App. 336; De Long *v.* Schroeder, 45 Ill. App. 236; Thayer *v.* Richard, 44 Ill. App. 195; Smith *v.* Culton, 5 Ill. App. 422.

Iowa.— Pond *v.* Waterloo Agricultural Works, 50 Iowa 596.

Maryland.— Citizens' Nat. Bank *v.* Hooper, 47 Md. 88.

Mississippi.— New Orleans, etc., R. Co. *v.* Mississippi College, 47 Miss. 560.

New York.— Chapman *v.* Rose, 56 N. Y. 137, 15 Am. Rep. 401 [*reversing* 44 How. Pr. (N. Y.) 364]; Seybel *v.* National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

Pennsylvania.— Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435.

Texas.— Buchanan *v.* Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077.

Virginia.— Frank *v.* Lilienfeld, 33 Gratt. (Va.) 377.

United States.— Swift *v.* Smith, 102 U. S. 442, 26 L. ed. 193; Brown *v.* Spofford, 95 U. S. 474, 24 L. ed. 508; Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857.

61. *Illinois.*— Comstock *v.* Hannah, 76 Ill. 530.

Michigan.— Miller *v.* Finlay, 26 Mich. 249, 12 Am. Rep. 306.

Minnesota.— Merchants' Nat. Bank *v.* Sullivan, 63 Minn. 468, 65 N. W. 924; Tourtelot *v.* Reed, 62 Minn. 384, 64 N. W. 928; Merchants' Nat. Bank *v.* Hanson, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5.

good or bad faith and not of diligence or negligence,[62] except so far as the want of caution is material as bearing on the question of good faith,[63] and suspicions or knowledge of facts which fall short of bad faith do not amount to notice.[64] In

Missouri.— Mayes *v.* Robinson, 93 Mo. 114, 5 S. W. 611.

New Jersey.— Hamilton *v.* Vought, 34 N. J. L. 187; National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.— Canajoharie Nat. Bank *v.* Diefendorf, 123 N. Y. 191, 25 N. E. 402, 33 N. Y. St. 389, 10 L. R. A. 676.

United States.— Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 22 L. ed. 645; Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62.

England.— Goodman *v.* Harvey, 4 A. & E. 870, 6 L. J. K. B. 260, 6 N. & M. 372, 31 E. C. L. 381; Swan *v.* North British Australasian Co., 2 H. & C. 175, 10 Jur. N. S. 102, 32 L. J. Exch. 273, 11 Wkly. Rep. 862.

62. *Arkansas.*— Thompson *v.* Love, 61 Ark. 81, 32 S. W. 65.

Georgia.— Matthews *v.* Poythress, 4 Ga. 287.

Illinois.— Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224; Metcalf *v.* Draper, 98 Ill. App. 399; Leseure *v.* Weaver, 89 Ill. App. 628.

Indiana.— Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316.

Iowa.— Pond *v.* Waterloo Agricultural Works, 50 Iowa 596.

Kansas.— Fox *v.* Kansas City Bank, 30 Kan. 441, 1 Pac. 789.

Maryland.— Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; Crampton *v.* Perkins, 65 Md. 22, 3 Atl. 300.

Minnesota.— Tourtelot *v.* Reed, 62 Minn. 384, 64 N. W. 928.

New York.— Cheever *v.* Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69; Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423; Magee *v.* Badger, 34 N. Y. 247, 90 Am. Dec. 691 [*affirming* 30 Barb. (N. Y.) 246].

Oregon.— Bowman *v.* Metzger, 27 Oreg. 23, 39 Pac. 3, 44 Pac. 1090.

Pennsylvania.— McSparran *v.* Neeley, 91 Pa. St. 17.

Texas.— Wilson *v.* Denton, 82 Tex. 531, 18 S. W. 620, 27 Am. St. Rep. 908; Rotan *v.* Maedgen, 24 Tex. Civ. App. 558, 59 S. W. 585.

Washington.— McNamara *v.* Jose, 28 Wash. 461, 68 Pac. 903.

United States.— Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857.

England.— Carlon *v.* Ireland, 5 E. & B. 765, 2 Jur. N. S. 39, 25 L. J. Q. B. 113, 4 Wkly. Rep. 200, 85 E. C. L. 765.

The ordinary rule of constructive notice is not applicable in the case of negotiable instruments. As promotive of their circulation a liberal view is taken, which makes the *bona fides* of the transaction the decisive test of the holder's right. He is entitled to recover upon it if he has come by it honestly. Wilson *v.* Denton, 82 Tex. 531, 18 S. W. 620, 27 Am. St. Rep. 908.

63. *Georgia.*— Matthews *v.* Poythress, 4 Ga. 287.

Illinois.— Murray *v.* Beckwith, 81 Ill. 43.

Indiana.— Salander *v.* Lockwood, 66 Ind. 285.

Maryland.— Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Michigan.— Howry *v.* Eppinger, 34 Mich. 29.

Missouri.— Cloud *v.* International Book, etc., Co., 23 Mo. App. 319.

New York.— Seybel *v.* National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Steinhart *v.* Boker, 34 Barb. (N. Y.) 436.

England.— Foster *v.* Pearson, 1 C. M. & R. 849, 4 L. J. Exch. 120, 5 Tyrw. 255.

64. *Michigan.*— Goodrich *v.* McDonald, 77 Mich. 486, 43 N. W. 1019; Mace *v.* Kennedy, 68 Mich. 389, 36 N. W. 187.

Missouri.— Borgess Invest. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Hamilton *v.* Marks, 63 Mo. 167.

Nebraska.— Martin *v.* Johnston, 34 Nebr. 797, 52 N. W. 819.

New Jersey.— Haines *v.* Merrill Trust Co., 56 N. J. L. 312, 28 Atl. 796.

New York.— New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332 [*affirming* 4 Bosw. (N. Y.) 420].

Ohio.— Kernohan *v.* Manss, 53 Ohio St. 118, 41 N. E. 258, 29 L. R. A. 317; Kitchen *v.* Loudenback, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540 [*affirming* 3 Ohio Cir. Ct. 228, 2 Ohio Cir. Dec. 129]; Johnson *v.* Way, 27 Ohio St. 374.

Oregon.— Bowman *v.* Metzger, 27 Oreg. 23, 29 Pac. 3, 44 Pac. 1090.

Pennsylvania.— Lancaster County Nat. Bank *v.* Garber, 178 Pa. St. 91, 35 Atl. 848; Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 30 Atl. 957, 44 Am. St. Rep. 652.

Knowledge of assignment for creditors.— It is evident that after a certain lapse of time, after a man has made an assignment for his creditors, the world may trade with him without being chargeable with notice or put upon inquiry to ascertain whether or not it is trading with the property of the assignee. The length of this time depends upon circumstances, such as the magnitude of the transaction and the character and business habits of the party who made the assignment. It cannot be said therefore as matter of law that a party is put upon notice by knowledge of the fact that his transferrer had previously made an assignment for his creditors. Cooley *v.* Jones, 25 Ill. 567.

Receipt of collateral by bank.— Where the purchase or discount of the note is otherwise made in good faith, with no knowledge of any infirmities in the note, and nothing to excite suspicion in the mind of the party discount-

jurisdictions where this rule obtains it is nevertheless held that where the circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction such indorsee should be charged with knowledge.[65]

(II) *KNOWLEDGE OF FAILURE OF CONSIDERATION*—(A) *Rule Stated.* If the purchaser knows at the time of his purchase that the consideration for which the note was given has failed,[66] if he is informed that the validity of the consideration is a question yet to be tested,[67] or if he knows or has legal constructive notice that the consideration is illegal,[68] he cannot be considered a *bona fide* holder. But a failure of the consideration in whole or in part after a *bona fide* transfer does not affect the character of the purchaser, although he had full knowledge of the original consideration for which the note was given.[69]

(B) *Application of Rule*—(1) ACCOMMODATION PAPER. Knowledge on the part of the purchaser that the bill or note is accommodation paper will not of itself affect his good faith,[70] but where he knows or is legally charged with notice

ing or purchasing the same, the mere fact that a bank, being unacquainted with the maker and knowing nothing of his financial rating, required or accepted collateral security from its customer, the indorser, at whose instance and for whose benefit the discount was made, will not be sufficient to require the court to hold as a matter of law that such bank is not an innocent holder. Harmon *v.* Hagerty, 88 Tenn. 705, 13 S. W. 690.

That the purchaser knows the check to be a gift is not sufficient to put him on inquiry. Fulweiler *v.* Hughes, 17 Pa. St. 440, 448, where the court, after commenting upon the freedom which it was necessary to accord commercial paper to maintain its integrity as a circulating medium, said: "Notice that it is a gift is not notice that payment is not intended, and one may purchase *bona fide* under the former notice, when he could not under the latter. The donee has a good title, though a revocable one, and he can pass a good title to any one not notified of the revocation."

65. *Connecticut.*— Craft's Appeal, 42 Conn. 146.

Indiana.— State Nat. Bank *v.* Bennett, 8 Ind App. 679, 36 N. E. 551.

Minnesota.— Gale *v.* Birmingham, 64 Minn. 555, 67 N. W. 659; Tourtelot *v.* Reed, 62 Minn. 384, 64 N. W. 928.

Missouri.— Whaley *v.* Neill, 44 Mo. App. 316.

United States.— Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78.

England.— Oakeley *v.* Ooddeen, 2 F. & F. 656.

66. *California.*— Russ Lumber, etc., Mill Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

Georgia.— Montgomery *v.* Hunt, 93 Ga. 438, 21 S. E. 59.

Illinois.— Bryant *v.* Sears, 16 Ill. 288.

Louisiana.— Burbridge *v.* Harrison, 20 La. Ann. 357.

Maine.— Bean *v.* Flint, 30 Me. 224.

Nebraska.— Hobbie *v.* Zaepffel, 17 Nebr. 536, 23 N. W. 514.

Texas.— National Exch. Bank *v.* Jackson, (Tex. Civ. App. 1895) 33 S. W. 277. See also Twohig *v.* Brown, 85 Tex. 51, 10 S. W. 768.

See 7 Cent. Dig. tit. "Bills and Notes," § 864.

One having knowledge of a partial failure of consideration is put on inquiry as to whether there is not a total failure of consideration for the note. Meade *v.* Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245.

67. Studebaker Mfg. Co. *v.* Dickson, 70 Mo. 272.

68. Ward *v.* Doane, 77 Mich. 328, 43 N. W. 980; Howk *v.* Eckert, 4 Thomps. & C. (N. Y.) 300; Pierce *v.* Kibbee, 51 Vt. 559.

69. *California.*— Splivallo *v.* Patten, 38 Cal. 138, 99 Am. Dec. 358.

Indiana.—Anthony *v.* Slonaker, 18 Ind. 273.

Massachusetts.— See Patten *v.* Gleason, 106 Mass. 439.

Nebraska.— Rublee *v.* Davis, 33 Nebr. 779, 51 N. W. 135, 29 Am. St. Rep. 509.

New York.— Davis *v.* McCready, 4 E. D. Smith (N. Y.) 565 [*affirmed* in 17 N. Y. 230, 72 Am. Dec. 461].

Tennessee.—Alderson *v.* Cheatham, 10 Yerg. (Tenn.) 304.

See 7 Cent. Dig. tit. "Bills and Notes," § 864.

70. *Illinois.*— Metcalf *v.* Draper, 98 Ill. App. 399.

Iowa.— Bankers' Iowa State Bank *v.* Mason Hand Lathe Co., (Iowa 1902) 90 N. W. 612.

Louisiana.— Matthews *v.* Rutherford, 7 La. Ann. 225.

Maryland.— Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Michigan.— Thatcher *v.* West River Nat. Bank, 19 Mich. 196.

Minnesota.— Tourtelot *v.* Bushnell, 66 Minn. 1, 68 N. W. 104; Tourtelot *v.* Reed, 62 Minn. 384, 64 N. W. 928.

New Jersey.— Duncan *v.* Gilbert, 29 N. J. L. 521.

North Carolina.— Parker *v.* Sutton, 103 N. C. 191, 9 S. E. 283, 14 Am. St. Rep. 801.

United States.— Israel *v.* Gale, 77 Fed. 532, 45 U. S. App. 219, 23 C. C. A. 274; Columbus City Bank *v.* Beach, 1 Blatchf. (U. S.) 438, 5 Fed. Cas. No. 2,737.

England.— Smith *v.* Knox, 3 Esp. 46.

Canada.— Kenny *v.* Price, 20 Rev. Lég. 1.

that the indorser probably has no authority to make an indorsement of this nature,[71] where the payee expressly promises that the paper shall not be presented to the maker and the indorsee takes it with knowledge of, and fully assenting to, such agreement,[72] or where, after the payee has received the note, he makes such promise and the indorsee takes it with knowledge of the same,[73] the rule is otherwise.

(2) WHAT CONSTITUTES NOTICE — (a) RECITAL IN INSTRUMENT. By the decided weight of authority the recital in a note of the consideration for which it was given is not of itself sufficient to apprise a purchaser of the failure of the same or to put him on inquiry concerning such failure.[74]

(b) EXECUTORY OR CONTINGENT CONSIDERATION. Knowledge that the note was made in consideration of an executory contract, unless the purchaser is also informed of the breach of such contract,[75] or the fact that the purchaser knew that the consideration was future and contingent and that there might be offsets against it,[76] will not affect the character of the purchaser.

(c) PATENT RIGHT. Generally speaking the mere knowledge that a note was given for a patent right is not sufficient notice of fraud or failure of consideration to put a purchaser on inquiry;[77] but if the statute requires a note given for such purpose to contain certain words expressing that fact,[78] a purchaser of a note which does not contain such statement, if with knowledge of the consideration, would be charged with notice sufficient to put him upon inquiry,[79] unless he is a

71. Friendship First Nat. Bank *v.* Weston, 25 N. Y. App. Div. 414, 49 N. Y. Suppl. 542 [*distinguished* in Union Nut, etc., Co. *v.* Doherty, 32 Misc. (N. Y.) 496, 66 N. Y. Suppl. 405]; Smith *v.* Weston, 88 Hun (N. Y.) 25, 34 N. Y. Suppl. 557, 68 N. Y. St. 513; Moquin *v.* Bennett, 24 Misc. (N. Y.) 157, 51 N. Y. Suppl. 18.

72. Daggett *v.* Whiting, 35 Conn. 366.

73. Skilding *v.* Warren, 15 Johns. (N. Y.) 270.

74. *Georgia.*— Howard *v.* Simpkins, 70 Ga. 322; Bank of Commerce *v.* Barrett, 38 Ga. 126, 95 Am. Dec. 384.

Illinois.— Siegel *v.* Chicago Trust, etc., Bank, 131 Ill. 569, 23 N. E. 417, 19 Am. St. Rep. 51, 7 L. R. A. 537. Although this may be considered in connection with other evidence by the jury with other notice. Henneberry *v.* Morse, 56 Ill. 394.

Kentucky.— McCarty *v.* Louisville Banking Co., 100 Ky. 4, 18 Ky. L. Rep. 569, 37 S. W. 144.

Louisiana.— Maurin *v.* Chambers, 6 Rob. (La.) 62.

Nebraska.— Heard *v.* Dubuque County Bank, 8 Nebr. 10, 30 Am. Rep. 811.

New York.— Mabie *v.* Johnson, 8 Hun (N. Y.) 309.

Tennessee.— Ferriss *v.* Tavel, 87 Tenn. 386, 11 S. W. 93, 3 L. R. A. 414; Ryland *v.* Brown, 2 Head (Tenn.) 270.

Texas.—Adoue *v.* Tankersley, (Tex. Civ. App. 1894) 28 S. W. 346.

Contra, Howard *v.* Kimball, 65 N. C. 175, 6 Am. Rep. 739.

See 7 Cent. Dig. tit. "Bills and Notes," § 864.

75. *Georgia.*— Hudson *v.* Best, 104 Ga. 131, 30 S. E. 688.

Michigan.— Miller *v.* Ottaway, 81 Mich. 196, 45 N. W. 665, 21 Am. St. Rep. 513, 8 L. R. A. 428.

Missouri.— Jennings *v.* Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373.

Nebraska.— Rublee *v.* Davis, 33 Nebr. 779, 51 N. W. 135, 29 Am. St. Rep. 509.

New York.— Davis *v.* McCready, 17 N. Y. 230, 72 Am. Dec. 461 [*affirming* 4 E. D. Smith (N. Y.) 565]; Ferdon *v.* Jones, 2 E. D. Smith (N. Y.) 106.

Oregon.— U. S. National Bank *v.* Floss, 38 Oreg. 68, 62 Pac. 751, 84 Am. St. Rep. 752.

Where the consideration is an insurance policy not yet issued, a purchaser who takes the note with notice that such policy has not yet been issued takes the risk of possible failure of the company to issue such a policy as is applied for. Heard *v.* Shedden, 113 Ga. 162, 38 S. E. 387.

76. State Nat. Bank *v.* Cason, 39 La. Ann. 865, 2 So. 881; Sadler *v.* White, 14 La. Ann. 177.

77. *Illinois.*— Comstock *v.* Hannah, 76 Ill. 530.

Indiana.— Woollen *v.* Ulrich, 64 Ind. 120; Doherty *v.* Perry, 38 Ind. 15; Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380.

Michigan.— Miller *v.* Finley, 26 Mich. 249, 12 Am. Rep. 306.

New Hampshire.— Green *v.* Bickford, 60 N. H. 159.

Ohio.— Sackett *v.* Kellar, 22 Ohio St. 554.

Pennsylvania.— Kraft *v.* Gingrich, 12 Pa. Co. Ct. 604.

Vermont.— Gerrish *v.* Bragg, 55 Vt. 329.

78. See *supra,* I, C, 1, i, (I), (B).

79. New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Delong *v.* Barnes, 45 Ohio St. 237, 12 N. E. 735; Tod *v.* Wick, 36 Ohio St. 370; Hunter *v.* Henninger, 93 Pa. St. 373; Johnson *v.* Martin, 19 Ont. App. 592. *Aliter* if the consideration is not expressed and the purchaser has no knowledge thereof. Parr *v.* Erickson, 115 Ga. 873, 42 S. E. 240.

resident of another state at the time of the purchase, and, although having knowledge of the consideration, does not know of the existence of such statute in the state where the note was made.[80]

(III) *Inadequacy of Purchase-Price.* The mere fact that a note is purchased for an amount less than its face or that an unusually large discount is accepted is never of itself sufficient to charge the purchaser with notice of existing equities,[81] although where the notes are apparently well secured by collateral or the purchaser knows the maker to be solvent payment of a price grossly inadequate should put him on inquiry.[82] The merits of each case must be determined by its particular facts and circumstances; and if it appears that the instrument is of depreciated value in the commercial world and not considered desirable from the standpoint of an investor,[83] if the financial stability of the primary obligors is doubted,[84] or if it does not appear that the purchase was made for the purpose of speculating upon the chances of its collection,[85] an otherwise unfair consideration should not charge the purchaser with notice of equities.

(IV) *Irregularities or Defects Apparent From Paper*—(A) *In General.* As a rule any irregularity, erasure, ambiguous or uncertain clause, or peculiarity connected with the paper, which is sufficient to excite suspicion or demand inquiry of a person exercising ordinary business prudence and judgment, will operate as constructive notice to a purchaser taking the same without inquiry.[86]

80. Palmer *v.* Minar, 8 Hun (N. Y.) 342.

81. *Illinois.*— Murray *v.* Beckwith, 81 Ill. 83.

Kentucky.— Nicholson *v.* New Castle Nat. Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223.

Louisiana.— Scott *v.* Seelye, 27 La. Ann. 95.

Minnesota.— Daniels *v.* Wilson, 21 Minn. 530.

New York.— Miller *v.* Crayton, 3 Thomps. & C. (N. Y.) 360; Gould *v.* Segee, 5 Duer (N. Y.) 260. See also McDonald *v.* Johnson, 19 N. Y. Suppl. 443, 46 N. Y. St. 838.

Ohio.— Kitchen *v.* Loudenback, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540 [*affirming* 3 Ohio Cir. Ct. 228].

Pennsylvania.— Forepaugh *v.* Baker, 21 Wkly. Notes Cas. (Pa.) 299, 13 Atl. 465; Leib *v.* Lanigan, 2 Leg. Chron. (Pa.) 386; Bank *v.* McCoy, 3 Leg. Gaz. (Pa.) 116.

Tennessee.— Oppenheimer *v.* Farmers', etc., Bank, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, 33 L. R. A. 767.

82. Smith *v.* Jansen, 12 Nebr. 125, 10 N. W. 537, 41 Am. Rep. 761 (where notes amounting in the aggregate to one hundred dollars and secured by mortgage upon real estate were purchased for thirty dollars); Hunt *v.* Sandford, 6 Yerg. (Tenn.) 387 (where a note for three hundred and thirty dollars was purchased for one hundred and twenty-five dollars, the maker being solvent and the purchaser at the time also agreeing to pay twenty-five dollars more if the notes should be collected without suit); Gould *v.* Stevens, 43 Vt. 125, 5 Am. Rep. 265 (where a note for three hundred dollars was purchased for fifty dollars, there being other suspicious circumstances as well); De Witt *v.* Perkins, 22 Wis. 473 (where a note for three hundred dollars was purchased shortly before maturity for five dollars, the purchaser knowing the credit of the maker to be fair and his financial standing such that he would probably be able to pay the same). See also *In re* Gomersall, 1 Ch. D. 137.

83. Smith *v.* Harlow, 64 Me. 510.

84. Cannon *v.* Canfield, 11 Nebr. 506, 9 N. W. 693.

85. McNamara *v.* Jose, 28 Wash. 461, 68 Pac. 903, where, although a note for one thousand dollars was purchased for five hundred dollars, it was shown to be payable at Cape Nome, Alaska, and it was not shown but that the purchaser might be compelled to enforce its payment at that place. It was held that the price was not of itself sufficient to charge a purchaser with notice.

86. *Colorado.*— Dunn *v.* Ghost, 5 Colo. 134.

Connecticut.— Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Hall *v.* Hale, 8 Conn. 336.

Georgia.— Gibson *v.* Hawkins, 69 Ga. 354, 47 Am. Rep. 757; Hamilton *v.* Wilson, 67 Ga. 494.

Illinois.— Hamill *v.* Mason, 51 Ill. 488; Prins *v.* South Branch Lumber Co., 20 Ill. App. 236.

Iowa.— McCramer *v.* Thompson, 21 Iowa 244, showing the erasure of the name of one of the sureties.

Massachusetts.— See Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680.

Minnesota.— Stein *v.* Rheinstrom, 47 Minn. 476, 50 N. W. 827.

Missouri.— Mechanics' Bank *v.* Valley Packing Co., 70 Mo. 643; Henderson *v.* Bondurant, 39 Mo. 369, 93 Am. Dec. 281.

New Jersey.—Skillman *v.* Titus, 32 N. J. L. 96, holding that where the letters "Mem." appeared on the face of an instrument, such irregularity, together with the fact that the instrument, which is a bank check, had been outstanding for two and a half years, was sufficient notice that it was not given in the usual course of trade.

New York.— Davis Sewing Mach. Co. *v.* Best, 105 N. Y. 59, 11 N. E. 146; Pope *v.* Al-

The effect of such notice cannot be avoided by having the irregularity corrected after receiving the note,[87] but it must plainly appear that the erasure or irregularity existed at the time the note was taken.[88] No alteration will constitute constructive notice, unless it be of a part of the note itself,[89] and any divergence from the ordinary form will constitute notice only where it naturally and reasonably implies or suggests an equity or defense, and then only notice of the equity suggested.[90]

bion Bank, 57 N. Y. 126 [*reversing* 59 Barb. (N. Y.) 226]; Caylus *v.* New York, etc., R. Co., 10 Hun (N. Y.) 295; Miller *v.* Crayton, 3 Thomps. & C. (N. Y.) 360; Newell *v.* Gregg, 51 Barb. (N. Y.) 263. See also Spero *v.* Holoschutz, 36 Misc. (N. Y.) 764, 74 N. Y. Suppl. 852.

North Carolina.— Cronly *v.* Hall, 67 N. C. 9, 12 Am. Rep. 597.

Ohio.— Gebhart *v.* Sorrels, 9 Ohio St. 461.

Pennsylvania.— See Haines *v.* Atwood, 7 Phila. (Pa.) 196.

South Carolina.— Mills *v.* Williams, 16 S. C. 593.

United States.—Fowler *v.* Brantley, 14 Pet. (U. S.) 318, 10 L. ed. 473.

England.— Lambert *v.* Heath, 15 M. & W. 486. See also Awde *v.* Dixon, 6 Exch. 869, 20 L. J. Exch. 295.

Canada.— Swaisland *v.* Davidson, 3 Ont. 320.

If drawn expressly for the use or benefit of a certain party it is notice to a taker.

Arkansas.— Evans *v.* Speer Hardware Co., 65 Ark. 204, 45 S. W. 370, 67 Am. St. Rep. 919.

California.— Carrillo *v.* McPhillips, 55 Cal. 130.

Massachusetts.— National Security Bank *v.* McDonald, 127 Mass. 82.

Minnesota.— Elias *v.* Finnegan, 37 Minn. 144, 33 N. W. 330.

Nebraska.— Rapid City First Nat. Bank *v.* Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618, 15 L. R. A. 386.

"In liquidation," when added to the signature of one of the members of a commercial firm, is sufficient notice to the payee that the firm is dissolved and that the partner could not bind his copartner without a special authorization. Speake *v.* Barrett, 13 La. Ann. 479.

The fact that the note was given by a married woman appearing on the face of the instrument is sufficient notice to a purchaser to put him on inquiry as to whether or not it inured to her separate use or whether the authority of her husband could be dispensed with. Pilcher *v.* Kerr, 7 La. Ann. 144; McComas *v.* Green, 6 La. Ann. 121; De Gaalon *v.* Matherne, 5 La. Ann. 495.

"Ne varietur" is not a circumstance calculated to create a reasonable suspicion and put the transferee upon inquiry. Kentucky Bank *v.* Goodale, 20 La. Ann. 50; Nott *v.* Watson, 11 La. Ann. 664; Maskell *v.* Haifleigh, 8 La. Ann. 457; Schmidt *v.* Frey, 8 Rob. (La.) 435; Chalaron *v.* Vance, 7 La. 571; Abat *v.* Gormley, 3 La. 238; Canfield *v.* Gibson, 1 Mart. N. S. (La.) 143; Fusilier *v.* Bonin, 12 Mart. (La.) 235.

Note dated on Sunday.— The fact that a note was made on Sunday is not a defect so apparent upon its face as to subject the purchaser to the doctrine of *caveat emptor*, he having a right to presume that the note was properly executed, especially where it was particularly warranted to him by the vendor. Gilman *v.* Berry, 59 N. H. 62.

The mere fact that a note has not the stamp required by statute at the time of its delivery, such irregularity not being noticed by the purchaser at the time of receiving it, is not of itself sufficient to charge him with notice of equities between the original parties. Ebert *v.* Gitt, 95 Md. 186, 52 Atl. 900.

87. Losee *v.* Bissell, 76 Pa. St. 459.

88. Crosby *v.* Grant, 36 N. H. 273.

89. Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246.

90. *Indiana.*— See Whitcomb *v.* Miller, 90 Ind. 384.

Kansas.— Parker *v.* Plymell, 23 Kan. 402, holding that a clause in a negotiable note to the effect that if it was not paid at maturity it should bear twelve per cent interest from date would not charge a *bona fide* holder for value before maturity with notice of usury in the inception of the note.

Ohio.— Allen *v.* Johnson, 20 Ohio Cir. Ct. 8, 11 Ohio Cir. Dec. 42.

Tennessee.— Chattanooga First Nat. Bank *v.* Stockell, 92 Tenn. 252, 21 S. W. 523, 20 L. R. A. 605, holding that the initials "C. I. P." standing unexplained on the face of a note gave no notice whatever of their meaning, much less did they show that the consideration was a patent right, viz., "Chapin Iron Process."

Wisconsin.— Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697.

United States.— Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323 [*approving* Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Fowler *v.* Brantly, 14 Pet. (U. S.) 318, 10 L. ed. 473; Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61], holding that the words "Second of exchange, first unpaid," did not import knowledge to the purchasers of one of such bills that the bills were drawn in sets. See also U. S. *v.* Metropolis Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774.

England.— Ingham *v.* Primrose, 7 C. B. N. S. 82, 5 Jur. N. S. 710, 28 L. J. C. P. 294, 97 E. C. L. 82, holding that where a bill was torn in two and thrown away with intent to destroy it, but the tear was in such manner that it might be inferred that it had been done to render its transmission the more ready through the post, and it was subsequently pasted together and negotiated, the

(B) *Expression of Fiduciary Relationship in Signature or Indorsement.* The expression of a fiduciary character of a holder or transferrer on the face of a negotiable instrument is notice to the purchaser of a probable limited or restricted authority to negotiate the same.[91] This is so where paper is signed or indorsed by an agent as such,[92] especially where the paper is made payable to him as agent[93] or where it appears on the face of the paper by the indorsement to the holder or by other papers or orders accompanying the note[94] that the transferrer has the instrument as trustee or guardian or in some other official capacity,[95] although it has been held that where it is not shown either by the note or other-

holder might infer under such circumstances that the breaking or tearing had been done for a lawful purpose and could not as a matter of law be charged with notice that it was for the purpose of destroying the bill. See also Maitland *v.* Chartered Mercantile Bank, 2 Hem. & M. 440, 38 L. J. Ch. 363, 12 L. T. Rep. N. S. 372.

Alternative place of payment.— Where a note is made payable at either of one of two places, the fact that the purchaser knows or believes in the non-existence of one of the places named for payment is not sufficient to put him on inquiry if he purchases for value or before maturity. Farthing *v.* Dark, 111 N. C. 243, 16 S. E. 337.

91. Jackson *v.* Davis, MacArthur & M. (D. C.) 334; Renshaw *v.* Wills, 38 Mo. 201; Thurber *v.* Cecil Nat. Bank, 52 Fed. 513; Lee *v.* Chillicothe Branch Bank, 1 Bond (U. S.) 387, 15 Fed. Cas. No. 8,186, 2 Leg. & Ins. Rep. 10. See also McConnell *v.* Hodson, 7 Ill. 640.

92. *Michigan.*— McBain *v.* Seligman, 58 Mich. 294, 25 N. W. 197.

Mississippi.— Davis *v.* Henderson, 25 Miss. 549, 59 Am. Dec. 229.

New York.— Gerard *v.* McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, 41 N. Y. St. 284; Jacoby *v.* Payson, 85 Hun (N. Y.) 367, 32 N. Y. Suppl. 1032, 66 N. Y. St. 436.

United States.— Germania Safety-Vault, etc., Co. *v.* Boynton, 71 Fed. 797, 37 U. S. App. 602, 19 C. C. A. 118.

England.— Reid *v.* Rigby, [1894] 2 Q. B. 40, 63 L. J. Q. B. 451, 10 Reports 280; Bryant *v.* La Banque du Peuple, [1893] A. C. 170; Attwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 78, 31 Rev. Rep. 194, 14 E. C. L. 130; Alexander *v.* Mackenzie, 6 C. B. 766, 13 Jur. 346, 18 L. J. C. P. 94, 60 E. C. L. 766.

See 7 Cent. Dig. tit. "Bills and Notes," § 844.

Extent of inquiry required.— Such a signature imposes upon the purchaser, however, no further obligation than to inquire whether the agent has the authority to bind the principal by signing bills in such manner and does not require of him any inquiry into the consideration of the bill. Weeks *v.* Fox, 3 Thomps. & C. (N. Y.) 354.

93. Leavens *v.* Thompson, 48 Hun (N. Y.) 389, 1 N. Y. Suppl. 18, 16 N. Y. St. 386; Thurber *v.* Cecil Nat. Bank, 52 Fed. 513.

94. For a deed of trust, an order of the court, or any other instrument accompanying the note is just as efficient and potent to impart notice to all those who see it or to those to whom it is delivered as if its terms had been written on the face, or embodied in the instrument itself. Turner *v.* Hoyle, 95 Mo. 337, 8 S. W. 157; Renshaw *v.* Wills, 38 Mo. 201; Ranney *v.* Brooks, 20 Mo. 105; Rowekamp *v.* Holters, 6 Ohio Dec. (Reprint) 998, 9 Am. L. Rec. 416.

95. *Alabama.*— Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590.

Arkansas.— Payne *v.* Flournoy, 29 Ark. 500.

District of Columbia.— Jackson *v.* Davis, MacArthur & M. (D. C.) 334.

Illinois.— Chicago Title, etc., Co. *v.* Brugger, 196 Ill. 96, 63 N. E. 637.

Indiana.— Nugent *v.* Laduke, 87 Ind. 482. See also Rogers *v.* Zook, 86 Ind. 237.

Kentucky.— Prather *v.* Weissiger, 10 Bush (Ky.) 117.

Louisiana.— McMasters *v.* Dunbar, 2 La. Ann. 577; Nicholson *v.* Chapman, 1 La. Ann. 222.

Maryland.— Baltimore Third Nat. Bank *v.* Lange, 51 Md. 138, 144, 34 Am. Rep. 304, where the court said: "If there are circumstances connected with the purchase which reasonably indicate that trust property is being dealt with, they will fix upon the purchaser notice of the trust, and if he fails to make inquiry about the title he is getting, it is his own fault and he must suffer the consequences of his own neglect."

Massachusetts.—Shaw *v.* Spencer, 100 Mass. 382, 393, 97 Am. Dec. 107, 1 Am. Rep. 115, where the court said: "The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist."

Mississippi.— Isom *v.* Jackson First Nat. Bank, 52 Miss. 902.

Missouri.— Renshaw *v.* Wills, 38 Mo. 201; Ranney *v.* Brooks, 20 Mo. 105; Galloway *v.* Gleason, 61 Mo. App. 21; Payne *v.* St. Charles First Nat. Bank, 43 Mo. App. 377. See also Turner *v.* Hoyle, 95 Mo. 337, 8 S. W. 157.

New York.—People *v.* Bank of North America, 75 N. Y. 547; Paterson First Nat. Bank *v.* National Broadway Bank, 22 N. Y. App. Div. 24, 47 N. Y. Suppl. 880; New York *v.* Sands, 39 Hun (N. Y.) 519.

wise that a fiduciary relationship exists, except by a word or phrase descriptive of the person, such terms should be considered as *descriptio personæ* and will not constitute notice to the purchaser of a probable limited authority to make the transfer.[96]

(c) *Instrument Overdue* — (1) Rule Stated. If from the face of the paper it appears that the whole or a part of the amount represented thereon is past due, that fact is of itself sufficient notice to put a purchaser on inquiry and to preclude him from claiming as a *bona fide* holder should he fail to make such inquiry.[97] The purchaser, however, is charged only with notice that the maker has some good defense to the instrument itself by reason of transactions between him and the payee or holder and does not permit an attack upon the purchaser's title.[98]

(2) Application of Rule — (a) In General. An instrument is not to be considered as overdue so as to affect the *bona fide* character of the purchaser merely because it is transferred on the last day of grace[99] or because the purchaser subsequently to the taking elected to make it and other notes of a series due by exercising his option on a previous default;[1] but notes are overdue where the trustee of a collateral mortgage has foreclosed it in the exercise of his

Ohio.— Strong *v.* Strauss, 40 Ohio St. 87.

Tennessee.— Tradesmen's Nat. Bank *v.* Looney, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830, 38 L. R. A. 837; Alexander *v.* Alderson, 7 Baxt. (Tenn.) 403.

Vermont.— Langdon *v.* Baxter Nat. Bank, 57 Vt. 1, 52 Am. Rep. 113.

United States.— Pierce *v.* U. S., 7 Wall. (U. S.) 666, 19 L. ed. 169.

See 7 Cent. Dig. tit. "Bills and Notes," § 842.

96. Fletcher *v.* Schaumburg, 41 Mo. 501; Powell *v.* Morrison, 35 Mo. 244. See also Paulette *v.* Brown, 40 Mo. 52; Mayer *v.* Columbia Sav. Bank, 86 Mo. App. 108 (holding that the mere addition of the word "curator" to the name of a payee and indorser does not carry notice that negotiable paper so indorsed is trust property).

97. *Alabama.*— Marshall *v.* Shiff, 130 Ala. 545, 30 So. 335.

California.— James *v.* Yaeger, 86 Cal. 184, 24 Pac. 1005; Woodsum *v.* Cole, 69 Cal. 142, 10 Pac. 331; Chase *v.* Whitmore, 68 Cal. 545, 9 Pac. 942.

Georgia.— Williams *v.* Nicholson, 25 Ga. 560; Smith *v.* Lloyd, T. U. P. Charlt. (Ga.) 304.

Illinois.— Morgan *v.* Bean, 100 Ill. App. 114; Jenkins *v.* Bauer, 8 Ill. App. 634.

Iowa.— Duncan *v.* Finn, 79 Iowa 658, 44 N. W. 888; Wood *v.* McKean, 64 Iowa 16, 19 N. W. 817.

Kentucky.— Greenwell *v.* Haydon, 78 Ky. 332, 39 Am. Rep. 234.

Louisiana.— Burroughs *v.* Nettles, 7 La. 113.

Maryland.— Avirett *v.* Barnhart, 86 Md. 545, 39 Atl. 532.

Massachusetts.— Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297; Potter *v.* Tyler, 2 Metc. (Mass.) 58; Thompson *v.* Hale, 6 Pick. (Mass.) 259; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232.

Michigan.— Comstock *v.* Draper, 1 Mich. 481, 53 Am. Dec. 78.

Missouri.— Turner *v.* Hoyle, 95 Mo. 337, 8 S. W. 157; Chappell *v.* Allen, 38 Mo. 213; Mayer *v.* Columbia Sav. Bank, 86 Mo. App. 108; Dryer *v.* Mercantile Bank, 4 Mo. App. 599.

New Jersey.— Tillou *v.* Britton, 9 N. J. L. 120.

New York.— Newell *v.* Gregg, 51 Barb. (N. Y.) 263.

United States.— U. S. *v.* Vermilye, 10 Blatchf. (U. S.) 280, 28 Fed. Cas. No. 16,618, 6 Am. L. T. Rep. 78; *In re* Sime, 3 Sawy. (U. S.) 305, 22 Fed. Cas. No. 12,861, 12 Nat. Bankr. Reg. 315.

England.— *In re* European Bank, L. R. 5 Ch. 358, 39 L. J. Ch. 588, 22 L. T. Rep. N. S. 422, 18 Wkly. Rep. 474; Tinson *v.* Francis, 1 Campb. 19, 10 Rev. Rep. 617; McClure *v.* Pringle, 13 Price 8. *Aliter* if this does not appear on the paper. Dunn *v.* O'Keeffe, 5 M. & S. 282, 17 Rev. Rep. 326 [*affirming* 1 Marsh. 613, 6 Taunt. 305, 16 Rev. Rep. 323, 1 E. C. L. 626].

Canada.— McQuin *v.* Sorell, 7 N. Brunsw. 140.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 888, 889.

Checks.— While ordinarily a check may be taken some days after its date without subjecting the purchaser to equities (Estes *v.* Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424; Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97; Rothschild *v.* Corney, 9 B. & C. 388, 4 M. & R. 411, 17 E. C. L. 178), yet it may be presented so long after its date, and under such circumstances as to put the party on inquiry (Newton First Nat. Bank *v.* Needham, 29 Iowa 249); but two or three days after the check is drawn is not sufficient to suggest any irregularity (Laber *v.* Steppacher, 103 Pa. St. 81).

98. Sanderson *v.* Crane, 14 N. J. L. 506.

99. See *supra*, VII, B, 8, e.

1. Battle Creek Nat. Bank *v.* Dean, 86 Iowa 656, 53 N. W. 338. See also Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 29 L. ed. 1044.

option to make the note due on any default.[2] So too where a note is taken as collateral security for future advances the holder can assume a *bona fide* character only as to advances made previous to the maturity of the instrument.[3]

(b) Overdue Interest. By the weight of authority the fact that an instalment of interest or an instrument is overdue and unpaid is not of itself sufficient to affect the purchaser with notice that the instrument is dishonored or put him on inquiry concerning the same,[4] although in several jurisdictions the opposite view has been taken, especially in cases where the interest was overdue for several payments.[5] In several of the jurisdictions holding the majority view, however, this fact is allowed to be considered in connection with other circumstances as evidence of notice.[6]

(c) Instrument Taken With Overdue Notes For Single Consideration. In some jurisdictions a purchaser who takes a note which is not yet due, with other notes overdue, all given for the same consideration, will be affected with notice as to the former,[7] but where it is not clear that the notes were all given for the same consideration the mere fact that a note not due is taken in the same transaction

Security taken after debt contracted but before giving note therefor.— Where, as collateral security for a cash loan, a party transfers a due-bill payable one day after date, but at the expiration of ten days gives his note, payable with ten per cent interest for the cash previously loaned him, authorizing the assignee of the due-bill to keep it as security for the note, inasmuch as such note is a new agreement, the assignee cannot claim as an innocent purchaser before maturity of the due-bill. Dowagiac City Bank *v.* Dill, 84 Mich. 549, 47 N. W. 1109.

2. Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443.

3. Texas Banking, etc., Co. *v.* Turnley, 61 Tex. 365.

4. *Alabama.*— Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590; State *v.* Cobb, 64 Ala. 127.

California.— McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748.

Indiana.— Cooper *v.* Merchants', etc., Nat. Bank, 25 Ind. App. 341, 57 N. E. 569 [*following* Cooper *v.* Hocking Valley Nat. Bank, 21 Ind. App. 358, 50 N. E. 775, 69 Am. St. Rep. 365].

Louisiana.— Fairex *v.* Bier, 37 La. Ann. 821.

Massachusetts.— National Bank of North America *v.* Kirby, 108 Mass. 497.

Oregon.— U. S. National Bank *v.* Floss, 38 Oreg. 68, 62 Pac. 751, 84 Am. St. Rep. 752.

Wisconsin.— Patterson *v.* Wright, 64 Wis. 289, 25 N. W. 10; Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697 [*following* Boss *v.* Hewitt, 15 Wis. 260, and *overruling dicta* in Hart *v.* Stickney, 41 Wis. 630, 22 Am. Rep. 728].

United States.— Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044; Indiana, etc., Cent. R. Co. *v.* Sprague, 103 U. S. 756, 26 L. ed. 554; Thompson *v.* Perrine, 103 U. S. 589, 1 S. Ct. 564, 27 L. ed. 298; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681 (leading case); Long Island L. & T. Co. *v.* Columbus, etc., R. Co., 65 Fed. 455.

See 7 Cent. Dig. tit. "Bills and Notes," § 868.

The reasons, as laid down in the leading cases, are not only that there is a manifest difference between a failure to pay interest and a failure to pay principal and that interest is an incident of the debt and is not subject to protest and notice to indorsers (National Bank of North America *v.* Kirby, 108 Mass. 497), but as is said by Field, J., in Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681: "To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every instalment of interest on them as it matured: and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons dishonored paper, subject to all defenses good against the original holders would greatly impair the currency and credit of such securities, and correspondingly diminish their value."

5. Waverly First Nat. Bank *v.* Forsyth, 67 Minn. 257, 69 N. W. 909, 64 Am. St. Rep. 415 [*following* St. Paul First Nat. Bank *v.* Scott County Com'rs, 14 Minn. 77, 100 Am. Dec. 194]; Chouteau *v.* Allen, 70 Mo. 290; Newell *v.* Gregg, 51 Barb. (N. Y.) 263. See also Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457.

6. Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590; National Bank of North America *v.* Kirby, 108 Mass. 497; Waverly First Nat. Bank *v.* Forsyth, 67 Minn. 257, 69 N. W. 909, 64 Am. St. Rep. 415; Parsons *v.* Jackson, 99 U. S. 434, 25 L. ed. 457.

7. Harrell *v.* Broxton, 78 Ga. 129, 3 S. E. 5 (by statute); Harrington *v.* Claflin, 91 Tex. 294, 42 S. W. 1055. *Contra,* Patterson *v.* Wright, 64 Wis. 289, 25 N. W. 10 [*citing* Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697; Boss *v.* Hewitt, 15 Wis. 260, in which

with other notes which are overdue is not notice of any equities existing against the former.[8]

(D) *Postdated Instrument.* The mere fact that an instrument was postdated and transferred before its date is not of itself sufficient to charge a purchaser with notice of an irregularity or defense,[9] although this has been considered as a suspicious circumstance which, with other circumstances, should put a purchaser on inquiry.[10]

(E) *Restrictive Indorsement* — (1) IN GENERAL. Notice of defenses or equities may be imputed to a purchaser by his taking a note having a restrictive or special indorsement thereon,[11] although this is not true where the note is acquired after the special indorsement has served the purpose for which it was made.[12]

(2) "FOR COLLECTION." An indorsement "for collection" or in words of similar import is notice to all parties subsequently dealing with the paper that a qualified title only is intended to be passed.[13]

(3) "WITHOUT RECOURSE." The expression "without recourse," or an expression of the same import, used in an indorsement is not of itself sufficient to put a purchaser on inquiry and constitute constructive notice to him;[14] but where

latter case, however, the court expressly refused to decide this particular point].

8. Boss *v.* Hewitt, 15 Wis. 260; Edgefield Bank *v.* Farmers' Co-operative Mfg. Co., 52 Fed. 98, 2 U. S. App. 282, 2 C. C. A. 637, 18 L. R. A. 201.

9. Bill *v.* Stewart, 156 Mass. 508, 31 N. E. 386; Mayer *v.* Mode, 14 Hun (N. Y.) 155; Brewster *v.* McCardell, 8 Wend. (N. Y.) 478; Walker *v.* Geisse, 4 Whart. (Pa.) 252, 33 Am. Dec. 60; Pasmore *v.* North, 13 East 517, 12 Rev. Rep. 420. See also Clarke Nat. Bank *v.* Albion Bank, 52 Barb. (N. Y.) 592, where the court used language from which the opposite might be inferred, although the case itself was decided on different grounds.

10. New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344, 6 N. W. 823.

11. *Alabama.*— People's Bank *v.* Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728, 54 Am. St. Rep. 59.

Connecticut.— See Bristol Knife Co. *v.* Hartford First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

Illinois.— Haskell *v.* Brown, 65 Ill. 29.

Kentucky.— Menzies *v.* Farmers Bank, 3 Ky. L. Rep. 822.

Maine.— Leary *v.* Blanchard, 48 Me. 269, holding that an indorsement "Pay to Arthur Leary, or order, for account" of the payee, was sufficient to put a purchaser on inquiry.

Massachusetts.— Wilson *v.* Holmes, 5 Mass. 543, 4 Am. Dec. 75 (holding that under an indorsement to the payee's own use the purchaser would take subject to defenses); Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232.

Michigan.— Aniba *v.* Yeomans, 39 Mich. 171, holding that the indorsee is not a *bona fide* holder without notice where the payee transferred only his right, title, and interest.

New Hampshire.— Pierce *v.* Ricker, 16 N. H. 322, 41 Am. Dec. 728, an indorsement "to be accountable without demand and notice."

New York.— Boyd *v.* Plumb, 7 Wend. (N. Y.) 309; Payne *v.* Eden, 3 Cai. (N. Y.) 213; Reed *v.* Warner, 5 Paige (N. Y.) 650.

Rhode Island.— Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429.

Virginia.— Power *v.* Finnie, 4 Call (Va.) 411, where the restricted indorsement was "pay the within contents to Jack Power only."

Wisconsin.— Pier *v.* Bullis, 48 Wis. 429, 4 N. W. 381.

United States.— Chicago First Nat. Bank *v.* Reno County Bank, 1 McCrary (U. S.) 491, 3 Fed. 257.

England.— Sigourney *v.* Lloyd, 8 B. & C. 622, 7 L. J. K. B. O. S. 73, 15 E. C. L. 308; Treuttel *v.* Barandon, 1 Moore C. P. 543, 8 Taunt. 100, 4 E. C. L. 59.

12. Brook *v.* Vannest, 58 N. J. L. 162, 73 Atl. 382.

13. *Georgia.*— Wilson *v.* Tolson, 79 Ga. 137, 3 S. E. 900; Central R. Co. *v.* Lynchburg First Nat. Bank, 73 Ga. 383.

Iowa.— Chaflin *v.* Wilson, 51 Iowa 15, 50 N. W. 578.

Maryland.— Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Minnesota.— Merchants' Nat. Bank *v.* Hanson, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5.

Mississippi.— See Meridian First Nat. Bank *v.* Strauss, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579.

Nebraska.— Lederer *v.* Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954.

New York.— Philbrick *v.* Dallett, 34 N. Y. Super Ct. 370; Hoffman *v.* Miller, 9 Bosw. (N. Y.) 334.

North Dakota.— National Bank of Commerce *v.* Johnson, 6 N. D. 180, 69 N. W. 49.

United States.— Metropolis Bank *v.* Jersey City First Nat. Bank, 19 Fed. 301.

But see Mills *v.* Philbin, 3 Rev. Lég. 255, where an indorsee and holder of a note for the purpose of collection is held to be a holder in due course.

14. *Colorado.*— Beach *v.* Bennett, (Colo. App. 1901) 66 Pac. 567.

Illinois.— Stevenson *v.* O'Neal, 71 Ill. 314.

Louisiana.— Maurin *v.* Chambers, 6 Rob. (La.) 62.

such indorsement is used it should be made in strict compliance with the technical rules of commercial law.[15]

(v) *Lis Pendens.* The doctrine of *lis pendens*, as constituting constructive notice to the purchaser, does not apply to negotiable paper purchased in good faith before maturity,[16] although to claim this immunity it is strictly essential that the paper possess the quality of negotiability,[17] and a party who buys negotiable paper with actual notice of the pendency of a suit affecting or contesting its legality will not be considered a *bona fide* holder.[18]

(vi) *Newspaper Publications.* The publication of a notice of an infirmity or defect concerning a negotiable instrument in a newspaper is not of itself constructive notice of such infirmity, and will affect one's character as a *bona fide* purchaser only where it can be shown that he is actually cognizant of such publication.[19] It has been held, however, that publications of this or of a similar

Massachusetts.— Goddard *v.* Lyman, 14 Pick. (Mass.) 268. But an indorsement of this sort made eight months after the note was due was held in a former case to be sufficient to put the purchaser upon inquiry. Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232. See also Bassett *v.* Daniels, 136 Mass. 547; Richardson *v.* Lincoln, 5 Metc. (Mass.) 201.

Michigan.— Borden *v.* Clark, 26 Mich. 410.

Minnesota.— Collins *v.* McDowell, 65 Minn. 110, 67 N. W. 845.

Missouri.— Mayes *v.* Robinson, 93 Mo. 114, 5 S. W. 611.

New York.— Russel *v.* Ball, 2 Johns. (N. Y.) 50, where, although the direct expression "without recourse" was not used in the instrument, the indorsement as a whole was of the same import.

Pennsylvania.— Epler *v.* Funk, 8 Pa. St. 468 [*approved* in Bisbing *v.* Graham, 14 Pa. St. 14, 53 Am. Dec. 510].

Wisconsin.— Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697.

15. Hatch *v.* Barrett, 34 Kan. 223, 8 Pac. 129.

16. *Alabama.*— Mayberry *v.* Morris, 62 Ala. 113; Winston *v.* Westfeldt, 22 Ala. 760, 58 Am. Dec. 278.

Georgia.— Mims *v.* West, 38 Ga. 18, 95 Am. Dec. 379.

Kansas.— State *v.* Wichita County, 59 Kan. 512, 53 Pac. 526.

Mississippi.— Madison County *v.* Paxton, 56 Miss. 679.

New York.— Leitch *v.* Willis, 48 N. Y. 585, applying the doctrine to stocks which, because of their ready circulation, had virtually assumed the province of commercial paper. See also Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441, where Chancellor Kent, applying the doctrine to an assignee of a bond and mortgage, expressed the opinion that the safety of commercial paper would require the limitation of the rule.

Ohio.— Stone *v.* Elliott, 11 Ohio St. 252.

Pennsylvania.— Hill *v.* Kroft, 29 Pa. St. 186; Kieffer *v.* Ehler, 18 Pa. St. 388.

Tennessee.— Matheny *v.* Hughes, 10 Heisk. (Tenn.) 401.

Texas.— Gannon *v.* Northwestern Nat. Bank, 83 Tex. 274, 18 S. W. 573.

Vermont.— Sawyer *v.* Phaley, 33 Vt. 69.

United States.— Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523; Carroll County *v.* Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. ed. 517; Cass County *v.* Gillett, 100 U. S. 585, 25 L. ed. 585; Warren County *v.* Marcy, 97 U. S. 96, 24 L. ed. 977; Myers *v.* Hazzard, 50 Fed. 155; Hill *v.* Scotland County, 34 Fed. 208; Marshall *v.* Elgin, 8 Fed. 783; *In re* Great Western Tel. Co., 5 Biss. (U. S.) 363, 10 Fed. Cas. No. 5,740; Durant *v.* Iowa County, 1 Woolw. (U. S.) 69, 8 Fed. Cas. No. 4,189.

17. Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

18. Applegarth *v.* Robertson, 65 Md. 493, 4 Atl. 896; Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78; Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Phelps *v.* Elliott, 35 Fed. 455; Hill *v.* Scotland County, 25 Fed. 395.

Notice of loss of instrument.— Where a bank has been notified by the treasury department of the loss of certain bonds or instruments having the character of negotiability, it is necessary that they make some note of the same whereby the identity of such paper may be recognized when it is presented and a bank disregarding this notice cannot be held to be a purchaser in good faith. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609. See also Raphael *v.* Bank of England, 17 C. B. 161, 25 L. J. C. P. 33, 4 Wkly. Rep. 10, 84 E. C. L. 161, where it was held that a party who received such a note twelve months after he had received notice of a robbery in which the note was procured, he having given reasonable value for the same, could not be said as a matter of law to be a holder in bad faith.

19. *Georgia.*— English-American L. & T. Co. *v.* Hiers, 112 Ga. 823, 38 S. E. 103.

Maryland.— Boyd *v.* McCann, 10 Md. 118.

Massachusetts.— Kellogg *v.* French, 15 Gray (Mass.) 354.

New Hampshire.—Clark *v.* Ricker, 14 N. H. 44.

New York.— Hagen *v.* Bowery Nat. Bank, 6 Lans. (N. Y.) 490.

Pennsylvania.— Beltzhoover *v.* Blackstock, 3 Watts (Pa.) 20, 27 Am. Dec. 330.

United States.— See Goetz *v.* Kansas City Bank, 119 U. S. 551, 7 S. Ct. 318, 30 L. ed. 515.

nature may be considered as evidence tending to show notice of such infirmities or defects in the instrument.[20]

(VII) *Occupation of Transferrer or Maker.* Inasmuch as commercial paper circulates upon the same plane as money and hence may legitimately find its way into the hands of almost any one, it follows that the occupation or profession of the transferrer is not of itself sufficient to put the purchaser on inquiry concerning the validity of the consideration or other defenses to the paper or to amount to *mala fides* on his part in taking it without inquiry.[21] Hence the fact that it is negotiated by an attorney[22] or broker,[23] or that the maker is a liquor-dealer,[24] is not sufficient to put the purchaser on notice.

(VIII) *Purchase From Stranger.* It has been said that no purchaser should buy paper from an entire stranger without using reasonable caution and making proper inquiry.[25] But while from the very nature of the function which negotiable paper performs this circumstance alone is not notice of fraud or irregularity it should, with other circumstances, be considered in determining the good faith of the purchaser.[26]

(IX) *Recitals in Collateral Paper.* If a note makes no reference to collateral securities the purchaser is not bound to make inquiries concerning the possible existence or nature of the same,[27] but where a note refers to, or is accompanied by, an assignment of collateral securities, or where the purchaser has knowledge of the same, he is charged with notice of their contents or conditions.[28] So where a note and mortgage refer respectively to each other the title of the purchaser would seem to be no stronger than that which could have been ascertained upon a proper examination.[29]

(X) *Relationship of Parties* — (A) *In General.* A party dealing in commercial paper has a right to assume that the relations of every party whose names appear upon it are precisely what they appear to be,[30] and if the paper is executed

England.— See Venables *v.* Baring, [1892] 3 Ch. 527, 61 L. J. Ch. 609, 67 L. T. Rep. N. S. 110, 40 Wkly. Rep. 699.

20. Merrill *v.* Hole, 85 Iowa 66, 52 N. W. 4.

21. See Sherman *v.* Blackman, 24 Ill. 345; Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316; Chapman *v.* Remington, 80 Mich. 552, 46 N. W. 34; Mitchell *v.* Catchings, 23 Fed. 710.

22. Greneaux *v.* Wheeler, 6 Tex. 515.

23. Redlon *v.* Churchill, 73 Me. 146, 40 Am. Rep. 345; Atlas Nat. Bank *v.* Savery, 127 Mass. 75; Gardner *v.* Gager, 1 Allen (Mass.) 502; American Exch. Nat. Bank *v.* New York Belting, etc., Co., 148 N. Y. 698, 43 N. E. 168; Parker *v.* Burgess, 5 R. I. 277.

24. Wright *v.* Wheeler, 72 Me. 278; Estabrook *v.* Boyle, 1 Allen (Mass.) 412; Bottomley *v.* Goldsmith, 36 Mich. 27.

25. Smith *v.* Mechanics', etc., Bank, 6 La. Ann. 610.

26. As where the purchaser buys the paper at a large discount, knows the maker, and could with reasonable diligence make inquiry of him. Auten *v.* Gruner, 90 Ill. 300; Sims *v.* Bice, 67 Ill. 88; Taylor *v.* Atchison, 54 Ill. 196, 5 Am. Rep. 118; Whaley *v.* Neill, 44 Mo. App. 316; Canajoharie Nat. Bank *v.* Diefendorf, 123 N. Y. 191, 25 N. E. 402, 33 N. Y. St. 389, 10 L. R. A. 676 [*reversing* 4 N. Y. Suppl. 262, 21 N. Y. St. 692]; Gould *v.* Stevens, 43 Vt. 125, 5 Am. Rep. 265.

27. Minell *v.* Reed, 26 Ala. 730; Ilslay *v.* Smedes, 7 N. Y. Suppl. 671, 26 N. Y. St. 938.

28. *Alabama.*— Owen *v.* Moore, 14 Ala. 640.

Illinois.— Ehrler *v.* Worthen, 47 Ill. App. 550.

Iowa.— Zebley *v.* Sears, 38 Iowa 507.

Michigan.—McNamara *v.* Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355; Mace *v.* Kennedy, 68 Mich. 389, 36 N. W. 187; Sutton *v.* Beckwith, 68 Mich. 303, 36 N. W. 79, 13 Am. St. Rep. 344.

Nebraska.— Norfolk Nat. Bank *v.* Nenow, 50 Nebr. 429, 69 N. W. 936.

Texas.— Brown *v.* Tom, (Tex. Civ. App. 1894) 26 S. W. 299.

Extent of notice.— Where a party causes a conveyance of land to be made to himself as security for a note which he purchases, the whole being in effect but one transaction, he will be charged with notice in regard to the notes with whatever the record brought to his knowledge in regard to the title to the realty. Packwood *v.* Gridley, 39 Ill. 388.

29. Strong *v.* Jackson, 123 Mass. 60, 25 Am. Rep. 19 [*approved* in Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680], which cases proceed upon the ground that a paper of this nature is not perhaps strictly speaking endowed with all the attributes and free from all the restrictions accorded purely commercial paper.

30. Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; Cheever *v.* Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69; Hoge *v.* Lansing, 35 N. Y. 136.

or indorsed by corporation officials presumed to have authority to act in such capacity a purchaser is not chargeable with notice of irregularity.[31] The identity or relationship of the parties in the transaction, together with other attendant circumstances, may be such, however, as to imply, or to charge the purchaser with notice of, fraud or irregularity and put him on inquiry.[32] Thus it may appear from the face of the paper or from the indorsement that a firm purports to act, not as a principal, but as a mere surety or guarantor,[33] as where for instance an instrument in the hands of the party primarily liable is indorsed in the name of a firm;[34] and a purchaser is charged where a corporate note or check is drawn

31. *Kansas.*— Mann *v.* Springfield Second Nat. Bank, 34 Kan. 746, 10 Pac. 150.

Massachusetts.— Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453.

Missouri.— Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 4 Mo. App. 276.

New York.— Atlantic State Bank *v.* Savery, 82 N. Y. 291; Ogden *v.* Andre, 4 Bosw. (N. Y.) 583.

United States.— Smyth *v.* Strader, 4 How. (U. S.) 404, 11 L. ed. 1031; American Exch. Nat. Bank *v.* Oregon Pottery Co., 55 Fed. 265; *Ex p.* Estabrook, 2 Lowell (U. S.) 547, 8 Fed. Cas. No. 4,534, 15 Alb. L. J. 271, 24 Pittsb. Leg. J. (Pa.) 152.

32. *Iowa.*— Galbraith *v.* McLaughlin, 91 Iowa 399, 39 N. W. 338.

Massachusetts.— Williams *v.* Cheney, 8 Gray (Mass.) 206.

Michigan.— Stevens *v.* Hannan, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125 [*affirmed* in 88 Mich. 13, 49 N. W. 874].

Missouri.— Meyer *v.* Withmar, 41 Mo. App. 397.

New York.— Railway Equipment, etc., Co. *v.* Lincoln Nat. Bank, 82 Hun (N. Y.) 8, 31 N. Y. Suppl. 44, 63 N. Y. St. 338; McElwee Mfg. Co. *v.* Trowbridge, 62 Hun (N. Y.) 471, 17 N. Y. Suppl. 3, 43 N. Y. St. 238; St. Nicholas Nat. Bank *v.* Savery, 45 N. Y. Super. Ct. 97; Smith *v.* Hall, 5 Bosw. (N. Y.) 319.

Pennsylvania.— Dickson *v.* Primrose, 2 Miles (Pa.) 366.

Vermont.— Roth *v.* Colvin, 32 Vt. 125.

Wisconsin.— Manny *v.* Glendinning, 15 Wis. 50.

United States.— Hamburg Bank *v.* Flynn, 38 Fed. 798; Cummings *v.* Mead, 6 Fed. Cas. No. 3,476, 6 Am. L. Reg. 51.

Purchase from accepter.— The authorities are divided upon the question as to whether the purchaser of a bill of exchange from the accepter is charged with notice by reason of the bill being offered by such party. The English courts hold that he is not, as a bill is not properly paid and satisfied according to its tenor, unless it be paid when due (Burbridge *v.* Manners, 3 Camph. 193, 13 Rev. Rep. 786; Morley *v.* Culverwell, 1 Hurl. & W. 13, 4 Jur. 1163, 10 L. J. Exch. 35, 7 M. & W. 174), and this view has been adopted in South Carolina (Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294), while in other states a contrary view has been taken upon the theory that the bill could only be in the accepter's hands for the purpose of acceptance or as a voucher after its payment by him (McKenzie *v.* Montgomery Branch Bank, 28 Ala. 606, 65 Am. Dec. 369; Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668; Central Bank *v.* Hammett, 50 N. Y. 158).

That the payee was a brother-in-law of the cashier of a bank which discounted a fraudulent note is not sufficient to overcome the presumption of good faith arising from the fact that such bank acquired the note before maturity and in due course of business. Stewart County Bank *v.* Adams, 96 Ga. 529, 23 S. E. 496.

33. In which case it is incumbent upon the purchaser to make inquiry as to whether or not the party so signing has authority to use his firm-name for such purpose.

Illinois.— Marsh *v.* Thompson Nat. Bank, 2 Ill. App. 217.

Iowa.— Whitmore *v.* Adams, 17 Iowa 567.

Massachusetts.—National Security Bank *v.* McDonald, 127 Mass. 82.

Michigan.— See Moynahan *v.* Hanaford, 42 Mich. 329, 3 N. W. 944.

Mississippi.— Bloom *v.* Helm, 53 Miss. 21.

New York.— Bank of Vergennes *v.* Cameron, 7 Barb. (N. Y.) 143; Rochester Bank *v.* Bowen, 7 Wend. (N. Y.) 158.

United States.— Lemoine *v.* Bank of North America, 3 Dill. (U. S.) 44, 15 Fed. Cas. No. 8,240, 1 Centr. L. J. 529, 7 Chic. Leg. N. 18, 20 Int. Rev. Rec. 153, 22 Pittsb. Leg. J. 47.

34. *Alabama.*— Noble *v.* Walker, 32 Ala. 456.

California.— Hendrie *v.* Berkowitz, 37 Cal. 113, 99 Am. Dec. 251.

Michigan.— Mechanics' Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475.

Mississippi.— Bloom *v.* Helm, 53 Miss. 21 [*distinguished* in Columbus Ins., etc., Co. *v.* Columbus First Nat. Bank, 73 Miss. 96, 15 So. 138].

New York.— National Park Bank *v.* German-American Mut. Warehouse, etc., Co., 116 N. Y. 281, 22 N. E. 567, 26 N. Y. St. 675, 5 L. R. A. 673 [*reversing* 53 N. Y. Super. Ct. 367]; Stall *v.* Catskill Bank, 18 Wend. (N. Y.) 478 [*distinguished* in Austin *v.* Vandermark, 4 Hill (N. Y.) 259].

Pennsylvania.— See Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435.

Accommodation inferred from position of the names of parties thereon.— The fact that the name of the party for whose accommodation a negotiable note was made appears last on the back of the note is not notice of its accommodation character. Farmers', etc.,

by one of the corporation officers to his own order, for his own benefit,[35] or to a fellow officer, and used for the personal benefit of the latter;[36] but this principle does not apply where the officer or agent negotiates a note executed by himself, if it is originally payable to a third party and it appears upon its face to have been regularly issued to him and transferred by him to the firm of which the officer is a member.[37]

(B) *Partnership Notes.* Not only would the receipt of a partnership note, knowingly received for the individual debt of a partner, affect the *bona fides* of the purchaser, if he made no further inquiries,[38] but a partnership indorsement on a note negotiated by a maker and member of the firm has been held sufficient to charge a purchaser with constructive notice that the debt is that of the individual.[39] A promissory note drawn by a member of a firm in the individual names of the partners instead of in their partnership name is sufficient to put a purchaser on inquiry,[40] but the fact that a member of a firm is made a payee is not of itself notice,[41] and the fact that the note was made by a partner to

Sav. Inst. *v.* Garesche, 12 Mo. App. 584. So where a draft payable to the order of the indorser was indorsed specially to defendant, and by him indorsed in blank and cashed by plaintiff for another corporation, whose indorsement was written above the indorsement of defendant, it was held that the position of the indorsements was not notice that defendant was an accommodation indorser. Marshall Nat. Bank *v.* O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344. See also Merchants' Nat. Bank *v.* McNeir, 51 Minn. 123, 53 N. W. 178; Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435.

35. *California.*— Smith *v.* Los Angeles Immigration, etc., Assoc., 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53.

Kentucky.— Chemical Nat. Bank *v.* Wagner, 93 Ky. 525, 14 Ky. L. Rep. 510, 20 S. W. 535, 40 Am. St. Rep. 206.

Missouri.— Lee *v.* Smith, 84 Mo. 304, 54 Am. Rep. 101.

New York.— Cheever *v.* Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69; Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293 [*reversing* 36 Barb. (N. Y.) 540]; Huie *v.* Allen, 87 Hun (N. Y.) 516, 34 N. Y. Suppl. 577, 68 N. Y. St. 641. See also Stainer *v.* Tysen, 3 Hill (N. Y.) 279. But see Goshen Nat. Bank *v.* State, 141 N. Y. 379, 36 N. E. 316, 57 N. Y. St. 597, where, however, it seems to have been within the power of the cashier who drew the draft in question to draw drafts for himself on the same terms as in due course of business he drew drafts for others.

North Dakota.— Security Bank *v.* Kingsland, 5 N. D. 263, 65 N. W. 697.

36. Chemical Nat. Bank *v.* Wagner, 93 Ky. 525, 14 Ky. L. Rep. 510, 20 S. W. 535, 40 Am. St. Rep. 206.

37. Cheever *v.* Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69.

38. *Alabama.*— Tyree *v.* Lyon, 67 Ala. 1.

Colorado.— Rocky Mountain Nat. Bank *v.* McCaskill, 16 Colo. 408, 26 Pac. 821.

Connecticut.— New York Firemen Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109.

Massachusetts.— Eastman *v.* Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600.

Missouri.— Johnson *v.* Suburban Realty Co., 62 Mo. App. 156.

New Jersey.— Mecutchen *v.* Kennady, 27 N. J. L. 230.

New York.— Wilson *v.* Metropolitan El. R. Co., 120 N. Y. 145, 24 N. E. 384, 30 N. Y. St. 787, 17 Am. St. Rep. 625 [*affirming* 14 Daly (N. Y.) 171, 6 N. Y. St. 234]; Spaulding *v.* Kelly, 43 Hun (N. Y.) 301; Union Nat. Bank *v.* Underhill, 21 Hun (N. Y.) 178; Atlantic State Bank *v.* Savery, 18 Hun (N. Y.) 36; Elliott *v.* Dudley, 19 Barb. (N. Y.) 326; Gansevoort *v.* Williams, 14 Wend. (N. Y.) 133; Livingston *v.* Hastie, 2 Cai. (N. Y.) 246. See also Hotchkiss *v.* English, 4 Hun (N. Y.) 369, 6 Thomps. & C. (N. Y.) 658.

Pennsylvania.—Potts *v.* Taylor, 140 Pa. St. 601, 21 Atl. 443; King *v.* Faber, 22 Pa. St. 21.

England.— *Ex p.* Agace, 2 Cox Ch. 312; Arden *v.* Sharpe, 2 Esp. 524, 5 Rev. Rep. 748; *Ex p.* Bonbonus, 8 Ves. Jr. 540.

39. *Kansas.*— See Barber *v.* Van Horn, 54 Kan. 33, 36 Pac. 1070.

Massachusetts.—National Bank *v.* Law, 127 Mass. 72. See also National Security Bank *v.* McDonald, 127 Mass. 82.

Michigan.— Mechanics' Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475.

Mississippi.— Bloom *v.* Helm, 53 Miss. 21.

New Jerscy.— Mecutchen *v.* Kennady, 27 N. J. L. 230.

New York.— Livingston *v.* Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273.

Pennsylvania.— Brown *v.* Pettit, 178 Pa. St. 17, 35 Atl. 865, 56 Am. St. Rep. 742, 34 L. R. A. 723; Tanner *v.* Hall, 1 Pa. St. 417.

United States.— National Park Bank *v.* Remsen, 43 Fed. 226.

Canada.— Creighton *v.* Halifax Banking Co., 18 Can. Supreme Ct. 140.

Contra, Redlon *v.* Churchill, 73 Me. 146, 40 Am. Rep. 345.

40. Lucker *v.* Iba, 54 N. Y. App. Div. 566, 66 N. Y. Suppl. 1019.

41. *Indiana.*— Thompson *v.* Lowe, 111 Ind. 272, 12 N. E. 476.

his firm and was discounted for such firm will not affect the good faith of the holder.[42]

(XI) *Disabilities of Parties.* A purchaser of commercial paper is said to take it with constructive notice of the legal disabilities of the parties thereto, such as insanity or infancy,[43] although it has been held that mere knowledge of the infancy of the indorser[44] or knowledge that the maker was dead[45] or was a married woman[46] will not preclude him from claiming as a *bona fide* holder.

c. By Whom Received — Agent. Notice of defenses or equities in the transfer of commercial paper falls under the general rule that notice to an agent is notice to the principal.[47]

B. What Law Governs. The question whether a purchaser is a *bona fide* holder involves the contractual rights and obligations of the parties and does not relate merely to the remedy and procedure employed for the performance of the obligation.[48] Hence such questions will be determined by the *lex loci contractus* and not by the *lex fori*.[49]

X. PRESENTMENT FOR PAYMENT AND DEMAND.

A. Necessity For — 1. In General — a. To Fix Liability of Indorser — (I) *In General* **— (A)** *Rule Stated.* As a general rule presentment for payment and

Massachusetts.— See Stimson *v.* Whitney, 130 Mass. 591.

Michigan.— Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627.

Missouri.— Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299.

Pennsylvania.— Haldeman *v.* Middletown Bank, 28 Pa. St. 440, 70 Am. Dec. 142; Ihmsen *v.* Negley, 25 Pa. St. 297.

United States.— U. S. National Bank *v.* Little Rock First Nat. Bank, 64 Fed. 985, 27 U. S. App. 605, 13 C. C. A. 472.

Compare Simrall *v.* O'Bannons, 7 B. Mon. (Ky.) 608.

That the signatures of a partner and of the partnership name are all in the handwriting of such partner is not of itself sufficient to awaken suspicion that the partner was making an improper use of the partnership name or to make it the duty of a purchaser to inquire into the regularity of the transaction. Lincoln Nat. Bank *v.* Schoen, 56 Mo. App. 160; Miller *v.* Consolidation Bank, 48 Pa. St. 514, 88 Am. Dec. 475.

42. Atlas Nat. Bank *v.* Savery, 127 Mass. 75. See also Parker *v.* Burgess, 5 R. I. 277.

43. McClain *v.* Davis, 77 Ind. 419.

44. Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

45. Clark *v.* Thayer, 105 Mass. 216, 7 Am. Rep. 511.

46. Erwin *v.* McDowns, 15 N. Y. 575, which decision rests upon the proposition that an indorsement imports a guaranty that the makers were competent to contract.

47. *Connecticut.*— Roberts *v.* Hall, 37 Conn. 205, 9 Am. Rep. 308.

Illinois.— Neil *v.* Cummings, 75 Ill. 170.

Iowa.— Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076.

Louisiana.— Dumartrait *v.* Kemper, 28 La. Ann. 620; Sinnot *v.* Barrow, 22 La. Ann. 201.

Maine.— Goodrich *v.* Buzzell, 40 Me. 500.

Maryland.— Devries *v.* Shumate, 53 Md. 211.

Minnesota.— National Citizens' Bank *v.* Ertz, 83 Minn. 12, 85 N. W. 821, 85 Am. St. Rep. 438, 53 L. R. A. 174.

Missouri.— Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Livermore *v.* Blood, 40 Mo. 48; Mackey *v.* Basil, 50 Mo. App. 190.

Nebraska.— Sanders *v.* Wedeking, 47 Nebr. 71, 66 N. W. 18.

Vermont.— Kelly *v.* Pember, 35 Vt. 183.

Wisconsin.—Knott *v.* Tidyman, 86 Wis. 164, 56 N. W. 632; Brothers *v.* Kaukauna Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Manufacturers' Nat. Bank *v.* Newall, 71 Wis. 309, 37 N. W. 420.

United States.— Pease *v.* McClelland, 2 Bond (U. S.) 42, 19 Fed. Cas. No. 10,882; Mason *v.* Jones, 1 Hayw. & H. (U. S.) 323, 16 Fed. Cas. No. 9,239.

England.— De la Chaumette *v.* Bank of England, 9 B. & C. 208, 17 E. C. L. 100; Oakeley *v.* Ooddeen, 2 F. & F. 656.

Where the payee takes in the capacity of agent he is not a *bona fide* holder, even though he afterward becomes the real owner of such paper and has no knowledge of any defenses against it. Boit *v.* Whitehead, 50 Ga. 76.

Notice to agent as notice to principal see Principal and Agent.

Notice to officer as notice to corporation see Banks and Banking, 5 Cyc. 460 *et seq.*; Corporations.

Notice to partner as notice to firm see Partnership.

48. Limerick Nat. Bank *v.* Howard, 71 N. H. 13, 51 Atl. 641.

49. *Connecticut.*— Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.

Louisiana.— Barrett *v.* Walker, 14 La. 303.

Mississippi.—Allen *v.* Bratton, 47 Miss. 119.

New Hampshire.— Limerick Nat. Bank *v.* Howard, 71 N. H. 13, 51 Atl. 641.

Tennessee.— King *v.* Doolittle, 1 Head (Tenn.) 77.

demand are essential to fix the liability of indorsers of any negotiable instrument unless waived [50] or unless facts exist which constitute a sufficient excuse for non-presentment,[51] even though in some jurisdictions he may not be damaged by the

Vermont.— Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364.

United States.— See Tilden *v.* Blair, 21 Wall. (U. S.) 241, 22 L. ed. 632.

50. *Alabama.*— Moody *v.* Keller, 127 Ala. 630, 29 So. 68; Crenshaw *v.* McKiernan, Minor (Ala.) 295; Ward *v.* Gifford, Minor (Ala.) 5.

Arizona.— Johnson *v.* Zeckendorf, (Ariz. 1886) 12 Pac. 65.

Arkansas.— Winston *v.* Richardson, 27 Ark. 34; White *v.* Cannada, 25 Ark. 41; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212; Ruddell *v.* Walker, 7 Ark. 457.

California.— Eastman *v.* Turman, 24 Cal. 379.

Connecticut.— Dwight *v.* Scovil, 2 Conn. 654.

Delaware.— Wilmington Bank *v.* Cooper, 1 Harr. (Del.) 10.

District of Columbia.—Preshrey *v.* Thomas, 1 App. Cas. (D. C.) 171.

Florida.— Guild *v.* Goldsmith, 9 Fla. 212.

Idaho.— Ankeny *v.* Henry, 1 Ida. 229.

Illinois.— Thayer *v.* Peck, 84 Ill. 74; Kimmel *v.* Weil, 95 Ill. App. 15; Edwards *v.* Shields, 7 Ill. App. 70; Burritt *v.* Tidmarsh, 5 Ill. App. 341.

Iowa.— Leonard *v.* Olson, 99 Iowa 162, 68 N. W. 677, 61 Am. St. Rep. 230, 35 L. R. A. 381; Pryor *v.* Bowman, 38 Iowa 92; Keater *v.* Hock, 11 Iowa 536 (holding that Iowa Code (1853), c. 108, § 3, revived the necessity of demand to hold the indorser of a negotiable note which had been unnecessary under Iowa Code (1851), § 955); Nollen *v.* Wisner, 11 Iowa 190.

Kansas.— Couch *v.* Sherill, 17 Kan. 622.

Kentucky.— Farmers', etc., Bank *v.* Small, 2 T. B. Mon. (Ky.) 88; Weil *v.* Sturgus, 23 Ky. L. Rep. 644, 63 S. W. 602; Slack *v.* Longshaw, 8 Ky. L. Rep. 166.

Louisiana.— Otto *v.* Belden, 28 La. Ann. 302; Union Ins. Co. *v.* Rodd, 26 La. Ann. 715; Van Wickle *v.* Downing, 19 La. Ann. 83.

Maryland.— Brandt *v.* Mickle, 28 Md. 436; Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78; Day *v.* Lyon, 6 Harr. & J. (Md.) 140.

Massachusetts.— Wylie *v.* Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; Carley *v.* Vance, 17 Mass. 389; Copp *v.* McDugall, 9 Mass. 1.

Minnesota.— Coon *v.* Pruden, 25 Minn. 105, where the note was made by a partner and indorsed by his firm.

Mississippi.— Moore *v.* Brungard, 5 How. (Miss.) 557, although the indorser indorsed in payment of property in the purchase of which he was jointly interested.

Missouri.— Napper *v.* Blank, 54 Mo. 131; Plahto *v.* Patchin, 26 Mo. 389.

New Hampshire.— Piscataqua Exch. Bank *v.* Carter, 20 N. H. 246, 51 Am. Dec. 217; Lawrence *v.* Langley, 14 N. H. 70; Dennie *v.* Walker, 7 N. H. 199; Otis *v.* Hussey, 3 N. H. 346.

New York.— Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685; Cayuga County Bank *v.* Warden, 1 N. Y. 413; Kelly *v.* Theiss, 65 N. Y. App. Div. 146, 72 N. Y. Suppl. 467; Storp *v.* Harbutt, 4 E. D. Smith (N. Y.) 464; Filler *v.* Gallantcheck, 66 N. Y. Suppl. 509; Berry *v.* Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267.

North Carolina.— Farrow *v.* Respess, 33 N. C. 170.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75; Hudson *v.* Walcott, 4 Ohio Dec. (Reprint) 459, 2 Clev. L. Rep. 194.

Pennsylvania.— Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202; Jackson *v.* Newton, 8 Watts (Pa.) 401; Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480.

South Carolina.— Kilpatrick *v.* Heaton, 3 Brev. (S. C.) 92.

Texas.— Forrest *v.* Rawlins, 35 Tex. 626 (sight draft); Green *v.* Elson, 31 Tex. 159.

Utah.— Hamer *v.* Brainerd, 7 Utah 245, 26 Pac. 299, 12 L. R. A. 434.

Virginia.— Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.— Cox *v.* New York State Nat. Bank, 100 U. S. 704, 25 L. ed. 739; Magruder *v.* Union Bank, 3 Pet. (U. S.) 87, 7 L. ed. 612; French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576; Alexandria Bank *v.* Deneale, 2 Cranch C. C. (U. S.) 488, 2 Fed. Cas. No. 846; Alexandria Bank *v.* Young, 2 Cranch C. C. (U. S.) 52, 2 Fed. Cas. No. 858; Offutt *v.* Hall, 1 Cranch C. C. (U. S.) 504, 18 Fed. Cas. No. 10,449 (holding that an indorser who promised to pay in case of insolvency of the maker is entitled to the usual demand); January *v.* Duncan, 3 McLean (U. S.) 19, 13 Fed. Cas. No. 7,217.

England.— Peacock *v.* Pursell, 14 C. B. N. S. 728, 10 Jur. N. S. 178, 32 L. J. C. P. 266, 8 L. T. Rep. N. S. 636, 11 Wkly. Rep. 834, 108 E. C. L. 728.

Canada.— Siddall *v.* Gibson, 17 U. C. Q. B. 98; Browne *v.* Commercial Bank, 10 U. C. Q. B. 129; Davis *v.* Dunn, 6 U. C. Q. B. 327; Truscott *v.* Lagourge, 5 U. C. Q. B. O. S. 134.

See 7 Cent. Dig. tit. "Bills and Notes," § 997.

51. Thayer *v.* Peck, 84 Ill. 74; Long *v.* Stephenson, 72 N. C. 569.

Excuses for failure to present see *infra*, XIII, H.

Under a statute so providing as to certain notes and bills issued by a bank without authority, a holder may recover from those personally interested in the company without proof of demand and notice, and the payee and the first indorser are liable without demand on the drawee. Watson *v.* Brown, 14 Ohio 473.

want of such presentment demand of payment,[52] and although the note was payable to bearer[53] or on demand.[54] In the case of non-negotiable paper, however, the indorser or assignor has been held liable on his indorsement or assignment without demand of payment on the maker,[55] although there is authority to the contrary,[56] and demand is not required to charge an indorser where there is a forged prior indorsement.[57] Nor does presentment to a nominal maker of a note seem to be necessary in order to hold an indorser who is regarded as the original maker.[58]

(B) *Paper Payable in Instalments.* If commercial paper is payable in instalments demand of each instalment must be made to preserve the liability of the indorser.[59]

(II) *Accommodation Indorser.* An accommodation indorser for the maker of a note is entitled to have demand made in the usual time,[60] but an indorser for whose accommodation a paper is made is not entitled to formal demand,[61]

52. Minehart *v.* Handlin, 37 Ark. 276; Hill *v.* Martin, 12 Mart. (La.) 177. 13 Am. Dec. 372. *Contra,* Smith *v.* Miller, 52 N. Y. 545; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94.

Presumption of injury.— In jurisdictions where failure to demand payment will not discharge a drawer or indorser if he was not injured, injury will be presumed from the omission until it is affirmatively proved that no injury could have resulted. Smith *v.* Miller, 52 N. Y. 545; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94.

53. Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

54. Although at the time of taking the note plaintiff said to the indorser that he would not take it unless the indorser would pay it and that he would look to no one else. Davis *v.* Gowen, 19 Me. 447; Good *v.* Arrowsmith, Anth. N. P. (N. Y.) 289.

Where the maker of a demand note dies before demand made, presentment of the note to his administrator for allowance as a claim against the estate is not a sufficient demand of payment. Chase *v.* Evoy, 49 Cal. 467.

55. *Georgia.*— Gilbert *v.* Seymour, 44 Ga. 63.

Iowa.— Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244; Billingham *v.* Bryan, 10 Iowa 317; Peddicord *v.* Whittam, 9 Iowa 471; Wilson *v.* Ralph, 3 Iowa 450; Long *v.* Smyser, 3 Iowa 266.

New York.— Newman *v.* Frost, 52 N. Y. 422; Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576 [*followed* in Cromwell *v.* Hewitt, 40 N. Y. 491, 100 Am. Dec. 527]; White *v.* Low, 7 Barb. (N. Y.) 204; Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403.

Virginia.— Broun *v.* Hull, 33 Gratt. (Va.) 23.

United States.— Ish *v.* Mills, 1 Cranch C. C. (U. S.) 567, 13 Fed. Cas. No. 7,104.

England.— Plimley *v.* Westley, 2 Bing. N. Cas. 249, 1 Hodges 324, 5 L. J. C. P. 51, 2 Scott 423, 29 E. C. L. 523.

56. Hart *v.* Eastman, 7 Minn. 74; Draper *v.* Sharp, 1 Pittsb. (Pa.) 478; Aldis *v.* Johnson, 1 Vt. 136. See also Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035 (holding that if the indorsement shows an intent to treat the same as an indorsement of a negotiable note, demand on the maker of the non-negotiable note is necessary); Parker *v.* Riddle, 11 Ohio 102 (holding that where a stranger indorses a non-negotiable note he is a guarantor and is entitled to demand).

57. Harrison *v.* Smith, 2 Tex. App. Civ. Cas. § 396.

The indorser of a forged bill is liable for the consideration which has failed without proof of demand. Hamer *v.* Brainerd, 7 Utah 245, 26 Pac. 299, 12 L. R. A. 434.

58. Massey *v.* Turner, 2 Houst. (Del.) 79; Western Boatmen's Benev. Assoc. *v.* Wolff, 45 Mo. 104; Miller *v.* Clendenin, 42 W. Va. 416, 26 S. E. 512.

59. Eastman *v.* Turman, 24 Cal. 379.

60. *Arkansas.*— Perry *v.* Friend, 57 Ark. 437, 21 S. W. 1065, where the name of the accommodation indorser appeared on the back of the note after that of the payee.

Louisiana.— Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267; Braux *v.* Le Blanc, 10 La. Ann. 97.

Maine.— Rea *v.* Dorrance, 18 Me. 137.

New Jersey.— Perry *v.* Green, 19 N. J. L. 61, 38 Am. Dec. 536.

New York.— Bradford *v.* Corey, 5 Barb. (N. Y.) 461, 4 How. Pr. (N. Y.) 161.

North Carolina.— Smith *v.* McLean, 4 N. C. 509, 7 Am. Dec. 693.

Rhode Island.— Sawyer *v.* Brownell, 13 R. I. 141, 43 Am. Rep. 19.

England.— Nicholson *v.* Gouthit, 2 H. Bl. 609, holding that an indorser merely for the purpose of security was entitled to presentment for payment.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 999, 1005.

61. Morris *v.* Birmingham Nat. Bank, 93 Ala. 511, 9 So. 606; Torrey *v.* Foss, 40 Me. 74; Shriner *v.* Keller, 25 Pa. St. 61; American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492; Black *v.* Fizer, 10 Heisk. (Tenn.) 48.

So if maker and indorser have left the country together before the maturity of the note. Reid *v.* Morrison, 2 Watts & S. (Pa.) 401. See also Susquehanna Valley Bank *v.*

and this is true as to an accommodation indorser who had received the benefit of the note.[62]

(III) *INDORSER BEFORE DELIVERY.* The rule as to one who indorses a note before its delivery varies in the different states, according to the character there given to such indorser,[63] but where he is held to be an indorser it has been decided that he is entitled to have the note duly presented to the maker.[64]

(IV) *INDORSER AFTER MATURITY OR DISHONOR.* Although a note is indorsed after it is overdue the indorser as a rule is entitled to have demand made upon the maker within a reasonable time,[65] although at the time of the

Loomis, 85 N. Y. 207, 39 Am. Rep. 652 [*affirming* 19 Hun (N. Y.) 230].

62. Holman *v.* Whiting, 19 Ala. 703.

63. Contract of anomalous or irregular indorsee see *supra*, II, B, 6.

64. Hooks *v.* Anderson, 58 Ala. 238, 29 Am. Rep. 745; Kamm *v.* Holland, 2 Oreg. 59.

65. *Alabama.*— Montgomery State Branch Bank *v.* Gaffney, 9 Ala. 153; Adams *v.* Torbert, 6 Ala. 865; Kennon *v.* McRea, 7 Port. (Ala.) 175; Kennon *v.* McRae, 3 Stew. & P. (Ala.) 249.

Arkansas.— Levy *v.* Drew, 14 Ark. 334; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California.— Beer *v.* Clifton, 98 Cal. 323, 33 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 580 (the only difference being as to the time when demand must be given); Beebe *v.* Brooks, 12 Cal. 308.

Connecticut.— Lockwood *v.* Crawford, 18 Conn. 361 (a demand note); Bishop *v.* Dexter, 2 Conn. 419.

Florida.— Bemis *v.* McKenzie, 13 Fla. 553; Guild *v.* Goldsmith, 9 Fla. 212.

Illinois.— Kimmel *v.* Weil, 95 Ill. App. 15.

Indiana.— Norvell *v.* Hittle, 23 Ind. 346.

Iowa.— Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250; Jones *v.* Middleton, 29 Iowa 188.

Kansas.— Shelby *v.* Judd, 24 Kan. 161; Swartz *v.* Redfield, 13 Kan. 550.

Louisiana.—Roquest *v.* Pickett, 20 La. Ann. 546; McCall *v.* Witkouski, 16 La. Ann. 179; Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372.

Maine.— Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478; Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108; Greely *v.* Hunt, 21 Me. 455.

Maryland.— Dixon *v.* Clayville, 44 Md. 573.

Massachusetts.— Colt *v.* Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584; Field *v.* Nickerson, 13 Mass. 131.

Minnesota.— Hart *v.* Eastman, 7 Minn. 74.

Missouri.—Light *v.* Kingsbury, 50 Mo. 331; Armstrong *v.* Armstrong, 36 Mo. 225.

New Hampshire.— Dwight *v.* Emerson, 2 N. H. 159.

New York.— Susquehanna Valley Bank *v.* Loomis, 85 N. Y. 207, 39 Am. Rep. 652; Leavitt *v.* Putnam, 1 Sandf. (N. Y.) 199; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75 [*distinguished* in Lockwood *v.* Crawford, 18 Conn. 361]; Berry *v.* Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267; Strong *v.* Duke, 5 Alb. L. J. 250.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75; Hudson *v.* Walcott, 4 Ohio Dec. (Reprint) 459, 2 Clev. L. Rep. 194 [*reversed* on other grounds in 39 Ohio St. 618].

Oregon.— Smith *v.* Caro, 9 Oreg. 278.

Pennsylvania.— Tyler *v.* Young, 30 Pa. St. 143; Patterson *v.* Todd, 18 Pa. St. 426, 57 Am. Dec. 622; Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 264; McKinney *v.* Crawford, 8 Serg. & R. (Pa.) 351; Campbell *v.* Carman, 1 Phila. (Pa.) 283, 9 Leg. Int. (Pa.) 2. But see Jordan *v.* Hurst, 12 Pa. St. 269; Leidy *v.* Tammany, 9 Watts (Pa.) 353; Bank of North America *v.* Barriere, 1 Yeates (Pa.) 360.

South Carolina.— Gray *v.* Bell, 2 Rich. (S. C.) 67, 44 Am. Dec. 277 (whether payable to bearer or order); Chadwick *v.* Jeffers, 1 Rich. (S. C.) 397, 44 Am. Dec. 260; Allwood *v.* Haseldon, 2 Bailey (S. C.) 457; Stockman *v.* Riley, 2 McCord (S. C.) 398; Poole *v.* Tolleson, 1 McCord (S. C.) 199, 10 Am. Dec. 663; Ecfert *v.* Des Coudres, 1 Mill (S. C.) 69, 12 Am. Dec. 609.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Union Bank *v.* Ezell, 10 Humphr. (Tenn.) 385; Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158; Stothart *v.* Lewis, 1 Overt. (Tenn.) 255.

Texas.— Winston *v.* Kelley, 33 Tex. 354.

Vermont.— Landon *v.* Bryant, 69 Vt. 203, 37 Atl. 297; Verder *v.* Verder, 63 Vt. 38, 21 Atl. 611; Aldis *v.* Johnson, 1 Vt. 136; Nash *v.* Harrington, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

Wisconsin.— Corwith *v.* Morrison, 1 Pinn. (Wis.) 489.

United States.— Cox *v.* Jones, 2 Cranch C. C. (U. S.) 370, 6 Fed. Cas. No. 3,303; Stewart *v.* French, 2 Cranch C. C. (U. S.) 300, 23 Fed. Cas. No. 13,427.

Canada.— Davis *v.* Dunn, 6 U. C. Q. B. 327; Truscott *v.* Lagourge, 5 U. C. Q. B. O. S. 134.

See 7 Cent. Dig. tit. "Bills and Notes," § 1009.

And see *infra*, X, B, 2.

Although the indorsement contained a guaranty, this is required. Colt *v.* Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584; Benton *v.* Gibson, 1 Hill (S. C.) 56.

Where a note is negotiated before maturity, and on its maturity is duly presented for payment and notice of dishonor given to the indorser and is afterward again negotiated by the holder, the last indorsee not only acquires the title to the note so that he can maintain a suit upon it in his own name,

indorsement he knew the maker to be insolvent [66] or at the time of transfer a suit on the note was pending in his name against the maker,[67] and the rule applies to non-negotiable paper [68] and to paper transferred by delivery.[69] The rule is subject to certain qualifications, however, dependent upon the character of the indorsement or other factors.[70]

b. To Fix Liability of Accepter or Maker — (1) *In General.* As a rule, in the absence of a statute, presentment or demand is not necessary to hold the accepter of a bill or maker of a promissory note payable generally, even when he is an accommodation accepter or maker.[71] This is true in most jurisdictions, even

but he also has the benefit of the original demand and notice, and it is not necessary that he shall make a new demand upon the maker for payment and give notice of non-payment to the indorser. French *v.* Jarvis, 29 Conn. 347. See also Airy *v.* Nelson, 39 Ark. 43; St. John *v.* Roberts, 31 N. Y. 441, 88 Am. Dec. 287 [*reversing* 6 Bosw. (N. Y.) 593]; Williams *v.* Matthews, 3 Cow. (N. Y.) 252.

66. Stewart *v.* French, 2 Cranch C. C. (U. S.) 300, 23 Fed. Cas. No. 13,427.

67. Bishop *v.* Dexter, 2 Conn. 419.

68. Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158.

69. Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108.

70. *Connecticut.*— French *v.* Jarvis, 29 Conn. 347, holding that a new demand on the maker is unnecessary, after the note is dishonored and negotiated, there having been an original demand and notice.

Iowa.— Hall *v.* Monohan, 6 Iowa 216, 71 Am. Dec. 204, holding that demand on the maker is unnecessary where the payee of an overdue note and an indorser of the same stand in the relation of principal and agent.

Kansas.— Shelby *v.* Judd, 24 Kan. 161, holding demand unnecessary where the payee indorses a note after maturity but retains possession until suit is brought against the maker.

Missouri.— Picklar *v.* Harlan, 75 Mo. 678, holding demand unnecessary where one indorses a negotiable note after maturity and after the death of the maker, knowing of his death.

Pennsylvania.— Williams *v.* Brobst, 10 Watts (Pa.) 111, holding demand on maker unnecessary where the indorser and holder had agreed to extend the time.

South Carolina.— Coleman *v.* Dunlap, 18 S. C. 591, holding demand unnecessary against an indorser who takes up a note and reissues it before maturity.

Where a note is indorsed after its maturity with protest attached to it further demand of payment has been held to be unnecessary. Williams *v.* Matthews, 3 Cow. (N. Y.) 252. See also St. John *v.* Roberts, 31 N. Y. 441, 88 Am. Dec. 287 [*reversing* 6 Bosw. (N. Y.) 593].

71. *Alabama.*— Steiner *v.* Jeffries, 118 Ala. 573, 24 So. 37; Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387; Sims *v.* National Commercial Bank, 73 Ala. 248; Cleaver *v.* Patterson, 14 Ala. 387 (holding that a note reciting that the maker has received from the payee a certain amount of money, "which I am to account for," constitutes an absolute indebtedness, on which action may be maintained without previous demand); Montgomery *v.* Elliott, 6 Ala. 701; Henderson *v.* Howard, 2 Ala. 342.

California.— Jones *v.* Nicholl, 82 Cal. 32, 22 Pac. 878; Machado *v.* Fernandez, 74 Cal. 362, 16 Pac. 19.

Colorado.— Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021.

Connecticut.— Jackson *v.* Packer, 13 Conn. 342; Eldred *v.* Hawes, 4 Conn. 465.

District of Columbia.— Wilkins *v.* McGuire, 2 App. Cas. (D. C.) 448, although it is expressly provided for as between maker and payee.

Florida.— Greeley *v.* Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286.

Georgia.— Carlton *v.* White, 99 Ga. 384, 27 S. E. 704; Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761; Cox *v.* Mechanics' Sav. Bank, 28 Ga. 529.

Illinois.— Yeaton *v.* Berney, 62 Ill. 61; Armstrong *v.* Caldwell, 2 Ill. 546.

Indiana.— Dunkle *v.* Nichols, 101 Ind. 473; Hinkley *v.* St. Louis Fourth Nat. Bank, 77 Ind. 475; Trammel *v.* Chipman, 74 Ind. 474 (although the note is made payable on condition of certain events happening); McCullough *v.* Cook, 34 Ind. 290; Indiana, etc., R. Co. *v.* Davis, 20 Ind. 6, 83 Am. Dec. 303.

Kentucky.— Rice *v.* Hogan, 8 Dana (Ky.) 133.

Maine.— Heslan *v.* Bergeron, 94 Me. 395, 47 Atl. 896, holding that a note payable at a bank and not payable on demand, or demand after date, need not be presented at the bank before the commencement of an action, and that this rule is not altered by Me. Rev. Stat. c. 32, § 10, providing that in an action on a note payable at a place certain on demand, or demand after a time specified, plaintiff cannot recover unless he proves a demand made at the place of payment prior to the commencement of the suit.

Maryland.— Key *v.* Knott, 9 Gill & J. (Md.) 342, although the paper is made by a bank payable in future and circulating as money.

Massachusetts.— Carley *v.* Vance, 17 Mass. 389.

Michigan.—McIntyre *v.* Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Mississippi.— Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432.

Missouri.— Henshaw *v.* Liberty Mar., etc.,

where the time and place of payment are specified in the instrument,[72] although in such case the maker or accepter may set up, as a matter of defense so far as costs and damages are concerned, the fact that he was prepared with funds and ready to make payment of the paper at the time and place specified and that the

Ins. Co., 9 Mo. 336, although the note is payable in a certain paper currency.

New Hampshire.— See Gay *v.* Haseltine, 18 N. H. 530, holding that one who has accepted an order to pay when in funds from a particular source is liable without demand as soon as the funds are in his hands.

New York.— Cottle *v.* Buffalo Mar. Bank, 166 N. Y. 53, 59 N. E. 736; Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685; Wheeler *v.* Warner, 47 N. Y. 519, 7 Am. Rep. 478; Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252 (although the note is secured by collateral to be delivered to the debtor on payment of the note); Finch *v.* Skilton, 79 Hun (N. Y.) 531, 29 N. Y. Suppl. 925, 61 N. Y. St. 544; Hirst *v.* Brooks, 50 Barb. (N. Y.) 334; Budweiser Brewing Co. *v.* Capparelli, 16 Misc. (N. Y.) 502, 38 N. Y. Suppl. 972; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396. So the maker of a note payable at the election of the maker in four yearly instalments, or when a certain sum shall have been subscribed for a college endowment, is liable at the expiration of the four years without notice of the completion of the subscription. Genesee College *v.* Dodge, 26 N. Y. 213.

South Carolina.— McNair *v.* Moore, 55 S. C. 435, 33 S. E. 491, 74 Am. St. Rep. 760.

Tennessee.— Blair *v.* State Bank, 11 Humphr. (Tenn.) 84.

West Virginia.— Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

Wisconsin.— Zautcke *v.* North Milwaukee Townsite Co. No. 3, 95 Wis. 21, 69 N. W. 978.

United States.— Chillicothe Branch Ohio State Bank *v.* Fox, 3 Blatchf. (U. S.) 431, 5 Fed. Cas. No. 2,683.

England.— Rhodes *v.* Gent, 5 B. & Ald. 244, 7 E. C. L. 140; Farquhar *v.* Southey, 2 C. & P. 497, 12 E. C. L. 697, M & M. 14, 22 E. C. L. 460, 31 Rev. Rep. 689; Anderson *v.* Cleveland, 13 East 430, note *b*; Hardy *v.* Woodroofe, 2 Stark. 319, 20 Rev. Rep. 689, 3 E. C. L. 426.

Canada.— Shuter *v.* Paxton, 5 L. C. Jur. 55; Grant *v.* Heather, 2 Manitoba 201; Wilson *v.* Brown, 6 Ont. App. 87 (although some of the makers are merely sureties for the others, *inter se*); Crepeau *v.* Moore, 8 Quebec 197; Archer *v.* Lortie, 3 Quebec 159.

Demand prior to set-off.—A formal demand, by a person holding the notes of an insolvent corporation, on such corporation, for the simple purpose of enabling him to adjust a mutual indebtedness by set-off, is unnecessary. Kelly *v.* Garrett, 6 Ill. 649.

72. *Alabama.*— Sims *v.* National Commercial Bank, 73 Ala. 248; Montgomery *v.* Elliott, 6 Ala. 701.

Arkansas.— Sumner *v.* Ford, 3 Ark. 389.

California.— Montgomery *v.* Tutt, 11 Cal. 307.

Connecticut.—Bond *v.* Storrs, 13 Conn. 412.

Delaware.—Allen *v.* Miles, 4 Harr. (Del.) 234.

Georgia.— Carlton *v.* White, 99 Ga. 384, 27 S. E. 704; Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761.

Illinois.— Yeaton *v.* Berney, 62 Ill. 61; Humphreys *v.* Matthews, 11 Ill. 471; Armstrong *v.* Caldwell, 2 Ill. 546; Butterfield *v.* Kinzie, 2 Ill. 445, 30 Am. Dec. 657.

Indiana.—McCullough *v.* Cook, 34 Ind. 290.

Kentucky.—Commonwealth Bank *v.* Hickey, 4 Litt. (Ky.) 225.

Louisiana.— Ripka *v.* Pope, 5 La. Ann. 61, 52 Am. Dec. 579. See also Wetmore *v.* Merrifield, 17 La. 513; Allain *v.* Lazarus, 14 La. 327, 33 Am. Dec. 583.

Maine.— Lyon *v.* Williamson, 27 Me. 149; McKenney *v.* Whipple, 21 Me. 98.

Massachusetts.— Payson *v.* Whitcomb, 15 Pick. (Mass.) 212; Carley *v.* Vance, 17 Mass. 389; Ruggles *v.* Patten, 8 Mass. 480.

Michigan.— Reeve *v.* Pack, 6 Mich. 240.

Minnesota.— Freeman *v.* Curran, 1 Minn. 169.

Mississippi.— Cook *v.* Martin, 5 Sm. & M. (Miss.) 379; Washington *v.* Planters' Bank, 1 How. (Miss.) 230, 28 Am. Dec. 333.

New Hampshire.— Otis *v.* Barton, 10 N. H. 433.

New York.— Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; Foden *v.* Sharp, 4 Johns. (N. Y.) 183; Herring *v.* Sanger, 3 Johns. Cas. (N. Y.) 71.

Pennsylvania.— Fitler *v.* Beckley, 2 Watts & S. (Pa.) 458.

South Carolina.—McNair *v.* Moore, 55 S. C. 435, 33 S. E. 491, 74 Am. St. Rep. 760.

Vermont.— Dawley *v.* Wheeler, 52 Vt. 574.

Virginia.— Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127; Armistead *v.* Armisteads, 10 Leigh (Va.) 512.

United States.— Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95; U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443; Silver *v.* Henderson, 3 McLean (U. S.) 165, 22 Fed. Cas. No. 12,854.

In England and Canada a bill or note made payable at a particular place must be presented there for payment before suit can be brought against the maker or accepter, although it is not necessary that it be presented on the day it falls due, as is necessary in order to charge an indorser. Rowe *v.* Young, 2 B. & B. 165, 6 E. C. L. 83; Vander Donckt *v.* Thellusson, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812; Sands *v.* Clarke, 8 C. B. 751, 14 Jur. 352, 19 L. J. C. P. 84, 65 E. C. L. 751; Spindler *v.* Grellett, 5 D. & L. 191, 1 Exch. 384, 17 L. J. Exch. 6; Howe *v.* Bowes, 16 East 112, 14 Rev. Rep. 319 [*reversed* on other grounds in 5 Taunt. 30, 14 Rev. Rep.

holder was not there to receive the money.[73] So an action may be maintained against the maker on interest coupons, as on the bond itself, without a demand;[74] and a demand is not necessary to charge the accepter or maker of non-negotiable paper.[75] On the other hand demand is necessary to charge the maker of a note payable in services[76] or goods[77] or an accepter *supra protest*.[78]

(11) *Bringing Action as Demand.* Where paper is payable on a future day, presentment and demand are sufficiently made, as against the maker or accepter, by bringing action thereon;[79] and the same is generally true as against

700, 1 E. C. L. 29]; Dickinson *v.* Bowes, 16 East 110; Saunderson *v.* Bowes, 14 East 500; Gammon *v.* Schmoll, 1 Marsh. 80, 5 Taunt. 344, 1 E. C. L. 182; Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39; Butterworth *v.* Le Despencer, 3 M. & S. 150; Trecothick *v.* Edwin, 1 Stark. 468, 2 E. C. L. 180; Chandler *v.* Beckwith, 2 N. Brunsw. 423; Merritt *v.* Woods, 2 N. Brunsw. 409; Merchants Bank *v.* Henderson, 28 Ont. 360; McLellan *v.* McLellan, 17 U. C. C. P. 109; Commercial Bank *v.* Johnston, 2 U. C. Q. B. 126; McDonnell *v.* Lowry, 3 U. C. Q. B. O. S. 302; Macaulay *v.* McFarlane, (Trin. T.) 3 & 4 Vict.; Henry *v.* McDonell, (Hil. T.) 3 Vict. *Contra*, Nicholls *v.* Bowes, 2 Camph. 498.

In Louisiana the rule was formerly the same as in England. Erwin *v.* Adams, 2 La. 318 (holding, however, that although a demand must be made at the place of payment designated in a note before suit against the maker the rule does not apply when there is no such place in existence when suit is begun); Mellon *v.* Croghan, 3 Mart. N. S. (La.) 423, 15 Am. Dec. 163. And see Allain *v.* Lazarus, 14 La. 327, 33 Am. Dec. 583. But in 1850 the earlier cases were in effect overruled and it was held that although a note is payable at a particular place it is not necessary, in an action thereon, to allege or prove any demand of payment at such place. Ripka *v.* Pope, 5 La. Ann. 61, 52 Am. Dec. 579.

73. Greeley *v.* Whitehead, 35 Fla. 523, 530, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286, where it was said: "The theory of the American courts is, that the maker of the note, being the principal debtor, is still liable to pay, though the note be not presented at the time and place designated for payment, and that it devolves upon him to show as a matter of defense a readiness with the money at the time and place to meet the note, and such defense must be set up by plea, and can only be in bar of damages and costs. Such a plea, in order to be available, must allege that the maker was ready to pay the money at the time and place named; that he has ever since been ready there to pay the note, and that he brings the money into court for the plaintiff." See also Montgomery *v.* Elliott, 6 Ala. 701; Lyon *v.* Williamson, 27 Me. 149; Carley *v.* Vance, 17 Mass. 389; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396.

74. Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62. Nor is it necessary on interest coupons attached to a bond, although it was stated in the bond that the interest was payable on presentment of the coupons for payment at a certain time and place. Warner *v.* Rising Fawn Iron Co., 3 Woods (U. S.) 514, 29 Fed. Cas. No. 17,188.

75. Soubercase *v.* Caldwell, 8 Mart. (La.) 714; Smith *v.* Cromer, 66 Miss. 157, 5 So. 619.

76. Jenkins *v.* Smith, 4 Metc. (Ky.) 380; Haskell *v.* Mathews, 37 Me. 541.

77. Stewart *v.* Smith, 28 Ill. 397; Markley *v.* Rhodes, 59 Iowa 57, 12 N. W. 775.

78. Schofield *v.* Bayard, 3 Wend. (N. Y.) 488; Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, M. & M. 381, 8 L. J. K. B. O. S. 18.

79. *Alabama.*— Clark *v.* Moses, 50 Ala. 326; Montgomery *v.* Elliott, 6 Ala. 701.

Arkansas.— McKiel *v.* Real Estate Bank, 4 Ark. 592; Sumner *v.* Ford, 3 Ark. 389.

California.— Montgomery *v.* Tutt, 11 Cal. 307.

Connecticut.— Bond *v.* Storrs, 13 Conn. 412; Jackson *v.* Packer, 13 Conn. 342; Eldred *v.* Hawes, 4 Conn. 465.

Delaware.— Martin *v.* Hamilton, 5 Harr. (Del.) 329; Allen *v.* Smith, 4 Harr. (Del.) 234.

Florida.— Greeley *v.* Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286.

Georgia.— Dougherty *v.* Western Bank, 13 Ga. 287.

Illinois.— Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Yeaton *v.* Berney, 62 Ill. 61; Hall *v.* Jones, 32 Ill. 38; Armstrong *v.* Caldwell, 2 Ill. 546; Thompson *v.* Kimball, 55 Ill. App. 249.

Indiana.— Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457; Fankboner *v.* Fankboner, 20 Ind. 62; Harbor *v.* Morgan, 4 Ind. 158; Gilly *v.* Springer, 1 Blackf. (Ind.) 257.

Iowa.— Jurgensen *v.* Carlsen, 97 Iowa 627, 66 N. W. 877; Callanan *v.* Williams, 71 Iowa 363, 32 N. W. 383; Tarbell *v.* Stevens, 7 Iowa 163; Games *v.* Manning, 2 Greene (Iowa) 251.

Louisiana.— Renshaw *v.* Richards, 30 La. Ann. 398; Roman *v.* Denney, 17 La. Ann. 126; Letchford *v.* Starns, 16 La. Ann. 252; Catalogne *v.* Alva, 13 La. Ann. 98; Ripka *v.* Pope, 5 La. Ann. 61, 52 Am. Dec. 579; Posey *v.* State Bank, 5 La. Ann. 187; Stilwell *v.* Bobb, 1 Rob. (La.) 311 [*affirmed* in 2 Rob. (La.) 327]; Hart *v.* Long, 1 Rob. (La.) 83; Waldron *v.* Turnpin, 15 La. 552, 35 Am. Dec. 210; Hamer *v.* Johnson, 15 La. 242; Union Bank *v.* Mortee, 14 La. 539; Allain *v.* Lazarus, 14 La. 327, 33 Am. Dec. 583; Warren *v.* Briscoe, 12 La. 472. *Contra*, Mellon *v.*

the maker on a demand note.[80] Actual demand is necessary, however, where a

Croghan, 3 Mart. N. S. (La.) 423, 15 Am. Dec. 163.

Maine.— Patterson *v.* Vose, 43 Me. 552; Dockray *v.* Dun, 37 Me. 442; McKenney *v.* Whipple, 21 Me. 98; Bacon *v.* Dyer, 12 Me. 19.

Maryland.— Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

Massachusetts.— Estes *v.* Tower, 102 Mass. 65, 3 Am. Rep. 439; Carter *v.* Smith, 9 Cush. (Mass.) 321; Payson *v.* Whitcomb, 15 Pick. (Mass.) 212; Carley *v.* Vance, 17 Mass. 389; Ruggles *v.* Patten, 8 Mass. 480; Berkshire Bank *v.* Jones, 6 Mass. 524, 4 Am. Dec. 175.

Michigan.— Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173, holding that no specific demand is necessary before suit on a note in the form of a certificate of deposit.

Minnesota.—Balme *v.* Wambaugh, 16 Minn. 116; Freeman *v.* Curran, 1 Minn. 169.

Mississippi.— Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150; Washington *v.* Planters' Bank, 1 How. (Miss.) 230, 28 Am. Dec. 333.

Missouri.— Collins *v.* Trotter, 81 Mo. 275.

Montana.— McFarland *v.* Cutter, 1 Mont. 383.

New Hampshire.— Brigham *v.* Smith, 16 N. H. 274; Otis *v.* Barton, 10 N. H. 433.

New Jersey.— Weed *v.* Van Houten, 9 N. J. L. 189, 17 Am. Dec. 468.

New York.— Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568; Hirst *v.* Brooks, 50 Barb. (N. Y.) 334; Gay *v.* Paine, 5 How. Pr. (N. Y.) 107, 3 Code Rep. 162; Haxton *v.* Bishop, 3 Wend. (N. Y.) 13; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396.

North Carolina.— Love *v.* Johnston, 72 N. C. 415; Nichols *v.* Pool, 47 N. C. 23.

Ohio.— Conn *v.* Gano, 1 Ohio 483, 13 Am. Dec. 639; Hamilton *v.* Cunningham, Tapp. (Ohio) 257.

Pennsylvania.— Middleton *v.* Boston Locomotive Works, 26 Pa. St. 257; Fitler *v.* Beckley, 2 Watts & S. (Pa.) 458; Collins *v.* Naylor, 10 Phila. (Pa.) 437, 32 Leg. Int. (Pa.) 248.

South Carolina.— McKenzie *v.* Durant, 9 Rich. (S. C.) 61; Smith *v.* Blythewood, Rice (S. C.) 245, 33 Am. Dec. 111; Woodward *v.* Drennan, 3 Brev. (S. C.) 189.

Tennessee.— Nashville *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296; Nashville *v.* First Nat. Bank, 1 Baxt. (Tenn.) 402; Mulherrin *v.* Hannum, 2 Yerg. (Tenn.) 81; McNairy *v.* Bell, 1 Yerg. (Tenn.) 502, 24 Am. Dec. 454.

Texas.— Deel *v.* Berry, 21 Tex. 463, 73 Am. Dec. 236; Hubbell *v.* Lord, 9 Tex. 472; Edwards *v.* Hasbrook, 2 Tex. 578.

Vermont.— Hart *v.* Green, 8 Vt. 191.

Washington.—Hardin *v.* Sweeney, 14 Wash. 129, 44 Pac. 138.

West Virginia.— Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

Wisconsin.— Howard *v.* Boorman, 17 Wis. 459.

United States.—Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131; Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95; Riddle *v.* Butler First Nat. Bank, 27 Fed. 503; Chillicothe Branch Ohio State Bank *v.* Fox, 3 Blatchf. (U. S.) 431, 6 Fed. Cas. No. 2,683; U. S. Bank *v.* Bussard, 3 Cranch C. C. (U. S.) 173, 2 Fed. Cas. No. 911; Smith *v.* Johnson, 2 Cranch C. C. (U. S.) 645, 22 Fed. Cas. No. 13,067; Beverley *v.* Beverley, 2 Cranch C. C. (U. S.) 470, 3 Fed. Cas. No. 1,376; Brown *v.* Piatt, 2 Cranch C. C. (U. S.) 253, 4 Fed. Cas. No. 2,026; Silver *v.* Henderson, 3 McLean (U. S.) 165, 22 Fed. Cas. No. 12,854; Thompson *v.* Cook, 2 McLean (U. S.) 122, 23 Fed. Cas. No. 13,952.

England.— Wegersloffe *v.* Keene, 1 Str. 214.

See 7 Cent. Dig. tit. "Bills and Notes," § 1022.

Where an instrument merely acknowledges the receipt of certain merchandise, promises payment to the order of a person named of a certain sum of money, and is duly signed, it is not a bill of exchange and an action may be maintained thereon against the maker without presenting it for payment. Smith *v.* Cromer, 66 Miss. 157, 5 So. 619.

Where the time of payment of a note is extended for a reasonable time no demand is necessary, after the expiration of a reasonable time, before bringing suit. Finch *v.* Skilton, 79 Hun (N. Y.) 531, 29 N. Y. Suppl. 925, 61 N. Y. St. 544.

80. *Alabama.*— Mobile Sav. Bank *v.* McDonnell, 83 Ala. 595, 4 So. 346; Montgomery State Branch Bank *v.* Gaffney, 9 Ala. 153.

Arkansas.— Pullen *v.* Chase, 4 Ark. 210.

California.— Bell *v.* Sackett, 38 Cal. 407; Ziel *v.* Dukes, 12 Cal. 479.

Georgia.— Lynch *v.* Goldsmith, 64 Ga. 42.

Illinois.— New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443 (holding that a bank is not entitled to demand before suit brought on notes issued by it); Mumford *v.* Tolman, 54 Ill. App. 471.

Massachusetts.— Jillson *v.* Hill, 4 Gray (Mass.) 316; Burnham *v.* Allen, 1 Gray (Mass.) 496.

Michigan.—Citizens' Sav. Bank *v.* Vaughan, 115 Mich. 156, 73 N. W. 143.

New York.— Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252 (even though the note be secured by collateral which must be delivered up on payment); Haxton *v.* Bishop, 3 Wend. (N. Y.) 13.

Ohio.— Hill *v.* Henry, 17 Ohio 9.

South Carolina.— Harrison *v.* Cammer, 2 McCord (S. C.) 246.

Texas.— Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806.

Washington.—Hardin *v.* Sweeney, 14 Wash. 129, 44 Pac. 138.

United States.— Harrisburg Trust Co. *v.* Shufeldt, 78 Fed. 292.

England.— Norton *v.* Ellam, 1 Jur. 433, 6 L. J. Exch. 121, 1 M. & H. 69, 2 M. & W. 461; Rumball *v.* Ball, 10 Mod. 39.

note is payable on demand in instalments on certain days,[81] and to entitle the holder to interest on a demand note.[82]

c. To Fix Liability of Guarantor or Surety. Formal demand upon the maker or accepter is unnecessary to fix the liability of a guarantor[83] or surety,[84] unless the terms of the contract otherwise provide[85] or the guarantor is shown to be damaged by the want of it,[86] especially where the guaranty is absolute and unconditional[87] or a special one of collectability,[88] and even though the maker is a bankrupt.[89] But demand is necessary to charge a guarantor of a non-negotiable note[90] or where the indorsement contains a guaranty of attorney's fees in case of suit;[91] and a demand must first be made on the maker to render liable one who indorses and guarantees a receipt given by a constable for a note taken for collection.[92]

See also *supra*, VII, A, 7, h, (I); and 7 Cent. Dig. tit. "Bills and Notes," § 1023.

When a note is payable a fixed time after demand there must be a special demand, and bringing suit is not sufficient. Chase *v.* Evoy, 49 Cal. 467. *Compare*, however, Dodd *v.* Gill, 3 F. & F. 261.

81. Hudson *v.* Barton, 1 Rolle 189.

82. Scovil *v.* Scovil, 45 Barb. (N. Y.) 517.

83. *California.*— San Diego County Sav. Bank *v.* Fisher, (Cal. 1895) 41 Pac. 490; San Diego First Nat. Bank *v.* Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94, under Cal. Civ. Code, § 2807. *Contra*, Pierce *v.* Kennedy, 5 Cal. 138; Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356.

Connecticut.— Forbes *v.* Rowe, 48 Conn. 413; Beckwith *v.* Angell, 6 Conn. 315; Williams *v.* Granger, 4 Day (Conn.) 444.

Illinois.— Gage *v.* Mechanics' Nat. Bank, 79 Ill. 62. See also Edwards *v.* Shields, 7 Ill. App. 70.

Iowa.— Knight *v.* Dunsmore, 12 Iowa 35, provided notice of non-payment is given him within a reasonable time.

Kentucky.— Bowman *v.* Curd, 2 Bush (Ky.) 565.

Maine.— Cooper *v.* Page, 24 Me. 73, 41 Am. Dec. 371; True *v.* Harding, 12 Me. 193; Read *v.* Cutts, 7 Me. 186, 22 Am. Dec. 184.

Massachusetts.— Parkman *v.* Brewster, 15 Gray (Mass.) 271.

Minnesota.— Hungerford *v.* O'Brien, 37 Minn. 306, 34 N. W. 161.

Mississippi.— Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274; Tatum *v.* Bonner, 27 Miss. 760; Thrasher *v.* Ely, 2 Sm. & M. (Miss.) 139.

Missouri.— Wright *v.* Dyer, 48 Mo. 525.

New Jersey.— Stout *v.* Stevenson, 4 N. J. L. 178.

New York.— Winchell *v.* Doty, 15 Hun (N. Y.) 1 (guaranty of payment of overdue note); Allen *v.* Rightmere, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288.

Ohio.— Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422.

England.— Walton *v.* Maskell, 2 D. & L. 410, 14 L. J. Exch. 54, 13 M. & W. 452.

See 7 Cent. Dig. tit. "Bills and Notes," § 1008.

84. *California.*— Chafoin *v.* Rich, 77 Cal. 476, 19 Pac. 882, holding this to be so where he is a surety in fact and is so known to the payee, although not so described.

Connecticut.— Bond *v.* Storrs, 13 Conn. 412.

Indiana.— Fitch *v.* Citizens' Nat. Bank, 97 Ind. 211; Scott *v.* Shir, 60 Ind. 160.

Louisiana.—Adams *v.* Gordon, 22 La. Ann. 41.

Missouri.— Buchner *v.* Liebig, 38 Mo. 188.

North Carolina.— Washington First Nat. Bank *v.* Eureka Lumber Co., 123 N. C. 24, 31 S. E. 348; Williams *v.* Irwin, 20 N. C. 59.

Rhode Island.— Mathewson *v.* Sprague, 1 R. I. 8.

85. Forest *v.* Stewart, 14 Ohio St. 246.

86. Weller *v.* Hawes, 19 Iowa 443.

87. *Alabama.*— Donley *v.* Camp, 22 Ala. 659, 58 Am. Dec. 274.

Connecticut.— Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Breed *v.* Hillhouse, 7 Conn. 523; Williams *v.* Granger, 4 Day (Conn.) 444.

Missouri.— Osborne *v.* Lawson, 26 Mo. App. 549.

Nebraska.— Bloom *v.* Warder, 13 Nebr. 476, 14 N. W. 395.

New York.— Winchell *v.* Doty, 15 Hun (N. Y.) 1; Curtis *v.* Brown, 2 Barb. (N. Y.) 51; Hough *v.* Gray, 19 Wend. (N. Y.) 202; Allen *v.* Rightmere, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288.

Ohio.— Castle *v.* Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839, holding that the owner and holder of a note has a *prima facie* right of recovery without proof of demand.

United States.— See Lewis *v.* Brewster, 2 McLean (U. S.) 21, 15 Fed. Cas. No. 8,318.

88. Forest *v.* Stewart, 14 Ohio St. 246.

89. Warrington *v.* Furbor, 8 East 242, 6 Esp. 89. But see Oxford Bank *v.* Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334.

So where the guarantor is informed before maturity of the note that the maker is insolvent and that the holder looks to him for payment. Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Donnerberg *v.* Oppenheimer, 15 Wash. 290, 46 Pac. 254; Holbrow *v.* Wilkins, 1 B. & C. 10, 2 D. & R. 59, 1 L. J. K. B. O. S. 11, 25 Rev. Rep. 285, 8 E. C. L. 5.

90. Parker *v.* Riddle, 11 Ohio 102.

91. Patillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616.

92. Rhodes *v.* Morgan, 1 Baxt. (Tenn.) 360.

d. To Fix Liability of Drawer — (I) *In General.* The drawer of a bill of exchange, whether foreign or inland, is liable as a rule only upon formal demand of payment on the drawee or accepter;[93] but in case acceptance is refused upon proper presentation therefor, the obligation of the drawer will be fixed and no new demand is necessary, nor is the holder bound to again make presentation at maturity or on the last day of grace,[94] even though the drawer may have failed after the indorser's liability is fixed by notice of non-acceptance.[95] Presentment and demand are unnecessary, however, when the bill is in effect a note, as when the drawer and drawee are identical,[96] to charge the drawer of a sealed bill,[97] or to charge the drawer on an accommodation acceptance,[98] and the corporation maker of a bond is liable on the coupon, although in the form of a draft, without a previous demand.[99]

93. *Alabama.*— Mobile Bank *v.* Brown, 42 Ala. 108.

Arizona.— Dowling *v.* Hunt, (Ariz. 1885) 7 Pac. 496.

Arkansas.— Minehart *v.* Handlin, 37 Ark. 276.

California.— Los Angeles Nat. Bank *v.* Wallace, 101 Cal. 478, 36 Pac. 197.

Connecticut.— Hoyt *v.* Seeley, 18 Conn. 353.

Florida.— Bailey *v.* South Western Railroad Bank, 11 Fla. 266; Holbrook *v.* Allen, 4 Fla. 87.

Georgia.— Hall *v.* Davis, 41 Ga. 614.

Illinois.— Wood *v.* Surrells, 89 Ill. 107; Thayer *v.* Peck, 84 Ill. 74; Bowes *v.* Industrial Bank, 58 Ill. App. 498.

Indiana.— Griffin *v.* Kemp, 46 Ind. 172.

Kentucky.— Lester *v.* Given, 8 Bush (Ky.) 357; Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61; Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576; Baxter *v.* Graves, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374; Mize *v.* Godsey, 16 Ky. L. Rep. 399.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Coons, 35 La. Ann. 364; Kercheval's Succession, 14 La. Ann. 457; Fulton Co. *v.* Wright, 12 La. 386.

Maine.— Green *v.* Darling, 15 Me. 139.

Missouri.— Adams *v.* Darby, 28 Mo. 162, 75 Am. Dec. 115.

New Hampshire.— Moore *v.* Waitt, 13 N. H. 415.

New York.— Smith *v.* Miller, 52 N. Y. 545; Bradford *v.* Fox, 39 Barb. (N. Y.) 203, 16 Abb. Pr. (N. Y.) 51; Vergennes Bank *v.* Cameron, 7 Barb. (N. Y.) 143; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126; Munroe *v.* Easton, 2 Johns. Cas. (N. Y.) 75; Tunno *v.* Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141.

North Carolina.— People's Nat. Bank *v.* Lutterloh, 95 N. C. 495.

Pennsylvania.— Case *v.* Morris, 31 Pa. St. 100; Mallory *v.* Kirwan, 2 Dall. (Pa.) 192, 1 L. ed. 344; Flemming *v.* Denny, 2 Phila. (Pa.) 111, 13 Phila. (Pa.) 140.

Texas.— Cole *v.* Wintercost, 12 Tex. 118.

Wisconsin.— Grange *v.* Reigh, 93 Wis. 552, 67 N. W. 1130.

United States.— Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499; Craig *v.* Brown, Pet. C. C. (U. S.) 171, 6 Fed. Cas. No. 3,327.

See 7 Cent. Dig. tit. "Bills and Notes," § 1010.

94. *Arkansas.*— Turner *v.* Greenwood, 9 Ark. 44.

Louisiana.— Lacroix *v.* Mager, 14 La. 74; Williams *v.* Robinson, 13 La. 419; Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306; Morgan *v.* Towles, 8 Mart. (La.) 730, 13 Am. Dec. 300.

Massachusetts.— Lenox *v.* Cook, 8 Mass. 460.

Missouri.— Lucas *v.* Ladew, 28 Mo. 342.

New Hampshire.— Exeter Bank *v.* Gordon, 8 N. H. 66.

New York.— Plato *v.* Reynolds, 27 N. Y. 586; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137 (holding that an indorsee of a bill, drawn in a French West India island on a house in Bordeaux, payable a certain number of days after sight and transferred in New York, need not present it for payment after protest for non-acceptance, notwithstanding the provisions of the French commercial code); Mason *v.* Franklin, 3 Johns. (N. Y.) 202.

United States.—Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238; Wallace *v.* Agry, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096.

95. Wild *v.* Passamaquoddy Bank, 3 Mason (U. S.) 505, 29 Fed. Cas. No. 17,646.

96. Bailey *v.* South Western Railroad Bank, 11 Fla. 266; Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193; Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432; Lyell *v.* Lapeer County, 6 McLean (U. S.) 446, 15 Fed. Cas. No. 8,618. *Contra*, Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

97. Force *v.* Craig, 7 N. J. L. 272.

98. *Alabama.*— Evans *v.* Norris, 1 Ala. 511.

Georgia.— McLaren *v.* Georgia Mar. Bank, 52 Ga. 131.

Kentucky.— Barbaroux *v.* Waters, 3 Metc. (Ky.) 304.

Louisiaina.— New Orleans Sav. Bank *v.* Harper, 12 Rob. (La.) 231, 43 Am. Dec. 226.

Missouri.— Beveridge *v.* Richmond, 14 Mo. App. 405.

New York.— Ross *v.* Bedell, 5 Duer (N. Y.) 462.

99. Nashville *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296; Nashville *v.* First Nat. Bank, 1 Baxt. (Tenn.) 402.

(II) *Of Check.* Presentment and demand are likewise necessary in case of a check,[1] but want of presentment does not discharge the drawer of a check on a bank, unless he is damaged thereby.[2]

(III) *Of Order.* As a rule too the drawer of an order is not liable unless payment has been demanded of the drawee.[3]

2. Where Paper Given or Transferred as Payment or Collateral. Where a bill drawn on a third person is received in full satisfaction of a debt, when paid,[4] or where a note is indorsed to a holder in conditional payment of a debt[5] the person receiving it assumes the duty of presenting it for payment and failing so to do loses not only his remedy on the paper but also the debt or consideration for which it was given. Substantially the same rule applies to negotiable paper

1. *Georgia.*— Daniels *v.* Kyle, 5 Ga. 245.
Indiana.— Pollard *v.* Bowen, 57 Ind. 232.
Kentucky.— Mize *v.* Godsey, 16 Ky. L. Rep. 399.
Louisiana.— Kercheval's Succession, 14 La. Ann. 457.
Massachusetts.— Kelley *v.* Brown, 5 Gray (Mass.) 108.
Nebraska.— Wood River Bank *v.* Omaha First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.
New York.— Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126.
Pennsylvania.— Case *v.* Morris, 31 Pa. St. 100.
United States.— Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499.
Presenting a check to be certified is not a demand of payment and does not discharge the holder's duty to make such demand. Bradford *v.* Fox, 39 Barb. (N. Y.) 203.

2. *Illinois.*— Allen *v.* Kramer, 2 Ill. App. 205, holding that presentment of a check at maturity and while the drawee is solvent is sufficient and that it need not be presented again, in order to hold the drawer after the drawee becomes satisfied of the genuineness of the signature.
Kentucky.— Lester *v.* Given, 8 Bush (Ky.) 357.
Massachusetts.— Kelley *v.* Brown, 5 Gray (Mass.) 108.
New York.— Woodin *v.* Frazee, 38 N. Y. Super. Ct. 190.
United States.— *In re* Brown, 2 Story (U. S.) 502, 4 Fed. Cas. No. 1,985, 10 Hunt. Mer. Mag. 377, 6 Law Rep. 508.
England.— Robinson *v.* Hawksford, 9 Q. B. 52, 10 Jur. 964, 15 L. J. Q. B. 377, 58 E. C. L. 52.
See also Banks and Banking, 5 Cyc. 532, note 71.

3. *Arkansas.*—Adams *v.* Boyd, 33 Ark. 33, order on third person for specific sum of money.
Indiana.— Goings *v.* Chapman, 18 Ind. 194; Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163 (holding that the holder of an order on a corporation must present the same as a condition precedent to action); Marion, etc., R. Co. *v.* Lomax, 7 Ind. 648.
Kentucky.— Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168.
Louisiana.— Henderson *v.* Griffin, 3 Mart. N. S. (La.) 403, an order on a third person for money expected to be realized on an execution.
Maine.— Auburn Nat. Shoe, etc., Bank *v.* Gooding, 87 Me. 337, 32 Atl. 967; Varner *v.* Nobleborough, 2 Me. 121, 11 Am. Dec. 48 (an order drawn by the selectmen of a town upon the town treasurer for a debt of the corporation).
Michigan.— Sweet *v.* Swift, 65 Mich. 90, 31 N. W. 767.
North Carolina.— Brown *v.* Teague, 52 N. C. 573.
South Carolina.— Treadway *v.* Nicks, 3 McCord (S. C.) 195.
Tennessee.— Porter *v.* Dillahunty, 8 Humphr. (Tenn.) 570, under statute.
Texas.— Fromme *v.* Kaylor, 30 Tex. 754, an order for cotton given in payment of a debt.
Contra, Smith *v.* Barnes, 24 Ga. 442 (written order to let a person have a certain number of dollars' worth of personal property); Steel *v.* Davis County, 2 Greene (Iowa) 469 (holding that a county order does not require presentment); Stewart *v.* Millard, 7 Lans. (N. Y.) 373 (holding that failure to present a non-negotiable draft did not discharge the drawer where no damage resulted to him); Platzer *v.* Norris, 38 Tex. 1 (order for payment indorsed on a bill for goods).
See 7 Cent. Dig. tit. "Bills and Notes," §1012.

4. *Arkansas.*— Minehart *v.* Handlin, 37 Ark. 276 [*citing* Edwards Bills 423].
New York.— Dayton *v.* Trull, 23 Wend. (N. Y.) 345.
North Carolina.— Mauney *v.* Coit, 80 N. C. 300, 30 Am. Rep. 80.
Pennsylvania.— Henry *v.* Donnaghy, Add. (Pa.) 39.
England.—Peacock *v.* Pursell, 14 C. B. N. S. 728, 10 Jur. N. S. 178, 32 L. J. C. P. 266, 8 L. T. Rep. N. S. 636, 11 Wkly. Rep. 834, 108 E. C. L. 728.

5. Minehart *v.* Handlin, 37 Ark. 276 [*citing* 2 Daniel Neg. Instr. § 971]; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175. *Compare* Griffith *v.* Grogan, 12 Cal. 317.

indorsed as collateral security for a debt.[6] So where negotiable paper is transferred for proceeds to be collected and the same applied on a debt demand is required, and if the creditor is guilty of laches he must sustain the loss.[7]

3. STATUTORY PROVISIONS. In some jurisdictions statutes have been enacted rendering presentment of commercial paper, or particular kinds of paper, for payment unnecessary in order to charge indorsers, and substituting therefor the bringing and prosecution of a suit against the maker.[8] In other jurisdictions statutes expressly declare presentment for payment to be necessary.[9]

B. Time For Presentment or Demand — 1. PAPER PAYABLE AT A FIXED TIME. In so far as the liability of the maker or accepter is concerned it is immaterial at what time the paper is presented and payment demanded, even where the paper is payable at a particular place and the rule in the particular jurisdiction requires a demand before suit. In such case all that is necessary is that demand shall be made before suit is commenced,[10] unless presentment or demand at a particular time is required by the terms of the instrument.[11] The time of presentment, however, is material as respects the liability of drawers or indorsers. When paper, whether a note or a bill, is payable on a fixed day[12] it is necessary in order to charge a drawer or indorser that it shall be presented for payment on the very day on which it is payable, which is on the third day of grace, where grace is allowed.[13] If under such circumstances it is presented either at an earlier[14]

6. Blanchard *v.* Tittabawassee Boom Co., 40 Mich. 566; Whitten *v.* Wright, 34 Mich. 92; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756; Jennison *v.* Parker, 7 Mich. 355; Betterton *v.* Roope, 3 Lea (Tenn.) 215, 31 Am. Rep. 633. But see Westphal *v.* Ludlow, 2 McCrary (U. S.) 505, 6 Fed. 348.

7. Foote *v.* Brown, 2 McLean (U. S.) 369, 9 Fed. Cas. No. 4,909; Gallagher *v.* Roberts, 2 Wash. (U. S.) 191, 9 Fed. Cas. No. 5,195.

8. See McDougald *v.* Rutherford, 30 Ala. 253; Williams *v.* Lewis, 69 Ga. 825; Lynch *v.* Goldsmith, 64 Ga. 42 [*limited* in Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653]; Pannell *v.* Phillips, 55 Ga. 618; Sydnor *v.* Gascoigne, 11 Tex. 449; Frosh *v.* Holmes, 8 Tex. 29; Hutchins *v.* Flintge, 2 Tex. 473, 47 Am. Dec. 659; Cartwright *v.* Roff, 1 Tex. 78.

Statutes requiring suit against maker see *supra*, VIII, B, 2.

9. See Keater *v.* Hock, 11 Iowa, 536; Edgar *v.* Greer, 8 Iowa 394, 74 Am. Dec. 316.

In Maine under Me. Rev. Stat. c. 32, § 10, providing that in an action on a note payable at a place certain on demand plaintiff shall not recover unless he prove a demand at the place of payment payable prior to suit, a note payable at a bank, but not on demand, need not be presented at the bank before suit brought. Heslan *v.* Bergeron, 94 Me. 395, 47 Atl. 896.

10. *Florida.*— Greeley *v.* Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286.

Louisiana.— Erwin *v.* Adams, 2 La. 318; Mellon *v.* Croghan, 3 Mart. N. S. (La.) 423, 15 Am. Dec. 163.

New Mexico.— Metzger *v.* Waddell, 1 N. M. 400.

Pennsylvania.— Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62; Hocking Valley Bank *v.* Barton, 72 Pa. St. 110.

England.— Rhodes *v.* Gent, 5 B. & Ald. 244, 7 E. C. L. 140; Smith *v.* Vertue, 9 C. B. N. S. 214, 7 Jur. N. S. 395, 30 L. J. C. P. 56, 3 L. T. Rep. N. S. 583, 9 Wkly. Rep. 146, 99 E. C. L. 214.

Canada.— Ratchford *v.* Griffith, 4 N. Brunsw. 112; Merritt *v.* Woods, 2 N. Brunsw. 409; Merchants Bank *v.* Henderson, 28 Ont. 360; McLellan *v.* McLellan, 17 U. C. C. P. 109; Henry *v.* McDonell, (Hil. T.) 3 Vict.

Necessity for presentment or demand as against maker or accepter see *supra*, X, A, 1, b.

11. **Where coupon bonds** contain a condition that if default in the payment of interest when payable and demanded continues for ninety days the whole principal is to become due at the option of the holder, presentment and demand on January 2, although premature as to the interest due January 1, grace being allowed, is due presentment as to that maturing July 1 previous. Wood *v.* Consolidated Electric Light Co., 36 Fed. 538.

12. **Maturity of paper payable at a fixed time** see *supra*, VII, A, 3.

13. **As to days of grace** see *supra*, VII, B.

14. *Alabama.*— Hart *v.* Smith, 15 Ala. 807, 50 Am. Dec. 161.

Connecticut.— Norton *v.* Lewis, 2 Conn. 478.

Georgia.— Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590.

Indiana.— Kohler *v.* Montgomery, 17 Ind. 220.

Iowa.— Closz *v.* Miracle, 103 Iowa 198, 72 N. W. 502; Edgar *v.* Greer, 8 Iowa 394, 74 Am. Dec. 316.

Louisiana.— Wood *v.* Mullen, 3 Rob. (La.) 395; Kenner *v.* His Creditors, 7 Mart. N. S. (La.) 540.

Maryland.— Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78.

Massachusetts.— Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13; Wentworth *v.* Clap, 11 Mass. 87 note; Jones *v.* Fales, 4 Mass. 245.

or at a later[15] day, unless an earlier or a later presentment is authorized by a valid custom or usage,[16] or in the case of delay unless the circumstances are such

New Hampshire.— Lawrence *v.* Langley, 14 N. H. 70; Orange County Bank *v.* Colby, 12 N. H. 520; Dennie *v.* Walker, 7 N. H. 199; Leavitt *v.* Simes, 3 N. H. 14.

New York.—Griffin *v.* Goff, 12 Johns. (N. Y.) 423.

Ohio.— McMonigal *v.* Brown, 45 Ohio St. 499, 15 N. E. 860; McMurchey *v.* Robinson, 10 Ohio 496.

Pennsylvania.—Jackson *v.* Newton, 8 Watts (Pa.) 401.

Tennessee.— State Bank *v.* Officer, 3 Baxt. (Tenn.) 173.

Wisconsin.— Walsh *v.* Dart, 12 Wis. 635; Stacy *v.* Dane County Bank, 12 Wis. 629.

United States.— Bell *v.* Chicago First Nat. Bank, 115 U. S. 373, 6 S. Ct. 105, 29 L. ed. 409; Mitchell *v.* Degrand, 1 Mason (U. S.) 176, 17 Fed. Cas. No. 9,661.

England.— Wiffen *v.* Roberts, 1 Esp. 261, 5 Rev. Rep. 737.

Sundays and holidays.—As to the maturity of paper and time of presentment where the day of maturity falls on Sunday or a holiday and no grace is allowed see *supra*, VII, A, 15. But as to the rule where the last day of grace falls on Sunday or a holiday see *supra*, VII, B, 9.

15. Presentment on the last day of grace, or on the day of maturity where grace is not allowed, is sufficient, but presentment on any later day is bad.

Alabama.—Eldridge *v.* Rogers, Minor (Ala.) 392; Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Arkansas.— Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212; Gracie *v.* Sandford, 9 Ark. 233; Ruddell *v.* Walker, 7 Ark. 457.

California.— Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430; McFarland *v.* Pico, 8 Cal. 626.

Connecticut.— Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397.

Illinois.— Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Cook *v.* Renick, 19 Ill. 598.

Indiana.— Piatt *v.* Eads, 1 Blackf. (Ind.) 81; Hoffman *v.* Hollingsworth, 10 Ind. App. 353, 37 N. E. 960.

Iowa.— Edgar *v.* Greer, 8 Iowa 394, 74 Am. Dec. 316.

Kentucky.—Strader *v.* Batchelor, 8 B. Mon. (Ky.) 168; Battertons *v.* Porter, 2 Litt. (Ky.) 388; Mills *v.* Rouse, 2 Litt. (Ky.) 203.

Louisiana.— Labadiole *v.* Landry, 20 La. Ann. 149; Jex *v.* Tureaud, 19 La. Ann. 64; Harp *v.* Kenner, 19 La. Ann. 63; Peet *v.* Zanders, 6 La. Ann. 364; Grant *v.* Long, 12 La. 402; Fulton Co. *v.* Wright, 12 La. 386.

Maine.— Groton *v.* Dallheim, 6 Me. 476; Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62. See also Robinson *v.* Blen, 20 Me. 109.

Maryland.— Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703.

Massachusetts.— Orleans Bank *v.* Whittemore, 12 Gray (Mass.) 469, 64 Am. Dec. 605; Farnum *v.* Fowle, 12 Mass. 89, 7 Am. Dec. 35; Henry *v.* Jones, 8 Mass. 453; Freeman *v.* Boynton, 7 Mass. 483.

Missouri.— Draper *v.* Clemens, 4 Mo. 52.

New Jersey.— Estell *v.* Vanderveer, 5 N. J. L. 917.

New York.— Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69; Montgomery County Bank *v.* Albany City Bank, 8 Barb. (N. Y.) 396; Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139.

North Carolina.— Mauney *v.* Coit, 80 N. C. 300, 30 Am. Rep. 80.

Ohio.— McMonigal *v.* Brown, 45 Ohio St. 499, 15 N. E. 860; Davis *v.* Herrick, 6 Ohio 55.

Pennsylvania.— Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202; Coleman *v.* Carpenter, 9 Pa. St. 178, 49 Am. Dec. 552.

Rhode Island.— Barnes *v.* Vaughan, 6 R. I. 259.

South Carolina.— Wartenburgh *v.* Lovel, 1 Nott & M. (S. C.) 83.

Tennessee.— Garland *v.* West, 9 Baxt. (Tenn.) 315; Broddie *v.* Searcy, Peck (Tenn.) 183.

Texas.— Cary Lombard Lumber Co. *v.* Ballinger First Nat. Bank, 86 Tex. 299, 24 S. W. 260, 24 S. W. 702.

Virginia.— Jackson *v.* Henderson, 3 Leigh (Va.) 196.

Wisconsin.— Wilson *v.* Senier, 14 Wis. 380.

United States.— Wiseman *v.* Chiappella, 23 How. (U. S.) 368, 16 L. ed. 466; McGruder *v.* Washington Bank, 9 Wheat. (U. S.) 598, 6 L. ed. 170; Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166; Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264; Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238, 7 Fed. 169; Neale *v.* Peyton, 2 Cranch C. C. (U. S.) 313, 17 Fed. Cas. No. 10,071; Auld *v.* Peyton, 2 Cranch C. C. (U. S.) 182, 2 Fed. Cas. No. 654; Beeding *v.* Pic, 2 Cranch C. C. (U. S.) 152, 3 Fed. Cas. No. 1,227; Thornton *v.* Stoddert, 1 Cranch C. C. (U. S.) 534, 23 Fed. Cas. No. 14,000. *Compare* Lenox *v.* Wright, 2 Cranch C. C. (U. S.) 45, 15 Fed. Cas. No. 8,249.

England.— Anderton *v.* Beck, 16 East 248, 14 Rev. Rep. 344; Nicholson *v.* Gouthit, 2 H. Bl. 609; Tassell *v.* Lewis, 1 Ld. Raym. 743.

Canada.— Truscott *v.* Lagourge, 5 U. C. Q. B. O. S. 134.

Demand of acceptance as demand of payment.— If a bill of exchange payable a specified time after date or on a day certain be presented for acceptance on the day it is due and acceptance be then refused no further demand of payment is necessary to charge the drawer or indorser. Plato *v.* Reynolds, 27 N. Y. 586.

16. Effect of custom or usage.— Presentment for payment on the fourth day after the maturity of paper is a good presentment, where there is a usage among the banks and merchants of the place of payment to allow four days of grace, known to the indorser, or

as to excuse the same,[17] it will be insufficient to charge either a drawer or indorser.

2. Paper Payable at Sight or on Demand — a. In General. The general rule in regard to presentment of paper payable on demand or at sight is that in order to charge indorsers or the drawer it must be presented and payment demanded within a reasonable time, unless there is something to show a contrary intention, although what is a reasonable time is not determined. This rule applies to bills of exchange or drafts payable at sight or on demand, whether foreign or inland,[18]

so general and well-established that knowledge on his part is to be presumed. See *supra*, VII, B, 7.

Custom to present before due.—But a custom to present paper for payment before it is due by its terms, or before the last day of grace allowed by statute, is not valid. Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13; Staples *v.* Franklin Bank, 1 Metc. (Mass.) 43, 35 Am. Dec. 345; Perkins *v.* Franklin Bank, 21 Pick. (Mass.) 483.

A collecting bank is not liable for damages for a failure to present a note on Saturday, when the last day of grace falls on Sunday, where its known custom is not to demand payment in such a case till Monday. Patriotic Bank *v.* Alexandria Farmers' Bank, 2 Cranch C. C. (U. S.) 560, 18 Fed. Cas. No. 10,811. And it has been held that presentment of paper before the last day of grace, if in accordance with a known custom of the local banks, will not render a collecting agent liable for negligence. Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13.

17. Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397.

Excuses for delay in presentment see *infra*, XIII, H.

18. *Alabama.*— Knott *v.* Venable, 42 Ala. 186.

Illinois.— Montelius *v.* Charles, 76 Ill. 303; Strong *v.* King, 35 Ill. 9, 85 Am. Dec. 336.

Indiana.—Dumont *v.* Pope, 7 Blackf. (Ind.) 367; Angaletos *v.* Meridian Nat. Bank, 4 Ind. App. 573, 31 N. E. 368.

Kentucky.— Piner *v.* Clary, 17 B. Mon. (Ky.) 645; Slack *v.* Longshaw, 8 Ky. L. Rep. 166.

Louisiana.— Bridgeford *v.* Simonds, 18 La. Ann. 121; Richardson *v.* Fenner, 10 La. Ann. 599.

Maryland.— Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200; Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703.

Massachusetts.— Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473.

Michigan.— Nutting *v.* Burked, 48 Mich. 241, 12 N. W. 184; Phœnix Ins. Co. *v.* Gray, 13 Mich. 191; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756.

Mississippi.— Parker *v.* Reddick, 65 Miss. 242, 3 So. 575, 7 Am. St. Rep. 646.

Missouri.— Salisbury *v.* Renick, 44 Mo. 554; Marbourg *v.* Brinkman, 23 Mo. App. 511; Dyas *v.* Hanson, 14 Mo. App. 363.

Nebraska.— Collingwood *v.* Merchants' Bank, 15 Nebr. 118, 17 N. W. 359.

New York.— Smith *v.* Miller, 52 N. Y. 545; Darnall *v.* Morehouse, 45 N. Y. 64; Sheldon *v.* Chapman, 31 N. Y. 644; Merritt *v.* Todd, 23 N. Y. 28, 80 Am. Dec. 243; Brady *v.* Little Miami R. Co., 34 Barb. (N. Y.) 249; Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459; Vantrot *v.* McCulloch, 2 Hilt. (N. Y.) 272; Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259; Brower *v.* Jones, 3 Johns. (N. Y.) 230. By section 131 of the Negotiable Instruments Law, in the case of a bill of exchange, presentment for payment is sufficient if made within a reasonable time after the last negotiation thereof.

North Carolina.— Cedar Falls Co. *v.* Wallace, 83 N. C. 225.

Pennsylvania.—Muncy Borough School Dist. *v.* Com., 84 Pa. St. 464; National Newark Banking Co. *v.* Erie Second Nat. Bank, 63 Pa. St. 404.

South Carolina.—Fernandez *v.* Lewis, 1 McCord (S. C.) 322.

Texas.— Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310; Nichols *v.* Blackmore, 27 Tex. 586; Chambers *v.* Hill, 26 Tex. 472; Jordan *v.* Wheeler, 20 Tex. 698.

West Virginia.— Thornburg *v.* Emmons, 23 W. Va. 325.

Wisconsin.— Cork *v.* Bacon, 45 Wis. 192, 30 Am. Rep. 712; Walsh *v.* Dart, 23 Wis. 334, 99 Am. Dec. 177.

United States.— Bull *v.* Kasson First Nat. Bank, 14 Fed. 612 [*reversed* on other grounds in 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97]; Lacon First Nat. Bank *v.* Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609; Olshauzen *v.* Lewis, 1 Biss. (U. S.) 419, 18 Fed. Cas. No. 10,507; Wallace *v.* Agry, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096; U. S. *v.* Barker, 24 Fed. Cas. No. 14,519, 1 U. S. L. J. 1.

England.—Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 14 Eng. Reprint 215; Shute *v.* Robins, 3 C. & P. 80, M. & M. 133, 14 E. C. L. 460; Medcalf *v.* Hall, 3 Dougl. 113, 26 E. C. L. 83; Muilman *v.* D'Eguino, 2 H. Bl. 565; Straker *v.* Graham, 4 M. & W. 721; Moore *v.* Warren, 1 Str. 415; Bills Exch. Act, § 45.

Canada.— Bills Exch. Act, § 45 (b). See Perley *v.* Howard, 4 N. Brunsw. 518.

Taking check in payment.— Where a draft was presented for payment on the day on which it was drawn, the check of the drawees was taken therefor, and the check was presented in the ordinary course of business through the clearing-house and was dishonored, whereupon the draft was again presented and notice of non-payment given, it was held that there was not such neglect as to discharge the drawer of the draft, although

to orders,[19] to certificates of deposit,[20] and to promissory notes payable on demand, including notes in which no time of payment is expressed,[21] whether according to the weight of authority they are expressed to be payable with interest or not.[22] A bill or note indorsed and transferred after its maturity, being payable on demand, is within this rule, some courts saying that a note indorsed when overdue is in effect a bill payable at sight or on demand, while others say that

the drawee had sufficient money to pay the debt when the check was given and would probably have paid money if it had been demanded. Burkhalter *v.* Erie Second Nat. Bank, 42 N. Y. 538, 40 How. Pr. (N. Y.) 324.

19. Adams *v.* Boyd, 33 Ark. 33; Gallagher *v.* Raleigh, 7 Ind. 1; Mitcherson *v.* Grays, 4 B. Mon. (Ky.) 399; Brower *v.* Jones, 3 Johns. (N. Y.) 230. *Compare* Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459.

20. Laughlin *v.* Marshall, 19 Ill. 390; Bower *v.* Hoffman, 23 Md. 263, 87 Am. Dec. 569; Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Lindsey *v.* McClelland, 18 Wis. 481, 86 Am. Dec. 786.

21. *Alabama.*— Somerville *v.* Williams, 1 Stew. (Ala.) 484.

California.—Keyes *v.* Fenstermaker, 24 Cal. 329; Jerome *v.* Stebbins, 14 Cal. 457.

Connecticut.— Hayes *v.* Werner, 45 Conn. 246; Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268; Culver *v.* Parish, 21 Conn. 408; Lockwood *v.* Crawford, 18 Conn. 361.

Georgia.— Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653.

Louisiana.— Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267.

Maryland.— Mudd *v.* Harper, 1 Md. 110, 54 Am. Dec. 644.

Massachusetts.— Merritt *v.* Jackson, 181 Mass. 69, 62 N. E. 987; Wylie *v.* Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Field *v.* Nickerson, 13 Mass. 131; Shaw *v.* Grifith, 7 Mass. 494; Freeman *v.* Boynton, 7 Mass. 483.

Michigan.— Home Sav. Bank *v.* Hosie, 119 Mich. 116, 77 N. W. 625.

Montana.— Oleson *v.* Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639.

New Jersey.— Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 39 Atl. 650; Perry *v.* Green, 19 N. J. L. 61, 38 Am. Dec. 536; Snyder *v.* Findley, 1 N. J. L. 48.

New York.— Alexander *v.* Parsons, 3 Lans. (N. Y.) 333; Salmon *v.* Grosvenor, 66 Barb. (N. Y.) 160; O'Neill *v.* Meighan, 32 Misc. (N. Y.) 516, 66 N. Y. Suppl. 313; Wethey *v.* Andrews, 3 Hill (N. Y.) 582; Sice *v.* Cunningham, 1 Cow. (N. Y.) 397; Good *v.* Arrowsmith, Anth. N. P. (N. Y.) 289.

South Carolina.— Allwood *v.* Haseldon, 2 Bailey (S. C.) 457.

Virginia.— Bacon *v.* Bacon, 94 Va. 686, 27 S. E. 576.

Wisconsin.— Turner *v.* Iron Chief Min. Co., 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L. R. A. 533.

United States.—Martin *v.* Winslow, 2 Mason (U. S.) 241, 16 Fed. Cas. No. 9,172; *In re* Grant, 10 Fed. Cas. No. 5,691, 6 Law Rep. 158; *In re* Crawford, 6 Fed. Cas. No. 3,364, 5 Nat. Bankr. Reg. 301.

England.— Chartered Mercantile Bank *v.* Dickson, L. R. 3 P. C. 574; Williams *v.* Smith, 2 B. & Ald. 496, 21 Rev. Rep. 373; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; James *v.* Holditch, 8 D. & R. 40, 16 E. C. L. 332; Smith *v.* Becket, 13 East 187. *Compare*, however, Brooks *v.* Mitchell, 11 L. J. Exch. 51, 9 M. & W. 15.

Canada.— Commercial Bank *v.* Allan, 10 Manitoba 330; Banque du Peuple *v.* Denincourt, 10 Quebec Super. Ct. 428.

Neg. Instr. L. § 131; Bills Exch. Act, § 86.

Maturity of note payable on demand see *supra*, VII, A, 7, b.

22. *California.*—Keyes *v.* Fenstermaker, 24 Cal. 329.

Connecticut.— Culver *v.* Parish, 21 Conn. 408; Lockwood *v.* Crawford, 18 Conn. 361.

Louisiana.— Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267.

Massachusetts.—Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Field *v.* Nickerson, 13 Mass. 131; Freeman *v.* Boynton, 7 Mass. 483.

New Jersey.— Perry *v.* Green, 19 N. J. L. 61, 38 Am. Dec. 536.

New York.— Salmon *v.* Grosvenor, 66 Barb. (N. Y.) 160; Wethey *v.* Andrews, 3 Hill (N. Y.) 582; Sice *v.* Cunningham, 1 Cow. (N. Y.) 397.

Vermont.— Verder *v.* Verder, 63 Vt. 38, 21 Atl. 611.

Wisconsin.— Turner *v.* Iron Chief Min. Co., 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L. R. A. 533.

United States.— *In re* Grant, 10 Fed. Cas. No. 5,691, 6 Law Rep. 158.

England.— Smith *v.* Becket, 13 East 187.

In New York it has been held that a note payable on demand, with interest, is a continuing security, not only as against the maker but also as against the indorsers, until after an actual demand, and that as a general rule mere delay in demanding payment, although for several years, will not discharge indorsers. Merritt *v.* Todd, 23 N. Y. 28, 80 Am. Dec. 243. See also Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176. But this rule does not apply where the holder of a demand note fails to present it for payment until after the maker has been discharged under the statute of limitations, in which case his discharge releases indorsers (Shutts *v.* Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231), to a demand note payable without interest one day after sight (Alexander *v.* Parsons, 3 Lans. (N. Y.) 333 [*distinguishing* Merritt *v.* Todd, 23 N. Y. 28, 80 Am. Dec. 243]), or to demand paper, even when it is payable with interest, if there is anything on the paper

such a note is a note payable on demand.[23] In some jurisdictions the time for presentment of commercial paper payable on demand is regulated by statute.[24]

to show that the parties intended that a demand should be made within a reasonable time (Crim *v.* Starkweather, 88 N. Y. 339, 42 Am. Rep. 250).

23. *Alabama.*— Montgomery State Branch Bank *v.* Gaffney, 9 Ala. 153; Adams *v.* Torbert, 6 Ala. 865; Kennon *v.* McRea, 7 Port. (Ala.) 175.

Arkansas.— Sachs *v.* Fuller, 69 Ark. 270, 62 S. W. 902; Levy *v.* Drew, 14 Ark. 334; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California.— Beer *v.* Clifton, 98 Cal. 323, 33 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 580; Beebe *v.* Brooks, 12 Cal. 308.

Connecticut.— Bishop *v.* Dexter, 2 Conn. 419.

Florida.— Bemis *v.* McKenzie, 13 Fla. 553.

Illinois.— Kimmel *v.* Weil, 95 Ill. App. 15.

Indiana.— Norvell *v.* Hittle, 23 Ind. 346.

Iowa.— Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250; Pryor *v.* Bowman, 38 Iowa 92; McKewer *v.* Kirtland, 33 Iowa 348; Jones *v.* Middleton, 29 Iowa 188.

Kansas.— Swartz *v.* Redfield, 13 Kan. 550.

Louisiana.— Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372.

Maine.— Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478; Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108; Sanborn *v.* Southard, 25 Me. 409, 43 Am. Dec. 288; Greely *v.* Hunt, 21 Me. 455.

Maryland.— Dixon *v.* Clayville, 44 Md. 573.

Massachusetts.— Colt *v.* Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584.

Minnesota.— Hart *v.* Eastman, 7 Minn. 74.

Missouri.— Light *v.* Kingsbury, 50 Mo. 331.

New York.— Eisenlord *v.* Dillenbach, 15 Hun (N. Y.) 23 [*affirmed* in 79 N. Y. 617]; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75; Berry *v.* Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75.

Oregon.— Smith *v.* Caro, 9 Oreg. 278.

Pennsylvania.— Tyler *v.* Young, 30 Pa. St. 143; Patterson *v.* Todd, 18 Pa. St. 426, 57 Am. Dec. 622.

South Carolina.— Gray *v.* Bell, 3 Rich. (S. C.) 71; Allwood *v.* Haseldon, 2 Bailey (S. C.) 457.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Union Bank *v.* Ezell, 10 Humphr. (Tenn.) 385; Stothart *v.* Lewis, 1 Overt. (Tenn.) 255.

Texas.— Winston *v.* Kelly, 33 Tex. 354.

Vermont.— Verder *v.* Verder, 63 Vt. 38, 21 Atl. 611.

Wisconsin.— Corwith *v.* Morrison, 1 Pinn. (Wis.) 489.

United States.— Cox *v.* Jones, 2 Cranch C. C. (U. S.) 370, 6 Fed. Cas. No. 3,303.

A bill of exchange may be transferred as well after as before it is due, being then payable on demand, and it must be presented for payment in a reasonable time. Union Bank *v.* Ezell, 10 Humphr. (Tenn.) 385.

Liability on agreement to indorse.— There is no liability on an agreement to indorse a note, made after its maturity, unless a demand of payment is made upon the principal within a reasonable time and notice of nonpayment given. Sachs *v.* Fuller, 69 Ark. 270, 62 S. W. 902.

The commencement of a suit against the maker within a few days after the indorsement and of another against the indorser more than twelve months afterward and after the maker had been sued to insolvency are not sufficient to charge the indorser. Allwood *v.* Haseldon, 2 Bailey (S. C.) 457. *Compare* Gray *v.* Bell, 3 Rich. (S. C.) 71, where it was held that an action against the maker to the first term after the indorsement was a sufficient demand, and that if the indorser knew of the action within a reasonable time it was sufficient notice.

Necessity for presentment of a note indorsed when overdue see *supra*, X, A, 1, a, (IV).

24. *California.*— Machado *v.* Fernandez, 74 Cal. 362, 16 Pac. 19, holding that under Cal. Civ. Code, § 3214, providing that mere delay in presenting a bill of exchange payable with interest at sight or on demand does not exonerate any party thereto, and section 3247, declaring the former section applicable to a promissory note, an indorser of a promissory note payable on demand, with interest, is not discharged by a failure to present the same for payment for more than one year.

Connecticut.— The former Connecticut statute provided that negotiable notes payable on demand, which should remain unpaid four months after their date, should be considered overdue and dishonored after that time, and required the holders of such notes, even where they were expressed to be with interest and were intended as continuing securities, to present the same within that time. Hayes *v.* Werner, 45 Conn. 246; Rhodes *v.* Seymour, 36 Conn. 1. But the statute did not apply to non-negotiable demand notes so as to render a delay of more than four months in presentment thereof a discharge of an indorser. Oley *v.* Miller, 74 Conn. 304, 50 Atl. 744. The present statute in Connecticut merely requires a promissory note payable on demand to be presented within a reasonable time after its issue. Conn. Gen. Stat. (1902), § 4241.

Idaho.— Fox *v.* Rogers, (Ida. 1899) 59 Pac. 538, construing Ida. Rev. Stat. (1887), § 3546, requiring a bill of exchange payable at sight or on demand without interest to be presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment, and providing that the drawer and indorser shall be exonerated if it is not so presented, unless such presentment is excused; and also construing section 3951, under which the drawer of a check is exonerated

b. What Is a Reasonable Time. The courts have not fixed upon any particular time as a reasonable time within which to present paper payable on demand or at sight, but what is a reasonable time depends upon all the circumstances of each particular case. In determining the question the courts will consider all the circumstances by which the question of diligence can be affected, as the distance between the residences of the parties, the mail facilities, the usages of the country respecting such paper, etc.[25] If a bill payable at sight or on demand is put into

by such delay in presentment only to the extent of the injury which he suffers thereby. Under Ida. Rev. Stat. (1887), § 3578, a promissory note payable on demand or at sight, without interest, must be presented for payment within six months from its date.

Massachusetts.— Merritt *v.* Jackson, 181 Mass. 69, 62 N. E. 987, construing Mass. Stat. (1898), c. 533, § 71, requiring demand notes to be presented within a reasonable time, and section 193, declaring that in determining what is a reasonable time regard is to be had to the nature of the instrument, the usage of trade with respect to such instruments, and the facts of the particular case, and holding that in the absence of evidence of custom or usage a demand must be made within sixty days. See also Rice *v.* Wesson, 11 Metc. (Mass.) 400, holding that the former statute (Mass. Stat. (1839), c. 121, § 2), requiring notes payable on demand to be presented within sixty days from the date thereof, did not apply to such a note when indorsed after sixty days from its date, but that in such case a demand on the maker was within a reasonable time, if made not later than at the expiration of sixty days from the time of the indorsement of the note.

South Dakota.— Warner *v.* Citizens' Bank, 6 S. D. 152, 60 N. W. 746, construing S. D. Comp. Laws, § 4544, requiring a bill of exchange payable at sight or on demand, without interest, to be presented for payment within ten days after the time in which it could with reasonable diligence be transmitted in the proper place for presentment, and declaring that failure to so present the same shall discharge the drawer and indorsers unless such presentment is excused.

Vermont.— Verder *v.* Verder, 63 Vt. 38, 21 Atl. 611, construing Vt. Stat. (1894), § 2320 (Vt. Rev. Laws, § 2013), requiring a promissory note payable on demand to be presented within sixty days, and holding that the statute applies to a demand note payable with interest annually.

25. *Arkansas.*— Peters *v.* Hobbs, 25 Ark. 67, 91 Am. Dec. 526; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California.— Keyes *v.* Fenstermaker, 24 Cal. 329.

Connecticut.— Lockwood *v.* Crawford, 18 Conn. 361.

Illinois.— Montelius *v.* Charles, 76 Ill. 303.

Louisiana.— Richardson *v.* Fenner, 10 La Ann. 599.

Maine.— Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478.

New York.— Salmon *v.* Grosvenor, 66 Barb. (N. Y.) 160; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75.

North Carolina.— Brittain *v.* Johnson, 12 N. C. 293.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75.

Texas.— Nichols *v.* Blackmore, 27 Tex. 586; Chambers *v.* Hill, 26 Tex. 472; Jordan *v.* Wheeler, 20 Tex. 698.

Sparsely populated territory.— If there is no delay in the presentment of paper other than that incident to the transaction of business in a sparsely populated territory the holder is not chargeable with laches. Montelius *v.* Charles, 76 Ill. 303.

Sight bills and drafts.— The courts have held the delay in presenting sight bills or drafts not to be unreasonable under the particular circumstances where there was a delay of one day after the receipt of the same (Moore *v.* Warren, 1 Str. 415); four days (Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473); where there was a delay of six days in forwarding from Michigan to New York a bank draft received "on deposit" for the purchase of a railroad ticket for an excursion five days after its receipt, the purchaser reserving the right to take the ticket or recall the money, the draft being forwarded the day after the ticket was taken and presented in New York in due course (Nutting *v.* Burked, 48 Mich. 241, 12 N. W. 184); and where there was a delay of seven days (Muncy Borough School Dist. *v.* Com., 84 Pa. St. 464); eleven days (National Newark Banking Co. *v.* Erie Second Nat. Bank, 63 Pa. St. 404); one month (Jordan *v.* Wheeler, 20 Tex. 698), where the draft had been lost and had to be duplicated (Benton *v.* Martin, 31 N. Y. 382); thirty-five days (Montelius *v.* Charles. 76 Ill. 303); seven weeks (Nichols *v.* Blackmore, 27 Tex. 586); two months, where the payee was requested to hold the draft till he should complete a contemplated purchase of land (Sheldon *v.* Chapman, 31 N. Y. 644); and three months, where it appeared that the bill was intended for circulation (Richardson *v.* Fenner, 10 La. Ann. 599; Boyes *v.* Joseph, 7 U. C. Q. B. 505). On the other hand the courts have held to be unreasonable under the particular circumstances a delay of two and one-half years (Chambers *v.* Hill, 26 Tex. 472); two years (Bridgeford *v.* Simonds, 18 La. Ann. 121); one year or more (Lacon First Nat. Bank *v.* Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609); eight months (Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 14 Eng. Reprint 215); more than one month (Ols-

circulation soon after its receipt and kept in circulation, a considerable time may elapse before presentment without discharging the drawer or indorsers.[26] In the case of a note payable on demand or indorsed and transferred when overdue, the terms of the instrument or the extraneous circumstances may show that the parties intended that it should be a continuing security and should not be

hausen *v.* Lewis, 1 Biss. (U. S.) 419, 18 Fed. Cas. No. 10,507); one month (Cedar Falls Co. *v.* Wallace, 83 N. C. 225); twenty-one days (Phœnix Ins. Co. *v.* Gray, 13 Mich. 191); ten days (Vantrot *v.* McCulloch, 2 Hilt. (N. Y.) 272); and five days (Slack *v.* Longshaw, 8 Ky. L. Rep. 166).

A bank draft issued for profit and for negotiable purposes need not be presented as promptly as a private draft. Nutting *v.* Burked, 48 Mich. 241, 12 N. W. 184; Marbourg *v.* Brinkman, 23 Mo. App. 511.

A sight draft received for collection against a drawee who resides in the same city must be presented before the close of the succeeding day. Dyas *v.* Hanson, 14 Mo. App. 363.

Notes payable on demand, or indorsed when overdue.— It has been held that the delay in presenting a promissory note payable on demand or indorsed and transferred when overdue was not unreasonable, under the circumstances of the particular case, where there was a delay of four days (Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727); six days, it appearing that the maker lived two hundred miles from the holder (Freeman *v.* Boynton, 7 Mass. 483); seven days (Seaver *v.* Lincoln, 21 Pick. (Mass.) 267); twenty-three days (Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478); one month (Ranger *v.* Cary, 1 Metc. (Mass.) 369; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75); two months (Lockwood *v.* Crawford, 18 Conn. 361); eight months (Yates *v.* Goodwin, 96 Me. 90, 51 Atl. 804); ten months (Chartered Mercantile Bank *v.* Dickson, L. R. 3 P. C. 574); nineteen months (Vreeland *v.* Hyde, 2 Hall (N. Y.) 429); two years (Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268); and thirty-two months (Commercial Bank *v.* Allan, 10 Manitoba 330). On the other hand the delay has been held unreasonable where there was a delay of more than five years (*In re* Grant, 10 Fed. Cas. No. 5,691, 6 Law. Rep. 158); four years and nine months (Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267); four years (*In re* Crawford, 6 Fed. Cas. No. 3,364, 5 Nat. Bankr. Reg. 301); two years and a half (Home Sav. Bank *v.* Hosie, 119 Mich. 116, 77 N. W. 625); over two years (Eisenlord *v.* Dillenback, 15 Hun (N. Y.) 23 [*affirmed* in 79 N. Y. 617]); sixteen months (Good *v.* Arrowsmith, Anth. N. P. (N. Y.) 289); fifteen months (Dixon *v.* Clayville, 44 Md. 573); fourteen months (Wylie *v.* Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305); thirteen months (Jerome *v.* Stebbins, 14 Cal. 457); one year (Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212; Hart *v.* Eastman, 7 Minn. 74); ten months (Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372; Turner *v.* Iron Chief Min. Co., 74 Wis. 355, 43 N. W. 149, 17 Am. St. Rep. 168, 5 L. R. A. 533); nine months (Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 39 Atl. 650); eight months (Field *v.* Nickerson, 13 Mass. 131); seven months (Martin *v.* Winslow, 2 Mason (U. S.) 241, 16 Fed. Cas. No. 9,172); five months (Sice *v.* Cunningham, 1 Cow. (N. Y.) 397); four months (Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75); three months (Shaw *v.* Griffith, 7 Mass. 494; Light *v.* Kingsbury, 50 Mo. 331); ten weeks (Alexander *v.* Parsons, 3 Lans. (N. Y.) 333); sixty days (Merritt *v.* Jackson, 181 Mass. 69, 62 N. E. 987); thirty days (Freeman *v.* Boynton, 7 Mass. 483); and twenty-five days (Levy *v.* Drew, 14 Ark. 334).

Certificates of deposit.— Under particular circumstances certificates of deposit have been held to have been presented within a reasonable time where they were presented in four days (Laughlin *v.* Marshall, 19 Ill. 390); six days (Lindsey *v.* McClelland, 18 Wis. 481, 86 Am. Dec. 786); and even in five months, where it appeared that the certificate was intended as a continuing security (Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176). On the other hand a delay of fifteen days in presenting a certificate of deposit has been held unreasonable, where it could have been presented by mail in two days and the money was lost by failure of the bank during the delay. Bower *v.* Hoffman, 23 Md. 263, 87 Am. Dec. 569.

Orders.— An order for the payment of money was held to have been presented within a reasonable time, where it was presented on the second day after it was drawn and again on the third day thereafter. Mitcherson *v.* Grays, 4 B. Mon. (Ky.) 399. But the delay was held unreasonable where an order was not presented until seventy or eighty days after it was drawn. Brower *v.* Jones, 3 Johns. (N. Y.) 230. And a delay of two years has been held unreasonable. Adams *v.* Boyd, 33 Ark. 33.

26. *Illinois.*— Montelius *v.* Charles, 76 Ill. 303.

Louisiana.— Richardson *v.* Fenner, 10 La. Ann. 599.

New York.— Gowan *v.* Jackson, 20 Johns. (N. Y.) 176; Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

Texas.— Jordan *v.* Wheeler, 20 Tex. 698.

England.— Goupy *v.* Harden, Holt 342, 3 E. C. L. 139, 2 Marsh. 454, 7 Taunt. 159, 2 E. C. L. 306, 17 Rev. Rep. 478, holding that it is no laches to put a foreign bill, payable after sight, into circulation before acceptance and to keep it circulating without acceptance so long as the convenience of the successive holders requires.

presented immediately.[27] If a demand note provides for the payment of interest this generally shows that immediate presentment was not contemplated and is to be considered in determining whether it has been presented within a reasonable time.[28]

3. Paper Payable a Certain Time After Demand. Some courts hold that where paper is payable a certain time after demand a demand must be made within a reasonable time, while others hold that it need not be made at any particular time or even within a reasonable time, and that it does not mature until the lapse of the specified time after demand is actually made.[29]

4. Notes Payable in Instalments. If a promissory note is payable in instalments at specified times the demand should be made for each instalment as it falls due or on the third day thereafter where grace is allowed,[30] unless there is a provision in the note by which the whole amount becomes due on default of the payment of any instalment.[31]

5. Where Maturity Is Accelerated by Other Default. Where a note stipulates that it shall become due and payable in case of default in the payment of any instalment of interest, it matures and demand must be made on the first default in the payment of interest or the indorser will be discharged.[32]

6. Checks — a. In General. A check, like a bill of exchange, must be presented for payment within a reasonable time, and what is a reasonable time will depend upon the circumstances of the particular case.[33] In the absence of special

27. Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268; Lockwood *v.* Crawford, 18 Conn. 361; Yates *v.* Goodwin, 96 Me. 90, 51 Atl. 804; Salmon *v.* Grosvenor, 66 Barb. (N. Y.) 160; Vreeland *v.* Hyde, 2 Hall (N. Y.) 429; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75.

28. Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268; Lockwood *v.* Crawford, 18 Conn. 361; Yates *v.* Goodwin, 96 Me. 90, 51 Atl. 804; Salmon *v.* Grosvenor, 66 Barb. (N. Y.) 160; Wethey *v.* Andrews, 3 Hill (N. Y.) 582; Gascoyne *v.* Smith, McClel. & Y. 338. See also Merritt *v.* Todd, 23 N. Y. 28, 80 Am. Dec. 243. *Compare* Crim *v.* Starkweather, 88 N. Y. 339, 42 Am. Rep. 250.

29. See *supra*, VII, A, 7, c.

30. Eastman *v.* Turman, 24 Cal. 379 (holding, however, that if a note falls due in instalments and demand is made for the whole amount at the maturity of the last instalment and not until then, such demand will be sufficient to preserve the indorser's liability for such last instalment); Orridge *v.* Sherborne, 7 Jur. 402, 12 L. J. Exch. 313, 11 M. & W. 374.

31. See *supra*, VII, A, 13.

32. Mallon *v.* Stevens, 6 Ohio Dec. (Reprint) 1042, 9 Am. L. Rec. 702, 6 Cinc. L. Bul. 69. See also *supra*, VII, A, 13.

33. *California.*— Himmelmann *v.* Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

Connecticut.— Woodruff *v.* Plant, 41 Conn. 344.

District of Columbia.— Deener *v.* Brown, 1 MacArthur (D. C.) 350.

Georgia.— Tomlin *v.* Thornton, 99 Ga. 585, 27 S. E. 147; Daniels *v.* Kyle, 5 Ga. 245.

Illinois.— Stevens *v.* Park, 73 Ill. 387.

Indiana.— Pollard *v.* Bowen, 57 Ind. 232.

Iowa.— Northwestern Coal Co. *v.* Bowman, 69 Iowa 150, 28 N. W. 496.

Louisiana.— Miller *v.* Moseley, 26 La. Ann. 667.

Maine.— Veazie Bank *v.* Winn, 40 Me. 60.

Maryland.— Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200.

Michigan.— Holmes *v.* Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; Freiberg *v.* Cody, 55 Mich. 108, 20 N. W. 813.

Mississippi.— Parker *v.* Reddick, 65 Miss. 242, 3 So. 575, 7 Am. St. Rep. 646.

Missouri.— Moody *v.* Mack, 43 Mo. 210; St. Johns *v.* Homans, 8 Mo. 382; Herider *v.* Phœnix Loan Assoc., 82 Mo. App. 427; Farmers' Nat. Bank *v.* Dreyfus, 82 Mo. App. 399; Marbourg *v.* Brinkman, 23 Mo. App. 511.

Nebraska.— Wymore First Nat. Bank *v.* Miller, 37 Nebr. 500, 55 N. W. 1064, 40 Am. St. Rep. 499 [*affirmed* in 43 Nebr. 791, 62 N. W. 195], holding that, although distance is material in determining what is a reasonable time, yet due consideration should be given to the fact that the places are connected by telegraph, telephone, railroad, and a daily mail, so that what might under other circumstances constitute a reasonable time for presentment might in view of these facts amount to unreasonable delay and discharge the indorser.

New Hampshire.— Hadduck *v.* Murray, 1 N. H. 140, 8 Am. Dec. 43, holding that the fact that there is no mail connection is material upon the question of reasonable delay.

New Jersey.— Taylor *v.* Sip, 30 N. J. L. 284.

New York.— Donlon *v.* Davidson, 7 N. Y. App. Div. 461, 39 N. Y. Suppl. 1020 [*affirming* 16 Misc. (N. Y.) 316, 39 N. Y. Suppl. 394]; Stephens *v.* O'Neill, 26 Barb. (N. Y.) 651; Murphy *v.* Levy, 23 Misc. (N. Y.) 147, 50 N. Y. Suppl. 682; Carroll *v.* Sweet, 9 Misc. (N. Y.) 382, 30 N. Y. Suppl. 204, 61

circumstances excusing delay[34] the reasonable time for presenting a check, where the person receiving the same and the bank on which it is drawn are in the same place, is not later than the next business day after it is received;[35] and where they are in different places, reasonable diligence requires the check to be for-

N. Y. St. 673; Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192; Bradley Fertilizer Co. *v.* Lathrop, 2 N. Y. City Ct. 289.

Pennsylvania.— Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202; Fegley *v.* McDonald, 89 Pa. St. 128.

Tennessee.— Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

West Virginia.— Cox *v.* Bonne, 8 W. Va. 500, 23 Am. Rep. 627.

Wisconsin.— Grange *v.* Reigh, 93 Wis. 552, 67 N. W. 1130; Gifford *v.* Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925.

United States.— Bull *v.* Kasson First Nat. Bank, 14 Fed. 612 [*reversed* on other grounds in 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97]; Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499.

England.— Bailey *v.* Bodenham, 16 C. B. N. S. 288, 10 Jur. N. S. 821, 33 L. J. C. P. 252, 10 L. T. Rep. N. S. 422, 12 Wkly. Rep. 865, 111 E. C. L. 288; Hare *v.* Henty, 10 C. B. N. S. 65, 7 Jur. N. S. 523, 30 L. J. C. P. 302, 4 L. T. Rep. N. S. 363, 9 Wkly. Rep. 738, 100 E. C. L. 65; Medcalf *v.* Hall, 3 Dougl. 113, 26 E. C. L. 83 (holding that the fact that a check is on a country bank or drawn in the country a distance away may operate to extend the time and constitute due diligence under circumstances that otherwise might be unreasonable delay).

Canada.— Reg. *v.* Montreal Bank, 1 Can. Exch. 154; Lord *v.* Hunter, 6 Montreal Leg. N. 310; Campbell *v.* Riendeau, 2 Quebec Q. B. 604; Banque Jacques-Cartier *v.* Limoilou Corp., 17 Quebec Super. Ct. 211.

See also BANKS AND BANKING, 5 Cyc. 531-533.

Taking check of bank in payment.— When the payee of a check takes from the drawee, who has ample funds of the drawer, a check of the drawee on some other bank instead of money he must use the utmost diligence to present the substituted check for payment, in order to hold the drawer liable on the check in case of the bankruptcy of the drawee. Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200.

A public officer who receives a bank check for money due the state must stand the loss where he fails to present it within a reasonable time and until after failure of the bank. State *v.* Gates, 67 Mo. 139.

34. Freiberg *v.* Cody, 55 Mich. 108, 20 N. W. 813; Moody *v.* Mack, 43 Mo. 210; Middletown Bank *v.* Morris, 28 Barb. (N. Y.) 616. And see BANKS AND BANKING, 5 Cyc. 533.

An established usage is to be considered in determining whether delay in forwarding a check for presentment was reasonable. Bridgeport Bank *v.* Dyer, 19 Conn. 136.

35. *Alabama.*— Morris *v.* Eufaula Nat. Bank, 122 Ala. 580, 25 So. 499, 82 Am. St. Rep. 95.

California.— Ritchie *v.* Bradshaw, 5 Cal. 228.

District of Columbia.— Clark *v.* National Metropolitan Bank, 2 MacArthur (D. C.) 249.

Illinois.— Rounds *v.* Smith, 42 Ill. 245; Strong *v.* King, 35 Ill. 9, 85 Am. Dec. 336; Brown *v.* Schintz, 98 Ill. App. 452; McDonald *v.* Mosher, 23 Ill. App. 206.

Iowa.— Northwestern Coal Co. *v.* Bowman, 69 Iowa 150, 28 N. W. 496.

Louisiana.— Ocean Tow Boat Co. *v.* The Ophelia, 11 La. Ann. 28.

Maine.— Veazie Bank *v.* Winn, 40 Me. 60.

Michigan.— Hamilton *v.* Winona Salt, etc., Co., 95 Mich. 436, 54 N. W. 903.

Missouri.— Dyas *v.* Hanson, 14 Mo. App. 363.

New York.— Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690; Burkhalter *v.* Erie Second Nat. Bank, 42 N. Y. 538, 40 How. Pr. (N. Y.) 324; Benton *v.* Martin, 31 N. Y. 382; Murphy *v.* Levy, 23 Misc. (N. Y.) 147, 50 N. Y. Suppl. 682; Harker *v.* Anderson, 21 Wend. (N. Y.) 372; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Kobbi *v.* Underhill, 3 Sandf. Ch. (N. Y.) 277.

Ohio.— Blachly *v.* Andrew, 1 Disn. (Ohio) 78, 12 Ohio Dec. (Reprint) 498; Davis *v.* Benton, 2 Ohio Dec. (Reprint) 329, 2 West. L. Month. 434; Merchants' Nat. Bank *v.* Procter, 1 Cinc. Super. Ct. 1.

Wisconsin.— Grange *v.* Reigh, 93 Wis. 552, 67 N. W. 1130.

England.— Rickford *v.* Ridge, 2 Campb. 537; Medcalf *v.* Hall, 3 Dougl. 113, 26 E. C. L. 83.

Canada.— Blackley *v.* McCabe, 16 Ont. App. 295.

See also BANKS AND BANKING, 5 Cyc. 531, note 68.

Presentment of a check on the day it is received is not necessary. *Alabama.*— Morris *v.* Eufaula Nat. Bank, 122 Ala. 580, 25 So. 499, 82 Am. St. Rep. 95.

California.— Simpson *v.* Pacific Mut. L. Ins. Co., 44 Cal. 139.

District of Columbia.— Clark *v.* National Metropolitan Bank, 2 MacArthur (D. C.) 249.

Massachusetts.— Taylor *v.* Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180.

New York.— Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443.

England.— Medcalf *v.* Hall, 3 Dougl. 113, 26 E. C. L. 83.

But it has been held that where the holder of a draft receives the drawee's check on presenting the same it is his duty, as between himself and the drawer of the draft, to present the check on the same day if he can do so,

warded to the place of payment for presentment not later than the next business day after it is received by the payee, and presented not later than the day after it is there received.[36] Inexcusable delay will discharge an indorser from liability if the check is not paid, whether he is in fact injured or not,[37] and it will discharge the drawer from liability if he is injured by the delay,[38] but not other-

although presentment on the following day would be sufficient diligence as between himself and the drawee of the draft by whom the check is given. Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690 [*reversing* 6 Rob. (N. Y.) 157, 413, 6 Abb. Pr. N. S. (N. Y.) 234]. See also Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11; Strong *v.* King, 35 Ill. 9, 85 Am. Dec. 336; Merchants' Nat. Bank *v.* Samuel, 20 Fed. 664. *Compare* Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 [*reversing* 16 Hun (N. Y.) 332]. And if a check is presented for payment on the day on which it is received and payment is offered by the drawee it is the duty of the holder to receive the money. If he refuses it and the check is not paid when presented on the following day the drawer is discharged. Simpson *v.* Pacific Mut. L. Ins. Co., 44 Cal. 139. See also East River Bank *v.* Gedney, 4 E. D. Smith (N. Y.) 582.

Presentment for certification.—A check may properly be presented for certification on the day on which it is received and presented for payment on the next day. Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; Robson *v.* Bennett, 2 Taunt. 388, 11 Rev. Rep. 614.

Receipt after close of banking hours.— It has been held that if a check is not received until after the close of banking hours, is deposited the next day for collection, and presented on the following day there is sufficient diligence. Willis *v.* Finley, 173 Pa. St. 28, 34 Atl. 213; Loux *v.* Fox, 171 Pa. St. 68, 33 Atl. 190.

36. *California.*— Ritchie *v.* Bradshaw, 5 Cal. 228.

Iowa.— Northwestern Coal Co. *v.* Bowman, 69 Iowa 150, 28 N. W. 496.

Maryland.— Grafton First Nat. Bank *v.* Buckhannon Bank, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332.

Mississippi.— Parker *v.* Reddick, 65 Miss. 242, 3 So. 575, 7 Am. St. Rep. 646.

Nebraska.— Wymore First Nat. Bank *v.* Miller, 43 Nebr. 791, 62 N. W. 195 [*affirming* 37 Nebr. 500, 55 N. W. 1064, 40 Am. St. Rep. 499].

New York.— Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192.

Pennsylvania.—Rosenthal *v.* Ehrlicher, 154 Pa. St. 396, 26 Atl. 435.

Vermont.— Gregg *v.* Beane, 69 Vt. 22, 37 Atl. 248.

Wisconsin.— Lloyd *v.* Osborne, 92 Wis. 93, 65 N. W. 859; Gifford *v.* Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925.

England.— Heywood *v.* Pickering, L. R. 9 Q. B. 428, 43 L. J. Q. B. 145; Moule *v.* Brown, 1 Arn. 79, 4 Bing. N. Cas. 266, 2 Jur. 277, 7 L. J. C. P. 111, 5 Scott 694, 33 E. C. L. 703.

See also BANKS AND BANKING, 5 Cyc. 532, note 69.

Circulation of check.— A check is intended for immediate presentment and payment and not for circulation, and putting it into circulation therefore is no excuse for delay in presenting it for payment. Parker *v.* Reddick, 65 Miss. 242, 3 So. 575, 7 Am. St. Rep. 646. See also Davis *v.* Benton, 2 Ohio Dec. (Reprint) 329, 2 West. L. Month. 434; Fegley *v.* McDonald, 89 Pa. St. 128. *Compare*, however, Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527.

Where a bank receives a check for collection it must forward it for presentment by a direct route and not indirectly by circulation through branch banks or otherwise. Moule *v.* Brown, 1 Arn. 79, 4 Bing. N. Cas. 266, 2 Jur. 277, 7 L. J. C. P. 111, 5 Scott 694, 33 E. C. L. 703. But the drawer will not be discharged by such indirect presentment if he sustains no loss. Allen *v.* Kramer, 2 Ill. App. 205.

Where check is sent by mail to the drawee, for collection and return, the holder makes the drawee his agent and must bear any loss arising after the time when the check could have been presented by express or other usual method. Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499. But the drawer of a check is not discharged from liability by reason of the holder's having sent the same to the drawee for collection, if it appears that no degree of diligence in presentment would have resulted in the payment of the check. Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

37. *Louisiana.*— Miller *v.* Moseley, 26 La. Ann. 667.

Missouri.— Moody *v.* Mack, 43 Mo. 210.

Nebraska.— Wymore First Nat. Bank *v.* Miller, 43 Nebr. 791, 62 N. W. 195 [*affirming* 37 Nebr. 500, 55 N. W. 1064, 40 Am. St. Rep. 499].

New York.— Merchants Nat. Bank *v.* Parker, 12 N. Y. St. 558; Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527.

Canada.— Lord *v.* Hunter, 6 Montreal Leg. N. 310.

See also BANKS AND BANKING, 5 Cyc. 532, note 70.

38. *California.*— Ritchie *v.* Bradshaw, 5 Cal. 228.

Connecticut.— Woodruff *v.* Plant, 41 Conn. 344.

District of Columbia.— Clark *v.* National Metropolitan Bank, 2 MacArthur (D. C.) 249.

wise.[39] *A fortiori* it will not discharge the drawer if he consents to the delay or waives it.[40]

b. Certified Checks. Where a check has been certified by the bank on which it is drawn the bank becomes the primary debtor and is not discharged from liability by any delay in presenting the same for payment short of the period of the statute of limitations;[41] but reasonable diligence in presenting a certified check is necessary to hold the drawer.[42]

7. Non-Negotiable Paper. The rule that paper payable on a day certain must be presented for payment on that day, and that paper payable on demand must be presented within a reasonable time in order to charge indorsers, applies where non-negotiable paper has been assigned or indorsed and it is sought to charge the assignor or indorser,[43] although it has been held that the drawer of a non-negotiable order for the payment of money will not be discharged by delay in pre-

Georgia.— Tomlin *v.* Thornton, 99 Ga. 585, 27 S. E. 147; Daniels *v.* Kyle, 5 Ga. 245.

Kentucky.— Piner *v.* Clary, 17 B. Mon. (Ky.) 645.

Maryland.— Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200; Norris *v.* Despard, 38 Md. 487.

Missouri.— St. John *v.* Homans, 8 Mo. 382.

New York.— East River Bank *v.* Gedney, 4 E. D. Smith (N. Y.) 582; Murphy *v.* Levy, 23 Misc. (N. Y.) 147, 50 N. Y. Suppl. 682; Bradley Fertilizer Co. *v.* Lathrop, 2 N. Y. City Ct. 289.

Wisconsin.— Grange *v.* Reigh, 93 Wis. 552, 67 N. W. 1130.

United States.— Farwell *v.* Curtis, 7 Biss. (U. S.) 160, 8 Fed. Cas. No. 4,690, 3 Centr. L. J. 352, 8 Chic. Leg. N. 267, 22 Int. Rev. Rec. 161, 2 N. Y. Wkly. Dig. 499.

England.— Bailey *v.* Bodenham, 16 C. B. N. S. 288, 10 Jur. N. S. 821, 33 L. J. C. P. 252, 10 L. T. Rep. N. S. 422, 12 Wkly. Rep. 865, 111 E. C. L. 288.

Canada.— Banque Jacques-Cartier *v.* Limoilou Corp., 17 Quebec Super. Ct. 211.

See also Banks and Banking, 5 Cyc. 532, note 71.

39. *Alabama.*— Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

Illinois.— Brown *v.* Schintz, 98 Ill. App. 452; Allen *v.* Kramer, 2 Ill. App. 205.

Maryland.— Grafton First Nat. Bank *v.* Buckhannon Bank, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332. *Compare* Anderson *v.* Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, 25 L. R. A. 200.

Michigan.— Holmes *v.* Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844.

Missouri.— Morrison *v.* McCartney, 30 Mo. 183; Herider *v.* Phœnix Loan Assoc., 82 Mo. App. 427.

New York.— Povall *v.* Dansville Cigar Mfg. Co., 59 Hun (N. Y.) 70, 12 N. Y. Suppl. 653, 35 N. Y. St. 837 (holding in effect that the drawer is discharged to the extent of the actual damage which he has sustained); Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126.

Tennessee.— Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

England.— Robinson *v.* Hawksford, 9 Q. B. 52, 10 Jur. 964, 15 L. J. Q. B. 377, 58 E. C. L. 52.

See also Banks and Banking, 5 Cyc. 533, note 73.

Delay for the period of the statute of limitations before presenting a check for payment will discharge the drawer from liability. Dolon *v.* Davidson, 16 Misc. (N. Y.) 316, 39 N. Y. Suppl. 394 [*affirmed* in 7 N. Y. App. Div. 461, 39 N. Y. Suppl. 1020].

The burden of showing that there has been no injury to the drawer of a check by reason of an unreasonable delay in presenting the same for payment is on the holder. In the absence of any evidence on the question injury will be presumed. Stevens *v.* Park, 73 Ill. 387. See also Banks and Banking, 5 Cyc. 533, note 72.

Laches of bona fide holder of check.— Unreasonable delay on the part of a *bona fide* transferee of a check in presenting the same for payment will not discharge the drawer from liability merely because of payments made by the drawer to the payee, where such payments were made in reliance on false representations by the payee that he had lost or mislaid the check, since the approximate cause of the drawer's loss is his imprudent reliance upon the representation of the payee. Bradley *v.* Andrus, 107 Fed. 196, 46 C. C. A. 238, 53 L. R. A. 432 [*affirming* Andrus *v.* Bradley, 102 Fed. 54].

40. Holmes *v.* Roe, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844.

41. Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Farmers', etc., Bank *v.* Butchers', etc., Bank, 4 Duer (N. Y.) 219; Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507. See also Banks and Banking, 5 Cyc. 534, note 81.

42. Andrews *v.* German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; Robson *v.* Bennett, 2 Taunt. 388, 11 Rev. Rep. 614. And see Banks and Banking, 5 Cyc. 532, note 68.

43. *Arkansas.*— Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

Connecticut.— Huntington *v.* Harvey, 4 Conn. 124.

Minnesota.— Hart *v.* Eastman, 7 Minn. 74.

New York.— Berry *v.* Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267.

North Carolina.— Plummer *v.* Christmas, 1 N. C. 46.

senting the same and demanding payment if it appears that he has not been injured thereby.[44]

8. Hour at Which Presentment Must Be Made — a. In General. Although the maker of a note or accepter of a bill has the entire day of maturity in which to pay the same, it is not necessary to wait until the last moment to present it and demand payment, but it may be presented for payment at any reasonable hour of the day of maturity, and if payment is refused it may be protested and notice of dishonor given at once.[45] The hour at which the presentment is made must, however, be a reasonable hour.[46]

b. What Are Reasonable Hours — (i) *Paper Not Payable at a Bank.* When paper is not payable at a bank, the rule that it must be presented at a reasonable hour requires that it shall be presented during the usual hours of business established by custom or usage in the particular place and renders it sufficient if the presentment is at any time within those hours.[47] If the paper is presented at the residence of the maker or accepter it must be presented within those hours when he may be presumed to be in a condition to attend to business and not after the usual time for retiring to rest.[48]

Vermont.— Aldis *v.* Johnson, 1 Vt. 136.

44. Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459; Hawkins *v.* Barney, 27 Vt. 392.

45. *California.*— McFarland *v.* Pico, 8 Cal. 626 [*overruling* Toothaker *v.* Cornwall, 4 Cal. 28].

Maine.— King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560.

Massachusetts.— Gordon *v.* Parmelee, 15 Gray (Mass.) 413; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209.

New York.— Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69; Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Osborn *v.* Moncure, 3 Wend. N. Y.) 170.

Pennsylvania.— Coleman *v.* Carpenter, 9 Pa. St. 178, 49 Am. Dec. 552.

Tennessee.— Garland *v.* West, 9 Baxt. (Tenn.) 315.

Vermont.— Thorpe *v.* Peck, 28 Vt. 127.

United States.— Metropolis Bank *v.* Walker, 2 Cranch C. C. (U. S.) 294, 2 Fed. Cas. No. 903.

England.— Burbridge *v.* Manners, 3 Camph. 193, 13 Rev. Rep. 786; *Ex p.* Moline, 19 Ves. Jr. 216.

If the presentment is made in reasonable time the holder after having given the indorser notice of the dishonor has performed his whole duty. He is not bound to remain at the place of payment all day, to wait until the close of the day, unless the note is payable at a bank, or to repeat the demand. Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69.

46. McFarland *v.* Pico, 8 Cal. 626; Dana *v.* Sawyer, 22 Me. 244, 39 Am. Dec. 574; Lunt *v.* Adams, 17 Me. 230; Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69; Patterson *v.* Tapley, 9 N. Brunsw. 292.

47. *California.*— McFarland *v.* Pico, 8 Cal. 626.

Illinois.— Skelton *v.* Dustin, 92 Ill. 49.

Maine.— Lunt *v.* Adams, 17 Me. 230.

Missouri.— Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393.

New York.— Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69; Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635.

Pennsylvania.— Ashton *v.* Dull, 31 Leg. Int. (Pa.) 61, 6 Leg. Gaz. (Pa.) 70.

Virginia.— Nelson *v.* Fotterall, 7 Leigh (Va.) 179.

England.— Triggs *v.* Newnham, 1 C. & P. 631, 3 L. J. C. P. O. S. 119, 12 E. C. L. 358, 10 Moore C. P. 249, 17 E. C. L. 572, 28 Rev. Rep. 678; Elford *v.* Teed, 1 M. & S. 28; Morgan *v.* Davison, 1 Stark. 114, 2 E. C. L. 52 (sustaining a demand made at the counting-house of the maker of a note between six and seven o'clock in the evening).

Canada.— Patterson *v.* Tapley, 9 N. Brunsw. 292.

Demand at eight in the morning.— In Lunt *v.* Adams, 17 Me. 230, it was held that a demand by the payee of a note upon the maker at his store at eight o'clock in the morning on the day the note became due was at an unreasonable hour. But in Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69, a demand at a store between eight and nine o'clock in the morning was held good.

Inference from store being closed.— Where a note was payable at a store, and the only evidence was that when the holder went to present it the store was closed and defendant objected that the presentment was not shown to have been made at a reasonable hour, it was held that in the absence of any evidence of the nature of the business carried on at the store it might be inferred that it was closed in the due course of business and therefore that the presentment was not made at a reasonable time. Patterson *v.* Tapley, 9 N. Brunsw. 292.

Demand made after business hours will be sufficient if an authorized agent of the maker is there to make answer. Triggs *v.* Newnham, 1 C. & P. 631, 12 E. C. L. 358, 3 L. J. C. P. O. S. 119, 10 Moore C. P. 249, 17 E. C. L. 572, 28 Rev. Rep. 678.

48. *California.*— McFarland *v.* Pico, 8 Cal. 626.

Illinois.— Skelton *v.* Dustin, 92 Ill. 49.

Kentucky.— Stivers *v.* Prentice, 3 B. Mon. (Ky.) 461, holding a presentment of a bill

(11) *Paper Payable at a Bank.* If a bill or note is made payable at a bank the holder must present it during banking hours,[49] unless he can obtain admission thereafter and find a person authorized to answer or in some other way get an answer from an authorized officer or agent, in which case a presentment after banking hours will be sufficient.[50] If no particular bank is named the hour

at the accepter's residence at three o'clock in the afternoon to be good.

Maine.— Dana *v.* Sawyer, 22 Me. 244, 39 Am. Dec. 574, holding that presentment of a note at the residence of the maker a few minutes before twelve o'clock at night, and after he had retired to bed, was insufficient to charge an indorser.

Massachusetts.—Estes *v.* Tower, 102 Mass 65, 3 Am. Rep. 439; Farnsworth *v.* Allen, 4 Gray (Mass.) 453 (holding that a demand made personally on the maker of a note at nine o'clock at night, although after he had gone to bed, was sufficient).

New York.— See Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635.

England.— Wilkins *v.* Jadis, 3 B. & Ad. 188, 9 L. J. K. B. O. S. 173, 1 M. & Rob. 41, 22 E. C. L. 86; Barclay *v.* Bailey, 2 Campb. 527, 11 Rev. Rep. 787 (holding that presentment of a bill at eight o'clock in the evening at the residence of the drawee was sufficient).

49. *Louisiana.*— Wallace *v.* Gwin, 15 La. 223, 35 Am. Dec. 202.

Massachusetts.— Staples *v.* Franklin Bank, 1 Metc. (Mass.) 43, 35 Am. Dec. 345; Church *v.* Clark, 21 Pick. (Mass.) 310.

Mississippi.— Harrison *v.* Crowder, 6 Sm. & M. (Miss.) 464, 45 Am. Dec. 290.

New Jersey.— Reed *v.* Wilson, 41 N. J. L. 29.

New York.— Metropolitan Bank *v.* Engel, 66 N. Y. App. Div. 273, 72 N. Y. Suppl. 691 (holding that where a note on the day of maturity is presented to the bank where it is payable during banking hours it is unimportant that the notary protesting it presented it for payment after the bank closed); Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Newark India Rubber Mfg. Co. *v.* Bishop, 3 E. D. Smith (N. Y.) 48. And see Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635.

Ohio.— Evans *v.* Geo. D. Cross Lumber Co., 21 Ohio Cir. Ct. 80, 11 Ohio Cir. Dec. 543.

Tennessee.— Swan *v.* Hodges, 3 Head (Tenn.) 251.

Vermont.— Thorpe *v.* Peck, 28 Vt. 127.

Virginia.— Waring *v.* Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890.

Wisconsin.— Lloyd *v.* Osborne, 92 Wis. 93, 65 N. W. 859.

United States.— U. S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 7 L. ed. 513; Suffolk Bank *v.* Lincoln Bank, 3 Mason (U. S.) 1, 23 Fed. Cas. No. 13,590.

England.— Wilkins *v.* Jadis, 2 B. & Ad. 188, 9 L. J. K. B. O. S. 173, 1 M. & Rob. 41, 22 E. C. L. 86; Barclay *v.* Bailey, 2 Campb. 527, 11 Rev. Rep. 787; Whitaker *v.* Bank of England, 1 C. M. & R. 744, 6 C. & P. 700, 1 Gale 54, 4 L. J. Exch. 57, 5 Tyrw. 268, 25 E. C. L. 646; Appleton *v.* Sweetapple, 3 Dougl. 137, 26 E. C. L. 99; Parker *v.* Gordon, 7 East 385, 6 Esp. 41, 3 Smith K. B. 358, 8 Rev. Rep. 646; Elford *v.* Teed, 1 M. & S. 28; Morgan *v.* Davison, 1 Stark. 114, 2 E. C. L. 52.

Canada.— Watters *v.* Reiffenstein, 16 L. C. Rep. 297.

Presumption.— If it appears that payment was demanded at the bank and was there refused by the cashier the legal inference is that the demand was made during business hours. Reed *v.* Wilson, 41 N. J. L. 29.

Where the bank has ceased to exist, a note payable at a bank is sufficiently presented to the indorser and last manager of the bank at his residence after five P. M. Waring *v.* Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890.

50. *Iowa.*— Marshalltown First Nat. Bank *v.* Owen, 23 Iowa 185, where the paper was presented to the acting teller of the bank after banking hours.

Kentucky.— Barbaroux *v.* Waters, 3 Metc. (Ky.) 304.

Maine.— Allen *v.* Avery, 47 Me. 287; Flint *v.* Rogers, 15 Me. 67.

Massachusetts.— Shepherd *v.* Chamberlain, 8 Gray (Mass.) 225, 69 Am. Dec. 248.

Mississippi.— Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150; Cohea *v.* Hunt, 2 Sm. & M. (Miss.) 227, 49 Am. Dec. 581; Commercial, etc., Bank *v.* Hamer, 7 How. (Miss.) 448, 40 Am. Dec. 80 (holding it immaterial that the notary entered the bank at the back door).

New Jersey.— Reed *v.* Wilson, 41 N. J. L. 29.

New York.— Salt Springs Nat. Bank *v.* Burton, 58 N. Y. 430, 17 Am. Rep. 265; Syracuse Bank *v.* Hollister, 17 N. Y. 46, 72 Am. Dec. 416 (holding it a good presentment where the notary, who was also teller of the bank, went with the note to the bank and, being unable to obtain admittance, demanded payment of himself at the door); Newark India Rubber Mfg. Co. *v.* Bishop, 3 E. D. Smith (N. Y.) 48; Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

Ohio.— Fox *v.* Newell, 1 Ohio Dec. (Reprint) 378, 8 West. L. J. 421; Lafayette Bank *v.* McLaughlin, 1 Ohio Dec. (Reprint) 202, 4 West. L. J. 70 (holding that, if no person is at the bank to answer, presentment after banking hours is not sufficient, but that if an answer be obtained it is sufficient).

England.— Crook *v.* Jadis, 5 B. & Ad. 909, 27 E. C. L. 383, 6 C. & P. 191, 25 E. C. L. 388, 3 L. J. K. B. 87, 3 N. & M. 257; Henry *v.* Lee, 2 Chit. 124, 18 E. C. L. 544; Garnett *v.* Woodcock, 6 M. & S. 44, 1 Stark. 475, 18 Rev. Rep. 298, 2 E. C. L. 182 (holding sufficient a demand at a bank after six o'clock P. M., and after the bank clerks had gone, of

will be determined by the usual banking hours at the bank or several banks in the place where the note is payable.[51] It has been held that the paper may be presented at any time during banking hours on the day of its maturity, and if not paid when so presented it may be treated as dishonored and notice given immediately and before the close of banking hours,[52] but there are decisions to the contrary.[53]

C. Place of Presentment or Demand — 1. Where Place Is Specified — a. In General. If a particular place for payment is specified in a bill or note[54] it is sufficient as against all parties to the instrument to make presentment there,[55]

a servant stationed there who answered, "No orders").

Cannot be presented after hours to unauthorized officer or employee. Newark India Rubber Mfg. Co. *v.* Bishop, 3 E. D. Smith (N. Y.) 48, holding presentment after banking hours to clerk having no control over the funds insufficient.

Presentment elsewhere than at bank.— It has been held that presentment after banking hours is insufficient, where it is made to an officer of the bank elsewhere than at the bank, although he states that no funds have been provided for payment. Swan *v.* Hodges, 3 Head (Tenn.) 251.

Where the maker of a note payable at a bank remains there until the close of banking hours, prepared to pay the note, presentment after banking hours without his knowledge will not be sufficient. Salt Springs Nat. Bank *v.* Burton, 58 N. Y. 430, 17 Am. Rep. 265. In this case, which was an action against the indorser of a note payable at a bank, it appeared that upon the day the note fell due the indorser was ready to pay it and sent the maker to the bank several times during banking hours to see if the note was there and to ascertain the amount. The note was not presented for payment until an hour after the close of the customary banking hours, when the holder was admitted into the bank, found the cashier and demanded payment, which was refused on the ground that no funds had been left with the bank to pay. It was held that the demand was sufficient to charge the indorser. It was said, however, that had the maker gone to the bank prepared to pay and waited there for that purpose until the close of banking hours or had he placed funds in the bank and allowed them to remain there until the close of business hours and then withdrawn them, in consequence of the non-presentment of the note, the indorser would have been discharged.

51. Church *v.* Clark, 21 Pick. (Mass.) 310.

52. Evans *v.* Geo. D. Cross Lumber Co., 21 Ohio Cir. Ct. 80, 11 Ohio Cir. Dec. 543; Thorpe *v.* Peck, 28 Vt. 127. And see *Ex p.* Moline, 19 Ves. Jr. 216.

53. Harrison *v.* Crowder, 6 Sm. & M. (Miss.) 464, 14 Am. Dec. 290; Planters' Bank *v.* Markham, 5 How. (Miss.) 397, 37 Am. Dec. 162 (holding that where by the usage of the bank all persons having notes payable there are allowed until the expiration of banking hours for payment, a demand of payment at the bank before that time is insufficient, unless the note is permitted to remain in bank until the close of banking hours). And see Church *v.* Clark, 21 Pick. (Mass.) 310.

If the paper is left in the bank and remains there until the close of banking hours it is sufficient. See *infra*, X, D, 3.

54. "The words 'place of payment' must receive a reasonable construction. They may mean a house, bank, counting room, store, or place of business, where the holder can present the note, where the maker can deposit or provide funds to meet it, and where a legal offer to pay can be made." Morphy, J., in Montross *v.* Doak, 7 Rob. (La.) 170, 171, 41 Am. Dec. 278.

55. *Alabama.*— Eason *v.* Isbell, 42 Ala. 456; Evans *v.* St. John, 9 Port. (Ala.) 186; Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Delaware.—Allen *v.* Miles, 4 Harr. (Del.) 234.

Indiana.— Hoffman *v.* Hollingsworth, 10 Ind. App. 353, 37 N. E. 960.

Louisiana.— Barker *v.* Fullerton, 11 La. Ann. 25; New Orleans, etc., R. Co. *v.* McKelvey, 2 La. Ann. 359; Gale *v.* Kemper, 10 La. 205.

Massachusetts.— Arnold *v.* Dresser, 8 Allen (Mass.) 435; Woodbridge *v.* Brigham, 13 Mass. 556. And see Farnsworth *v.* Mullen, 164 Mass. 112, 41 N. E. 131.

Mississippi.— Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150, holding that if a note is at the place designated on the day it is due a specific demand of payment is not necessary.

Missouri.— Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503; McKee *v.* Boswell, 33 Mo. 567 (holding that if it is agreed that a note shall be payable at a particular place demand is sufficient if made there); Lawrence *v.* Dobyns, 30 Mo. 196; Dailey *v.* Sharkey, 29 Mo. App. 518.

New York.— Cooperstown Bank *v.* Woods, 28 N. Y. 545; De Wolf *v.* Murray, 2 Sandf. (N. Y.) 166 (holding that if no one is there to answer mere attendance there on the holder's part with the instrument is sufficient demand); Gillett *v.* Averill, 5 Den. (N. Y.) 85; Troy City Bank *v.* Grant, Lalor (N. Y.) 119.

Pennsylvania.— Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255; Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610.

Rhode Island.— Barnes *v.* Vaughan, 6 R. I. 259.

although the place so designated is neither the residence or place of business of the accepter or maker,[56] and although he may be known to be elsewhere at the time of presentment.[57] Such presentment will be sufficient, although there is no one at all at the place named, and it is not the maker's or accepter's residence.[58]

b. Necessity For Presentment at Place Specified — (I) *As to Accepter or Maker.* Presentment of a bill or note at a particular place of payment designated therein is not necessary as a general rule to fix the liability of the accepter or maker, even though he may be there in readiness to meet the obligation or may have deposited funds there for such purpose, but the only effect of a failure to present is that he may set the same up as a defense to the extent of any loss he may have sustained.[59] This is true, although the note draws interest by its terms

Tennessee.— Ocoee Bank *v.* Hughes, 2 Coldw. (Tenn.) 52; Gardner *v.* State Bank, 1 Swan (Tenn.) 420 (foreign bill).

United States.— Wiseman *v.* Chiappella, 23 How. (U. S.) 368, 16 L. ed. 466; U. S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 7 L. ed. 513; Metropolis Bank *v.* Brent, 2 Cranch C. C. (U. S.) 530, 2 Fed. Cas. No. 900.

England.— Hine *v.* Allely, 4 B. & Ad. 624, 2 L. J. K. B. 105, 1 N. & M. 433, 24 E. C. L. 275 (holding that if the house is closed presentment made at the door is sufficient); Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381; Stedman *v.* Gooch, 1 Esp. 3 (holding that an answer given to the demand at the place designated is sufficient, although it is given, not by the drawee, but by the owner of the place designated); Saunderson *v.* Judge, 2 H. Bl. 509, 3 Rev. Rep. 492; Buxton *v.* Jones, 1 M. & G. 83, 39 E. C. L. 656; Butterworth *v.* Le Despencer, 3 M. & S. 150; Harris *v.* Packer, 3 Tyrw. 370 note.

Canada.— McDonald *v.* McArthur, 8 Ont. App. 553. And see Biggs *v.* Wood, 2 Manitoba 272.

See 7 Cent. Dig. tit. "Bills and Notes," § 1083.

The obligation of the maker of a note is to be present, either personally or by some agent, at the place of payment prepared to pay. If the holder causes the paper to be presented at that place to the person in charge it is sufficient, whether the person making the presentment is personally acquainted with the man having charge of the office at which the note is payable or not. Cooperstown Bank *v.* Woods, 28 N. Y. 545.

It is sufficient to present a bank-bill at the place of payment stated on the face thereof, even though no one can be found there. Ocoee Bank *v.* Hughes, 2 Coldw. (Tenn.) 52.

56. Evans *v.* St. John, 9 Port. (Ala.) 186; Lawrence *v.* Dobyns, 30 Mo. 196; Reed *v.* Wilson, 41 N. J. L. 29.

57. Pierce *v.* Struthers, 27 Pa. St. 249, 30 Pa. St. 139.

58. Hardy *v.* Woodroofe, 2 Stark. 319, 20 Rev. Rep. 689, 3 E. C. L. 426. And see De Wolf *v.* Murray, 2 Sandf. (N. Y.) 166.

59. *Alabama.*— Sims *v.* National Commercial Bank, 73 Ala. 248; Connerly *v.* Planters', etc., Ins. Co., 66 Ala. 432; Irvine *v.* Withers, 1 Stew. (Ala.) 234.

Arkansas.— Sumner *v.* Ford, 3 Ark. 389. But see Pryor *v.* Wright, 14 Ark. 189.

California.— Montgomery *v.* Tutt, 11 Cal. 307 [*overruling* Wild *v.* Van Valkenburgh, 7 Cal. 166].

Delaware.— Martin *v.* Hamilton, 5 Harr. (Del.) 329.

Illinois.— Yeaton *v.* Berney, 62 Ill. 61.

Indiana.— Hall *v.* Allen, 37 Ind. 541; McCullough *v.* Cook, 34 Ind. 290. But see Palmer *v.* Hughes, 1 Blackf. (Ind.) 328.

Iowa.— Robinson *v.* Lair, 31 Iowa 9.

Louisiana.— Thiel *v.* Conrad, 21 La. Ann. 214; Letchford *v.* Starns, 16 La. Ann. 252; McCalop *v.* Fluker, 12 La. Ann. 551; Ripka *v.* Pope, 5 La. Ann. 61, 52 Am. Dec. 579; Wetmore *v.* Merrifield, 17 La. 513; Maurin *v.* Perot, 16 La. 276. The earlier cases were to the contrary. Wood *v.* Mullen, 3 Rob. (La.) 395; Stillwell *v.* Bobb, 1 Rob. (La.) 311; Warren *v.* Briscoe, 12 La. 472; Warren *v.* Allnutt, 12 La. 454; Smith *v.* Robinson, 2 La. 405; Mellon *v.* Croghan, 3 Mart. N. S. (La.) 423, 15 Am. Dec. 163.

Maine.— Dockray *v.* Dunn, 37 Me. 442; Lyon *v.* Williamson, 27 Me. 149; McKenney *v.* Whipple, 21 Me. 98. Making a note payable "at Mt. Vernon" is not such a "place certain" as to require presentment there, under a statute, before suit against the maker. Greenlief *v.* Watson, 83 Me. 266, 22 Atl. 165.

Maryland.— Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

Massachusetts.— Carter *v.* Smith, 9 Cush. (Mass.) 321; Payson *v.* Whitcomb, 15 Pick. (Mass.) 212; Carley *v.* Vance, 17 Mass. 389; Ruggles *v.* Patten, 8 Mass. 480.

Michigan.— Reeve *v.* Pack, 6 Mich. 240.

Minnesota.— Freeman *v.* Curran, 1 Minn. 169, holding that presentment at the place named in a bill is not necessary to charge the accepter, although his readiness may relieve him of damages and costs.

Mississippi.— Washington *v.* Planters' Bank, 1 How. (Miss.) 230, 28 Am. Dec. 333.

Missouri.— Mahan *v.* Waters, 60 Mo. 167; Baltzer *v.* Kansas Pac. Ry. Co., 3 Mo. App. 574.

New Hampshire.— Otis *v.* Barton, 10 N. H. 433; Walton *v.* Herderson, Smith (N. H.) 168.

New Jersey.— Weed *v.* Van Houten, 9 N. J. L. 189, 17 Am. Dec. 468.

New York.— Hills *v.* Place, 48 N. Y. 520, 8

after maturity, if then presented at the place named and not paid,[60] or although it is payable on demand at a particular place.[61] The same principle governs bank-notes[62] and corporation bonds.[63]

(II) *As to Drawers, Indorsers, and Sureties.* The rule has been constantly affirmed that in the absence of some legal excuse presentment of a bill must be made and payment demanded at the place designated, the paper having been there accepted, in order to hold the drawer.[64] Such present-

Am. Rep. 568; Green *v.* Goings, 7 Barb. (N. Y.) 652; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; Foden *v.* Sharp, 4 Johns. (N. Y.) 183; Mason *v.* Franklin, 3 Johns. (N. Y.) 202.

North Carolina.— Nichols *v.* Pool, 47 N. C. 23.

Pennsylvania.— Fitler *v.* Beckley, 2 Watts & S. (Pa.) 458; Collins *v.* Naylor, 10 Phila. (Pa.) 437.

Tennessee.— Blair *v.* State Bank, 11 Humphr. (Tenn.) 84; McNairy *v.* Bell, 1 Yerg. (Tenn.) 502, 24 Am. Dec. 454.

Texas.— Hubbell *v.* Lord, 9 Tex. 472.

Vermont.— Hart *v.* Green, 8 Vt. 191.

Virginia.— Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127 (although the note is payable at a bank in another state, and therefore, in Virginia, non-negotiable); Armistead *v.* Armisteads, 10 Leigh (Va.) 512; Watkins *v.* Crouch, 5 Leigh (Va.) 522.

Wisconsin.— Howard *v.* Boorman, 17 Wis. 459.

United States.— Cox *v.* New York State Nat. Bank, 100 U. S. 704, 25 L. ed. 739; Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131; Covington *v.* Comstock, 14 Pet. (U. S.) 43, 10 L. ed. 346; Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95; U. S. *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443; Kendall *v.* Badger, McAll. (U. S.) 523, 14 Fed. Cas. No. 7,691; Silver *v.* Henderson, 3 McLean (U. S.) 165, 22 Fed. Cas. No. 12,854; Thompson *v.* Cook, 2 McLean (U. S.) 122, 23 Fed. Cas. No. 13,952; Brown *v.* Noyes, 2 Woodb. & M. Adm. 75, 4 Fed. Cas. No. 2,023. *Compare*, however, Picquet *v.* Curtis, 1 Sumn. (U. S.) 478, 19 Fed. Cas. No. 11,131.

England.— Nicholls *v.* Bowes, 2 Campb. 498; Lyon *v.* Sundius, 1 Campb. 423; Fenton *v.* Goundry, 13 East 459; Garnett *v.* Woodcock, 6 M. & S. 44, 1 Stark. 475, 18 Rev. Rep. 298, 2 E. C. L. 182; Callaghan *v.* Aylett, 3 Taunt. 397. Other decisions in England were to the contrary. Bowes *v.* Howe, 5 Taunt. 30, 14 Rev. Rep. 700, 1 E. C. L. 29. See also Halstead *v.* Skelton, 5 Q. B. 86, D. & M. 664, 2 Dowl. N. S. 961, 7 Jur. 680, 13 L. J. Exch. 177, 48 E. C. L. 86; Rowe *v.* Young, 2 B. & B. 165, 6 E. C. L. 83; Fayle *v.* Bird, 6 B. & C. 531, 13 E. C. L. 243, 2 C. & P. 303, 12 E. C. L. 584, 9 D. & R. 639, 5 L. J. K. B. O. S. 217; Turner *v.* Hayden, 4 B. & C. 1, 10 E. C. L. 455, 6 D. & R. 5, R. & M. 215, 21 E. C. L. 736; Hawkey *v.* Borwick, 4 Bing. 135, 13 E. C. L. 436, 12 Moore C. P. 478, 1 Y. & J. 376; Selby *v.* Eden, 3 Bing. 611, 4 L. J. C. P. O. S. 198, 11 Moore C. P. 511, 11 E. C. L. 298; Roche *v.* Campbell, 3 Campb. 247; Higgins *v.* Nichols, 7 Dowl. P. C. 551, 3 Jur. 340, 1 W. W. & H. 582; Sanderson *v.* Bowes, 14 East 500, 13 Rev. Rep. 299; Smith *v.* De la Fontaine, Holt 366 note, 3 E. C. L. 148 note; Siggers *v.* Nicholls, 3 Jur. 341; Gammon *v.* Schmoll, 1 Marsh. 80, 5 Taunt. 344, 1 E. C. L. 182; Birks *v.* Trippet, 1 Saund. 32; Hardy *v.* Woodroofe, 2 Stark. 319, 20 Rev. Rep. 689, 3 E. C. L. 426. In 1821 the question was settled by 1 & 2 Geo. IV, which provided that bills need only be presented at the place named in the acceptance, when they are accepted payable at such place "only, and not otherwise or elsewhere." See Gibb *v.* Mather, 8 Bing. 214, 2 Cr. & J. 254, 1 L. J. Exch. 87, 1 Moore & S. 387, 2 Tyrw. 189, 21 E. C. L. 512. This statute was substantially incorporated into the bills of exchange. Bills Exch. Act, § 19.

Canada.— Merchants Bank *v.* Henderson, 28 Ont. 360. *Compare*, however, O'Brien *v.* Stevenson, 15 L. C. Rep. 265; Biggs *v.* Wood, 2 Manitoba 272.

Loss of money deposited to pay.— Where a note was made payable at the office of certain factors of the maker and they credited the maker with the amount thereof in a subsequent settlement, and the factors had transferred the note before maturity to a purchaser in good faith, who neglected to present it for payment at maturity, and the factors subsequently failed, it was held that the transferee could not maintain an action thereon against the maker. Charleston Bank Nat. Banking Assoc. *v.* Zorn, 14 S. C. 444, 37 Am. Rep. 733.

60. Robinson *v.* Lair, 31 Iowa 9.

61. *Alabama.*— Montgomery *v.* Elliott, 6 Ala. 701.

Maine.— Gammon *v.* Everett, 25 Me. 66, 43 Am. Dec. 255.

Mississippi.— Cook *v.* Martin, 5 Sm. & M. (Miss.) 379.

New Hampshire.— Brigham *v.* Smith, 16 N. H. 274.

North Carolina.— State Bank *v.* Cape Fear Bank, 35 N. C. 75.

62. New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443.

63. Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406.

64. Wolfe *v.* Jewett, 10 La. 383; Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239; Gibb *v.* Mather, 8 Bing. 214, 2 Cr. & J. 254, 1 L. J. Exch. 87, 1 Moore & S. 387, 2 Tyrw. 189, 21 E. C. L. 512 (holding also that the need of such presentment as against the drawer and indorsers was not affected by 1 & 2 Geo. IV); Saul *v.* Jones, 1 E. & E. 59,

ment and demand is likewise necessary to charge indorsers of a bill or note[65] or sureties.[66]

(III) *Memorandum Address.* If a memorandum address is added to the maker's signature by the payee the latter will be bound as indorser by presentment made there.[67] But it has been decided that if a memorandum naming a place of payment has been added by the maker, after indorsement of the note for his accommodation, it will constitute an alteration as against the indorser, and presentment at such place will not be binding upon him.[68]

(IV) *Place Designated and Acceptance Generally.* Where a bill of exchange designates a place of payment and it is accepted generally it will be sufficient to demand payment at such place, without making a personal demand of the accepter.[69]

5 Jur. N. S. 220, 28 L. J. Q. B. 37, 7 Wkly. Rep. 47, 102 E. C. L. 59.

65. *Delaware.*— Wilmington Bank *v.* Cooper, 1 Harr. (Del.) 10.

Illinois.— Barber *v.* Bell, 77 Ill. 490.

Iowa.— Fuller *v.* Dingman, 41 Iowa 506.

Louisiana.— Moore *v.* Britton, 22 La. Ann. 64; Hart *v.* Long, 1 Rob. (La.) 83.

Massachusetts.— Arnold *v.* Dresser, 8 Allen (Mass.) 435; Shaw *v.* Reed, 12 Pick. (Mass.) 132 (although the maker has absconded); Woodbridge *v.* Brigham, 13 Mass. 556 (holding that the holder must have the note at the particular place designated for payment in order to charge the indorser where no personal demand is made).

Missouri.— Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503; Glasgow *v.* Pratte, 8 Mo. 336, 40 Am. Dec. 142.

New York.— Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685; Brooks *v.* Higby, 11 Hun (N. Y.) 235; Ferner *v.* Williams, 37 Barb. (N. Y.) 9; Gay *v.* Paine, 5 How. Pr. (N. Y.) 107, 3 Code Rep. (N. Y.) 162.

North Carolina.— Smith *v.* McLean, 4 N. C. 509, 7 Am. Dec. 693.

Tennessee.— Apperson *v.* Bynum, 5 Coldw. (Tenn.) 341.

Virginia.— Watkins *v.* Crouch, 5 Leigh (Va.) 522, although the note was negotiated with the indorser's consent at another bank whose usage was to present notes at its own counter only and although there were no funds at the place of payment to meet the note.

England.— Parkes *v.* Edge, 1 Cr. & M. 429, 1 Dowl. P. C. 643, 2 L. J. Exch. 94, 3 Tyrw. 364.

Canada.— Biggs *v.* Wood, 2 Manitoba 272; Truscott *v.* Lagourge, 5 U. C. Q. B. O. S. 134.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1083, 1084.

A personal demand on the maker at another place is not sufficient to render an indorser liable. Bynum *v.* Apperson, 9 Heisk. (Tenn.) 632. See also Smith *v.* McLean, 4 N. C. 509, 7 Am. Dec. 693; Swan *v.* Hodges, 3 Head (Tenn.) 251. *Compare*, however, Herring *v.* Sanger, 3 Johns. Cas. (N. Y.) 71, holding that where no injury could possibly have resulted to the drawer from omission to go to the particular place designated a personal demand was sufficient.

Demand by letter.— Where a note is payable on demand at a particular place, a demand by letter is not sufficient to give rise to a cause of action against an indorser or to start the statute of limitations in his favor. Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685. See also National Hudson River Bank *v.* Kinderhook, etc., R. Co., 17 N. Y. App. Div. 232, 45 N. Y. Suppl. 588.

Variance in name of corporation.— Presentment and demand is sufficient to charge the indorsers when made at the office of the corporation intended, although the name differs slightly. Powell *v.* State Bank, 1 Disn. (Ohio) 269, 12 Ohio Dec. (Reprint) 615.

66. Fort *v.* Cortes, 14 La. 180. See also Principal and Surety.

67. Farnsworth *v.* Mullen, 164 Mass. 112, 41 N. E. 131.

Such memorandum in England is directory only and presentment at the place so named is not essential. Williams *v.* Waring, 10 B. & C. 2, 8 L. J. K. B. O. S. 7, 5 M. & R. 9, 21 E. C. L. 11; Price *v.* Mitchell, 4 Campb. 200, 16 Rev. Rep. 775. But it was formerly held otherwise if the memorandum was printed on the instrument. Trecothick *v.* Edwin, 1 Stark. 468, 2 E. C. L. 180.

68. Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239. It is declared, however, that although every alteration in a negotiable instrument whereby the identity of the paper is in any way affected is material and voids it even in the hands of a subsequent indorsee for value, except as to him who made the alteration, yet noting the residence of drawers and indorsers after their names does not affect the identity of a bill of exchange or avoid it as to any of the parties to it. It is in the nature of a memorandum for a notary, that he may know how to address notices of protest. It does not vary the tenor of the bill or add to the responsibility of the indorsers. Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610.

69. McClane *v.* Fitch, 4 B. Mon. (Ky.) 599; Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610; Pierce *v.* Struthers, 27 Pa. St. 249; Buxton *v.* Jones, 1 M. & G. 83, 39 E. C. L. 656. See also Cox *v.* New York Nat. Bank, 100 U. S. 704, 25 L. ed. 739, holding that if a bill is addressed to the drawee at a designated city where he has a place of business, and is there accepted generally, present-

(v) *Place Designated in Acceptance.* It has been decided that the designation of a place of payment in the acceptance of a bill of exchange constitutes a part of the contract, so that demand may be made there in order to charge the drawer or the indorser, and must be so made, unless there is a sufficient excuse.[70] The drawer and indorsers will be bound by a presentment at the place named in the acceptance, although the bill was payable generally[71] or addressed to the drawee generally.[72]

(vi) *Paper Payable at a Bank.* Where the place of payment designated in a bill or note is a particular bank presentment and demand there are sufficient,[73] even though the bank has closed[74] or has ceased to exist and the building or room is occupied by another person.[75] On the other hand presentment and demand at the specified bank are necessary in order to charge a drawer or indorser,[76] in the

ment at the place named in the address is sufficient.

70. Brown *v.* Jones, 113 Ind. 46, 13 N. E. 857, 3 Am. St. Rep. 623; Tuckerman *v.* Hartwell, 3 Me. 147, 14 Am. Dec. 225; Brooks *v.* Higby, 11 Hun (N. Y.) 235; Philpot *v.* Briant, 4 Bing. 717, 13 E. C. L. 708, 3 C. & P. 244, 14 E. C. L. 549, 6 L. J. C. P. O. S. 182, 1 M. & P. 754, 29 Rev. Rep. 710 (although the accepter has died in the meantime); Saul *v.* Jones, 1 E. & E. 59, 5 Jur. N. S. 220, 28 L. J. Q. B. 37, 7 Wkly. Rep. 47, 102 E. C. L. 59 (although it is directed to the drawee's residence at another place). But *compare* Niagara Dist. Bank *v.* Fairman, etc., Mach. Tool Mfg. Co., 31 Barb. (N. Y.) 403, holding that if a bill is drawn upon one place and accepted payable at another the drawer is entitled to have it presented at the place named by him.

71. Troy City Bank *v.* Lauman, 19 N. Y. 477.

72. Myers *v.* Standart, 11 Ohio St. 29.

73. *Alabama.*— Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Delaware.—Allen *v.* Miles, 4 Harr. (Del.) 234.

Illinois.— Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186.

Indiana.— Hoffman *v.* Hollingsworth, 10 Ind. App. 353, 37 N. E. 960.

Kentucky.— Huffaker *v.* Monticello Nat. Bank, 13 Bush (Ky.) 644.

Maryland.— People's Bank *v.* Keech, 26 Md. 521, 90 Am. Dec. 118.

Missouri.— Stix *v.* Matthews, 75 Mo. 96.

New Jersey.— Reed *v.* Wilson, 41 N. J. L. 29.

Pennsylvania.— Scull *v.* Mason, 43 Pa. St. 99.

South Carolina.— State Bank *v.* Flagg, 1 Hill (S. C.) 177, holding that where a note was indorsed to the bank in which it was payable and was there when it fell due, it constituted a presentment for payment, the promisor being assumed to have deposited funds there to meet the payment.

Tennessee.— Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874; Ocoee Bank *v.* Hughes, 2 Coldw. (Tenn.) 52.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.— Hildeburn *v.* Turner, 5 How. (U. S.) 69, 12 L. ed. 54; U. S. Bank *v.* O'Neale, 2 Cranch C. C. (U. S.) 466, 2 Fed. Cas. No. 932. And see Metropolis Bank *v.* Brent, 2 Cranch C. C. (U. S.) 530, 2 Fed. Cas. No. 900.

See 7 Cent. Dig. tit. "Bills and Notes," § 1084.

Presentment at a bank of a very similar name in the same place was held sufficient, it not appearing that there was any other bank in the place than the one in which the note was presented. Buss *v.* Horrocks, 1 Ohio Dec. (Reprint) 376, 8 West. L. J. 419; Worley *v.* Waldran, 3 Sneed (Tenn.) 548.

Want of authority of partner to designate bank.— Where a bill on a commercial partnership is accepted after dissolution by one of the partners, payable at a particular bank, but he is not shown to have been authorized by his former partners to bind the firm, and demand is made only at the bank, and of none of the drawees, the drawer will be discharged. Commercial Bank *v.* Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168.

74. Berg *v.* Abbott, 83 Pa. St. 177, 24 Am. Rep. 158; Waring *v.* Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890.

75. *Alabama.*— Roberts *v.* Mason, 1 Ala. 373.

Florida.— Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346, holding that where a note was payable at the agency of a banking company at a particular place a demand there was sufficient to charge the indorser, although the agency had removed before the time of demand.

Maine.— Central Bank *v.* Allen, 16 Me. 41, holding that, where a note is made payable at a particular bank and before the day of payment arrives that bank has no place of business and ceases to exist and another bank does business in the same room, if it be necessary to make a presentment of the note for payment, it is sufficient if made at that room.

Tennessee.— Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419.

Texas.— Texarkana First Nat. Bank *v.* Wever, (Tex. App. 1890) 15 S. W. 41.

Canada.— McRobbie *v.* Torrance, 4 Manitoba 426, holding that where a bank at which a note is made payable ceases to exist no demand is necessary.

76. *Alabama.*— Roberts *v.* Mason, 1 Ala. 373.

absence of some good and sufficient reason for failing to make presentment there.[77]

(VII) *PLACE OF PAYMENT UNCERTAIN, AND ELECTION.* The place of payment of a bill or note may be uncertain by reason of the designation being "at any bank" in a certain city or at either of several banks or other places, and in such case the holder has his election between the banks or other places, so that a presentment at either will be sufficient, both as against the maker and as against indorsers.[78] Generally in these cases the holder need not give any notice of the

Delaware.— Wilmington, etc., Bank *v.* Cooper, 1 Harr. (Del.) 10.

Maine.— Magoun *v.* Walker, 49 Me. 419.

Maryland.— Farmers', etc., Bank *v.* Allen, 18 Md. 475, in the absence of a special agreement.

Massachusetts.— Lee Bank *v.* Spencer, 6 Metc. (Mass.) 308, 39 Am. Dec. 734.

New Jersey.— Reed *v.* Wilson, 41 N. J. L. 29; Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239.

North Carolina.— Streator *v.* Cape Fear Bank, 55 N. C. 31 (holding that if a note is payable at a branch bank presentment at the principal bank is ineffectual); Smith *v.* McLean, 4 N. C. 509, 7 Am. Dec. 693; Sullivan *v.* Mitchell, 4 N. C. 93, 6 Am. Dec. 546.

Virginia.— Watkins *v.* Crouch, 5 Leigh (Va.) 522.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Contra, where no objection was made by the maker to a demand upon him personally, and no injury could have resulted. Herring *v.* Sanger, 3 Johns. Cas. (N. Y.) 71.

See 7 Cent. Dig. tit. "Bills and Notes," § 1084.

Making a note negotiable at a certain bank is not the same thing as making it payable there, and it will not be necessary as against the maker to present it there for payment. Barrett *v.* Wills, 4 Leigh (Va.) 114, 26 Am. Dec. 315; Beeding *v.* Thornton, 3 Cranch C. C. (U. S.) 698, 3 Fed. Cas. No. 1,228.

77. Wilmington, etc., Bank *v.* Cooper, 1 Harr. (Del.) 10; Sherer *v.* Easton Bank, 33 Pa. St. 134 (where the maker had no funds in the bank).

Where bank has closed.— If a bill or note is made payable at a bank, and the bank is closed at the time the paper matures, further presentment is unnecessary.

Maine.— Central Bank *v.* Allen, 16 Me. 41.

Pennsylvania.— Berg *v.* Abbott, 83 Pa. St. 177, 24 Am. Rep. 158.

Tennessee.— Ocoee Bank *v.* Hughes, 2 Coldw. (Tenn.) 52.

England.— Howe *v.* Bowes, 16 East 112, 14 Rev. Rep. 319 [*reversed* on other grounds in 5 Taunt. 30, 14 Rev. Rep. 700, 1 E. C. L. 29].

Canada.— McRobbie *v.* Torrance, 4 Manitoba 426. See also Waring *v.* Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890, holding that if a bank has ceased to do business when a note there payable falls due, and a personal demand for payment is made on the former manager of the bank who is also an indorser, it is not necessary to present the note at the bank during banking hours. Presentment made at a place to which the books and papers of the bank at which a note is payable are removed before maturity is sufficient to bind the indorser. Gelpecke *v.* Lovell, 18 Iowa 17.

Demand of payment at another bank in the same town has been held to be sufficient as against the maker, where the bank named as the place of payment had gone out of business before the note matured. Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346; Central Bank *v.* Allen, 16 Me. 41.

Demand at the bank of issue of a note entitles the holder to maintain an action on non-payment, although the note is payable at a branch of such bank which was discontinued before maturity of the note. Nashville Bank *v.* Henderson, 5 Yerg. (Tenn.) 104, 26 Am. Dec. 257.

Personal demand not objected to.— Where a note was made payable at a bank, and a demand of payment was made of the maker personally in the city, but not at the bank, and no objection was made at the time, the demand was held sufficient. Herring *v.* Sanger, 3 Johns. Cas. (N. Y.) 71.

78. *Connecticut.*— Jackson *v.* Packer, 13 Conn. 342.

Maine.— Allen *v.* Avery, 47 Me. 287; Langley *v.* Palmer, 30 Me. 467, 50 Am. Dec. 634; Page *v.* Webster, 15 Me. 249, 33 Am. Dec. 608.

Massachusetts.— Nash *v.* Brown, 165 Mass. 384, 43 N. E. 180; Way *v.* Butterworth, 106 Mass. 75, 108 Mass. 509; Hampden F. Ins. Co. *v.* Davis, 13 Gray (Mass.) 156 note; Malden Bank *v.* Baldwin, 13 Gray (Mass.) 154, 74 Am. Dec. 627 (holding that where a note was payable "at any bank in Boston" presentment at any bank in Boston was sufficient demand on the maker to charge an indorser); North Bank *v.* Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334. See also Carter *v.* Smith, 9 Cush. (Mass.) 321.

Vermont.— Brickett *v.* Spaulding, 33 Vt. 107.

England.— Beeching *v.* Gower, Holt 313, 17 Rev. Rep. 644, 3 E. C. L. 129, holding that a banker's promissory note made payable at Tunbridge and also at London could be presented at either place at the election of the holder.

Canada.— Baldwin *v.* Hitchcock, 12 N. Brunsw. 310, holding that a note drawn in Boston, where the maker and payee resided, and made payable "at any bank" meant any bank in Boston.

place selected by him.[79] The place of course must come within the designation.[80] If a note is made payable at "the house" of a person in a certain place, it may be presented either at his office or dwelling-house.[81]

c. Designation of City at Large. Where a bill or note merely designates a particular city at large as the place of payment, without naming any particular place therein, the paper should be presented in such city at the residence or place of business of the maker if he has any, or upon him personally if he can be found, but if he has no residence or place of business there and is not found after the exercise of reasonable diligence, having the paper in such city on the day it becomes due is a sufficient presentment.[82]

2. Where No Place of Payment Is Designated — a. In General. The rule established by the weight of authority is that where no particular place of payment is designated in a bill or note it is necessary, in order to charge a drawer or indorser, to present the same either to the maker or accepter personally or at his residence or usual place of business, if he has one and it is known or can be ascertained by the exercise of reasonable diligence, and that either is sufficient.[83] This

79. Jackson *v.* Packer, 13 Conn. 342; Allen *v.* Avery, 47 Me. 287; Langley *v.* Palmer, 30 Me. 467, 50 Am. Dec. 634; Page *v.* Webster, 15 Me. 249, 33 Am. Dec. 608; Malden Bank *v.* Baldwin, 13 Gray (Mass.) 154, 74 Am. Dec. 627. But see North Bank *v.* Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334.

Where notice is expressly required.— If a note is payable "at any bank in Philadelphia with notice" its presentation at some particular bank in Philadelphia is insufficient without notice to the makers of an intention to present it there. Cecil Nat. Bank *v.* Holt, 7 Pa. Co. Ct. 485.

80. **Trust companies.**— Presentment at the offices of a loan and trust company is not sufficient to bind an indorser on a note payable at any "bank" in a city, in the absence of a well-established custom. Nash *v.* Brown, 165 Mass. 384, 43 N. E. 180.

Private bankers.—It has been held that the office of a private banker is not a bank within the meaning of a note payable at any bank in a particular city. Way *v.* Butterworth, 108 Mass. 509.

Proof that place is a bank.— In Way *v.* Butterworth, 106 Mass. 75, it was held that evidence that a place in Boston was called "Bank of the Metropolis," that it had that name over the door, that notes were discounted there, and that accounts with depositors were kept there did not justify a ruling that the place was a bank and therefore a proper place to present a note payable at any bank in Boston, but that the question was for the jury.

81. Miller *v.* Hennen, 3 Mart. N. S. (La.) 587. And see State Bank *v.* Hennen, 4 Mart. N. S. (La.) 226.

82. *Louisiana.*— Montross *v.* Doak, 7 Rob. (La.) 170, 41 Am. Dec. 278.

Maine.— Greenlief *v.* Watson, 83 Me. 266, 22 Atl. 165, also holding that a note payable at a designated town is not payable at a place certain, under a statute making a demand a prerequisite to a suit "where a note is payable" at a place certain.

Massachusetts.— Malden Bank *v.* Baldwin, 13 Gray (Mass.) 154, 74 Am. Dec. 627.

New Hampshire.—Smith *v.* Little, 10 N. H. 526, holding that if a note is made payable at a particular town a demand at the maker's residence or place of business elsewhere is unnecessary.

New York.— Meyer *v.* Hibsher, 47 N. Y. 265; Boot *v.* Franklin, 3 Johns. (N. Y.) 207.

Tennessee.— Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555.

England.— Hardy *v.* Woodroofe, 2 Stark. 319, 20 Rev. Rep. 689, 3 E. C. L. 426.

83. *Alabama.*— Decatur Branch Bank *v.* Hodges, 17 Ala. 42.

Arkansas.— Levy *v.* Drew, 14 Ark. 334.

California.— Haber *v.* Brown, 101 Cal. 445, 451, 35 Pac. 1035, where it is said that "a note not payable at any particular place is payable and should be presented for payment at the residence or place of business of the maker, or wherever he may be found, at the option of the presentor."

Iowa.— Red Oak Bank *v.* Orvis, 42 Iowa 691; Hartford Bank *v.* Green, 11 Iowa 476.

Kansas.— Hume *v.* Watt, 5 Kan. 34.

Kentucky.— Stivers *v.* Prentice, 3 B. Mon. (Ky.) 461, holding it sufficient to present a bill of exchange at the residence of the accepter when he is not a banker.

Louisiana.— Mitchell *v.* Young, 21 La. Ann. 279; Puig *v.* Carter, 20 La. Ann. 414; Farley *v.* Hewson, 10 La. Ann. 783; Bigelow *v.* Kellar, 6 La. Ann. 59, 54 Am. Dec. 555; Montross *v.* Doak, 7 Rob. (La.) 170, 41 Am. Dec. 278; State Bank *v.* Hennen, 4 Mart. N. S. (La.) 226; Bellievre *v.* Bird, 4 Mart. N. S. (La.) 186; Miller *v.* Hennen, 3 Mart. N. S. (La.) 587; Louisiana State Ins. Co. *v.* Shamburgh, 2 Mart. N. S. (La.) 511; Shamburgh *v.* Cemmagere, 10 Mart. (La.) 18 (holding presentment of a note at the maker's residence sufficient); Hennen *v.* Johnston, 7 Mart. (La.) 364; Lanusse *v.* Massicot, 3 Mart. (La.) 261. See also Penn *v.* Watts, 11 La. Ann. 205; Oakey *v.* Beauvais, 11 La. 487.

Maine.— King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560.

Maryland.— Tate *v.* Sullivan, 30 Md. 464, 96 Am. Dec. 597; Williams *v.* Brailsford, 25

is true where the maker of a note resides in a different state from that in which the payee or holder resides, if he was known to so reside when the note was

Md. 126; Staylor *v.* Ball, 24 Md. 183; Sasscer *v.* Whitely, 10 Md. 98, 69 Am. Dec. 126; Nailor *v.* Bowie, 3 Md. 251. See Farmers', etc., Bank *v.* Allen, 18 Md. 475, holding that a demand made, not on the maker, but at a bank where the note was not made payable, was insufficient to charge an indorser.

Massachusetts.— Demond *v.* Burnham, 133 Mass. 339; Talbot *v.* National Bank, 129 Mass. 67, 37 Am. Rep. 302; Estes *v.* Tower, 102 Mass. 65, 3 Am. Rep. 439; Arnold *v.* Dresser, 8 Allen (Mass.) 435; Porter *v.* Judson, 1 Gray (Mass.) 175; Pierce *v.* Cate, 12 Cush. (Mass.) 190, 59 Am. Dec. 176; Granite Bank *v.* Ayres, 16 Pick. (Mass.) 392, 28 Am. Dec. 253. See Parker *v.* Kellogg, 158 Mass. 90, 32 N. E. 1038.

Mississippi.— Lewis *v.* Planters' Bank, 3 How. (Miss.) 267.

Missouri.— Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503 (holding that where a note is payable at no particular place and is presented for payment to the maker in person the place of presentment is immaterial); St. Louis Fourth Nat. Bank *v.* Heuschen, 52 Mo. 207; Jarvis *v.* Garnett, 39 Mo. 268; Bateson *v.* Clark, 37 Mo. 31; Simmons *v.* Belt, 35 Mo. 461 (where it was said that presentment of a note payable generally "ought to be made to the maker, either personally, or at his dwelling-house or place of business"); McKee *v.* Boswell, 33 Mo. 567; Plahto *v.* Patchin, 26 Mo. 389.

Nebraska.— Townsend *v.* Star Wagon Co., 10 Nebr. 615, 7 N. W. 274, 35 Am. Rep. 493.

New Hampshire.— New York Belting, etc., Co. *v.* Ela, 61 N. H. 352.

New Jersey.— Winans *v.* Davis, 18 N. J. L. 276; Sussex Bank *v.* Baldwin, 17 N. J. L. 487 (which hold that presentment of a note may be made at the maker's place of business as well as at his residence).

New York.— Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207; Holtz *v.* Boppe, 37 N. Y. 634; Benedict *v.* Caffe, 5 Duer (N. Y.) 226; Packard *v.* Lyon, 5 Duer (N. Y.) 82; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Anderson *v.* Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442. And see Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

Ohio.— West *v.* Brown, 6 Ohio St. 542.

Pennsylvania.— Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255; Baumgardner *v.* Reeves, 35 Pa. St. 250 (holding presentment at maker's place of business sufficient); Lightner *v.* Will, 2 Watts & S. (Pa.) 140; Stuckert *v.* Anderson, 3 Whart. (Pa.) 116; Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480.

Rhode Island.— Barnes *v.* Vaughan, 6 R. I. 259, holding that written notice to the maker by mail, given by a bank with which the note was left for collection and previous to the note's falling due, that the note had been so left and of the day of payment was not a sufficient demand upon the maker to render the indorser liable.

South Carolina.— Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

Tennessee.—Sulzbacher *v.* Charleston Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828; Mason *v.* Pritchard, 9 Heisk. (Tenn.) 793; Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555; Gardner *v.* State Bank, 1 Swan (Tenn.) 420 (holding that where no place of payment in a city is stated on the face of a bill of exchange it is sufficient to present the same at the counting-house of the drawees and to demand payment of their bookkeeper); Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158.

Wisconsin.— Reinke *v.* Wright, 93 Wis. 368, 67 N. W. 737; Wallace *v.* Crilley, 46 Wis. 577, 1 N. W. 301 (holding presentment of a note at the maker's place of business sufficient).

United States.— Wiseman *v.* Chiappella, 23 How. (U. S.) 368, 16 L. ed. 466 (holding that presentment of a bill at the accepter's counting-house was sufficient); Goldsborough *v.* Jones, 2 Cranch C. C. (U. S.) 305, 10 Fed. Cas. No. 5,517; Burrows *v.* Hannegan, 1 McLean (U. S.) 309, 4 Fed. Cas. No. 2,205.

Canada.— Kinnear *v.* Godard, 9 N. Brunsw. 559; Reed *v.* Kavanagh, 9 N. Brunsw. 457; Thorne *v.* Scovil, 4 N. Brunsw. 557 (holding that a letter written by the attorney of the indorsee to the maker, stating that the note in question, together with other notes, had been placed in his hands for collection, and requiring him to pay the interest, and give new security for the principal, was not such a presentment and demand of payment as would make the indorser liable); Nowlin *v.* Roach, 4 N. Brunsw. 337 (holding that presentment of a note at the residence or place of business of the maker was not excused by the fact that the maker was lying dangerously ill, and that a presentment to his brother in the street near the residence was not sufficient to charge an indorser); Fitch *v.* Kelly, 44 U. C. Q. B. 578.

Cases apparently to the contrary.—In some cases it has been said that a bill or note must be presented to the maker or accepter, either personally or at his residence, but they are cases in which nothing was said as to presentment at the place of business, and it is probable that the maker or accepter had no place of business other than his residence. See Penn *v.* Watts, 11 La. Ann. 205; Oakey *v.* Beauvais, 11 La. 487; Bellievre *v.* Bird, 4 Mart. N. S. (La.) 186; Louisiana State Ins. Co. *v.* Shamburgh, 2 Mart. N. S. (La.) 511; Shamburgh *v.* Commagere, 10 Mart. (La.) 18.

Place of residence stated in bill.— If the drawee of a bill cannot be found at the place where the bill states him to reside, and it appears that he never resided there or has

given.[84] If the maker or accepter has no place of business, inquiry must be made for his residence and the paper presented there, unless a demand is made upon him personally.[85] If he has neither a residence nor a place of business, or if neither can be found by the exercise of reasonable diligence, it is necessary to use diligence to find him.[86] If he cannot be found by the exercise of reasonable diligence presentment is excused.[87]

b. Presentment on Street. Presentment of a bill or note to the maker or accepter on the street, when he has a known residence or place of business, is probably insufficient if he objects and refuses to pay on that ground;[88] but it is sufficient if he waives the objection, and he does so if, without making any objection to the place of presentment, he refuses to pay on other grounds.[89]

c. What Constitutes Place of Business. When it is sought to sustain the presentment of a bill or note on the ground that it was made at the maker's or

absconded, the bill is to be considered as dishonored. Wolfe *v.* Jewett, 10 La. 383.

Death of maker.— In Simon *v.* Reynaud, 10 La. Ann. 506, it was held that where the maker of a note died before it became due a demand of payment made of his widow at his late residence was sufficient.

Demand on government employee.— Where the maker of a note was an employee of the government at Washington, resided in the country and not in the city, and was only at the place at which he was employed during certain hours of the day, it was held that presentment at such place when he was absent from the room, although within the usual hours of public business, was insufficient, and that presentment should have been made at his residence. Goldsborough *v.* Jones, 2 Cranch C. C. (U. S.) 305, 10 Fed. Cas. No. 5,517.

84. *Massachusetts.*—Orleans Bank *v.* Whittemore, 12 Gray (Mass.) 469, 74 Am. Dec. 605.

New Jersey.— Winans *v.* Davis, 18 N. J. L. 276.

New York.— Spies *v.* Gilmore, 1 N. Y. 321; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Anderson *v.* Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442.

Pennsylvania.— Browning *v.* Armstrong, 9 Phila. (Pa.) 59, 29 Leg. Int. (Pa.) 228.

United States.— Specht *v.* Howard, 16 Wall. (U. S.) 564, 21 L. ed. 348; Burrows *v.* Hannegan, 1 McLean (U. S.) 309, 4 Fed. Cas. No. 2,205.

85. *Kansas.*— Hume *v.* Watt, 5 Kan. 34, holding that where the maker of a note lives in a town at the same place where he has resided for several years, and where the notary having the note for presentment has recently seen him and conversed with him, no amount of inquiry as to his residence will be sufficient diligence, without visiting his house.

Louisiana.— Penn *v.* Watts, 11 La. Ann. 205.

Maryland.— Tate *v.* Sullivan, 30 Md. 464, 96 Am. Dec. 597.

Massachusetts.— Talbot *v.* National Bank, 129 Mass. 67, 37 Am. Rep. 302; Porter *v.* Judson, 1 Gray (Mass.) 175; Granite Bank *v.* Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253.

Missouri.— Jarvis *v.* Garnett, 39 Mo. 268.

New York.— Benedict *v.* Caffe, 5 Duer (N. Y.) 226; Packard *v.* Lyon, 5 Duer (N. Y.) 82 (holding that demand at a bank where a note was lodged for collection, with inquiry of its officers as to the residence of the maker, who was a married woman and had a domicile in the city, was insufficient, no inquiry having been made of the actual holder of the note).

Rhode Island.— Glaser *v.* Rounds, 16 R. I. 235, 14 Atl. 863.

Tennessee.— Apperson *v.* Bynum, 5 Coldw. (Tenn.) 341.

Wisconsin.— Reinke *v.* Wright, 93 Wis. 368, 67 N. W. 737.

86. *Maine.*— Whittier *v.* Graffam, 3 Me. 82.

Massachusetts.— Farnsworth *v.* Mullen, 164 Mass. 112, 41 N. E. 131.

New Hampshire.— Otis *v.* Hussey, 3 N. H. 346.

South Carolina.—Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

Tennessee.— Sulzbacher *v.* Charleston Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828; Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555.

87. *Louisiana.*— Barriere *v.* Samory, 10 La. Ann. 107; Peet *v.* Sanders, 6 La. Ann. 364.

Maryland.— Staylor *v.* Ball, 24 Md. 183.

Massachusetts.— Farnsworth *v.* Mullen, 164 Mass. 112, 41 N. E. 131.

Missouri.— McKee *v.* Boswell, 33 Mo. 567; Plahto *v.* Patchin, 26 Mo. 389; Shepard *v.* Citizens' Ins. Co., 8 Mo. 272.

New York.— Holtz *v.* Boppe, 37 N. Y. 634.

88. King *v.* Holmes, 11 Pa. St. 456.

89. King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560. See also Parker *v.* Kellogg, 158 Mass. 90, 32 N. E. 1038 (holding that where the holder of a promissory note made a demand upon the maker personally at the indorser's office during business hours of the last day of grace and produced the note, and the maker said that he was unable to pay it and made no objection to the place of demand, it was sufficient to hold the indorser); Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503; King *v.* Holmes, 11 Pa. St. 456.

accepter's place of business, and not on him personally, the place must have been his usual place of business.[90]

d. Absence of Maker or Accepter. Presentment of a bill or note at the maker's or accepter's residence or place of business is sufficient, although he may be temporarily absent,[91] and his absence is no excuse for not presenting it there,[92]

90. Bigelow *v.* Kellar, 6 La. Ann. 59, 54 Am. Dec. 555 (holding that it is not sufficient to present a note for payment at an office which the maker often visits); Sussex Bank *v.* Baldwin, 17 N. J. L. 487, 488 (where it was said: "Where a person has an office or known and settled place of business for the transaction of his moneyed concerns — whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place, (as well as a presentment and demand at his residence,) is good in law. It must not however be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his moneyed concerns. The counting-room of a banker or merchant, may be a proper place for a demand, though the manufactory or work shop would not. Yet if the manufacturer or mechanic have an office, or known place of business for the purpose aforesaid, a good demand may be made there"). See also West *v.* Brown, 6 Ohio St. 542, where it was held that demand of payment of a note made at an office where the maker had been accustomed to receive business calls and had directed them to be made, and which he had thus held out as his office for transacting business, he having no other place of business in the city, was sufficient, although the same office was also the place of business of other persons.

Where the drawee of a draft was an employee in a factory without a desk there and was generally occupied elsewhere, it was held a question for the jury whether presentment at the factory was sufficient. Burrus *v.* Virginia L. Ins. Co., 121 N. C. 62, 28 S. E. 62.

Assignment for benefit of creditors.—When the maker of a note payable at no place named at the time of making it has a known place of business, but before its maturity fails and makes a general assignment of all his property to one of the indorsers for the benefit of creditors, and the assignee transacts his business of assignee at such place, that fact alone will not make a presentment of the note and a demand of its payment at that place sufficient to charge the indorsers. If it has ceased to be the maker's place of business a demand must be made of him personally or at his place of residence. Benedict *v.* Caffe, 5 Duer (N. Y.) 226.

Office of corporation.— Presentment of the note of a corporation where it keeps its office is a good presentment, although its keeping its office there may be unauthorized by its articles of incorporation and the laws of the state of its creation. Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa 74, holding that where by the articles of incorporation and the laws of the state in which a foreign corporation was incorporated, it was required to keep its office within such state, but it actually kept an office in Iowa, a presentation of a note for payment where the office was actually kept was sufficient.

The holder of a corporation warrant or order can ordinarily look only to the treasurer's office to make demand to bind the indorser, although such warrant or order is not properly executed in accordance with the corporation articles. Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa 74.

91. *Alabama.*— Decatur Branch Bank *v.* Hodges, 17 Ala. 42, holding that presentment of a draft at the place of business of the drawee is sufficient, although he is absent, leaving no one but his bookkeeper.

Iowa.— Red Oak Bank *v.* Orvis, 42 Iowa 691.

Louisiana.— State Bank *v.* Satterfield, 14 La. Ann. 80, 74 Am. Dec. 427; Deyraud *v.* Banks, 16 La. 461; State Bank *v.* Hennen, 4 Mart. N. S. (La.) 226.

Maine.— Brooks *v.* Blaney, 62 Me. 456; King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560.

Missouri.— Bateson *v.* Clark, 37 Mo. 31, holding that presentment of a note at the maker's place of business is sufficient, and that if he is not there it is not necessary to go to his residence.

New York.— Ogden *v.* Cowley, 2 Johns. (N. Y.) 274.

North Carolina.— Fields *v.* Mallett, 10 N. C. 465.

Ohio.— Belmont Bank *v.* Patterson, 17 Ohio 78, holding that going to a hotel and being informed that the accepter had gone away to be absent for some days was sufficient, without presenting the bill or making demand of payment on any one at the hotel, in order to fix the liability of an indorser.

Tennessee.— Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555.

Vermont.— Sanford *v.* Norton, 17 Vt. 285.

Canada.— Reed *v.* Kavanagh, 9 N. Brunsw. 457.

92. *Arkansas.*— Levy *v.* Drew, 14 Ark. 334.

Louisiana.— Mitchell *v.* Young, 21 La. Ann. 279.

Maine.— Whittier *v.* Graffam, 3 Me. 82, holding that the maker's absence at sea was no excuse for failure to present a note at his residence.

Massachusetts.— Pierce *v.* Cate, 12 Cush. (Mass.) 190, 59 Am. Dec. 176 (holding that the fact that the maker of a note has absconded and left the state, leaving no visible property, is no excuse for not presenting the note for payment at his place of business or

the presumption being that he has left someone there to pay or answer a demand.[93] It has been held that if a note or bill is presented for payment at the known business house of the maker or accepter during business hours and it is closed or there is no one there to answer there is a sufficient presentment, and it is not necessary to make presentment also at his residence or to seek further for him.[94]

e. Change of Residence or Place of Business. If the maker of a note or accepter of a bill changes his residence or place of business before the paper becomes due, but does not leave the state, diligence must be exercised in the absence of a personal demand to find his new residence or place of business and make presentment there.[95] If it is not known and cannot be found by the exercise of reasonable diligence presentment is excused or may be made at his former residence.[96] If the maker or accepter instead of merely changing his residence in the state abandons his residence and place of business and goes to another state or country, presentment at his former residence or place of business will be suffi-

residence); Granite Bank *v.* Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253.

Rhode Island.— Glaser *v.* Rounds, 16 R. I. 235, 14 Atl. 863.

93. Reason for the rule.—"Though a man is out of town, yet if he has a domicil, or place of business, it is to be presumed that he will leave some person charged with the care of his business, or at least some one between whom and himself there is a privity or confidence. It is upon this principle that all notices at one's domicil, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed in law to be good constructive notice and to have the legal effect of actual notice." Granite Bank *v.* Ayers, 16 Pick. (Mass.) 392, 394, 28 Am. Dec. 253.

94. Wiseman *v.* Chiappella, 23 How. (U. S.) 368, 16 L. ed. 466, where Wayne, J., said: "We infer, from all the cases in our books, notwithstanding many of them are contradictory to subsequent decisions, that the practice now, both in England and the United States, does not require more to be done, in the presentment of a bill of exchange to an acceptor for payment, than that the demand should be made of a merchant acceptor at his counting room or place of business; and if that be closed, so in fact that a demand cannot be made, or that the acceptor is not to be found at his place of business, and has left no one there to pay it, that further inquiry for him is not necessary, and will be considered as due diligence; and that presenting a bill under such circumstances at the place of business of the acceptor will be, *prima facie* evidence that it had been done at a proper time of the day." See also State Bank *v.* Satterfield, 14 La. Ann. 80, 74 Am. Dec. 427; Shed *v.* Brett, 1 Pick. (Mass.) 413; Baumgardner *v.* Reeves, 35 Pa. St. 250; Sulzbacher *v.* Charleston Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828; Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555. *Compare*, however, Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63.

95. *Illinois.*— Tarlton *v.* Miller, 1 Ill. 68.

Louisiana.— Bigelow *v.* Kellar, 6 La. Ann. 59, 54 Am. Dec. 555; Oakey *v.* Beauvais, 11 La. 487.

Maine.— Brooks *v.* Blaney, 62 Me. 456.

Maryland.— Nailor *v.* Bowie, 3 Md. 251.

Massachusetts.—Farnsworth *v.* Mullen, 164 Mass. 112, 41 N. E. 131; Granite Bank *v.* Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253; Freeman *v.* Boynton, 7 Mass. 483.

New York.—Anderson *v.* Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442.

Rhode Island.— Glaser *v.* Rounds, 16 R. I. 235, 14 Atl. 863.

South Carolina.— Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

Tennessee.— Sulzbacher *v.* Charleston Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828; Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555.

96. Farley *v.* Hewson, 10 La. Ann. 783; Petet *v.* Zanders, 6 La. Ann. 364 (holding that where the maker had no place of business and reasonable diligence was unsuccessfully exercised to find his residence a demand at an office in which he had recently transacted his business was sufficient to bind the indorser); Central Bank *v.* Allen, 16 Me. 41; Whittier *v.* Graffam, 3 Me. 82; Farnsworth *v.* Mullen, 164 Mass. 112, 41 N. E. 131; Paton *v.* Lent, 4 Duer (N. Y.) 231.

Information as to change of residence.—Where the holder of a note or his agent knows that the maker has recently been residing at a particular place, and he is in fact still residing there, failure to present the note at such residence is not excused by mere rumor that the maker has changed his residence. Due diligence requires at the least that inquiry should be made at such residence. Hume *v.* Watt, 5 Kan. 34.

Change of domicile by collusion with indorser.— Where the drawer of a note changes his domicile shortly before its maturity, by collusion with the indorser, with the view of creating difficulty in making the proper demand for protest, and thereby enabling the indorser to resist the payment of the note, the demand will be considered as having been properly made at the place which the public had been led to suppose was the drawer's place of business, and the indorser will consequently be held liable. McHenry *v.* Kellar, 6 La. Ann. 326.

cient,[97] or, according to some of the cases, presentment will be altogether excused.[98] If the maker of a note resides and has his place of business out of the state at the time the note is given and there is no agreement to the contrary, diligence must be exercised to find his residence or place of business wherever it may be and to present the note there.[99]

f. Notes Dated at Particular Place. If a note is dated at a particular place and does not specify any place of payment, the place of payment is presumptively the place of date, and it is necessary and sufficient to seek the maker personally or his residence or place of business at such place.[1] The place of date, however, is merely *prima facie* the place of payment, and if the maker has a residence or place of business elsewhere, and this fact is known or could be ascertained by the exercise of reasonable diligence by the holder or his agent, it is the general

97. *Alabama.*— Goading *v.* Britain, 1 Stew. & P. (Ala.) 282.

Kentucky.— Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576.

Maryland.— Nailor *v.* Bowie, 3 Md. 251.

Massachusetts.— Grafton Bank *v.* Cox, 13 Gray (Mass.) 503 (holding that where the maker of a note has before its maturity become insolvent, absconded from the state, and gone into parts unknown, there must be a presentment and demand of payment at his last place of business or of residence or due and reasonable efforts to find them for that purpose in order to fix the indorser and render his liability absolute; that such demand will be sufficient if made at either of those places, if they were both left and abandoned at the same time; but if there he a difference in the time it should be made at that which was the most recently occupied); Orleans Bank *v.* Whittemore, 12 Gray (Mass.) 469, 74 Am. Dec. 605; Wheeler *v.* Field, 6 Metc. (Mass.) 290.

Minnesota.— Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

New Hampshire.— New York Belting, etc., Co. *v.* Ela, 61 N. H. 352.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Adams *v.* Leland, 30 N. Y. 309 [*affirming* 5 Bosw. (N. Y.) 411]; Foster *v.* Julien, 24 N. Y. 28, 80 Am. Dec. 320; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Anderson *v.* Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442.

South Carolina.— Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

Vermont.— Sanford *v.* Norton, 17 Vt. 285.

United States.— McGruder *v.* Washington Bank, 9 Wheat. (U. S.) 598, 6 L. ed. 170.

Canada.— Robinson *v.* Taylor, 4 N. Brunsw. 198.

Where a foreign corporation having an office in a state, after making a note abandons its office and removes from the state, presentment of the note at the abandoned office is sufficient. Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402.

98. Goading *v.* Britain, 1 Stew. & P. (Ala.) 282; Adams *v.* Leland, 30 N. Y. 309 [*affirming* 5 Bosw. (N. Y.) 411].

Presumption.— Where a note was made in the state it is presumed, the contrary not appearing, that the maker's residence was at that date in the state. Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

99. See *supra*, X, C, 2, a, note 84.

1. *Kansas.*— Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793, holding that in the absence of knowledge of the place of business or residence of the makers of a note, and if diligent but useless inquiry is made, a demand of the maker is excused if the holder has the note when due ready to be presented at the place where it is dated.

Louisiana.— Mitchell *v.* Young, 21 La. Ann. 279; Farley *v.* Hewson, 10 La. Ann. 783; White *v.* Wilkinson, 10 La. Ann. 394; Baggett *v.* Rightor, 4 Rob. (La.) 18; Hepburn *v.* Toledano, 10 Mart. (La.) 643, 13 Am. Dec. 345 (holding a demand good at the place where the note purported to be executed, although the maker resided in another state).

Maryland.— Staylor *v.* Ball, 24 Md. 183; Selden *v.* Washington, 17 Md. 379, 79 Am. Dec. 659; Ricketts *v.* Pendleton, 14 Md. 320; Sasscer *v.* Whitely, 10 Md. 98, 69 Am. Dec. 126; Nailor *v.* Bowie, 3 Md. 251 (holding that if there is no other evidence of the maker's residence than the date of the note the holder must inquire there, the presumption being that the maker resides where the note is dated and that he contemplated payment there).

Massachusetts.— Smith *v.* Philbrick, 10 Gray (Mass.) 252, 69 Am. Dec. 315.

Minnesota.— Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

Missouri.— McKee *v.* Boswell, 33 Mo. 567; Plahto *v.* Patchin, 26 Mo. 389.

New York.— Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Spencer *v.* Salina Bank, 3 Hill (N. Y.) 520.

North Carolina.— Wittkowski *v.* Smith, 84 N. C. 671, 37 Am. Rep. 632.

Pennsylvania.— Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480.

South Carolina.— Moodie *v.* Morrall, 1 Mill (S. C.) 367.

Tennessee.— Mason *v.* Pritchard, 9 Heisk. (Tenn.) 793.

United States.— Britton *v.* Niccolls, 104 U. S. 757, 26 L. ed. 917; *Ex p.* Heidelback, 2 Lowell (U. S.) 526, 11 Fed. Cas. No. 6,322, 9 Chic. Leg. N. 183, 1 Cinc. L. Bul. 21, 23 Int. Rev. Rec. 73, 15 Nat. Bankr. Reg. 495

rule that presentment and demand should be made at such residence or place of business.[2]

g. Agreement as to Place of Presentment. If the maker of a note agrees with the holder on a place where the note may be presented, a presentment there will be sufficient, without going to his residence or place of business or making a personal demand.[3]

D. Manner of Presentment or Demand — 1. In General. Presentment and demand, it has been said, must be of such a character that if complied with the drawee will be divested of possession of the fund,[4] but no particular form of words is necessary.[5] The presenting of a bill, note, or check for payment implies that the holder of it desires and is ready and willing to accept payment,[6] but there is not sufficient demand if the presentment is for some other purpose than that of receiving payment.[7] The demand should be in compliance with the terms of the paper,[8] as with reference to the coin or currency in which it is payable;[9] but the fact that paper is presented with a request for payment or for new paper does not render the demand insufficient.[10] If the drawee of a bill

(where the bill was made and dated at the business domicile of the drawee and the undertaking was held to be to pay it there).

2. *California.*— Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035, holding that merely looking for the maker of a note at the place of date is insufficient, and that inquiry should be made at his domicile or known place of business.

Illinois.— Tarlton *v.* Miller, 1 Ill. 68, holding that merely searching for the maker in the county where the note was made is not necessarily due diligence.

Iowa.— Hart *v.* Wills, 52 Iowa 56, 2 N. W. 619, 35 Am. Rep. 255; Hartford Bank *v.* Green, 11 Iowa 476.

Louisiana.— Bigelow *v.* Kellar, 6 La. Ann. 59, 54 Am. Dec. 555.

Maryland.— Staylor *v.* Ball, 24 Md. 183; Sasscer *v.* Whitely, 10 Md. 98, 69 Am. Dec. 126; Nailor *v.* Bowie, 3 Md. 251 (holding that if, when the note falls due, the maker resides elsewhere in the state than in the place where the note is dated, and this is known to the holder, demand must be made at the maker's place of residence or of business).

Massachusetts.— Smith *v.* Philbrick, 10 Gray (Mass.) 252, 69 Am. Dec. 315.

Missouri.— McKee *v.* Boswell, 33 Mo. 567; Plahto *v.* Patchin, 26 Mo. 389.

Nebraska.— Nicholson *v.* Barnes, 11 Nebr. 452, 9 N. W. 652, 38 Am. Rep. 373, holding that where an address other than the place of date is appended below the name of the maker demand must be made there, and not merely at the place of date.

New York.— Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Anderson *v.* Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442.

Pennsylvania.— Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255; Lightner *v.* Will, 2 Watts & S. (Pa.) 140; Bornwing *v.* Armstrong, 9 Phila. (Pa.) 59, 29 Leg. Int. (Pa.) 228.

South Carolina.— Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640, holding that the fact that a note is dated at a particular place does not necessarily render it payable at that place alone, and if inquiry be made for the drawer at such place and he cannot be found the holder is not thereby excused from inquiring elsewhere.

Tennessee.— Mason *v.* Pritchard, 9 Heisk. (Tenn.) 793.

United States.— Britton *v.* Niccolls, 104 U. S. 757, 26 L. ed. 917.

3. State Bank *v.* Hurd, 12 Mass. 172; McKee *v.* Boswell, 33 Mo. 567; Meyer *v.* Hibsher, 47 N. Y. 265; Apperson *v.* Bynum, 5 Coldw. (Tenn.) 341.

4. Burch *v.* Newberry, 1 Barb. (N. Y.) 648, 666 [*affirmed* in 10 N. Y. 374], holding that a demand of payment of an order should be made "by some third person authorized to receive the actual possession of the fund," and that a demand made by the drawees on themselves was insufficient.

5. Gregg *v.* George, 16 Kan. 546.

6. See Simpson *v.* Pacific Mut. L. Ins. Co., 44 Cal. 139.

7. Chase *v.* Evoy, 49 Cal. 467 (holding that presenting a note to the maker's administrator for allowance is not a demand); Simpson *v.* Pacific Mut. L. Ins. Co., 44 Cal. 139 (holding that presenting a check for the purpose of ascertaining the genuineness of the signatures or to identify the payee is not sufficient); Bradford *v.* Fox, 39 Barb. (N. Y.) 203, 16 Abb. Pr. (N. Y.) 51 (holding that presenting a check for certification merely is not equivalent to a demand of payment).

Service of process in an action on a note is not a sufficient demand to charge an indorser. Montgomery Branch Bank *v.* Gaffney, 9 Ala. 153.

8. Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685.

Place of presentment see *supra*, X, C.

9. Langenberger *v.* Krœger, 48 Cal. 147, 17 Am. Rep. 418, holding that demand of payment in gold coin is not sufficient to charge the drawer of a draft which does not specify the kind of money in which it is made payable.

10. Presentment of a note with a request for payment or a new note is a good demand

does not refuse payment, but merely requires and is given time to examine his accounts, a new demand is necessary before protest.[11]

2. Paper Payable Generally. Where a bill or note is payable generally and not at a bank or other particular place, it is necessary that it be presented to the maker or accepter personally or at his place of business or residence, unless the circumstances are such as to excuse such presentment.[12]

3. Paper Payable at a Bank or Other Place. Where commercial paper is payable at a particular office or other place,[13] having or leaving it at such place to be surrendered when paid is a sufficient demand, and presentment to the maker or accepter personally or at his place of business or residence is not necessary.[14] If it is payable at a bank it is sufficient if the bank is its holder or if it is in the bank at maturity ready to be surrendered when paid, and a formal demand is unnecessary.[15] The rule that where commercial paper is payable at a

on a note payable on or after sight. Wolfe *v.* Whiteman, 4 Harr. (Del.) 246.

11. Case *v.* Burt, 15 Mich. 82. But see Allen *v.* Kramer, 2 Ill. App. 205.

12. See *supra*, X, C, 2.

13. Place of presentment specified see *supra*, X, C, 1.

14. *Delaware.*—Allen *v.* Miles, 4 Harr. (Del.) 234.

Illinois.— Ewen *v.* Wilbor, 99 Ill. App. 132.

Missouri.— Lawrence *v.* Dobyns, 30 Mo. 196.

New York.— Meyer *v.* Hibsher, 47 N. Y. 265 (holding that a note may be left in a designated town at a place agreed upon, but not expressed on the face of the note); Woodin *v.* Foster, 16 Barb. (N. Y.) 146 (holding that it is sufficient to leave a note at the place of payment the day before it falls due, if it remains there until after it becomes due); Nichols *v.* Goldsmith, 7 Wend. (N. Y.) 160.

Ohio.— Remington *v.* Harrington, 8 Ohio 507.

England.— Hawkey *v.* Borwick, 4 Bing. 135, 12 Moore C. P. 478, 13 E. C. L. 436.

Canada.— Souther *v.* Wallace, 20 Nova Scotia 509 [*affirmed* in 9 Can. L. T. 210]; Harris *v.* Perry, 8 U. C. C. P. 407.

A bill may be left in the morning in the accepter's hands, with the understanding that the money will be called for later in the day. Hoar *v.* Dacosta, 2 Str. 910; Turner *v.* Mead, 1 Str. 416. *Contra*, Hayward *v.* Bank of England, 1 Str. 550.

15. *Delaware.*— Allen *v.* Miles, 4 Harr. (Del.) 234.

Illinois.— Wing *v.* Beach, 31 Ill. App. 78.

Kentucky.— Huffaker *v.* Monticello Nat. Bank, 13 Bush (Ky.) 644, 649, where it was said: "That the note was in the bank, in the custody of the proper officer, on the day of its maturity, is not an excuse for not presenting it, but such possession is of itself treated as due presentment."

Louisiana.— Thomas *v.* Marsh, 2 La. Ann. 353.

Maryland.— Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78.

Massachusetts.— Berkshire Bank *v.* Jones, 6 Mass. 524, 4 Am. Dec. 175. And see Gilbert *v.* Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329.

Michigan.— Martin *v.* Smith, 108 Mich. 278, 66 N. W. 61.

Mississippi.— Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150.

Missouri.— Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393; Lawrence *v.* Dobyns, 30 Mo. 196.

New York.— Merchants' Bank *v.* Elderkin, 25 N. Y. 178 (holding that there is a sufficient presentment of a note where it is left for collection at the bank where it is payable and, the maker having no funds, is returned to the holder before the expiration of the last business hour); Dykman *v.* Northridge, 1 N. Y. App. Div. 26, 36 N. Y. Suppl. 962, 72 N. Y. St. 64; Ogden *v.* Dobbin, 2 Hall (N. Y.) 112; Gillett *v.* Averill, 5 Den. (N. Y.) 85; Troy City Bank *v.* Grant, Lalor (N. Y.) 119; Nichols *v.* Goldsmith, 7 Wend. (N. Y.) 160.

Pennsylvania.— Hallowell *v.* Curry, 41 Pa. St. 322.

Rhode Island.— Barnes *v.* Vaughan, 6 R. I. 259.

South Carolina.— State Bank *v.* Flagg, 1 Hill (S. C.) 177.

Tennessee.— State Bank *v.* Napier, 6 Humphr. (Tenn.) 270, 44 Am. Dec. 308.

United States.— U. S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 7 L. ed. 513; Fullerton *v.* U. S. Bank, 1 Pet. (U. S.) 604, 7 L. ed. 280; Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65; U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443; Browning *v.* Andrews, 3 McLean (U. S.) 576, 4 Fed. Cas. No. 2,040.

England.— Bailey *v.* Porter, 14 L. J. Exch. 244, 14 M. & W. 44.

Canada.— Merchants Bank *v.* Mulvey, 6 Manitoba 467; Union Bank *v.* McKilligan, 4 Manitoba 29; Pullen *v.* Sanford, 16 Nova Scotia 242.

Where by the usage of the bank all persons having notes payable there are allowed until the expiration of banking hours for payment, a demand of payment at the bank before that time is insufficient, unless the note is permitted to remain in bank until the close of banking hours. Planters' Bank *v.* Markham, 5 How. (Miss.) 397, 37 Am. Dec. 162.

Presumption.— If paper belongs to the bank at which it is made payable proper presentment there will be presumed without

bank or other particular place there is sufficient presentment and demand if it is at such place on the day it becomes due does not apply to paper payable on demand. In such a case formal demand of payment at the place specified is necessary to render the paper due.[16] In presenting a check for payment to the bank on which it is drawn no particular form of expression is necessary to make a legal demand and refusal, but it is sufficient if it clearly appears that the bank, after demand, declines to honor the check.[17]

4. PRODUCTION OF BILL OR NOTE. It is a general rule that the person demanding payment of a bill or note must have possession of the same at the time and produce or offer to produce the same if requested, or the demand will be ineffectual,[18] and, if the paper is secured by collateral, the collateral should also be pro-

proof of its being actually in the bank at maturity. Folger *v.* Chase, 18 Pick. (Mass.) 63.

Examination of books.— It is a sufficiently formal demand to request an examination of the books of the bank as to the condition of the maker's account, and to ascertain that there are no funds.

Louisiana.— Maurin *v.* Perot, 16 La. 276.

New York.— Nichols *v.* Goldsmith, 7 Wend. (N. Y.) 160.

South Carolina.— State Bank *v.* Flagg, 1 Hill (S. C.) 177.

United States.— U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443.

England.— Bailey *v.* Porter, 14 L. J. Exch. 244, 14 M. & W. 44.

Inquiry by the holder or his agent of the bookkeeper whether there are funds to meet the obligation and a reply that there are no funds is sufficient. Browning *v.* Andrews, 3 McLean (U. S.) 576, 4 Fed. Cas. No. 2,040. See also Wilmington, etc., Bank *v.* Cooper, 1 Harr. (Del.) 10; Gillett *v.* Averill, 5 Den. (N. Y.) 85.

Lost or mislaid paper.— If a bill or note payable at a bank is sent to the bank by mail for collection, and the letter, before it is opened, is lost or mislaid so that the officers do not know that the paper is in the bank on the day of maturity, the paper is not to be regarded as present in the bank so as to constitute a presentment or demand against the maker or accepter. In such a case the holder loses his remedy against the drawer or indorser. His remedy is by an action against the bank for its negligence. Chicopee Bank *v.* Philadelphia Seventh Nat. Bank, 8 Wall. (U. S.) 641, 19 L. ed. 422.

16. National Hudson River Bank *v.* Kinderhook, etc., R. Co., 17 N. Y. App. Div. 232, 45 N. Y. Suppl. 588 [*affirming* 162 N. Y. 623, 57 N. E. 1118], holding that a letter written by a bank to the maker of a note payable at such bank on demand, requesting payment on the day specified, is not such a demand as to mature the note and require protest on the day specified, in order to charge the indorsers, where it does not appear what reply was made to the letter or that the maker had any funds in the bank. See also Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685.

17. Gregg *v.* George, 16 Kan. 546, holding that the bank's refusal to pass the check to the credit of the holder is a dishonor of it.

18. *Louisiana.*— Peet *v.* Dougherty, 7 Rob. (La.) 85; Union Bank *v.* Penn, 7 Rob. (La.) 79; Harbour *v.* Taylor, 7 Rob. (La.) 32; Nott *v.* Beard, 16 La. 308; Carlile *v.* Holdship, 15 La. 375.

Maine.— King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560.

Maryland.— Nailor *v.* Bowie, 3 Md. 251; Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78.

Massachusetts.— Arnold *v.* Dresser, 8 Allen (Mass.) 435; Shaw *v.* Reed, 12 Pick. (Mass.) 132; Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165; Freeman *v.* Boynton, 7 Mass. 483.

Missouri.— Draper *v.* Clemens, 4 Mo. 42.

New York.— Vergennes Bank *v.* Cameron, 7 Barb. (N. Y.) 143.

Virginia.— Waring *v.* Betts, 90 Va. 46, 51, 17 S. E. 739, 44 Am. St. Rep. 890, where it is said: "Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself, or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand ready to be delivered, and such must really be the case."

United States.— Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. ed. 967.

England.— Griffin *v.* Weatherby, L. R. 3 Q. B. 753, 9 B. & S. 726, 37 L. J. Q. B. 280, 18 L. T. Rep. N. S. 881, 17 Wkly. Rep. 8; Hansard *v.* Robinson, 7 B. & C. 90, 14 E. C. L. 50, 9 D. & R. 860, 5 L. J. K. B. O. S. 242, R. & M. 403 note, 21 E. C. L. 780, 31 Rev. Rep. 166.

Canada.— De la Chevrotière *v.* Guilmet, 9 Montreal Leg. N. 412; Cousineau *v.* Lecours, 4 Montreal Super. Ct. 249; Jordan *v.* Coates, 7 N. Brunsw. 107.

"This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of, upon paying the amount." Waring *v.* Betts, 90 Va. 46, 51, 17 S. E. 739, 44 Am. St. Rep. 890.

The paper should be in the hands of a person authorized to receive payment of it. Shaw *v.* Reed, 12 Pick. (Mass.) 132.

Interest coupons may be presented without producing the principal note. Codman *v.* Vermont, etc., R. Co., 17 Blatchf. (U. S.) 1, 5 Fed. Cas. No. 2,936.

Where a bill of exchange is executed in a set of two or more parts one part may be

duced or offered.[19] Possession and production of the instrument may, however, be dispensed with if it has been lost or destroyed[20] or if there is an established custom rendering it unnecessary under the circumstances.[21] Actual production and exhibition of the paper, however, is not necessary, where its production is not requested, and payment is refused on other grounds than its non-production.[22]

5. Demand by Letter or Written Notice. Ordinarily a demand in writing mailed or sent to the maker of a note or accepter of a bill or left at his house with a servant is not a sufficient presentment to charge a drawer or indorser;[23] but such a demand may be sufficient under special circumstances,[24] as where it is

presented. Kenworthy *v.* Hopkins, 1 Johns. Cas. (N. Y.) 107.

Bank-notes may be presented for payment in a package, and payment of the aggregate amount demanded. Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755; Suffolk Bank *v.* Lincoln Bank, 3 Mason (U. S.) 1, 23 Fed. Cas. No. 13,590.

In making demand against estate of a deceased maker a claim has been held to be sufficient without producing the note. Posey *v.* Decatur Bank, 12 Ala. 802.

Non-negotiable notes.— Possession or production of a non-negotiable note is not necessary to a proper demand of payment. Wain *v.* Bailey, 10 A. & E. 616, 2 P. & D. 507, 37 E. C. L. 330.

19. Ocean Nat. Bank *v.* Fant, 50 N. Y. 474.

20. Hinsdale *v.* Miles, 5 Conn. 331 (holding that a demand of payment of a lost note, on presentment of a copy, is sufficient presentment); Arnold *v.* Dresser, 8 Allen (Mass.) 435; Farmers' Bank *v.* Reynolds, 4 Rand. (Va.) 186 (holding that where a bank-note was cut in half and one half was sent by mail and lost the holder of the remaining half had the right to demand payment at the bank upon presentation of the half in his possession, proving ownership, and giving the bank an indemnifying bond).

21. Portland Bank *v.* Brown, 22 Me. 295; Warren Bank *v.* Parker, 8 Gray (Mass.) 221; Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165; Statesville Bank *v.* Pinkers, 83 N. C. 377.

The cashier of a bank with which a note has been left for collection need not have the note with him when he demanded payment in order to hold an indorser, but it is sufficient if the note is in the bank where it can be produced if requested. Gallagher *v.* Roberts, 11 Me. 489.

Taking note from files.— If a note payable at a bank is there on the day of its maturity and the maker does not go there to pay it or provide funds for its payment it is not necessary to take the note from the files and make a demand. Gilbert *v.* Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329.

A notary need not have possession of note when he demands payment, where the note is held by a bank, is payable there, and is in the cashier's hands; but it is otherwise, if the place of payment is other than at the bank and the bank is not the holder. Union Bank *v.* Jones, 4 La. Ann. 220; Union Bank *v.* Morgan, 2 La. Ann. 418.

22. *Connecticut.* — Lockwood *v.* Crawford, 18 Conn. 361.

Maine.— King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560.

Massachusetts.— Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518; Gilbert *v.* Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329.

New York.— Porter *v.* Thom, 167 N. Y. 584, 60 N. E. 1119 [*affirming* 40 N. Y. App. Div. 34, 57 N. Y. Suppl. 479].

Virginia.— Waring *v.* Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890.

23. *Colorado.* — German Nat. Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247.

Iowa.— Closz *v.* Miracle, 103 Iowa 198, 72 N. W. 502.

Maine.—Davis *v.* Gowen, 19 Me. 447; Whittier *v.* Graffam, 3 Me. 82.

Maryland.— Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78.

New Hampshire.— Moore *v.* Waitt, 13 N. H. 415, holding that where a bill of exchange accepted by the drawee is left at a bank for collection a notice sent by the bank through the mail to the accepter and the drawer on the last day of grace that the bill has been left there for payment is not sufficient presentment and demand to render the drawer liable.

New York.— Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685; National Hudson River Bank *v.* Kinderhook, etc., R. Co., 17 N. Y. App. Div. 232, 45 N. Y. Suppl. 588 [*affirmed* in 162 N. Y. 623, 57 N. E. 1118].

Pennsylvania.— Stuckert *v.* Anderson, 3 Whart. (Pa.) 116.

Rhode Island.— Barnes *v.* Vaughan, 6 R. I. 259.

South Carolina.— Halls *v.* Howell, Harp. (S. C.) 426.

United States.—Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705.

England.— Norfolk *v.* Howard, 2 Show. 235.

Canada.— Thorne *v.* Scovil, 4 N. Brunsw. 557.

24. Tredick *v.* Wendell, 1 N. H. 80, holding that where a note was left at a bank for collection, and on the day when it became due a letter was sent to the house of the maker, which was within a few rods of the bank, informing him where the note was and requesting him to pay it, but the maker was not at home when the letter was delivered, there was a sufficient demand to charge the indorser, although the note was not sent to the house of the maker. But *compare* Davis *v.* Gowen, 19 Me. 447; Moore *v.* Waitt, 13 N. H. 415.

authorized by an established usage known to and acquiesced in by the maker or accepter.[25] A bill or draft not payable at a bank cannot properly be presented for payment by mailing it to the drawee,[26] but a draft or check on a bank may be sent to the bank by mail, according to established usage,[27] and it has been held that where a note is payable at a bank established usage may render it proper to send the same to the bank by mail. in order to present the same there for payment.[28]

E. To Whom Presentment Should Be Made — 1. In General. Presentment is sufficiently made, either to the drawee or accepter of a bill or to the maker of a note, or to his agent in his absence, at the legally required place, and it must be so made in order to charge the drawer or indorsers.[29] Presentment

25. Portland Bank *v.* Brown, 22 Me. 295; Maine Bank *v.* Smith, 18 Me. 99; Whittier *v.* Graffam, 3 Me. 82; Warren Bank *v.* Parker, 8 Gray (Mass.) 221 (where a bank in Boston with which a promissory note was placed for collection gave notice to the maker before the note fell due, according to the usage in Boston, of the day when the note would be payable and requested him to come and pay it, and the note remained in the bank through the banking hours of that day,— it being held that if the maker was a trader and accustomed to transact business at the bank his consent to the general usage which made such notice sufficient might be shown, and if shown rendered any other demand unnecessary); Shove *v.* Wiley, 18 Pick. (Mass.) 558; Boston Bank *v.* Hodges, 9 Pick. (Mass.) 420 (holding that the usage must be strictly followed); Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165; Peirce *v.* Butler, 14 Mass. 303; Woodbridge *v.* Brigham, 12 Mass. 403, 7 Am. Dec. 85, 13 Mass. 556; Smith *v.* Whiting, 12 Mass. 6, 7 Am. Dec. 25; Blanchard *v.* Hilliard, 11 Mass. 85; Weld *v.* Gorham, 10 Mass. 366 (holding that leaving notice for the maker and indorser, who were directors of the bank, on the cashier's desk, in accordance with a custom known to them, was good); Lincoln, etc., Bank *v.* Page, 9 Mass. 155, 6 Am. Dec. 52; Jones *v.* Fales, 4 Mass. 245; Statesville Bank *v.* Pinkers, 83 N. C. 377. *Compare*, however, Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78. See also Marrett *v.* Brackett, 60 Me. 524, holding that such usage must be well established, lawful, and reasonable in its character, uniform and general in its application, and known and recognized by the trading community and by the parties to the paper.

Knowledge of the usage by the maker or accepter is necessary. Moore *v.* Waitt, 13 N. H. 415.

Usage of other banks.— The parties to a note deposited in a particular bank for collection are not affected by a usage in other banks which has no existence in the bank where the paper is lodged. Pierce *v.* Whitney, 29 Me. 188; Camden *v.* Doremus, 3 How. (U. S.) 515, 11 L. ed. 705.

26. Drovers' Nat. Bank *v.* Anglo-American Packing, etc., Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 875; Anderson *v.* Rodgers, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248; Wagner *v.* Crook, 167 Pa. St. 259, 31 Atl. 576, 46 Am. St. Rep. 672; Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202; Merchants' Nat. Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687, 58 Am. Rep. 728.

27. Heywood *v.* Pickering, L. R. 9 Q. B. 428, 43 L. J. Q. B. 145; Prideaux *v.* Criddle, L. R. 4 Q. B. 455, 10 B. & S. 515, 38 L. J. Q. B. 232, 20 L. T. Rep. N. S. 695; Bailey *v.* Bodenham, 16 C. B. N. S. 288, 10 Jur. N. S. 821, 33 L. J. C. P. 252, 10 L. T. Rep. N. S. 422, 12 Wkly. Rep. 865, 111 E. C. L. 288; Hare *v.* Henty, 10 C. B. N. S. 65, 7 Jur. N. S. 523, 30 L. J. C. P. 302, 4 L. T. Rep. N. S. 363, 9 Wkly. Rep. 738, 100 E. C. L. 65.

28. Nidig *v.* National City Bank, 59 How. Pr. (N. Y.) 10.

29. *California.*— Luning *v.* Wise, 64 Cal. 410, 1 Pac. 495, 874, holding that a demand is sufficient if made on one who has signed a note on his own behalf and also on behalf of another.

Illinois.— Thayer *v.* Peck, 84 Ill. 74; Bowes *v.* Industrial Bank, 58 Ill. App. 498.

Indiana.— Dickerson *v.* Turner, 12 Ind. 223.

Iowa.— Gage *v.* Dubuque, etc., R. Co., 11 Iowa 310, 77 Am. Dec. 145, holding that presentment of an acceptance to a third party, not in the place where the acceptance was payable, but in an adjoining building, was insufficient.

Kentucky.— Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Coons, 35 La. Ann. 364; Whaley *v.* Houston, 12 La. Ann. 585; Fulton Co. *v.* Wright, 12 La. 386.

Maryland.— Farmers', etc., Bank *v.* Allen, 18 Md. 475 (holding that a demand made, not on the maker of a note, but at a bank at which the note was not payable, was insufficient); Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703.

Mississippi.— Stinson *v.* Lee, 68 Miss. 113, 8 So. 272, 24 Am. St. Rep. 257, 9 L. R. A. 830, holding that demand should be made of one who signs in his own name adding the word "Agent," and that presentment to his wife, the supposed principal, is insufficient.

Missouri.— Draper *v.* Clemens, 4 Mo. 52.

New York.— Vergennes Bank *v.* Cameron, 7 Barb. (N. Y.) 143; Munroe *v.* Easton, 2 Johns. Cas. (N. Y.) 75.

Texas.— Cole *v.* Wintercost, 12 Tex. 118.

may, in the absence of the accepter or maker, be made to any one on the premises[30] in charge thereof, the paper being payable there;[31] to an attorney in fact at the accepter's counting-house;[32] to the maker's brother, who has paid other notes in the same transaction;[33] to a clerk;[34] to a bookkeeper[35] or one representing himself as such, or as duly authorized;[36] to a person representing himself to be the maker,[37] or to a servant "who used to pay money for him";[38] or to a daughter of the maker at his residence.[39] Presentment to the president of a corporation which has accepted a bill drawn on a building committee is proper.[40] So payment of a bill drawn by a corporation on its treasurer by its agent and indorsed by it may be demanded of the treasurer,[41] and demand of

Virginia.— Stainback *v.* Commonwealth Bank, 11 Gratt. (Va.) 260.

United States.— Goldsborough *v.* Jones, 2 Cranch C. C. (U. S.) 305, 10 Fed. Cas. No. 5,517, holding that it was not sufficient to demand payment of the barkeeper of a tavern to which was attached the stable in which the maker sometimes put up his horse, while he was at his office.

England.— Heylyn *v.* Adamson, 2 Burr. 669, 2 Ld. Ken. 379 (holding that presentment must be made to the accepter and not to the drawer); Cheek *v.* Roper, 5 Esp. 175 (holding that it was not sufficient to present a bill to an unknown person who was found in a tan-yard of the drawee, but made no representation as to himself).

Presentment to agent.— If the accepter of a bill or maker of a note is abroad it should be presented for payment to his agent, especially if the acceptance was given by the agent while his principal was abroad. Philips *v.* Astling, 2 Taunt. 206. And presentment of a bill of exchange to an agent of the accepter appointed to pay it or to refuse payment is sufficient to charge the drawer and indorsers. Phillips *v.* Poindexter, 18 Ala. 579. So if a note is signed by one as agent, the principal being undisclosed, it is sufficiently presented to such agent, although he ceases to act for the principal before the maturity of the note. Hall *v.* Bradbury, 40 Conn. 32. And if an agent having authority to accept the bill has accepted it it should be presented to him for payment. Philips *v.* Astling, 2 Taunt. 206.

Former agent.— It is not sufficient to present to the former agent of an insolvent corporation, who states that the company has no longer an agent in that place, but the paper should in such case be presented at the principal office of the company. McKee *v.* Boswell, 33 Mo. 567. If the place of payment is designated at an agency which has since been removed the note need not be presented to the former agent, although he resides in the town. Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346.

Assignee for benefit of creditors or in bankruptcy.— Presentment of a note to the assignee for the benefit of creditors of the maker, or at the assignee's office, will not be sufficient (Armstrong *v.* Thruston, 11 Md. 148), and it has been held that a surety will not be discharged by the holder's omission to present the note for payment to the assignee of the bankrupt maker (Dye *v.* Dye, 21 Ohio St. 86, 8 Am. Rep. 40).

Acceptance supra protest.— Although a bill has been accepted *supra protest*, it should be presented at maturity for payment to the original drawee. Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381; Williams *v.* Germaine, 7 B. & C. 468, 6 L. J. K. B. O. S. 90, 1 M. & R. 394, 31 Rev. Rep. 248, 14 E. C. L. 212; Hoare *v.* Cazenove, 16 East 391, 14 Rev. Rep. 370.

Presentment of a check to the drawee named in it is sufficient, although if it had been presented at the clearing-house it would have been paid there. Kleekamp *v.* Meyer, 5 Mo. App. 444.

30. Buxton *v.* Jones, 1 M. & G. 83, 39 E. C. L. 656.

31. Gage *v.* Dubuque, etc., R. Co., 11 Iowa 310, 77 Am. Dec. 145; Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69.

32. Phillips *v.* Poindexter, 18 Ala. 579. But see Fortier *v.* Field, 17 La. 587.

33. Clayton *v.* Coburn, 42 Conn. 348.

34. *Alabama.*— Bradley *v.* Northern Bank, 60 Ala. 252.

Louisiana.—Whaley *v.* Houston, 12 La. Ann. 585.

Missouri.— Draper *v.* Clemens, 4 Mo. 52.

New York.— Foden *v.* Sharp, 4 Johns. (N. Y.) 183; Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222 (holding that it is sufficient presentment if a note is taken to the place of business of the makers and when they cannot there be found payment is demanded of a clerk who says that they are out of town and have left no instructions to pay).

Tennessee.— Gardner *v.* State Bank, 1 Swan (Tenn.) 420.

35. Bradley *v.* Northern Bank, 60 Ala. 252; Decatur Branch Bank *v.* Hodges, 17 Ala. 42; Gardner *v.* State Bank, 1 Swan (Tenn.) 450.

36. Wesson *v.* Garrison, 8 La. Ann. 136, 58 Am. Dec. 674.

37. Hunt *v.* Maybee, 7 N. Y. 266.

38. Bank of England *v.* Newman, 12 Mod. 241.

39. Sanford *v.* Norton, 17 Vt. 285.

40. Rice *v.* Ragland, 10 Humphr. (Tenn.) 545, 53 Am. Dec. 737.

41. Commercial Bank *v.* St. Croix Mfg. Co., 23 Me. 280.

payment of a note made by the committee of a parish may be made of the committee, presentment to the parish treasurer not being necessary.[42]

2. To Bank Officers and Employees. Where paper is payable at a bank presentment may be made to the president, where the bank is closed;[43] to its last manager where it has ceased to exist;[44] to the cashier,[45] if the presentment is made at the bank;[46] to the teller;[47] to the proper clerk or bookkeeper;[48] to the officers of another bank occupying the premises of the specified bank at which the note is payable;[49] or to a receiver of the bank at his office.[50] But it is not sufficient to make presentment out of banking hours to a clerk of the bank, who has no authority to pay the paper, or control of the funds.[51]

3. To Joint, or Joint and Several, Promisors — a. In General. If several persons who are not partners have joined as makers or accepters of a note or bill presentment must be made to all,[52] unless there is sufficient excuse.[53] This is true

42. Casco Bank *v.* Mussey, 19 Me. 20.

43. Niblack *v.* Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203, 39 L. R. A. 159.

44. Waring *v.* Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890.

45. Crenshaw *v.* McKiernan, Minor (Ala.) 295; Union Bank *v.* Morgan, 2 La. Ann. 418; New Orleans, etc., R. Co. *v.* McKelvey, 2 La. Ann. 359; Gale *v.* Kemper, 10 La. 205; Seneca County Bank *v.* Neass, 5 Den. (N. Y.) 329; Bechtell *v.* Miners' Bank, 2 Phila. (Pa.) 121.

46. Magoun *v.* Walker, 49 Me. 419; Swan *v.* Hodges, 3 Head (Tenn.) 251 (holding that demand made of the cashier on the street after banking hours will not bind an indorser, although the cashier answers that there are no funds to meet the paper); Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888 (holding that where paper is payable at a bank it is not sufficient to show that it was presented for payment to the cashier of the bank, unless it further appears that such presentment was made to the cashier at the bank).

47. Minturn *v.* Fisher, 7 Cal. 573.

A bank notary may even present the paper to himself as teller at the door of the bank after it is closed. Syracuse Bank *v.* Hollister, 17 N. Y. 46, 72 Am. Dec. 416.

48. Armor *v.* Lewis, 16 La. 331.

Delivery of check to bank porter.— The delivery of a bank check by one bank to the porter of another bank upon which the check is drawn, and the return of the same as not good, accompanied by evidence of the invariable practice of the porter to present checks thus received and to return them if dishonored on the same day that they are delivered to him, is sufficient proof of presentment to authorize the submission of the case to the jury. Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443.

49. Faulkner *v.* Faulkner, 73 Mo. 327.

50. Hutchison *v.* Crutcher, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89; Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

A certificate of deposit payable on its return to the bank may be presented to the receiver. Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

51. Newark India Rubber Mfg. Co. *v.* Bishop, 3 E. D. Smith (N. Y.) 48; Swan *v.* Hodges, 3 Head (Tenn.) 251.

Where a bank is closed when a notary calls during business hours with paper payable there the fact that he afterward makes demand on one who has been, but is no longer, an employee of the bank, does not affect the sufficiency of the demand at the bank. Berg *v.* Abbott, 83 Pa. St. 177, 24 Am. Rep. 158.

52. *Iowa.*— Closz *v.* Miracle, 103 Iowa 198, 72 N. W. 502; Red Oak Bank *v.* Orvis, 40 Iowa 332; Blake *v.* McMillen, 33 Iowa 150, 22 Iowa 358; Allen *v.* Harrah, 30 Iowa 363.

Massachusetts.—Arnold *v.* Dresser, 8 Allen (Mass.) 435; Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541.

Missouri.—Nave *v.* Richardson, 36 Mo. 130.

New York.— Shutts *v.* Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207; Willis *v.* Green, 5 Hill (N. Y.) 232, 40 Am. Dec. 351.

United States.— Tayloe *v.* Davidson, 2 Cranch C. C. (U. S.) 434, 23 Fed. Cas. No. 13,769.

Under a statute (Mass. Pub. Stat. c. 77, § 15) providing that persons becoming parties to a note by signature upon the back thereof in blank before delivery shall be entitled to notice of non-payment the same as an indorser, it is not necessary that demand of payment shall be made upon all of those so signing to bind the others so signing. Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518.

53. Blake *v.* McMillen, 33 Iowa 150 (holding that if one of the joint makers of a note dies before maturity, demand is to be made of the surviving maker); McClelland *v.* Bishop, 42 Ohio St. 113 (holding that where a joint note was executed by husband and wife and the husband deserted his wife before maturity and could not be found a demand on the wife was sufficient).

Note payable in particular town.— If some of the makers of a note reside in the particular town in which the note is made payable it is sufficient for the holder to present it at their place of business or residence, unless the other maker who resides elsewhere gives notice at what place in that town he will be ready to pay it. Smith *v.* Little, 10 N. H. 526.

although one may in reality be surety for the other joint maker and so known by the indorsee.[54] The same rule has been applied by some of the courts in the case of a joint and several note,[55] but other courts have held that a demand on one of the several makers of such a note is sufficient.[56]

b. Partners. If a note is made by a firm, or if a bill is drawn upon or accepted by a firm, presentment may be made to any partner and need not be made to all.[57] This is so in case of the dissolution of the firm,[58] and if a partner dies before the maturity of a partnership note demand is sufficient if made of the surviving partner.[59]

4. To Personal Representatives. If the accepter or maker dies before maturity of the paper presentment should be made to his personal representative, if appointed, and if he can be found or his address is known,[60] even though the indorser himself be an executor or administrator.[61] The rule applies even though the executor or administrator is temporarily absent, and notwithstanding the

54. Britt *v.* Lawson, 15 Hun (N. Y.) 123.

55. *Iowa.*— Blake *v.* McMillen, 22 Iowa 358.

Massachusetts.— Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541.

New York.— Britt *v.* Lawson, 15 Hun (N. Y.) 123.

Washington.— Benedict *v.* Schmieg, 13 Wash. 476, 43 Pac. 374, 52 Am. St. Rep. 61, 36 L. R. A. 703.

United States.— Tayloe *v.* Davidson, 2 Cranch C. C. (U. S.) 434, 23 Fed. Cas. No. 13,769.

56. Hestres *v.* Petrovic, 1 Rob. (La.) 119; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Harris *v.* Clark, 10 Ohio 5; Greenough *v.* Smead, 1 Ohio Dec. (Reprint) 516, 10 West. L. J. 271 [*affirmed* in 3 Ohio St. 415].

57. Mt. Pleasant Branch State Bank *v.* McLeran, 26 Iowa 306; St. Louis Fourth Nat. Bank *v.* Heuschen, 52 Mo. 207; Hunter *v.* Hempstead, 1 Mo. 67, 13 Am. Dec. 468; Erwin *v.* Downs, 15 N. Y. 575; Otsego County Bank *v.* Warren, 18 Barb. (N. Y.) 290; Greatrake *v.* Brown, 2 Cranch C. C. (U. S.) 541, 10 Fed. Cas. No. 5,743.

Apparent partnerships.— The rule applies if an acceptance is by an apparent partnership. Erwin *v.* Downs, 15 N. Y. 575.

Note by partner to the firm.—Where a note is made by a member of a firm to the order of the firm and is indorsed by it, the relation of the firm is that of indorser and demand on the maker is necessary to make the firm liable. Coon *v.* Pruden, 25 Minn. 105.

58. *Alabama.*— Brown *v.* Turner, 15 Ala. 832, holding that if both of the partners are absent from their places of residence presentment may be made to the agent of one of them.

Louisiana.— Helme *v.* Middleton, 14 La. Ann. 484.

Maryland.— Crowley *v.* Barry, 4 Gill (Md.) 194, even though the holder had no actual notice of the dissolution.

Missouri.— St. Louis Fourth Nat. Bank *v.* Heuschen, 52 Mo. 207, holding that a demand made on a member of a firm at the place which one of the firm said was their place of business was good, even though the partnership had been dissolved.

New York.— Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207 [*affirming* 3 Thomps. & C. (N. Y.) 404], where the firm was dissolved by bankruptcy.

United States.— Greatrake *v.* Brown, 2 Cranch C. C. (U. S.) 541, 10 Fed. Cas. No. 5,743, in case of renewal note.

Demand made upon assignee of an insolvent firm does not bind an indorser. Armstrong *v.* Thruston, 11 Md. 148.

59. Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635; Barlow *v.* Coggan, 1 Wash. Terr. 257. *Compare* Blake *v.* McMillen, 33 Iowa 150.

60. *Iowa.*— Blake *v.* McMillen, 33 Iowa 150.

Louisiana.— Toby *v.* Maurian, 7 La. 493, holding that a notary who is informed at the residence of the maker of the latter's death should make demand on the heirs or representatives, and not merely of a colored woman on the place.

Maine.— Gower *v.* Moore, 25 Me. 16, 43 Am. Dec. 247.

Missouri.— Frayzer *v.* Dameron, 6 Mo. App. 153.

South Carolina.— Price *v.* Young, 1 McCord (S. C.) 339; Price *v.* Young, 1 Nott & M. (S. C.) 438.

See 7 Cent. Dig. tit. "Bills and Notes," § 1033.

So in Great Britain if no place of payment is named. Bills Exch. Act, § 45.

If a joint maker of a note dies before its maturity demand must be made upon his administrator. Blake *v.* McMillen, 33 Iowa 150.

In case of partners no demand need be made upon the representative of a deceased partner where the bill of exchange mentions no place of payment, and was drawn upon and accepted by the partners as such. Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635. See Barlow *v.* Coggan, 1 Wash. Terr. 257.

61. Groth *v.* Gyger, 31 Pa. St. 271, 72 Am. Dec. 745; Carolina Nat. Bank *v.* Wallace, 13 S. C. 347, 36 Am. Rep. 694; Magruder *v.* Union Bank, 3 Pet. (U. S.) 87, 7 L. ed. 612 [*reversing* 2 Cranch C. C. (U. S.) 687, 24 Fed. Cas. No. 14,360].

notary is ignorant of the maker's death,[62] and although the maker's estate is insolvent.[63] If no personal representative has been appointed payment of a note should be demanded at the last residence of the deceased maker,[64] or it may be presented to the widow of the maker at such residence, she answering that it will not be paid at present,[65] although she has nothing to do with the estate.[66] Presentation of a note payable thirty days after demand to the administrator of the deceased maker as a claim against the estate is not a sufficient demand.[67] Demand is unnecessary if a note matures after the death of the maker and before the expiration of the year during which the administrators cannot be sued.[68]

F. By Whom Presentment May Be Made — 1. In General. Presentment and demand may be made not only by the holder of a bill or note himself, but by any one having possession and authority from him to receive payment,[69] unless there is some stipulation to the contrary.[70] It need not be made by a notary to charge indorsers,[71] except according to some decisions in the case of a foreign bill, and in other cases where protest by a notary is necessary.[72] The authority need not be in writing.[73] Presentment may be made by the personal representative of a deceased owner,[74] by an assignee in bankruptcy or insol-

62. Frayzer *v.* Dameron, 6 Mo. App. 153.

63. Gower *v.* Moore, 25 Me. 16, 43 Am. Dec. 247.

64. Huff *v.* Ashcraft, 1 Disn. (Ohio) 277, 12 Ohio Dec. (Reprint) 620 [*reversing* 1 Disn. (Ohio) 60, 12 Ohio Dec. (Reprint) 487].

65. Simon *v.* Reynaud, 10 La. Ann. 506; Washington Bank *v.* Reynolds, 2 Cranch C. C. (U. S.) 289, 2 Fed. Cas. No. 954.

66. Washington Bank *v.* Reynolds, 2 Cranch C. C. (U. S.) 289, 2 Fed. Cas. No. 954.

67. Chase *v.* Evoy, 49 Cal. 467.

68. Hale *v.* Burr, 12 Mass. 86; Burrill *v.* Smith, 7 Pick. (Mass.) 291; Davis *v.* Francisco, 11 Mo. 572, 49 Am. Dec. 98.

69. *Alabama.*— Eason *v.* Isbell, 42 Ala. 456.

Illinois.— Ewen *v.* Wilbor, 99 Ill. App. 132.

Iowa.— Mt. Pleasant Branch State Bank *v.* McLeran, 26 Iowa 306 (holding that the drawer of a bill may act as the agent of the holder in presenting it for payment); Smith *v.* Ralston, Morr. (Iowa) 87.

Maine.— Foss *v.* Norris, 70 Me. 117; Warren *v.* Gilman, 17 Me. 360.

Maryland.—Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

Massachusetts.— Wright *v.* Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303; Adams *v.* Farnsworth, 15 Gray (Mass.) 423.

New York.— Cole *v.* Jessup, 10 N. Y. 96; Baer *v.* Leppert, 12 Hun (N. Y.) 516; Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

Wisconsin.— Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105.

England.— Tennant *v.* Strachan, 4 C. & P. 31, M. & M. 377, 19 E. C. L. 393; Coore *v.* Callaway, 1 Esp. 115.

Authority as agent disputed.— If the authority of a person presenting paper is questioned by the maker or accepter and refusal to comply with the demand is based upon a supposed want of authority, such authority must be shown.

Mississippi.— Robertson *v.* Crane, 27 Miss. 362, 61 Am. Dec. 520.

New Hampshire.— Ham *v.* Boody, 14 N. H. 27.

Texas.— Blankenship *v.* Berry, 28 Tex. 448.

United States.— Watt *v.* Potter, 2 Mason (U. S.) 77, 29 Fed. Cas. No. 17,291.

England.— Coore *v.* Callaway, 1 Esp. 115; Solomons *v.* Dawes, 1 Esp. 83.

Statement of agent insufficient.—A demand made by a clerk for money, who shows no authority but his own statement that he has been sent for the purpose of obtaining it is not sufficient to sustain an action for the recovery of the money. Coore *v.* Callaway, 1 Esp. 115.

Disputed title.— The holder should present the note although his right or title is disputed, as by reason of the indorser's bankruptcy. Jones *v.* Fort, 9 B. & C. 764, 4 M. & R. 547, 17 E. C. L. 340.

Demand may be made by the government or its authorized officer where the bill is held by the government. U. S. *v.* Barker, 12 Wheat. (U. S.) 559, 6 L. ed. 728.

70. In case of a valid and binding restriction stamped on the face of the check that it will positively not be paid to a certain company or its agent, it has been held that there must be a presentation to the drawee through some agency other than the one specified in order to hold the drawer of such a check. Commercial Nat. Bank *v.* Gastonia First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, 32 L. R. A. 712.

71. Smith *v.* Ralston, Morr. (Iowa) 87; Marsoudet *v.* Jacobs, 6 Rob. (La.) 276; Harrison *v.* Bowen, 16 La. 282; Sussex Bank *v.* Baldwin, 17 N. J. L. 487; Cole *v.* Jessup, 10 N. Y. 96.

72. See *infra*, X, F, 3.

73. Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Freeman *v.* Boynton, 7 Mass. 483; Sussex Bank *v.* Baldwin, 17 N. J. L. 487; Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

74. White *v.* Stoddard, 11 Gray (Mass.) 258, 71 Am. Dec. 711, holding that if such representative is not appointed until after

vency,[75] or by a pledgee if he holds the note;[76] and one who holds negotiable paper as collateral security for a debt due him should present it for payment.[77] A power of attorney authorizing demand of payment is revoked by the death of the principal before demand.[78]

2. Party in Possession of Paper. Presentment of a bill or note for payment may be made by any one lawfully in possession thereof, and possession at the time and place of payment is *prima facie* evidence of authority to demand payment.[79]

3. Notary and Notary's Deputy. Although any agent may in general present a bill for payment,[80] it has been decided that a foreign bill must be presented by a notary public.[81] A justice of the peace, if *ex officio* a notary public, may make demand of payment of a bill or note and protest the same.[82] Although some courts have held that when paper is to be protested by a notary it may be presented by his clerk or deputy,[83] the weight of authority is to the effect that he must make the presentment personally,[84] unless there is an established

maturity of the paper he may make demand within a reasonable time after his appointment.

75. Hill *v.* Reed, 16 Barb. (N. Y.) 280.

76. Jennison *v.* Parker, 7 Mich. 355; Cowperthwaite *v.* Sheffield, 1 Sandf. (N. Y.) 416.

Liability of pledgee for loss caused by his failure to present paper for payment see Pledges.

77. Whitten *v.* Wright, 34 Mich. 92; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756; Jennison *v.* Parker, 7 Mich. 355. See also Blanchard *v.* Tittabawassee Boom Co., 40 Mich. 566; and, generally, Pledges.

78. Gale *v.* Tappan, 12 N. H. 145, 37 Am. Dec. 194.

79. *Illinois.*— Brinkley *v.* Going, 1 Ill. 366 (holding that the payee of a negotiable note with an indorsement thereon to a third person if he is the *bona fide* holder and owner of the note may maintain an action thereon in his own name, and that his possession is, in the absence of anything to show the contrary, evidence that he is the *bona fide* holder and owner); Ewen *v.* Wilbor, 99 Ill. App. 132.

Iowa.— Smith *v.* Ralston, Morr. (Iowa) 87.

Louisiana.— Jex *v.* Tureaud, 19 La. Ann. 64; Follain *v.* Dupré, 11 Rob. (La.) 454; Marsoudet *v.* Jacobs, 6 Rob. (La.) 276.

Maryland.—Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

Massachusetts.— Bachellor *v.* Priest, 12 Pick. (Mass.) 399 (holding that if a bill of exchange payable to a particular person is indorsed in blank by him, but is made payable to a particular person by the last indorsement, it may be presented by the last indorser if he is in *bona fide* possession, without the indorsement of the last indorsee); Shed *v.* Brett, 1 Pick. (Mass.) 413; Hartford Bank *v.* Barry, 17 Mass. 94.

New Jersey.— Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

New York.— Cole *v.* Jessup, 10 N. Y. 96, 10 How. Pr. (N. Y.) 515; Baer *v.* Leppert, 12 Hun (N. Y.) 516; Burbank *v.* Beach, 15 Barb. (N. Y.) 326.

Pennsylvania.— Morris *v.* Foreman, 1 Dall. (Pa.) 193, 1 L. ed. 96, 1 Am. Dec. 235.

United States.— U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 11 L. ed. 439, 453; Picquet *v.* Curtis, 1 Sumn. (U. S.) 478, 19 Fed. Cas. No. 11,131.

Paper payable to bearer or indorsed in blank is within this rule. Ewen *v.* Wilbor, 99 Ill. App. 132; Cone *v.* Brown, 15 Rich. (S. C.) 262. See Sprigg *v.* Cuny, 7 Mart. N. S. (La.) 253.

80. See *supra*, X, F, 1.

81. Commercial Bank *v.* Barksdale, 36 Mo. 563 (holding that the presentment and demand of payment of a foreign bill of exchange must be made by the same notary who protests the bill, and that it cannot be done by his clerk or by any other person as his agent, although he be also a notary); Sussex Bank *v.* Baldwin, 17 N. J. L. 487; Cape Fear Bank *v.* Stinemetz, 1 Hill (S. C.) 44; Leftley *v.* Mills, 4 T. R. 170, 175.

Son of holder as notary.— The relation which exists between a notary and the holder of commercial paper with regard to demand, protest, and notice to the drawer or indorser is that of principal and agent, and a son of the holder of such paper if he be a notary may act as agent of his father in his notarial capacity. Eason *v.* Isbell, 42 Ala. 456.

82. Austen *v.* Miller, 5 McLean (U. S.) 153, 2 Fed. Cas. No. 661.

83. Alexandria Bank *v.* Wilson, 2 Cranch C. C. (U. S.) 5, 2 Fed. Cas. No. 856; Browning *v.* Andrews, 3 McLean (U. S.) 576, 4 Fed. Cas. No. 2,040.

84. *Alabama.*— Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275.

Kentucky.— Commonwealth Bank *v.* Garey, 6 B. Mon. (Ky.) 626; Chenowith *v.* Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145.

Massachusetts.— Ocean Nat. Bank *v.* Williams, 102 Mass. 141; Cribbs *v.* Adams, 13 Gray (Mass.) 597.

Mississippi.— Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63; Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408.

usage[85] or statute[86] to the contrary. If a demand by a notary's clerk is good where the note is protested it is good everywhere.[87]

XI. PAYMENT[88] AND DISCHARGE.

A. Mode and Sufficiency of Payment — 1. In General. Ordinarily the holder of a negotiable note is not bound to receive anything but money in payment thereof,[89] and an insufficient tender will not operate as a discharge.[90] A mere offer to pay will not constitute a payment,[91] and a payment is not good if made in violation of law[92] or if not made and received in good faith,[93] and the question whether there has been a payment may also depend upon the intention of the parties.[94] So payment by a surety after the maturity of a note which according to the agreement is to be taken as indemnity only will not operate as a payment of such instrument.[95]

2. Acceptance of, or Realizing on, Collateral Security. Where the execution of commercial paper is accompanied by an agreement that the maker is to transfer to the payee certain property as collateral, which shall be accepted in full satisfaction in case of the maker's default, there is in case of default a payment of such paper.[96] A different rule prevails if the property is transferred simply as collateral security,[97] but in all cases the rights and duties of the parties are to

Missouri.— Commercial Bank *v.* Barksdale, 36 Mo. 563.

New York.— Gawtry *v.* Doane, 51 N. Y. 84; Hunt *v.* Maybee, 7 N. Y. 266; Onondaga County Bank *v.* Bates, 3 Hill (N. Y.) 53.

Tennessee.— Carter *v.* Union Bank, 7 Humphr. (Tenn.) 548, 46 Am. Dec. 89.

Texas.— Locke *v.* Huling, 24 Tex. 311.

United States.— Sacrider *v.* Brown, 3 McLean (U. S.) 481, 21 Fed. Cas. No. 12,205.

85. *Kentucky.*— Chenowith *v.* Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145.

Maryland.—Atwell *v.* Grant, 11 Md. 101.

Massachusetts.— Ocean Nat. Bank *v.* Williams, 102 Mass. 141.

Missouri.— Miltenberger *v.* Spaulding, 33 Mo. 421.

New York.— Commercial Bank *v.* Varnum, 49 N. Y. 269 [*reversing* 3 Lans. (N. Y.) 86].

Virginia.— Nelson *v.* Fortterall, 7 Leigh (Va.) 179.

86. *Kentucky.*— Lee *v.* Buford, 4 Metc. (Ky.) 7.

Louisiana.— Buckley *v.* Seymour, 30 La. Ann. 1341; Citizens' Bank *v.* Bry, 3 La. Ann. 630; State Bank *v.* Lawless, 3 La. Ann. 129; Follain *v.* Dupré, 11 Rob. (La.) 454.

Mississippi.— Dwight *v.* Richardson, 12 Sm. & M. (Miss.) 325.

Tennessee.— Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555; Carter *v.* Union Bank, 7 Humphr. (Tenn.) 548, 46 Am. Dec. 89.

Texas.— Sheegog *v.* James, 26 Tex. 501.

87. McClane *v.* Fitch, 4 B. Mon. (Ky.) 599; Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63.

88. As to payment generally see PAYMENT.

89. Graydon *v.* Patterson, 13 Iowa 256, 81 Am. Dec. 432.

Acceptance of equivalent.—As between the maker and payee of a bill or note the acceptance of something valuable as an equivalent of the thing promised may constitute a sufficient payment, but a release on an inadequate consideration would be evidence of fraud and would not affect the rights of third parties. Swearingen *v.* Buckley, 1 Tex. Unrep. Cas. 421.

90. Shafer *v.* Willis, 124 Cal. 36, 56 Pac. 635; Henly *v.* Streeter, 5 Ind. 207; Streeter *v.* Henley, 1 Ind. 401; Moore *v.* Staser, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 665.

91. *Compare* McQuesten *v.* Noyes, 6 N. H. 19; Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

An offer to pay in property will not discharge a money demand. McPherson *v.* Foust, 81 Ala. 295, 8 So. 193; Bozell *v.* Hauser, 9 Ind. 522.

92. Springfield M. & F. Ins. Co. *v.* Peck, 102 Ill. 265; Watson *v.* Poague, 42 Iowa 582.

93. Fleece *v.* O'Rear, 83 Ind. 200; Torrance *v.* Bank of British North America, L. R. 5 P. C. 246, 29 L. T. Rep. N. S. 109, 21 Wkly. Rep. 529; Scholey *v.* Ramsbottom, 2 Campb. 485; Lovell *v.* Martin, 4 Taunt. 799, 14 Rev. Rep. 668.

94. Watson *v.* Walther, 23 Mo. App. 263. See also Selma City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138.

95. Brown *v.* Whittington, 39 Oreg. 300, 64 Pac. 649.

96. McGarvey *v.* Hall, 23 Cal. 140; First Nat. Bank *v.* Watkins, 154 Mass. 385, 28 N. E. 275; Gilliam *v.* Davis, 7 Wash. 332, 35 Pac. 69; Pauly *v.* Wilson, 57 Fed. 548.

97. *Maryland.*— Brengle *v.* Bushey, 40 Md. 141, 17 Am. Rep. 586.

Massachusetts.—Aldrich *v.* Blake, 134 Mass. 582.

New York.— Lancaster *v.* Knight, 74 N. Y. App. Div. 255, 77 N. Y. Suppl. 488; Averill *v.* Loucks, 6 Barb. (N. Y.) 470; Mohawk Bank *v.* Van Horne, 7 Wend. (N. Y.) 117.

Pennsylvania.— Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179.

be determined by their agreement.[98] If after suit is brought upon a note collateral security for more than enough to pay the balance due on the note is sold by plaintiff, this has been declared to be payment *pendente lite*, and to discharge the cause of action.[99] So if the collateral is retaken by the maker and a judgment in replevin rendered against him in the payee's favor is paid by him it will satisfy the note secured;[1] but if a judgment is rendered on the collateral, and is transferred to the maker himself on a part payment by him, it will amount to a payment *pro tanto* only.[2]

3. Application of Fund or Deposit. Where the holder of a note or his agent has in his hands at maturity funds of the maker provided for its payment, or which he is entitled to apply in payment, this will generally constitute a payment and discharge the maker and indorsers.[3] So the charging or crediting of a note or check to an account by a bank holding the same for collection may operate as a payment,[4] but it is not necessarily so, even though the note be canceled or marked as paid.[5] There is no presumption of law that funds of the maker of

Wisconsin.— Marschuetz *v.* Wright, 50 Wis. 175, 6 N. W. 511.

See 7 Cent. Dig. tit. "Bills and Notes," § 1248.

98. *Alabama.*— Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950.

California.— McGarvey *v.* Hall, 23 Cal. 140.

Illinois.—Esty *v.* Brooks, 54 Ill. 379; Mines *v.* Moore, 41 Ill. 273; Bodley *v.* Anderson, 2 Ill. App. 450.

Indiana.— Lewis *v.* Wintrode, 76 Ind. 13.

Iowa.— Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998.

Kentucky.— Kentucky Nat. Bank *v.* Bramlett, 19 Ky. L. Rep. 1566, 43 S. W. 714.

Maine.— Southard *v.* Wilson, 29 Me. 56.

Massachusetts.— First Nat. Bank *v.* Watkins, 154 Mass. 385, 28 N. E. 275; Springfield Five Cents Sav. Bank *v.* South Cong. Soc., 127 Mass. 516; Tucker *v.* Crowley, 127 Mass. 400; Brown *v.* Smith, 122 Mass. 589; Leland *v.* Loring, 10 Metc. (Mass.) 122; Mackay *v.* Holland, 4 Metc. (Mass.) 69.

Michigan.— Kent *v.* May, 13 Mich. 38.

New York.— Cory *v.* Leonard, 56 N. Y. 494; Remington *v.* Staats, 1 Thomps. & C. (N. Y.) 394; Stokes *v.* Stokes, 28 Misc. (N. Y.) 58, 59 N. Y. Suppl. 801.

Pennsylvania.— Oliphant *v.* Church, 19 Pa. St. 318.

South Carolina.—Glenn *v.* Caldwell, 4 Rich. Eq. (S. C.) 168.

Vermont.— Austin *v.* Howe, 17 Vt. 654.

Washington.— Gilliam *v.* Davis, 7 Wash. 332, 35 Pac. 69.

Wisconsin.— Matteson *v.* Matteson, 55 Wis. 450, 13 N. W. 463; Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146.

United States.— Pauly *v.* Wilson, 57 Fed. 548; *In re* Ford, 9 Fed. Cas. No. 4,932, 18 Nat. Bankr. Reg. 426.

England.—Ansell *v.* Baker, 15 Q. B. 20, 69 E. C. L. 20.

See 7 Cent. Dig. tit. "Bills and Notes," § 1248.

99. Lewis *v.* Jewett, 51 Vt. 378.

1. Miles *v.* Walther, 5 Mo. App. 595.

2. Burnheimer *v.* Hart, 27 Iowa 19, 99 Am. Dec. 641, 1 Am. Rep. 209.

An unsatisfied judgment may merge the bill or note, but is not of itself a payment (Norris *v.* Badger, 6 Cow. (N. Y.) 449; Witz *v.* Fite, 91 Va. 446, 22 S. E. 171; Tarleton *v.* Allhusen, 2 A. & E. 32, 4 L. J. K. B. 17, 29 E. C. L. 37), and cannot be pleaded as such (Claxton *v.* Swift, 2 Show. 441, 494).

3. Alpena Nat. Bank *v.* Greenbaum, 74 Mich. 157, 41 N. W. 885, 42 N. W. 606; Rochester Cent. Bank *v.* Thein, 76 Hun (N. Y.) 571, 28 N. Y. Suppl. 232, 58 N. Y. St. 239; Grandy *v.* Abbott, 92 N. C. 33. But *compare* Hecksher *v.* Shoemaker, 47 Pa. St. 249, holding that the omission of a bank officer to apply funds in the bank in payment of a note when presented by the holder does not relieve the maker from liability to the holder.

4. Daniel *v.* St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214; Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355; Crocker *v.* Whitney, 71 N. Y. 161; Pratt *v.* Foote, 9 N. Y. 463; Arnot *v.* Bingham, 55 Hun (N. Y.) 553, 9 N. Y. Suppl. 68, 29 N. Y. St. 878; Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897.

5. Steinhart *v.* D. O. Mills, etc., Nat. Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132, where it appeared that a bank received a note from the payee for collection, and upon presentation of it for payment to the maker, who was a customer of the bank, he wrote on it, "Please charge the same to my account." At the time he had no money in the bank to his credit and was indebted to it in a considerable sum, but the bank supposing him to be of good credit charged the note to his account and marked it canceled. Afterward, on the same day, learning that he was insolvent and had made an assignment for the benefit of his creditors, the bank indorsed upon the note the words "Charged in error" and "Canceled in error," and procured from the post-office and canceled a check which it had drawn in favor of the bank through which plaintiffs had sent the note. It was held that the transaction did not constitute a payment of the note. And see Freeman *v.* Savannah Bank, etc., Co., 88 Ga. 252, 14 S. E. 577; Columbia Loan, etc., Bank *v.* Mil-

a note in the holder's hands are in all cases to be applied in payment of the note,[6] and it has been decided that a bank is under no legal obligation to apply money on deposit in payment of a bill or note in the absence of an express agreement or direction.[7] The fact that an indorser has funds on deposit with the bank holding the note which exceed the amount thereof does not as a matter of law constitute a payment,[8] and the maker of a note cannot compel a bank holding the same to apply the deposit of an indorser to its payment.[9] Payment at a clearing-house is declared to be provisional only.[10]

4. Cancellation. Canceling a note or bill or stamping it paid does not necessarily constitute or show a payment.[11]

5. Check, Draft, Certificate of Deposit, Etc.[12] A check where received as absolute payment will operate to extinguish the note or other instrument for the payment of which it is given, but the giving and receipt of a check in such a case is usually considered *prima facie* as a conditional payment only, that is, that it will become absolute when paid.[13] This is true of payment by check of a

ler, 39 S. C. 175, 17 S. E. 592; Bell *v.* Buckley, 11 Exch. 631, 25 L. J. Exch. 163, 4 Wkly. Rep. 251; Warwick *v.* Rogers, 12 L. J. C. P. 113, 5 M. & G. 340, 6 Scott N. R. 1, 44 E. C. L. 184.

Cancellation see *infra*, XI, A, 4.

6. Randall *v.* Pettes, 12 Fla. 517; Harlan *v.* Ash, 84 Iowa 38, 50 N. W. 41; McGill *v.* Ott, 10 Lea (Tenn.) 147; Pease *v.* Hirst, 10 B. & C. 122, 8 L. J. K. B. O. S. 94, 5 M. & R. 88, 21 E. C. L. 61.

7. *Georgia.*— Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547.

Illinois.— Voss *v.* German American Bank, 83 Ill. 599, 25 Am. Rep. 415.

Massachusetts.— Mahaiwe Nat. Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368.

Missouri.— Citizens' Bank *v.* Carson, 32 Mo. 191.

New York.—Newburgh Nat. Bank *v.* Smith, 66 N. Y. 271, 23 Am. Rep. 48 [*affirming* 5 Hun (N. Y.) 183]; Marsh *v.* Oneida Cent. Bank, 34 Barb. (N. Y.) 298.

Pennsylvania.— People's Bank *v.* Legrand, 103 Pa. St. 309, 49 Am. Rep. 126.

United States.—Hulburt *v.* Squires, Brunn. Col. Cas. (U. S.) 13, 12 Fed. Cas. No. 6,855, 1 West. L. Month. 443.

Withdrawal of funds is a revocation of a direction to apply the same on a note. Lafayette Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239.

Application of deposit to note held by bank.— In order that a note held by a bank may be regarded as paid, so as to discharge indorsers, because of a deposit held by the bank, it is necessary that the deposit be sufficient at the time of maturity of the note, that it shall not have been previously appropriated to any other use, and that the deposit be to the credit of the party primarily liable. Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832.

The mere deposit of money in a bank for the purpose of paying a note does not constitute payment, where the note has not been left at such bank for collection. St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

If a bank fails before application of a deposit to payment of a bill sent to it for collection, there is no payment, the bank being the agent of the creditor. Moore *v.* Meyer, 57 Ala. 20.

8. Levy *v.* U. S. Bank, 1 Binn. (Pa.) 27, 4 Dall. (Pa.) 234, 1 L. ed. 814; Reading Sav. Bank *v.* Miller, 2 Woodw. (Pa.) 418. See also Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111.

9. Mechanics', etc., Bank *v.* Seitz, 155 Pa. St. 191, 26 Atl. 209. See also Marsh *v.* Oneida Cent. Bank, 34 Barb. (N. Y.) 298; Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832.

10. Atlas Nat. Bank *v.* National Exch. Bank, 176 Mass. 300, 57 N. E. 605, 60 N. E. 121; National Exch. Bank *v.* National Bank of North America, 132 Mass. 147; Merchants' Nat. Bank *v.* Procter, 1 Cinc. Super. Ct. (Ohio) 1. *Compare* Albers *v.* Commercial Bank, 9 Mo. App. 59.

11. Steinhart *v.* D. O. Mills, etc., Nat. Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132; Union Bank *v.* Slidell, 15 La. 314; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Scott *v.* Betts, Lalor (N. Y.) 363.

A cancellation and delivery by mistake does not discharge principal or sureties. Dewey *v.* Bowers, 26 N. C. 538. See also Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490.

The indorsers of a note are not discharged where a note made payable at a certain bank is erroneously certified by such bank as "good," in consequence of which another bank, which was the holder, marked it paid, where the latter bank was immediately notified by the former upon the discovery of its error in sufficient time to prevent any loss in consequence thereof, and the former paid to the latter the amount of the note presented at their own counter and gave notice of nonpayment to defendant as indorsers thereon. Irving Bank *v.* Wetherald, 36 N. Y. 335 [*affirming* 34 Barb. (N. Y.) 323].

12. **Payment by new bill or note** see *infra*, XI, A, 11.

13. *Arkansas.*— Henry *v.* Conley, 48 Ark. 267, 3 S. W. 181.

third person,[14] and the principle also applies to payment by an order on a third person,[15] by a certificate of deposit,[16] by a draft,[17] or by a bill of exchange.[18]

6. Credits. Payment of commercial paper may in some cases be made by credits.[19] Where a check on itself is offered to a bank as a deposit the bank has the option to accept or reject it, but if it is received as a deposit, there being no fraud or lack of good faith and the check being genuine, and is credited to the depositor, it will operate as a payment.[20] Matters of account, however, in favor

Illinois.— Heartt *v.* Rhodes, 66 Ill. 351; Strong *v.* King, 35 Ill. 9, 85 Am. Dec. 336; Cooney *v.* U. S. Wringer Co., 101 Ill. App. 468.

Maine.— Skowhegan First Nat. Bank *v.* Maxfield, 83 Me. 576, 22 Atl. 479.

Missouri.— Union Sav. Assoc. *v.* Clayton, 6 Mo. App. 587.

Montana.— Murphy *v.* Phelps, 12 Mont. 531, 31 Pac. 64.

New York.—Burkhalter *v.* Erie Second Nat. Bank, 42 N. Y. 538, 40 How. Pr. (N. Y.) 324; Turner *v.* Fox Lake Bank, 4 Abb. Dec. (N. Y.) 434, 3 Keyes (N. Y.) 425, 2 Transcr. App. (N. Y.) 344 [*affirming* 23 How. Pr. (N. Y.) 399]; Meadville First Nat. Bank *v.* New York City Fourth Nat. Bank, 16 Hun (N. Y.) 332; Kelty *v.* Erie Second Nat. Bank, 52 Barb. (N. Y.) 328; First Nat. Bank *v.* Dowie, 2 N. Y. City Ct. 425; Kobbi *v.* Underhill, 3 Sandf. Ch. (N. Y.) 277.

Ohio.— McGregor *v.* Loomis, 1 Disn. (Ohio) 247, 12 Ohio Dec. (Reprint) 602.

United States.— Merchants' Nat. Bank *v.* Samuel, 20 Fed. 664.

See 7 Cent. Dig. tit. "Bills and Notes," § 1257.

Payment by check generally see Payment.

Holder of note is not bound to give up note before check or draft is paid. Smith *v.* Harper, 5 Cal. 329.

A tender of a check in payment is sufficient if not objected to as such. Ohio Ins. Co. *v.* Nunemacher, 10 Ind. 234; Jennings *v.* Mendenhall, 7 Ohio St. 257. But the drawer must show that sufficient funds were in the bank. Harrisburg Bank *v.* Forster, 8 Watts (Pa.) 304.

14. *Illinois.*— Welge *v.* Batty, 11 Ill. App. 461.

Missouri.— Lionberger *v.* Kinealy, 13 Mo. App. 4.

New York.— Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490.

Pennsylvania.— Canonsburg Iron Co. *v.* Union Nat. Bank, (Pa. 1886) 6 Atl. 574.

Texas.— Curtis, etc., Mfg. Co. *v.* Douglass, 79 Tex. 167, 15 S. W. 154.

See 7 Cent. Dig. tit. "Bills and Notes," § 1257.

15. Tuttle *v.* Chapman, 10 Iowa 437; Knox *v.* Gerhauser, 3 Mont. 267; Cunningham *v.* Smith, Harp. Eq. (S. C.) 90.

The acceptance of an order by the maker in favor of a third person is within the rule. Shaw *v.* Gookin, 7 N. H. 16.

16. Union Bank *v.* Smiser, 1 Sneed (Tenn.) 501; Lindsey *v.* McClelland, 18 Wis. 481, 86 Am. Dec. 786.

17. Hamill *v.* German Nat. Bank, 13 Colo. 203, 22 Pac. 438; Lee *v.* Highland Bank, 2 Sandf. Ch. (N. Y.) 311; Hopkins *v.* Detwiler, 25 W. Va. 734; Cooper *v.* Gibbs, 4 McLean (U. S.) 396, 6 Fed. Cas. No. 3,194.

18. Stam *v.* Kerr, 31 Miss. 199.

Payment by draft or bill generally see Payment.

19. *Indiana.*— Wallace *v.* Rowley, 91 Ind. 586; Vawter *v.* Griffin, 40 Ind. 593.

Maryland.— Hammett *v.* Dudley, 62 Md. 154.

Massachusetts.— Savage *v.* Merle, 5 Pick. (Mass.) 83; Peabody *v.* Peters, 5 Pick. (Mass.) 1.

New York.— Dunn *v.* Hornbeck, 72 N. Y. 80; Davis *v.* Spencer, 24 N. Y. 386; Wilcox *v.* National Shoe, etc., Bank, 67 N. Y. App. Div. 466, 73 N. Y. Suppl. 900.

Tennessee.— Nashville First Nat. Bank *v.* McClung, 7 Lea (Tenn.) 492, 40 Am. Rep. 66.

United States.— Gwathney *v.* McLane, 3 McLean (U. S.) 371, 11 Fed. Cas. No. 5,882.

England.— Atkins *v.* Owen, 2 A. & E. 35, 4 L. J. K. B. 15, 4 N. & M. 123, 29 E. C. L. 38; Wallace *v.* Kelsall, 8 Dowl. P. C. 841, 4 Jur. 1064, 10 L. J. Exch. 12, 7 M. & W. 264; Bell *v.* Buckley, 11 Exch. 631, 25 L. J. Exch. 163, 4 Wkly. Rep. 251.

See 7 Cent. Dig. tit. "Bills and Notes," § 1247.

A mere agreement for a credit is not a payment. Pedder *v.* Watt, Peake Add. Cas. 41.

Credit to a bank according to the custom of dealing between banks may operate as a payment (Briggs *v.* Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285; Charlotte Iron Works *v.* American Exch. Nat. Bank, 34 Hun (N. Y.) 26; Nashville First Nat. Bank *v.* McClung, 7 Lea (Tenn.) 492, 40 Am. Rep. 66; Gillard *v.* Wise, 5 B. & C. 134, 7 D. & R. 523, 4 L. J. K. B. O. S. 88, 29 Rev. Rep. 190, 11 E. C. L. 399. See also Kupfer *v.* Galena Bank, 34 Ill. 328, 85 Am. Dec. 309; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331), although it has been held otherwise where the bank acts merely as collecting agent (Central R. Co. *v.* Lynchburg First Nat. Bank, 73 Ga. 383; Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429; Metropolis Bank *v.* Jersey City First Nat. Bank, 19 Fed. 301; Sigourney *v.* Lloyd, 8 B. & C. 622, 7 L. J. K. B. O. S. 73, 15 E. C. L. 308).

20. *Alabama.*— Selma City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138.

Illinois.— American Exch. Nat. Bank *v.* Cregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171 [*reversing* 37 Ill. App. 425].

Missouri.— Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355.

of the maker of a note cannot be set off against such note so as to constitute payment of the same in the absence of some agreement, express or implied, that they should be so applied.[21]

7. Deposit in Court. The deposit of the money in court after the institution of a suit on a note is not a payment of the note to the creditor or to any person authorized to receive it for him,[22] unless ratified by him.[23]

8. Executory Agreement. An agreement, which was never executed, to discharge the maker of a note will not operate as a payment,[24] and of course an agreement which is invalid for want of consideration is of no effect.[25]

9. Legacy or Appointment as Executor. A legacy by the accepter or maker of a bill or note to the holder is not a satisfaction or a payment thereof,[26] but the holder's appointment of his debtor as executor of the former's will has been held *prima facie* a bequest of the debt or evidence of an intention to release or discharge it.[27]

10. Money, Currency, Etc.— a. In General. Where a note is payable in currency or in current funds the payee has the right to demand funds equal in value to the current coin of the country,[28] and a tender of payment which is not equiva-

New York.— Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Pratt *v.* Foote, 9 N. Y. 463.

Tennessee.— Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897.

United States.— Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766; Andressen *v.* Northfield First Nat. Bank, 1 McCrary (U. S.) 252, 2 Fed. 122.

England.— Chambers *v.* Miller, 13 C. B. N. S. 125, 9 Jur. N. S. 626, 32 L. J. C. P. 30, 7 L. T. Rep. N. S. 856, 11 Wkly. Rep. 236, 106 E. C. L. 125; Bolton *v.* Reichard, 1 Esp. 106, 6 T. R. 139.

That a credit by mistake may be corrected see Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229.

21. Russell *v.* Klink, 53 Mich. 161, 18 N. W. 627; Rugland *v.* Thompson, 48 Minn. 539, 51 N. W. 604; Kenniston *v.* Bartlett, 46 N. H. 517; Callander *v.* Howard, 10 C. B. 290, 14 Jur. 672, 19 L. J. C. P. 312, 1 L. M. & P. 562, 70 E. C. L. 290.

Where an account is barred by the statute of limitations it will not operate as a payment. Nason *v.* McCulloch, 31 Me. 158.

22. Alexandria *v.* Saloy, 14 La. Ann. 327.

23. Molineux *v.* Eastman, 14 N. H. 504.

24. *Iowa.*— Burrows *v.* Robertson, 7 Iowa 100.

Kentucky.— Moseby *v.* Lewis, 4 Litt. (Ky.) 159.

Maine.— Noble *v.* Edes, 51 Me. 34.

Massachusetts.—Taylor *v.* Lewis, 146 Mass. 222, 15 N. E. 617; Cary *v.* Bancroft, 14 Pick. (Mass.) 315, 25 Am. Dec. 393.

Michigan.— Robertson *v.* Port Huron First Nat. Bank, 41 Mich. 356, 1 N. W. 1033.

New Hampshire.— Kenniston *v.* Bartlett, 46 N. H. 517.

Compare Nalle *v.* Gates, 20 Tex. 315.

See 7 Cent. Dig. tit. "Bills and Notes," § 1246.

An agreement by an heir with an administrator that notes held by the estate against the heir shall be deducted from her portion before final distribution of the estate does not constitute a payment. Taylor *v.* Lewis, 146 Mass. 222, 15 N. E. 617.

25. Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; Goldthwait *v.* Bradford, 36 Ind. 149.

An executory verbal agreement without consideration between the holder and maker of a promissory note, whereby the former agrees to accept from the latter a less sum than is due thereon, will not constitute a defense to a suit on the notes. Titsworth *v.* Hyde, 54 Ill. 386.

26. Carr *v.* Estabrooke, 3 Ves. Jr. 561. See also Mitchell *v.* Rice, 6 J. J. Marsh. (Ky.) 623.

27. Marvin *v.* Stone, 2 Cow. (N. Y.) 781; Freakley *v.* Fox, 9 B. & C. 130, 7 L. J. C. P. O. S. 148, 4 M. & R. 18, 17 E. C. L. 66. A different intention, however, may be shown. Carey *v.* Goodinge, 3 Bro. Ch. 110; Lowe *v.* Peskett, 16 C. B. 500, 1 Jur. N. S. 1049, 24 L. J. C. P. 196, 3 Wkly. Rep. 481, 81 E. C. L. 500.

28. *Alabama.*— Carter *v.* Penn, 4 Ala. 140; Lacy *v.* Holbrook, 4 Ala. 88.

Arkansas.— Wilburn *v.* Greer, 6 Ark. 255; Graham *v.* Adams, 5 Ark. 261.

Florida.— Williams *v.* Moseley, 2 Fla. 304.

Georgia.— Crim *v.* Sellars, 37 Ga. 324.

Illinois.— Marc *v.* Kupfer, 34 Ill. 286; Springfield M. & F. Ins. Co. *v.* Tincher, 30 Ill. 399; Chicago Mar. Bank *v.* Rushmore, 28 Ill. 463; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.

Indiana.— Conwell *v.* Pumphrey, 9 Ind. 135, 68 Am. Dec. 611.

Iowa.— Graydon *v.* Patterson, 13 Iowa 256, 81 Am. Dec. 432.

Kentucky.— McChord *v.* Ford, 3 T. B. Mon. (Ky.) 166; Lampton *v.* Haggard, 3 T. B. Mon. (Ky.) 149.

Louisiana.— Fry *v.* Dudley, 20 La. Ann. 368; Ballard *v.* Wall, 2 La. Ann. 404.

Michigan.— Phelps *v.* Town, 14 Mich. 374; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756.

lent thereto, but is in depreciated currency, will be insufficient.[29] So if a bill or note designates a particular currency in which it shall be payable, payment should be made in conformity to such designation.[30]

b. Bank-Notes — (I) *In General.* A payment in bank-notes, although they may not be legal tender, is a good payment, if they are accepted;[31] and bank-notes are a good tender unless objection to the tender is made on the ground that they are not.[32]

(II) *Of Insolvent Bank.* Where by universal consent bank-notes have become the medium of exchange and the representative of property and are regarded as money, although not a legal tender and although no person is bound to receive them in payment, yet if they come into one's hands by consent as a payment and the loss ensues by a subsequent failure of the bank, such loss should be his in whose hands they happen to be at the time in the absence of fraud or concealment.[33] But if the bank has already failed it has been held that although they are offered and accepted in good faith and without knowledge of the failure there is no payment, unless the party receiving them has been guilty of laches in retaining them.[34]

c. Confederate Notes. Confederate notes were regarded as a currency imposed on the community by irresistible force and where, according to the understanding of the parties, a contract was to be paid in such currency, the party entitled to payment could recover only the value of Confederate dollars in lawful money of the United States.[35] So where Confederate notes were current at the

Mississippi.— Mitchell *v.* Hewitt, 5 Sm. & M. (Miss.) 361.

Missouri.— Cockrill *v.* Kirkpatrick, 9 Mo. 697.

New York.— Frank *v.* Wessels, 64 N. Y. 155.

North Carolina.— Hilliard *v.* Moore, 65 N. C. 540.

Pennsylvania.—Smith *v.* Philadelphia Bank, 14 Pa. St. 525.

Tennessee.— Turley *v.* Taylor, 6 Baxt. (Tenn.) 376.

Texas.— Bell *v.* Joyce, 33 Tex. 479.

Virginia.— Caldwell *v.* Craig, 22 Gratt. (Va.) 340.

Wisconsin.— Klauber *v.* Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773.

United States.— Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97.

See 7 Cent. Dig. tit. "Bills and Notes," § 311.

Omission to designate any currency.— Where the currency in which a bill or note is to be paid is not mentioned therein, it is presumed that payment is to be made in the currency of the country in which it is payable, and in conformity to this rule the word "dollars" will be supplied where omitted in such a paper. Williamson *v.* Smith, 1 Coldw. (Tenn.) 1, 78 Am. Dec. 478. See also Coolbroth *v.* Purinton, 29 Me. 469; Sweetser *v.* French, 13 Metc. (Mass.) 262; Petty *v.* Fleishel, 31 Tex. 169, 98 Am. Dec. 524; Du Costa *v.* Cole, Skin. 272.

29. *Illinois.*— Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.

Kentucky.— Breckinridge *v.* Rolls, 2 T. B. Mon. (Ky.) 150.

Louisiana.— Case *v.* Berwin, 22 La. Ann. 321.

Maryland.— Hoffman *v.* Boisneuf, 4 Harr. & M. (Md.) 352.

Pennsylvania.— Housum *v.* Rogers, 40 Pa. St. 190.

United States.— Olshausen *v.* Lewis, 1 Biss. (U. S.) 419, 18 Fed. Cas. No. 10,507.

See 7 Cent. Dig. tit. "Bills and Notes," § 310.

30. Ledford *v.* Smith, 6 Bush. (Ky.) 129; Mangum *v.* Ball, 43 Miss. 288, 5 Am. Rep. 488; Edwards *v.* Morris, 1 Ohio 524.

31. Bayard *v.* Shunk, 1 Watts & S. (Pa.) 92, 37 Am. Dec. 441. And see, generally, PAYMENT.

32. Snow *v.* Perry, 9 Pick. (Mass.) 539. And see, generally, TENDER.

33. Snow *v.* Perry, 9 Pick. (Mass.) 539; Ware *v.* Street, 2 Head (Tenn.) 609, 75 Am. Dec. 755. *Compare* Owenson *v.* Morse, 7 T. R. 64.

34. *New Hampshire.*— Fogg *v.* Sawyer, 9 N. H. 365.

New York.— Ontario Bank *v.* Lightbody, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179.

Ohio.— Westfall *v.* Braley, 10 Ohio St. 188, 75 Am. Dec. 509.

South Carolina.— Harley *v.* Thornton, 2 Hill (S. C.) 509 note.

Wisconsin.— Townsends *v.* Racine Bank, 7 Wis. 185.

Contra, Bayard *v.* Shunk, 1 Watts & S. (Pa.) 92, 37 Am. Dec. 441.

And see, generally, PAYMENT.

As to duty to return the notes see Frontier Bank *v.* Morse, 22 Me. 88, 38 Am. Dec. 284; Gilman *v.* Peck, 11 Vt. 516, 34 Am. Dec. 702; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; Rogers *v.* Lanford, 1 Cr. & M. 637, 3 Tyrw. 654.

35. Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361. And see, generally, PAYMENT.

time and place of payment and constituted the principal currency of the state in which business transactions were conducted, it was presumed that the parties referred thereto when dollars were mentioned, unless coin was specified.[36] It was held, however, that payment to one holding paper in a fiduciary capacity could not be made in Confederate currency.[37]

d. Counterfeit Coin or Money. Taking counterfeit coin or paper money will not as a general rule constitute payment of a bill or note.[38]

11. New Bill or Note[39] — a. In General. A new bill or note is not a payment of the original instrument, in the absence of an understanding or agreement to that effect, but when given and received in satisfaction of the earlier paper such paper is thereby discharged.[40]

36. *Alabama.*— Lyon *v.* Robertson, 50 Ala. 74.

Arkansas.— Berry *v.* Bellows, 30 Ark. 198; Glenn *v.* Case, 25 Ark. 616.

Georgia.—Green *v.* Jones, 38 Ga. 347; Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255.

Kentucky.— White *v.* Guthrie, 1 J. J. Marsh. (Ky.) 503.

Louisiana.— Vance *v.* Cooper, 22 La. Ann. 508; Luzenberg *v.* Cleveland, 19 La. Ann. 473; Graves *v.* Hardesty, 19 La. Ann. 186.

New York.— Lester *v.* Union Mfg. Co., 1 Hun (N. Y.) 288.

North Carolina.— Norment *v.* Brown, 79 N. C. 363; Mercer *v.* Wiggins, 74 N. C. 48; Wooten *v.* Sherrard, 71 N. C. 374.

Tennessee.— Sharp *v.* Harrison, 10 Heisk. (Tenn.) 573; Binford *v.* Memphis Bulletin Co., 10 Heisk. (Tenn.) 355.

Texas.— Piegzar *v.* Twohig, 37 Tex. 225; Spann *v.* Glass, 35 Tex. 761; Ritchie *v.* Sweet, 32 Tex. 333, 5 Am. Rep. 245.

Virginia.— Dearing *v.* Rucker, 18 Gratt. (Va.) 426.

West Virginia.— Jarrett *v.* Ludington, 9 W. Va. 333; Washington *v.* Burnett, 4 W. Va. 84.

United States.— Stewart *v.* Salamon, 94 U. S. 434, 24 L. ed. 275.

Where received under duress such payment is not valid. Harshaw *v.* Dobson, 67 N. C. 203; Harrell *v.* Barnes, 34 Tex. 413; Anderson *v.* Lewis, 31 Tex. 675. *Compare* McCartney *v.* Wade, 2 Heisk. (Tenn.) 369.

37. *Arkansas.*— Hendry *v.* Cline, 29 Ark. 414.

Georgia.— Sirrine *v.* Griffin, 40 Ga. 169; Campbell *v.* Miller, 38 Ga. 304, 95 Am. Dec. 389.

Louisiana. — Martin *v.* Singleton, 23 La. Ann. 551.

Mississippi.— New Orleans, etc., R. Co. *v.* State, 52 Miss. 877.

New York.— Sands *v.* New York L. Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535; Robinson *v.* International L. Assur. Soc., 42 N. Y. 54, 1 Am. Rep. 400.

North Carolina.— Wilson *v.* Powell, 75 N. C. 468.

Tennessee.—Maloney *v.* Stephens, 11 Heisk. (Tenn.) 738.

Texas.— Griffin *v.* Walker, 36 Tex. 88; Casey *v.* Turner, 32 Tex. 64; Kleberg *v.* Bonds, 31 Tex. 611.

Virginia.— Alley *v.* Rogers, 19 Gratt. (Va.) 366.

United States.— Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769.

38. *Maryland.*— Mudd *v.* Reeves, 2 Harr. & J. (Md.) 368.

New York.— Baker *v.* Bonesteel, 2 Hilt. (N. Y.) 397; Markle *v.* Hatfield, 2 Johns. (N. Y.) 455, 3 Am. Dec. 446.

North Carolina.— Anderson *v.* Hawkins, 10 N. C. 568.

Pennsylvania.— Ramsdale *v.* Horton, 3 Pa. St. 330.

Virginia.— Edmunds *v.* Digges, 1 Gratt. (Va.) 359, 42 Am. Dec. 561.

See, generally, PAYMENT.

Recovery of amount of counterfeit bill.— Where one, in payment of a promissory note made payable in foreign bills, paid the amount in such bills, took up the note, and it was afterward discovered that one of the bills paid was counterfeit, it was held that the payee might recover the amount of such counterfeit bill, in an action for money had and received, against the payer. Young *v.* Adams, 6 Mass. 182.

39. **Payment by check, draft, certificate of deposit, etc.** see *supra*, XI, A, 5.

40. *California.*— Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

Georgia.— Horne *v.* Young, 40 Ga. 193.

Illinois.— Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850; Belleville Sav. Bank *v.* Bornman, 124 Ill. 200, 16 N. E. 210; Wickenkamp *v.* Wickenkamp, 77 Ill. 92; Yates *v.* Valentine, 71 Ill. 643; Union Nat. Bank *v.* Post, 93 Ill. App. 339; Adams *v.* Squires, 61 Ill. App. 513.

Indiana.— Reeder *v.* Nay, 95 Ind. 164; Stevens *v.* Anderson, 30 Ind. 391.

Iowa.— German Sav. Bank *v.* Bates Addition Imp. Co., 111 Iowa 432, 82 N. W. 1005; Merchants' Nat. Bank *v.* Eyre, 107 Iowa 13, 77 N. W. 498; Dubuque First Nat. Bank *v.* Getz, 96 Iowa 139, 64 N. W. 799.

Kentucky.— Commonwealth Bank *v.* Letcher, 3 J. J. Marsh. (Ky.) 195; Montague *v.* Bell, 14 Ky. L. Rep. 890.

Louisiana.— Woods *v.* Halsey, 42 La. Ann. 245, 7 So. 451.

Massachusetts.— Kendall *v.* Equitable L. Assur. Soc., 171 Mass. 568, 51 N. E. 464; Granite Nat. Bank *v.* Firch, 145 Mass. 567, 14 N. E. 650, 1 Am. St. Rep. 484; Eames *v.* Cushman, 135 Mass. 573; Dewey *v.* Bell, 5

b. For Less Amount. Where a new note is given in renewal of a former one and for a less amount it may operate as a satisfaction of a prior note, as it is presumed that all differences between the parties were adjusted and settled when such new note was given.[41]

c. Of Part of Promisors. Under some circumstances a promissory note executed by a part only of the promisors may be a payment of a prior note,[42] but

Allen (Mass.) 165; Adams *v.* Jenkins, 16 Gray (Mass.) 146; Huse *v.* Alexander, 2 Metc. (Mass.) 157; Canfield *v.* Ives, 18 Pick. (Mass.) 253.

Michigan.— Ellis *v.* Ballou, (Mich. 1902) 88 N. W. 898.

Minnesota.— Hanson *v.* Tarbox, 47 Minn. 433, 50 N. W. 474; Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

Mississippi.— Bacon *v.* Ventress, 32 Miss. 158.

New Hampshire.— Laconia Sav. Bank *v.* Vittum, 71 N. H. 465, 52 Atl. 848; Jones *v.* Rider, 60 N. H. 452; Ward *v.* Howe, 38 N. H. 35; Patterson *v.* Whittier, 19 N. H. 192.

New Mexico.— Albuquerque First Nat. Bank *v.* Lesser, 9 N. M. 604, 58 Pac. 345.

New York.— Neff *v.* Clute, 12 Barb. (N. Y.) 466; Burrall *v.* Jones, 7 Bosw. (N. Y.) 404; Sing Sing First Nat. Bank *v.* Knevals, 21 N. Y. Suppl. 1058, 51 N. Y. St. 22; Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490.

North Carolina.— Cable *v.* Hardin, 67 N. C. 472.

Ohio.— Cadiz Bank *v.* Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364; Shinkle *v.* Ripley First Nat. Bank, 22 Ohio St. 516; Miller *v.* Woods, 21 Ohio St. 485, 8 Am. Rep. 71.

Pennsylvania.— Cake *v.* Lebanon First Nat. Bank, 86 Pa. St. 303.

South Carolina.— Sullivan *v.* Sullivan Mfg. Co., 20 S. C. 79; Chester Nat. Bank *v.* Gunhouse, 17 S. C. 489; Allston *v.* Allston, 2 Hill (S. C.) 362.

South Dakota.— Grissel *v.* Woonsocket Bank, 12 S. D. 93, 80 N. W. 161.

Tennessee.— Bowman *v.* Rector, (Tenn. Ch. 1900) 59 S. W. 389.

Texas.—Bell *v.* Boyd, 76 Tex. 133, 13 S. W. 232; Boyd *v.* Bell, 69 Tex. 735, 7 S. W. 657.

Vermont.— *In re* Stevens, 74 Vt. 408, 52 Atl. 1034.

Virginia.— Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

Washington.— Boston Nat. Bank *v.* Jose, 10 Wash. 185, 38 Pac. 1026.

West Virginia.— Parkersburg First Nat. Bank *v.* Handley, 48 W. Va. 690, 37 S. E. 536; Hess *v.* Dille, 23 W. Va. 90; Merchants' Nat. Bank *v.* Good, 21 W. Va. 455; Bantz *v.* Basnett, 12 W. Va. 772.

Wisconsin.— Lowry *v.* Milwaukee Nat. Bank, 114 Wis. 311, 90 N. W. 178; Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608.

United States.— *In re* Dixon, 2 McCrary (U. S.) 556, 13 Fed. 109.

Canada.— See Emerson *v.* Gardiner, 6 N. Brunsw. 451.

See 7 Cent. Dig. tit. "Bills and Notes," § 1251.

Payment by bill or note generally see PAYMENT.

A renewal note where forged is no payment of the original. Stratton *v.* McMakin, 84 Ky. 641, 4 Am. St. Rep. 215.

The effect of taking a new note upon the vitality of the first is sometimes determinable by the law and sometimes by the contract under which it was given and received. Sage *v.* Walker, 12 Mich. 425.

It is a payment and discharge of a note where a new note is made by the same party, discounted by the holder of the old note and the proceeds applied to the payment of the latter note. Letcher *v.* Commonwealth Bank, 1 Dana (Ky.) 82; Fisher *v.* Marvin, 47 Barb. (N. Y.) 159.

Where the original note is left as collateral security there is no payment of the same. East River Bank *v.* Butterworth, 45 Barb. (N. Y.) 476, 30 How. Pr. (N. Y.) 444 [*affirmed* in 51 N. Y. 637]; Greening *v.* Patten, 51 Wis. 146, 8 N. W. 107. See also Merchants' Trust, etc., Co. *v.* Jones, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412.

What law governs.—In determining whether or not a new note was received in satisfaction and payment of the original the law of the place where the transaction occurs governs. Ward *v.* Howe, 38 N. H. 35.

41. Piper *v.* Wade, 57 Ga. 223; Compton *v.* Patterson, 28 S. C. 115, 5 S. E. 270; Bolt *v.* Dawkins, 16 S. C. 198; Draper *v.* Hitt, 43 Vt. 439, 5 Am. Rep. 292. But see Jenness *v.* Lane, 26 Me. 475, holding that a new note is not of itself to be considered as a payment of the larger note or to discharge the payee from liability thereon, and that in order to make out a defense to a suit on that note it should appear that the smaller one was paid, that payment was tendered at the proper time, that by the wrong of the holder payment was prevented, or that the new note was adopted in discharge of the old.

42. *California.*— Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545 [*modified* in (Cal. 1890) 26 Pac. 800].

Georgia.— Gresham *v.* Morrow, 40 Ga. 487.

Kentucky.— Smith *v.* Young, 11 Bush (Ky.) 393; Berry *v.* Stockwell, 10 B. Mon. (Ky.) 299.

Massachusetts.— Chandler *v.* Brainard, 14 Pick. (Mass.) 285.

Michigan.— Sage *v.* Walker, 12 Mich. 425.

Minnesota.— Bausman *v.* Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496.

Mississippi.— Lapiece *v.* Hughes, 24 Miss. 69.

New York.— Central City Bank *v.* Dana, 32 Barb. (N. Y.) 296; Livingston *v.* Radcliff, 6 Barb. (N. Y.) 201; Dias *v.* Wanmaker, 1 Sandf. (N. Y.) 469.

it has been held that it will not be so considered in the absence of an agreement to that effect.[43]

d. Of Third Person. The acceptance of a note of a third person unconditionally and in full satisfaction of the whole amount due on a previous note may operate as a payment of the whole instrument;[44] but it will not have this effect unless it appear that such was the agreement or understanding of the parties,[45] even though such note may be surrendered.[46]

e. Effect of Invalidity of New Note. Since an obligation cannot be paid and satisfied by a new promise of a debtor which is unfulfilled and which he can avoid at his pleasure,[47] a note is not discharged by the giving of a new note in payment thereof where the new note proves invalid.[48] Therefore the surrender of a note and the acceptance of a new note in payment without knowledge that the new note is a forgery does not discharge the original note.[49]

Pennsylvania.— Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

See 7 Cent. Dig. tit. "Bills and Notes," § 1252.

43. Bristol Milling, etc., Co. *v.* Probasco, 64 Ind. 406; Hill *v.* Sleeper, 58 Ind. 221; Bates *v.* Rosekrans, 37 N. Y. 409, 4 Transcr. App. (N. Y.) 332, 4 Abb. Pr. N. S. (N. Y.) 276 [*affirming* 23 How. Pr. (N. Y.) 98]; Boston Nat. Bank *v.* Jose, 10 Wash. 185, 38 Pac. 1026.

44. Dennis *v.* Williams, 40 Ala. 633; Lawson *v.* Gudgel, 45 Mo. 480; Freeland *v.* Van Campen, 2 Abb. Dec. (N. Y.) 184, 1 Keyes (N. Y.) 39; Booth *v.* Smith, 3 Wend. (N. Y.) 66; Johnson *v.* Clarke, 15 S. C. 72.

45. *Georgia.*— Gresham *v.* Morrow, 40 Ga. 487.

Indiana.— Stevens *v.* Anderson, 30 Ind. 391.

Massachusetts.— Woods *v.* Woods, 127 Mass. 141.

Michigan.— See Ellis *v.* Ballou, (Mich. 1902) 88 N. W. 898.

New York.— Whipple *v.* Walker, 2 Thomps. & C. (N. Y.) 456.

Ohio.— Riddle *v.* Canby, 2 Ohio Dec. (Reprint) 586, 4 West. L. Month. 124.

Tennessee.— Nichol *v.* Thompson, 1 Yerg. (Tenn.) 151.

United States.— U. S. Bank *v.* Beverley, 1 How. (U. S.) 134, 11 L. ed. 75.

See 7 Cent. Dig. tit. "Bills and Notes," § 1253.

If received through mistake and it appears that the party receiving it never agreed to receive the note of a third person, but believed that it was the obligation of the maker of the original note, there is no payment. Hedge *v.* McQuaid, 11 Cush. (Mass.) 352.

Possession of note of third party has been held to be *prima facie* evidence of payment. Hedge *v.* McQuaid, 11 Cush. (Mass.) 352; Butts *v.* Dean, 2 Metc. (Mass.) 76, 35 Am. Dec. 389; Lawson *v.* Gudgel, 45 Mo. 480. *Compare* Tilford *v.* Miller, 84 Ind. 185; Ward *v.* Howe, 38 N. H. 35.

46. *Alabama.*— Crocket *v.* Trotter, 1 Stew. & P. (Ala.) 446.

California.— Welch *v.* Allington, 23 Cal. 322.

New York.— Van Eps *v.* Dillaye, 6 Barb. (N. Y.) 244.

Texas.— Scott *v.* Atchison, 38 Tex. 384.

West Virginia.— Hess *v.* Dille, 23 W. Va. 90; Merchants' Nat. Bank *v.* Good, 21 W. Va. 455.

See 7 Cent. Dig. tit. "Bills and Notes," § 1253.

47. Central City Bank *v.* Dana, 32 Barb. (N. Y.) 296.

48. *Massachusetts.*— Ramsdell *v.* Soule, 12 Pick. (Mass.) 126.

New Hampshire.— Williams *v.* Gilchrist, 11 N. H. 535.

New York.— Winsted Bank *v.* Webb, 46 Barb. (N. Y.) 177 [*affirmed* in 39 N. Y. 325, 100 Am. Dec. 435]; Central City Bank *v.* Dana, 32 Barb. (N. Y.) 296; Sheppard *v.* Hamilton, 29 Barb. (N. Y.) 156; Hughes *v.* Wheeler, 8 Cow. (N. Y.) 77.

Pennsylvania.— Martin *v.* Smith, 13 Phila. (Pa.) 103, 36 Leg. Int. (Pa.) 115.

Vermont.— Edgell *v.* Stanford, 6 Vt. 551.

See 7 Cent. Dig. tit. "Bills and Notes," § 1256.

49. *Indiana.*— Lovinger *v.* Madison First Nat. Bank, 81 Ind. 354; Allen *v.* Sharpe, 37 Ind. 67, 10 Am. Dec. 80.

Iowa.— Humboldt State Bank *v.* Rossing, 95 Iowa 1, 63 N. W. 351; Hubbard *v.* Hart, 71 Iowa 668, 33 N. W. 233.

Kentucky.— Covington First Nat. Bank *v.* Gaines, 87 Ky. 597, 10 Ky. L. Rep. 451, 9 S. W. 396; Stratton *v.* McMakin, 84 Ky. 641, 4 Am. St. Rep. 215; Bowman *v.* Wood, 14 Ky. L. Rep. 926; Carter *v.* Columbia Bank, 12 Ky. L. Rep. 968, 16 S. W. 79.

Maine.— Sandy River Nat. Bank *v.* Miller, 82 Me. 137, 19 Atl. 109.

Missouri.— Kincaid *v.* Yates, 63 Mo. 45.

Ohio.— Emerine *v.* O'Brien, 36 Ohio St. 491.

Pennsylvania.— Reading Second Nat. Bank *v.* Wentzel, 151 Pa. St. 142, 31 Wkly. Notes Cas. (Pa.) 33, 24 Atl. 1087; West Philadelphia Nat. Bank *v.* Field, 143 Pa. St. 473, 28 Wkly. Notes Cas. (Pa.) 417, 22 Atl. 829, 24 Am. St. Rep. 562; Ritter *v.* Singmaster, 73 Pa. St. 400.

Tennessee.— Athens First Nat. Bank *v.* Buchanan, 87 Tenn. 32, 9 S. W. 202, 10 Am. St. Rep. 617, 1 L. R. A. 199.

Vermont.— Goodrich *v.* Tracy, 43 Vt. 314, 5 Am. Rep. 281.

f. Necessity of Surrender or Cancellation of Old Note. Where a new note is given and taken as payment of another note it is not necessary to its operation as a payment that the original note be surrendered or canceled.[50]

12. Property. Bills or notes may by agreement of the parties be payable in real or personal property, and when it is so stipulated a payment in conformity therewith will be sufficient;[51] but if the right to pay in property is for the benefit of the maker he must show a delivery of, or offer to deliver, the property in payment of the note.[52] Where an election is given to the promisor to pay in property instead of money by a specified time, if he fails to avail himself of the option, he is bound to pay in money.[53]

13. Services. The parties to a bill or note may agree for the payment of the same by work done or services rendered,[54] but performance of part of the serv-

See 7 Cent. Dig. tit. "Bills and Notes," § 1256.

50. Woodbridge *v.* Skinner, 15 Conn. 306; Dubuque First Nat. Bank *v.* Getz, 96 Iowa 139, 64 N. W. 799; French *v.* French, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300; Gardner *v.* Levasseur, 28 La. Ann. 679; Dixon *v.* Dixon, 31 Vt. 450, 76 Am. Dec. 129. *Compare* Schmidt *v.* Livingston, 16 Misc. (N. Y.) 554, 38 N. Y. Suppl. 746, 74 N. Y. St. 264.

Old note left as security.— Where the old note is not surrendered but is left in the holder's hands as security for the payment of the new note there is no payment of the original. East River Bank *v.* Butterworth, 45 Barb. (N. Y.) 476.

51. *Alabama.*—McPherson *v.* Foust, 81 Ala. 295, 8 So. 193; Garrard *v.* Zachariah, 1 Stew. (Ala.) 272.

Colorado.— Bacon *v.* Lamb, 4 Colo. 578.

Indiana.—Collins *v.* Stanfield, 139 Ind. 184, 38 N. E. 1091; Kenton *v.* Robbins, 7 Ind. 102.

Kentucky.— Ryan *v.* Doyle, 79 Ky. 363.

Massachusetts.— Branning *v.* Markham, 12 Allen (Mass.) 454.

Nebraska.— Smith *v.* Hobleman, 12 Nebr. 502, 11 N. W. 753; Kelsey *v.* McLaughlin, 10 Nebr. 6, 4 N. W. 361.

New York.— Farmers', etc., Bank *v.* Sherman, 33 N. Y. 69 [*affirming* 6 Bosw. (N. Y.) 181]; Lyons Bank *v.* Demmon, Lalor (N. Y.) 398.

Pennsylvania.— Christie *v.* Craige, 20 Pa. St. 430; Tatem *v.* Harkness, 1 Phila. (Pa.) 287, 9 Leg. Int. (Pa.) 11.

Texas.— Duble *v.* Batts, 38 Tex. 312; Pettigrew *v.* Dix, 33 Tex. 277; Copes *v.* Perkins, 6 Tex. 150; Swearingen *v.* Buckley, 1 Tex. Unrep. Cas. 421.

Vermont.— Barber *v.* Slade, 30 Vt. 191, 73 Am. Dec. 299; Fletcher *v.* Blodgett, 16 Vt. 26, 42 Am. Dec. 487.

Washington.— Cock *v.* Blalock, 1 Wash. Terr. 560.

United States.— Virginia Farmers Bank *v.* Groves, 12 How. (U. S.) 51, 13 L. ed. 889.

See 7 Cent. Dig. tit. "Bills and Notes," § 1259.

An executory parol agreement to receive property in payment will not discharge a bill or note. Walker *v.* Greene, 22 Ala. 679; Damon *v.* De Bar, 83 Mich. 262, 47 N. W. 216.

Interest is not payable in goods, although the note may be so payable. Huff *v.* Staus, 10 Kan. App. 306, 62 Pac. 548.

52. Love *v.* Simmons, 10 Ala. 113; State *v.* Shupe, 16 Iowa 36, 85 Am. Dec. 485; Dumas *v.* Hardwick, 19 Tex. 238; Fisk *v.* Holden, 17 Tex. 408.

The maker must hold himself in readiness to deliver the property. Smith *v.* Loomis, 7 Conn. 110; Johnson *v.* Baird, 3 Blackf. (Ind.) 153; Bailey *v.* Simonds, 6 N. H. 159, 25 Am. Dec. 454; Barns *v.* Graham, 4 Cow. (N. Y.) 452, 15 Am. Dec. 394.

Tender of goods.— Upon a note payable in ponderous articles at a day certain, without specifying any place of payment to make a tender, the promisor ought to seek the promisee before the day and know of him where he will have the articles delivered; and then if he appoint a reasonable place, or such a place as might have been in the contemplation of the parties when they contracted, offer the articles there. Barns *v.* Graham, 4 Cow. (N. Y.) 452, 15 Am. Dec. 394. If the note be payable either generally or at a certain place, the articles should not be tendered in bulk, mixed and undistinguishable from others of the kind, but should be separated and distinguished, so that the promisee may know what to take. Barns *v.* Graham, 4 Cow. (N. Y.) 452, 15 Am. Dec. 394. It is also necessary that the tender shall be of goods of the quality called for (Fisk *v.* Holden, 17 Tex. 408), and that it shall be made at the stipulated time (Pratt *v.* Graff, 15 Ind. 1).

53. Campbell *v.* Clark, Hempst. (U. S.) 67, 4 Fed. Cas. No. 2,355*a*.

If no time is fixed for delivery by an agreement entered into after maturity of a note to accept property in payment thereof, the maker will be allowed a reasonable time in which to deliver. Jones *v.* Peet, 1 Swan (Tenn.) 293. See also Smith *v.* Corn, 3 Head (Tenn.) 116, holding that readiness and ability to pay in the manner stipulated is sufficient, where no time is fixed for performance of the condition.

54. *Connecticut.*— Jennings *v.* Davis, 31 Conn. 134.

Indiana.— Johnson *v.* Seymour, 19 Ind. 24.

Minnesota.— Nunnemacker *v.* Johnson, 38 Minn. 390, 38 N. W. 351; Ferguson *v.* Hogan, 25 Minn. 135.

ices agreed upon will not operate as a payment *pro tanto* where the contract is an entirety.[55]

14. Payment of One Part of Bill. Payment of any one part of a bill of exchange which is drawn in a set of several parts is a payment of the bill.[56]

15. Partial Payments — a. In General. The holder of a bill or note is not bound to accept a partial payment when the obligation becomes due and payable, for he has a right to payment of the whole,[57] but he may accept partial payments, in which case, however, they will operate as a discharge *pro tanto* only in the absence of a consideration for release of the residue.[58] A partial payment of the amount due on a bill or note is not a sufficient consideration for the discharge of the entire amount, where the payment is not made before maturity.[59] The drawer or indorser of a bill is not discharged by a part payment made by the accepter, although it may operate as a discharge *pro tanto*;[60] and the full amount of a note may be proved by the holder against the bankrupt estate of both maker and indorser.[61] Where payment of the principal is received in full

Missouri.— Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39.

Nebraska.— Hitchcock *v.* Hassler, 16 Nebr. 467, 20 N. W. 396.

Pennsylvania.— Martin *v.* Draher, 5 Watts (Pa.) 544; Tatem *v.* Harkness, 1 Phila. (Pa.) 287, 9 Leg. Int. (Pa.) 11.

South Carolina.— Cook *v.* Cook, 24 S. C. 204.

Vermont.— Camp *v.* Page, 42 Vt. 739.

See 7 Cent. Dig. tit. "Bills and Notes," § 1259.

An indorser not consenting to an agreement for the payment of a note by rendering services is released, where the agreement extends the time of payment of the note, and his liability is not revived by breach of the agreement. Timberlake *v.* Thayer, 71 Miss. 279, 14 So. 446, 24 L. R. A. 231.

A promise to pay in services does not of itself operate as a payment. Weeks *v.* Elliott, 33 Me. 488.

If a note is payable in work at the option of the maker before maturity, tender of the work must be made before that time, or the note becomes a money demand. Schuessler *v.* Watson, 37 Ala. 98, 76 Am. Dec. 348; Nipp *v.* Diskey, 81 Ind. 214, 42 Am. Rep. 124; Schnier *v.* Fay, 12 Kan. 184; Deel *v.* Berry, 21 Tex. 463, 73 Am. Dec. 236. *Compare* Johnson *v.* Seymour, 19 Ind. 24.

55. Weeks *v.* Elliott, 33 Me. 488.

56. *Louisiana.*— Wright *v.* McFall, 8 La. Ann. 120.

Mississippi.— Holden *v.* Davis, 57 Miss. 769.

New York.— Durkin *v.* Cranston, 7 Johns. (N. Y.) 442.

Pennsylvania.— Ingraham *v.* Gibbs, 2 Dall. (Pa.) 134, 1 L. ed. 320.

England.— Kearney *v.* Granada Gold, etc., Min. Co., 1 H. & N. 412, 26 L. J. Exch. 15, 5 Wkly. Rep. 200.

57. Jennings *v.* Shriver, 5 Blackf. (Ind.) 37; *In re* Brown, 2 Story (U. S.) 502, 4 Fed. Cas. No. 1,985, 10 Hunt. Mer. Mag. 377, 6 Law Rep. 508.

58. *Alabama.*— Hart *v.* Freeman, 42 Ala. 567.

Georgia.— Mordecai *v.* Stewart, 36 Ga. 126.

Illinois.— Miller *v.* Montgomery, 31 Ill. 350.

Massachusetts.— Lincoln *v.* Bassett, 23 Pick. (Mass.) 154.

New York.— Duden *v.* Waitzfelder, 16 Hun (N. Y.) 337; Cowperthwaite *v.* Sheffield, 1 Sandf. (N. Y.) 416.

United States.— *In re* Weeks, 8 Ben. (U. S.) 269, 29 Fed. Cas. No. 17,349, 13 Nat. Bankr. Reg. 263; Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, 1 Liv. L. Mag. 193; *Ex p.* Harris, 2 Lowell (U. S.) 568, 11 Fed. Cas. No. 6,109, 16 Nat. Bankr. Reg. 432.

England.— *Ex p.* Worrall, 1 Cox Ch. 309; Lord *v.* Ferrand, 1 D. & L. 630, 13 L. J. Exch. 111.

See 7 Cent. Dig. tit. "Bills and Notes," § 1250.

59. *Kentucky.*— Fenwick *v.* Phillips, 3 Mete. (Ky.) 87.

Massachusetts.— Lathrop *v.* Page, 129 Mass. 19.

Mississippi.— Carraway *v.* Odeneal, 56 Miss. 223.

Missouri.— Price *v.* Cannon, 3 Mo. 453.

New York.— Bliss *v.* Shwarts, 65 N. Y. 444.

England.— Fitch *v.* Sutton, 5 East 230, 1 Smith K. B. 415.

See, generally, Accord and Satisfaction, 1 Cyc. 319.

60. Sohier *v.* Loring, 6 Cush. (Mass.) 537; Motte *v.* Kennedy, 3 McCord (S. C.) 13; *Ex p.* Ryswicke, 2 P. Wms. 89.

After part payment by an accommodation accepter the holder may still prove for the entire amount against the drawer accommodated, and the accepter, being in fact a surety, may apply to the court to have all excess above the balance due the holder paid into court for his benefit. Downing *v.* Traders' Bank, 2 Dill (U. S.) 136, 7 Fed. Cas. No. 4,046, 11 Nat. Bankr. Reg. 371.

61. National Mt. Wollaston Bank *v.* Porter, 122 Mass. 308; Blake *v.* Ames, 8 Allen (Mass.) 318; *In re* Miller, 82 Pa. St. 113, 22 Am. Rep. 754.

He may be allowed a dividend on the full amount proved against the indorser's estate, after he has received a dividend of one-half

satisfaction of principal and interest, it has been held that the claim for interest will be discharged,[62] and where payment of the face of a bill has been accepted by the holder without costs after suit brought, a further action for nominal damages or costs cannot be maintained by him.[63]

b. By Joint Maker, Drawer, or Accepter. Each of the joint makers of a note, or joint accepters or drawers of a bill, is liable for the whole amount, and a payment by him of a proportionate part of the same will not operate to discharge him as to the balance, in the absence of an agreement to such effect supported by a consideration;[64] and one of several joint guarantors is not discharged as to the balance of a note by a receipt thereon of his proportion in full.[65] *A fortiori* a part payment by a joint maker will not discharge the other makers.[66] A part payment by one of several joint makers inures as against the holder to the benefit of all.[67]

c. By Indorser. The indorser of a note may be discharged by a part payment by him, under an agreement with the holder, without impairing the rights and remedies of the latter against the maker;[68] and if a partial payment is made by an indorser of a bill or note and a discharge obtained by him as a bankrupt the holder may still prove the whole amount of the note as a debt due from the maker or accepter, and the recovery in excess of the amount actually due him will be held by him as trustee for the indorser.[69]

the entire amount from the maker's estate (National Mt. Wollaston Bank *v.* Porter, 122 Mass. 308), although he could have proved only his claim for the balance after such dividend had been received (*Ex p.* Lefebvre, 2 P. Wms. 407. See also *Ex p.* Harris, 2 Lowell (U. S.) 568, 11 Fed. Cas. No. 6,109, 16 Nat. Bankr. Reg. 432; *In re* Howard, 12 Fed. Cas. No. 6,750, 4 Nat. Bankr. Reg. 571).

But where dividends have been received by the holder from the estates of both the accepter and indorser, and the balance of the dividend due to the holder from the estate of the latter, after paying the holder in full, is paid to the accepter, who had been guaranteed by the indorser, as a dividend on the amount paid by his estate to the holder, no further proof against the indorser's estate can be made in favor of the accepter's estate on the ground of the double liability incurred by the debtor. *In re* Oriental Commercial Bank, L. R. 7 Ch. 99, 41 L. J. Ch. 217, 25 L. T. Rep. N. S. 648, 20 Wkly. Rep. 82 [*affirming* L. R. 12 Eq. 501].

62. Comparet *v.* Ewing, 8 Blackf. (Ind.) 328; Beaumont *v.* Greathead, 2 C. B. 494, 3 D. & L. 631, 15 L. J. C. P. 130, 52 E. C. L. 494. But see Hall *v.* King, 2 Colo. 711; Robbins *v.* Cheek, 32 Ind. 328, 2 Am. Rep. 348.

The payment of a judgment which does not include the interest will discharge the note. Couch *v.* Waring, 9 Conn. 261.

Where the principal subject of a claim is extinguished all the incidents go with it. Moore *v.* Fuller, 47 N. C. 205.

Where dividends from the insolvent estates of the maker and indorser have been received by the holder equal to the full amount of the principal and interest at the date of filing proof of his claim, further dividends to cover subsequently accrued interest should not be allowed to him until the other creditors have been paid to the full extent of their claims proved. Blake *v.* Ames, 8 Allen (Mass.) 318.

63. Thame *v.* Boast, 12 Q. B. 808, 12 Jur. 1024, 17 L. J. Q. B. 339, 64 E. C. L. 808.

64. Eldred *v.* Peterson, 80 Iowa 264, 45 N. W. 755, 20 Am. St. Rep. 416; Missouri Loan Bank *v.* Garner, 1 Mo. App. 200; Winslow *v.* Brown, 7 R. I. 95, 80 Am. Dec. 638.

The release must be shown by unequivocal proof in order that such a payment may be held a discharge. Coburn *v.* Ware, 25 Me. 330.

What law governs.— In determining the legal effect of a contract and payment discharging one of several joint promisors, the law of the place where the contract and payment were made is to control. Winslow *v.* Brown, 7 R. I. 95, 80 Am. Dec. 638.

65. Griffith *v.* Grogan, 12 Cal. 317; Carrier *v.* Jones, 68 N. C. 127.

66. Ruggles *v.* Patten, 8 Mass. 480; Madison Square Bank *v.* Pierce, 62 Hun (N. Y.) 493, 17 N. Y. Suppl. 270, 42 N. Y. St. 832 [*affirmed* in 137 N. Y. 444, 33 N. E. 557, 51 N. Y. St. 175, 33 Am. St. Rep. 751, 20 L. R. A. 335]; Ayrey *v.* Davenport, 2 B. & P. N. R. 474.

67. See *infra*, XI, B, 7, c.

68. Farmer *v.* Medico-Legal Journal Assoc., 7 N. Y. Suppl. 322, 26 N. Y. St. 940.

69. Farmer *v.* Medico-Legal Journal Assoc., 7 N. Y. Suppl. 322, 26 N. Y. St. 940; *In re* Souther, 2 Lowell (U. S.) 320, 22 Fed. Cas. No. 13,184, 9 Nat. Bankr. Reg. 502; *In re* Ellerhorst, 8 Fed. Cas. No. 4,381, 6 Am. L. Rev. 162, 5 Nat. Bankr. Reg. 144. *Compare* Cooper *v.* Pepys, 1 Atk. 106, 26 Eng. Reprint 70.

Where a dividend is received from the drawer's estate the holder can only prove the balance due against the accepter's estate. *In re* Oriental Commercial Bank, L. R. 6 Eq. 582, 18 L. T. Rep. N. S. 450, 16 Wkly. Rep. 784; *Ex p.* Tayler, 1 De G. & J. 302, 3 Jur. N. S. 753, 26 L. J. Bankr. 58, 5 Wkly. Rep.

16. Surrender of Instrument and Tender of Payment — a. In General. The possession of an instrument by the party obligated to pay the same is evidence of payment,[70] and possession by a stranger is *prima facie* evidence of indebtedness.[71] Therefore one who pays a note is entitled to a surrender and should for his own protection require that it be surrendered to him, and if the holder refuses to deliver it he will be liable in trover for such refusal.[72] Since a tender should be absolute and unconditional, and one with a condition annexed is invalid,[73] one who makes a tender of payment of a bill or note cannot insist on a receipt in full of all demands, as he loses the benefit of the tender by insisting thereon.[74] It has also been held that the maker of a note cannot demand a delivery of it as a condition precedent on tendering payment, but that he must pay the money due, and then if a delivery is refused his remedy is by proving payment which will avail him against a subsequent indorsee.[75]

b. Payment Before Maturity. It is necessary to the protection of one paying a bill or note before maturity that he obtain a surrrender of such instrument at the time of payment, for otherwise if it be subsequently transferred to a *bona fide* holder the latter may recover from the payer, notwithstanding the previous payment.[76] A payment, however, before maturity of which a subsequent trans-

669, 58 Eng. Ch. 234; *Ex p.* Scotland Royal Bank, 2 Rose 197, 19 Ves. Jr. 310.

70. See *infra*, XIV, E [8 Cyc.].

71. See *infra*, XIV, E [8 Cyc.].

72. *Illinois.*— McClelland *v.* Bartlett, 3 Ill. App. 481.

Maine.— Otisfield *v.* Mayherry, 63 Me. 197.

Maryland.— Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

Missouri.— Union Sav. Assoc. *v.* Clayton, 6 Mo. App. 587.

New Hampshire.— Stone *v.* Clough, 41 N. H. 290.

New York.— Streever *v.* Ft. Edward Bank, 34 N. Y. 413; Wilder *v.* Seelye, 8 Barb. (N. Y.) 408.

Washington.— Carr *v.* Jones, 29 Wash. 78, 69 Pac. 646.

England.— Hansard *v.* Robinson, 7 B. & C. 90, 14 E. C. L. 50, 9 D. & R. 860, 5 L. J. K. B. O. S. 242, R. & M. 403 note, 21 E. C. L. 780 note, 31 Rev. Rep. 166; Cornes *v.* Taylor, 10 Exch. 441, 18 Jur. 963; Buzzard *v.* Fleecknoe, 1 Stark. 333, 2 E. C. L. 131; Davis *v.* Dodd, 4 Taunt. 602, Wils. Exch. 110.

See also *infra*, XIV, F [8 Cyc.]; and 7 Cent. Dig. tit. "Bills and Notes, § 1260.

An agreement for surrender of a foreign bill in several parts is not satisfied by a surrender of one part. Kearney *v.* West Granada Gold, etc., Min. Co., 1 H. & N. 412, 26 L. J. Exch. 15, 5 Wkly. Rep. 200.

Payment without surrender is at risk of the party paying.— *Georgia.*— University Bank *v.* Tuck, 96 Ga. 456, 23 S. E. 467.

Illinois.—Avery *v.* Swords, 28 Ill. App. 202.

New York.— Fowler *v.* Palmer, 62 N. Y. 533.

North Carolina.— Mercantile Bank *v.* Pettigrew, 74 N. C. 326.

South Carolina.— Horton *v.* Blair, 2 Bailey (S. C.) 545.

United States.— Exchange Nat. Bank *v.* Johnson, 30 Fed. 588.

Fraudulent substitution of another paper. — Where the payee of a note pretends to surrender the same upon payment to him, but fraudulently substitutes another paper, and the note is assigned by him before maturity, without indorsement, to a *bona fide* purchaser, it has been held that as against such purchaser the payment will be a good one, unless it is shown that the substitution was due to the negligence of the maker. Miller *v.* Tharel, 75 N. C. 148.

Where the instrument is non-negotiable surrender of the same on payment is unnecessary. Hart *v.* Freeman, 42 Ala. 567; Wain *v.* Bailey, 10 A. & E. 616, 2 P. & D. 507, 37 E. C. L. 330.

73. See, generally, Tender.

74. Storey *v.* Krewson, 55 Ind. 397, 23 Am. Rep. 668; Thayer *v.* Brackett, 12 Mass. 450; Holton *v.* Brown, 18 Vt. 224, 46 Am. Dec. 148; Laing *v.* Meader, 1 C. & P. 257, 12 E. C. L. 155; Green *v.* Croft, 2 H. Bl. 30; Cole *v.* Blake, Peake 179, 3 Rev. Rep. 681.

75. Fales *v.* Russell, 16 Pick. (Mass.) 315; Baker *v.* Wheaton, 5 Mass. 509, 4 Am. Dec. 71. But see Wilder *v.* Seelye, 8 Barb. (N. Y.) 408; Hansard *v.* Robinson, 7 B. & C. 90, 14 E. C. L. 50, 9 D. & R. 860, 5 L. J. K. B. O. S. 242, R. & M. 403 note, 21 E. C. L. 780 note, 31 Rev. Rep. 166.

An offer to pay upon surrender of the bill is not itself equivalent to payment. Williams *v.* Gottschalk, 6 Mo. App. 597.

76. *Illinois.*— Mayo *v.* Moore, 28 Ill. 428.

Kansas.— Best *v.* Crall, 23 Kan. 482, 33 Am. Rep. 185.

Massachusetts.— Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Emerson *v.* Cutts, 12 Mass. 78.

Missouri.— Union Sav. Assoc. *v.* Clayton, 6 Mo. App. 587.

New York.— Ward *v.* Howard, 88 N. Y. 74; Ft. Edward Nat. Bank *v.* Washington County Nat. Bank, 5 Hun (N. Y.) 605.

Vermont.— Griswold *v.* Davis, 31 Vt. 390; Connecticut, etc., R. Co. *v.* Newell, 31 Vt. 364.

feree has knowledge will be good, as the latter in such a case takes the instrument subject to the defense.[77]

17. FAILURE TO TAKE UP INSTRUMENT. If the maker pays a note before due and fails to take it up and it is afterward, and before maturity, negotiated in due course of trade, the assignee, if he is an innocent holder for a valuable consideration, will be entitled to enforce its payment.[78]

B. By Whom Payment May Be Made and Effect of Payment — 1. In General. A bill of exchange, promissory note, or order made payable to a particular person, which has been paid by one whose duty it is to make the payment, without any right to call upon other parties to repay the amount, is no longer a valid contract. It has performed its office and ceased to have legal existence.[79]

2. By Accepter — a. In General. The accepter's obligation is to pay the bill when due and not before, and he should not be permitted to deprive the drawer of a defense to the bill by assuming to pay it before he is bound to, and where he in fact pays it before maturity he is not as against the drawer a holder for value.[80] Payment, however, generally operates to extinguish the bill[81] and discharges all parties to it.[82] Destruction of canceled drafts by parties in accordance with their custom, and without fraudulent intent, does not deprive them of the right to prove acceptance and payment of such drafts.[83]

b. Accommodation Acepter. A bill will be extinguished by payment by an accommodation accepter, even as against the drawer who has been accommodated by the acceptance, so far as regards the accepter's rights as against the drawer;[84]

See 7 Cent. Dig. tit. "Bills and Notes," § 1260.

77. American Bank *v.* Jenness, 2 Metc. (Mass.) 288; Grant *v.* Kidwell, 30 Mo. 455; White *v.* Kibling, 11 Johns. (N. Y.) 128.

78. *Alabama.*— Capital City Ins. Co. *v.* Quinn, 73 Ala. 558.

California.— Swall *v.* Clarke, 51 Cal. 227.

Florida.— Trustees Internal Imp. Fund *v.* Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209, 26 L. R. A. 743. *Compare* Johnston *v.* Allen, 22 Fla. 224, 1 Am. St. Rep. 180.

Illinois.— Mobley *v.* Ryan, 14 Ill. 51, 56 Am. Dec. 488; McAuliff *v.* Reuter, 61 Ill. App. 32.

Kansas.— Best *v.* Crall, 23 Kan. 482, 33 Am. Dec. 185.

Massachusetts.— Murphy *v.* Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340. And see Watson *v.* Wyman, 161 Mass. 96, 36 N. E. 692.

Missouri.— Grant *v.* Kidwell, 30 Mo. 455.

Oregon.— Adair *v.* Lenox, 15 Oreg. 489, 16 Pac. 182.

Tennessee.— Vatterlien *v.* Howell, 5 Sneed (Tenn.) 441.

Vermont.— Griswold *v.* Davis, 31 Vt. 390.

Virginia.— Davis *v.* Miller, 14 Gratt. (Va.) 1.

West Virginia.— Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

United States.— Exchange Nat. Bank *v.* Johnson, 30 Fed. 588; Patterson *v.* Atherton, 3 McLean (U. S.) 147, 18 Fed. Cas. No. 10,822.

England.— Burbridge *v.* Manners, 3 Campb. 193, 13 Rev. Rep. 786; Dod *v.* Edwards, 2 C. & P. 602, 12 E. C. L. 757; Morley *v.* Culverwell, 1 Hurl. & W. 13, 4 Jur. 1163, 10 L. J. Exch. 35, 7 M. & W. 174.

See 7 Cent. Dig. tit. "Bills and Notes," § 1240.

Where the drawer of a check pays the same to the payee without taking it up this has been held not to constitute a payment. Levy *v.* Temerson, 67 N. Y. Suppl. 853.

79. Ballard *v.* Greenbush, 24 Me. 336; Havens *v.* Huntington, 1 Cow. (N. Y.) 387; Beck *v.* Robley, 1 H. Bl. 89, note *a*. See also Citizens' Bank *v.* Lay, 80 Va. 436.

A promise to pay notes imposes an obligation upon a party to discharge the same, and where such duty exists the party owing it cannot purchase the notes and continue them in force. Powers *v.* Fouche, 14 N. Y. St. 406.

80. Stark *v.* Alford, 49 Tex. 260.

81. Salaun *v.* Relf, 4 La. Ann. 575; Brunswick Bank *v.* Sewall, 34 Me. 202; Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567; Elsam *v.* Denny, 15 C. B. 87, 18 Jur. 981, 23 L. J. C. P. 190, 2 Wkly. Rep. 554, 80 E. C. L. 87.

An accommodation drawer is held to be discharged where the accepter has paid the bill out of the funds of the principal drawer in his hands. Brander *v.* Phillips, 16 Pet. (U. S.) 121, 10 L. ed. 909.

82. Boardman *v.* Paige, 11 N. H. 431; Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Harmer *v.* Steele, 4 Exch. 1, 19 L. J. Exch. 34.

Although the amount paid is less than the face of the bill the drawer is discharged. Tassell *v.* Lewis, 1 Ld. Raym. 743; English *v.* Darley, 2 B. & P. 61, 3 Esp. 49, 5 Rev. Rep. 543; De la Torre *v.* Barclay, 1 Stark. 7, 2 E. C. L. 13. *Compare* Yglesias *v.* River Plate Mercantile Bank, 3 C. P. D. 60.

83. Steele *v.* Lord, 70 N. Y. 280, 26 Am. Rep. 602. See also Irby *v.* Brigham, 9 Humphr. (Tenn.) 750.

84. Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640; Skowhegan First Nat. Bank *v.* Maxfield, 83 Me. 576, 22 Atl. 479; Suydam *v.* Westfall, 2 Den. (N. Y.) 205 [*reversing* 4

but where a party accepts a bill for accommodation there is an implied contract in law on the part of the drawer to indemnify him.[85] This implied contract extends to a joint drawer signing as a surety, and known by the accepter to be such.[86] Mere acceptance, however, is not of itself sufficient to support an action against the drawer by the accommodation accepter. The latter must pay the bill before he has any right of action against the drawer as principal debtor.[87]

3. By Bank Where Payable. Where a bill or note is payable at a particular bank it is considered in some jurisdictions as an authorization to the bank to pay such instrument out of money which the maker or accepter may have deposited there;[88] and where there are sufficient funds in the bank at the maturity of the paper, and the bank fails to pay the same by application of the deposit, the indorser will be discharged.[89] A bank cannot recover from the drawer the amount of a draft paid by it where it only relies on a verbal agreement between the drawer and accepter that the former will take care of a counter draft on himself in favor of the bank for the amount of the first draft.[90]

4. By Drawer. A bill of exchange is not discharged in case of a payment by the drawer, and the latter may maintain an action against the accepter;[91] but

Hill (N. Y.) 211]; Wing *v.* Terry, 5 Hill (N. Y.) 160; Griffith *v.* Reed, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267; Christian *v.* Keen, 80 Va. 369.

A payment on the day before the last day of grace by an accommodation accepter takes effect as a payment at the commencement of the last day as against the drawer. Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

If an accommodation accepter and indorser makes payment of the whole of a new note given as extension of the old, both notes will be extinguished, but if he refuses to pay more than half because his obligation is joint his obligation on the former will remain in full force. Woods *v.* Halsey, 42 La. Ann. 245, 7 So. 451.

85. *Indiana.*— Dickerson *v.* Turner, 15 Ind. 4.

Louisiana.— Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640; Porter *v.* Sandidge, 32 La. Ann. 449.

Maine.— Skowhegan First Nat. Bank *v.* Maxfield, 83 Me. 576, 22 Atl. 479.

New York.— Pearce *v.* Wilkins, 2 N. Y. 469 [*affirming* 5 Den. (N. Y.) 541].

Pennsylvania.— De Barry *v.* Withers, 44 Pa. St. 356.

Tennessee.— See Planters' Bank *v.* Douglass, 2 Head (Tenn.) 699.

Compare Barnet *v.* Young, 29 Ohio St. 7.

See 7 Cent. Dig. tit. "Bills and Notes," § 1224.

He may have the benefit of additional securities as between himself and the drawer. Sublett *v.* McKinney, 19 Tex. 438. *Compare* Salaun *v.* Relf, 4 La. Ann. 575; Gomez *v.* Lazarus, 16 N. C. 205.

Subrogation in equity.— If the drawer is insolvent, the accommodation accepter may be subrogated in equity to the position of the holder. Toronto Bank *v.* Hunter, 4 Bosw. (N. Y.) 646.

Accepter has a lien on property of the drawer in his hands which he holds for the purpose of paying the bill or for reimbursement. Martin *v.* Curd, 1 Bush (Ky.) 327. See also Printup *v.* Johnson, 19 Ga. 73.

Where a bill is accepted and indorsed for the accommodation of the drawer, and is subsequently paid by the accommodation indorser, it is held that the latter will have a right of action against the accommodation accepter (Gillespie *v.* Campbell, 39 Fed. 724, 5 L. R. A. 698; Brown *v.* Maffey, 15 East 216; Houle *v.* Baxter, 3 East 177; Wiffen *v.* Roberts, 1 Esp. 261, 5 Rev. Rep. 737), as well as against the drawer who was accommodated (Low *v.* Copestake, 3 C. & P. 300, 14 E. C. L. 578).

86. Turner *v.* Browder, 5 Bush (Ky.) 216; Suydam *v.* Westfall, 2 Den. (N. Y.) 205; Griffith *v.* Reed, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267.

87. Suydam *v.* Combs, 15 N. J. L. 133; Planters' Bank *v.* Douglass, 2 Head (Tenn.) 699; Christian *v.* Keen, 80 Va. 369; Braxton *v.* Willing, 4 Call (Va.) 288; Chilton *v.* Whiffin, 3 Wils. C. P. 13.

88. See Banks and Banking, 5 Cyc. 555, notes 77, 78.

89. Rochester Cent. Bank *v.* Thein, 76 Hun (N. Y.) 571, 28 N. Y. Suppl. 232, 58 N. Y. St. 239; Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; German Nat. Bank *v.* Foreman, 138 Pa. St. 474, 21 Atl. 20, 21 Am. St. Rep. 908; Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 1 Atl. 190, 20 Atl. 718; Commercial Nat. Bank *v.* Henninger, 105 Pa. St. 496. See also Mechanics', etc., Bank *v.* Seitz, 150 Pa. St. 632, 24 Atl. 356, 30 Am. St. Rep. 853.

Deposit after dishonor.— A bank has no right to apply a deposit made after dishonor of paper. Gordon *v.* Müchler, 34 La. Ann. 604; Lock Haven First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Steiner *v.* Erie Dime Sav., etc., Co., 98 Pa. St. 591.

90. Bay City Bank *v.* Lindsay, 94 Mich. 176, 54 N. W. 42.

91. *Arkansas.*— Kinney *v.* Heald, 17 Ark. 397.

Iowa.— Wilkerson *v.* Daniels, 1 Greene (Iowa) 179.

where the acceptance is for the drawer's accommodation, a payment by the latter will operate to discharge the accepter.[92]

5. By Guarantor. On payment of a note by the guarantor, there may be a recovery by him from the principal on an implied promise of repayment.[93]

6. By Indorser — a. In General. Where the indorser of a bill or note pays it or takes it up, such action by him will as a general rule extinguish all right of recovery upon it against all parties subsequent to him to whom he was liable to pay it while they held it,[94] but it will not extinguish the debt as to prior parties or discharge such parties,[95] unless the paper was made for the accommodation of

Kentucky.— Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199.

New Hampshire.—Drew *v.* Phelps, 18 N. H. 572.

North Carolina.— Smith *v.* Bryan, 33 N. C. 418.

Texas.—Fulton *v.* Thomas, 2 Tex. App. Civ. Cas. § 243.

England.— Louviere *v.* Laubray, 10 Mod. 36; Callow *v.* Lawrence, 3 M. & S. 95, 15 Rev. Rep. 423.

Canada.— Montreal Bank *v.* Armour, 9 U. C. C. P. 401.

See 7 Cent. Dig. tit. "Bills and Notes," § 1228.

Effect as against indorsee.— In an action by the indorsee against the accepter of a bill not appearing to have been accepted for the accommodation of the drawer, a plea of payment by the drawer is no defense, unless it is shown to have been made on the accepter's account and adopted by him at the time of payment or subsequently. Montreal Bank *v.* Armour, 9 U. C. C. P. 401.

An action in the payee's name for the use of the drawer may be brought at common law. Davis *v.* McConnell, 3 McLean (U. S.) 391, 7 Fed. Cas. No. 3,640; Williams *v.* James, 15 Q. B. 498, 14 Jur. 699, 19 L. J. Q. B. 445, 69 E. C. L. 498; Randall *v.* Moon, 12 C. B. 261, 21 L. J. C. P. 226, 74 E. C. L. 261.

92. Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196; Lazarus *v.* Cowie, 3 Q. B. 459, 2 G. & D. 487, 11 L. J. Q. B. 310, 43 E. C. L. 819; Parr *v.* Jewell, 16 C. B. 684, 81 E. C. L. 684; Smith *v.* Knox, 3 Esp. 46.

An accepter may be discharged pro tanto by a dividend secured from an insolvent estate of the drawer, at the suit of a holder with notice, although the acceptance was not strictly for the drawer's accommodation, if the latter could not have sued the accepter because of the balance in their account being largely in the accepter's favor. Cook *v.* Lister, 13 C. B. N. S. 543, 9 Jur. N. S. 823, 32 L. J. C. P. 121, 7 L. T. Rep. N. S. 712, 11 Wkly. Rep. 369, 106 E. C. L. 543.

93. King *v.* Hannah, 6 Ill. App. 495. And see, generally, Guaranty.

If his guarantee is for payment by the payee of the first indorser, he cannot subsequently upon payment of a note by him look to the maker for reimbursement. Putnam *v.* Tash, 12 Gray (Mass.) 121.

Subrogation to rights of holder.— Where a guarantor at the request of the maker takes up a note or bill, he may be subrogated to all the rights of the holder, including the security of a chattel mortgage. Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530. See also Voltz *v.* National Bank, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155; Babcock *v.* Blanchard, 86 Ill. 165.

94. *Alabama.*— Borland *v.* Phillips, 3 Ala. 718.

Arkansas.— State Bank *v.* Bozeman, 13 Ark. 631.

Louisiana.—Nugent *v.* Delhomme, 2 Mart. (La.) 307.

Massachusetts.— Gilmore *v.* Carr, 2 Mass. 171.

North Carolina.—Adrian *v.* McCaskill, 103 N. C. 182, 9 S. E. 284, 14 Am. St. Rep. 788, 3 L. R. A. 759.

United States.— Howe Mach. Co. *v.* Hadden, 8 Biss. (U. S.) 208, 12 Fed. Cas. No. 6,785, 18 Alb. L. J. 294, 6 Centr. L. J. 446, 24 Int. Rev. Rec. 236, 2 Month. Jur. 136, 25 Pittsb. Leg. J. 204, 6 Reporter 136.

England.— Macdonald *v.* Bovington, 4 T. R. 825; Hayling *v.* Mullhall, 2 W. Bl. 1235.

See 7 Cent. Dig. tit. "Bills and Notes," § 1228.

Payment by indorser with money due him in the hands of the principal debtor is a payment by the former. Newark Nat. State Bank *v.* Davis, 24 Ohio St. 190.

95. *California.*— Leeke *v.* Hancock. 76 Cal. 127, 17 Pac. 937.

Connecticut.— French *v.* Jarvis, 29 Conn. 347.

Louisiana.— Lanata *v.* Bayhi, 31 La. Ann. 229; State Bank *v.* Roberts, 4 La. 530.

Maine.— Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62.

Massachusetts.— North Nat. Bank *v.* Hamlin, 125 Mass. 506; Eaton *v.* Carey, 10 Pick. (Mass.) 211; Guild *v.* Eager, 17 Mass. 615.

Michigan.— Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874.

Nebraska.— Hartzell *v.* McClurg, 54 Nebr. 316, 74 N. W. 626.

New Hampshire.— Hopkins *v.* Farwell, 32 N. H. 425; Davis *v.* Stevens, 10 N. H. 186.

New York.— Havens *v.* Huntington, 1 Cow. (N. Y.) 387.

Vermont.— Norton *v.* Downer, 33 Vt. 26.

Virginia.— Davis *v.* Miller, 14 Gratt. (Va.) 1.

United States.— McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162.

England.— Woodward *v.* Pell, L. R. 4 Q. B. 55, 9 B. & S. 994, 38 L. J. Q. B. 30, 19 L. T. Rep. N. S. 557, 17 Wkly. Rep. 117.

the indorser making the payment.[96] A note may be paid at any time after maturity by the indorser thereof, who may then sue the maker,[97] or prior indorsers.[98] If an indorser takes up the paper in the hands of a *bona fide* purchaser for value before maturity, he is regarded as a purchaser from such holder and succeeds to his rights.[99] In general an indorser is entitled to be subrogated, like a surety, to any collateral security held for the payment of the note or bill.[1]

See 7 Cent. Dig. tit. "Bills and Notes," § 1228.

Money paid by an indorser to an indorsee is not for the benefit of the maker but rather to protect the indorser's contract with the indorsee, and it operates as a purchase and not as a payment, so far as concerns the maker, and cannot be taken advantage of by him. Hartzell *v.* McClurg, 54 Nebr. 316, 74 N. W. 626. See also Madison Square Bank *v.* Pierce, 62 Hun (N. Y.) 493, 17 N. Y. Suppl. 270, 42 N. Y. St. 832 [*affirmed* in 137 N. Y. 444, 33 N. E. 557, 51 N. Y. St. 175, 33 Am. St. Rep. 751, 20 L. R. A. 335].

96. Schultz *v.* Noble, 77 Cal. 79, 19 Pac. 182. See also Rowland *v.* Smith, 49 Conn. 404; Marsh *v.* Consolidated Bank, 48 Pa. St. 510; Love *v.* Brown, 38 Pa. St. 307.

97. *Alabama.*—Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635.

Indiana.— Hoffman *v.* Butler, 105 Ind. 371, 4 N. E. 681; Robertson *v.* Huffman, 92 Ind. 247; Hayes *v.* Drain, 5 Ind. 486.

Louisiana.— Wiggin *v.* Flower, 5 Rob. (La.) 406.

Maine.— Breckenridge *v.* Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353; Bishop *v.* Rowe, 71 Me. 263; Godfrey *v.* Rice, 59 Me. 308; Garnsey *v.* Allen, 27 Me. 366; Goodnow *v.* Howe, 20 Me. 164, 37 Am. Dec. 46.

Maryland.— Duvall *v.* Farmers' Bank, 9 Gill & J. (Md.) 31.

Massachusetts.— Pinney *v.* McGregory, 102 Mass. 186; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; Cole *v.* Cushing, 8 Pick. (Mass.) 48.

Michigan.— Tredway *v.* Antisdel, 86 Mich. 82, 48 N. W. 956.

Minnesota.— Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429.

Missouri.— Fenn *v.* Dugdale, 40 Mo. 63; Wernse *v.* Garesché, 13 Mo. App. 575.

New York.— Lancey *v.* Clark, 64 N. Y. 209, 21 Am. Rep. 604; Gloversville Nat. Bank *v.* Burr, 27 Hun (N. Y.) 109; Gloversville Nat. Bank *v.* Wells, 15 Hun (N. Y.) 51; Ainslie *v.* Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Havens *v.* Huntington, 1 Cow. (N. Y.) 387; Lynch *v.* Reynolds, 16 Johns. (N. Y.) 41.

North Carolina.— Howell *v.* McCracken, 87 N. C. 399.

Ohio.— Newark Nat. State Bank *v.* Davis, 24 Ohio St. 190.

Texas.— Perry *v.* Shropshire, 23 Tex. 153.

United States.— Reintzel *v.* Morgan, 2 Cranch C. C. (U. S.) 20, 20 Fed. Cas. No. 11,683 [*affirmed* in 7 Cranch (U. S.) 273, 3 L. ed. 340].

See 7 Cent. Dig. tit. "Bills and Notes," § 1228.

After death of maker.— If a note is paid and taken up by an indorser after the death of the maker the indorser will become a creditor of the maker's estate. Meriden Steam Mill Lumber Co. *v.* Guy, 40 Conn. 163.

Payment by indorser after bankruptcy of maker does not discharge the latter and the entire note may be proved against the latter's estate. Lynch *v.* Reynolds, 16 Johns. (N. Y.) 41; *In re* Souther, 2 Lowell (U. S.) 320, 22 Fed. Cas. No. 13,184, 9 Nat. Bankr. Reg. 502.

Where a note is paid by the administrator of an indorser who has been discharged he may recover against the maker. Kennedy *v.* Carpenter, 2 Whart. (Pa.) 344.

A guarantor indorsing a note before delivery to the payee and who takes it up at maturity may sue the maker as a purchaser. McGregory *v.* McGregory, 107 Mass. 543.

Payment of a bill or note is a prerequisite to the right of recovery by the indorser (Mendez *v.* Carreroon, 1 Ld. Raym. 742) and must be proved by him (Longfellow *v.* Andrews, 45 Me. 75; Mendez *v.* Carreroon, 1 Ld. Raym. 742).

Payment with knowledge of defenses.— Where there is a voluntary payment by an accommodation indorser of a note with knowledge of usury in its inception, there can be no recovery from the maker by the former if the latter relies on such a plea. Wallace *v.* Lipps, 47 W. Va. 339, 34 S. E. 731.

98. Commonwealth Bank *v.* Floyd, 4 Metc. (Ky.) 159; Selfridge *v.* Gill, 4 Mass. 95; Meyer *v.* Spencer, 9 Mo. App. 590; Marr *v.* Johnson, 9 Yerg. (Tenn.) 1.

An indorser who has been discharged by laches and afterward pays a bill or note cannot sue another and prior indorser who has also been discharged (Turner *v.* Leech, 4 B. & Ald. 451, 23 Rev. Rep. 344, 6 E. C. L. 556; Roscow *v.* Hardy, 2 Campb. 458, 12 East 434), and this is true although such indorser had no knowledge of the laches by which he was discharged at the time he made the payment (Wilson *v.* Ray, 10 A. & E. 82, 3 Jur. 384, 8 L. J. Q. B. 224, 2 P. & D. 253, 37 E. C. L. 67).

99. Ticonic Nat. Bank *v.* Bagley, 68 Me. 249; Barker *v.* Parker, 10 Gray (Mass.) 339; Deas *v.* Harvie, 2 Barb. Ch. (N. Y.) 448.

1. *Alabama.*— Dunlap *v.* Clements, 7 Ala. 539.

Illinois.— Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573.

Michigan.— Manwaring *v.* Jenison, 61 Mich. 117, 27 N. W. 899.

Mississippi.—O'Hara *v.* Haas, 46 Miss. 374.

Missouri.— Arnot *v.* Woodburn, 35 Mo. 99.

New York.— Shutts *v.* Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; National Exch. Bank *v.* Silliman, 65 N. Y. 475; Boyd *v.* Finnegan, 3 Daly (N. Y.) 222.

b. After Suit or Judgment. A payment of a judgment rendered upon a bill or note by the indorser does not operate as an extinguishment of the debt as against prior parties,[2] and where a judgment has been rendered against the maker an indorser may take an assignment of the same;[3] but the recovery by an indorsee of a judgment against his indorser will not operate as a transfer of the note to the latter while such judgment remains unsatisfied,[4] and an indorser is not entitled to an assignment of a judgment recovered by the holder against the maker of a note, unless he has paid the same.[5] Where an indorser pays a bill or note during the pendency of a suit against both him and the maker, with the understanding that the suit against the maker shall be continued for the indorser's benefit, such payment cannot be set up as a defense by the maker.[6]

7. By Maker — a. In General. As a general rule payment of a note by the maker extinguishes the same.[7]

b. Agent of Maker. Where the agent of the maker of a bill or note takes up such obligation with funds furnished by the latter, it will generally operate as

England.— Duncan *v.* North, etc., Wales Bank, 6 App. Cas. 1, 50 L. J. Ch. 355, 43 L. T. Rep. N. S. 706, 29 Wkly. Rep. 763.

Payment by an indorser is a prerequisite to the right of subrogation. Buffalo First Nat. Bank *v.* Wood, 71 N. Y. 405, 27 Am. Rep. 66.

But where an indorser has been discharged and subsequently voluntarily pays the note or bill collateral security given to him for his indemnity cannot be enforced, as such indemnity is only against the legal liability. Bachellor *v.* Priest, 12 Pick. (Mass.) 399.

2. Cotten *v.* Bradley, 38 Ala. 506; Cole *v.* Cushing, 8 Pick. (Mass.) 48; Bunker *v.* Langs, 76 Hun (N. Y.) 543, 28 N. Y. Suppl. 210, 58 N. Y. St. 243.

An indorser may make payment to a sheriff, after judgment recovered against the sheriff for laches in proceeding against the maker, and may recover on the strength of such payment against a prior indorser. Baker *v.* Martin, 3 Barb. (N. Y.) 634.

An indorsee is entitled to have a judgment canceled as to him where his indorser has satisfied it. Somerville First Nat. Bank *v.* Hoffman, (N. J. 1902) 52 Atl. 280.

3. *Alabama.*— Lyon *v.* Bolling, 9 Ala. 463, 44 Am. Dec. 444.

California.—Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441.

Georgia.— Thomason *v.* Wade, 72 Ga. 160.

Illinois.— Crawford *v.* Logan, 97 Ill. 396. *Compare* Cleiman *v.* Murphy, 34 Ill. App. 633.

Iowa.— Schleissman *v.* Kallenberg, 72 Iowa 338, 33 N. W. 459, 2 Am. St. Rep. 247.

Minnesota.— Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429.

Mississippi.— Pope *v.* Bowman, 31 Miss. 639.

New York.— Clason *v.* Morris, 10 Johns. (N. Y.) 524.

North Carolina.— State Bank *v.* Wilson, 12 N. C. 484.

Utah.— Utah Nat. Bank *v.* Forbes, 18 Utah 225, 55 Pac. 61.

Where judgment is joint against maker and indorser the latter is entitled to an assignment. Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441; Marsh *v.* Benedict, 14 Hun (N. Y.) 317; Corey *v.* White, 3 Barb. (N. Y.) 12; Davis *v.* Perrine, 4 Edw. (N. Y.) 62; Feamster *v.* Withrow, 12 W. Va. 611.

4. Russell, etc., Mfg. Co. *v.* Carpenter, 5 Hun (N. Y.) 162.

5. Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441.

6. Mechanics' Bank *v.* Hazard, 13 Johns. (N. Y.) 353.

7. *Alabama.*— Wallace *v.* Mobile Branch Bank, 1 Ala. 565; Currie *v.* Mobile Bank, 8 Port. (Ala.) 360.

Illinois.— International Bank *v.* Bowen, 80 Ill. 541.

Kentucky.— Ryan *v.* Doyle, 79 Ky. 363.

Louisiana.— Hoyle *v.* Cazabat, 25 La. Ann. 438.

Maine.— Mitchell *v.* Albion, 81 Me. 482, 17 Atl. 546; Willey *v.* Greenfield, 30 Me. 452; Ballard *v.* Greenbush, 24 Me. 336.

Massachusetts.— Blake *v.* Sewell, 3 Mass. 556.

Mississippi.— Dunlap *v.* Petrie, 35 Miss. 590.

Ohio.— Board of Education *v.* Sinton, 41 Ohio St. 504; Jordan *v.* Forlong, 19 Ohio St. 89.

Pennsylvania.— Eckert *v.* Cameron, 43 Pa. St. 120.

United States.— Dooley *v.* Virginia F. & M. Ins. Co., 3 Hughes (U. S.) 221, 7 Fed. Cas. No. 3,999; Turnbull *v.* Thomas, 1 Hughes (U. S.) 172, 24 Fed. Cas. No. 14,243.

England.— Brown *v.* Davies, 3 T. R. 80.

See 7 Cent. Dig. tit. "Bills and Notes," § 1224.

Duty of maker to pay.— In the absence of evidence to the contrary the maker of a note is primarily liable to pay it as between the parties to it, and there can be no deduction for a payment not made by him, in his behalf, or in law inuring to his benefit. North Nat. Bank *v.* Hamlin, 125 Mass. 506.

Payment by maker discharges indorsers and sureties.— Cason *v.* Heath, 86 Ga. 438, 12 S. E. 678; Woods *v.* Woods, 127 Mass. 141; Borst *v.* Bovee, 5 Hill (N. Y.) 219.

a payment and will extinguish the bill or note ;[8] but where money is sent to an agent to pay a note and such agent fails with the money in his hands the loss falls on the maker, from whom the holder may still recover.[9]

c. Joint Maker.[10] Where a note is paid by one of several joint makers to the payee or holder it will operate as an extinguishment of the note as to the latter,[11] and a part payment so made will inure to the benefit of all.[12] Where a payment on a note due has been made by a joint promisor it cannot be revoked by an arrangement between him and the payee so as to revive it against the other

8. This rule has been applied where an agent of the maker has taken up a note with the proceeds of goods belonging to the latter (Halsey *v.* Lange, 28 La. Ann. 248), where an agent of a bank has purchased bills issued by such bank, although still in the agent's hands as vouchers (Wildes *v.* Nahant Bank, 20 Pick. (Mass.) 352), where a note is taken and held by an agent for his principal and is afterward paid by him to his principal (Brice *v.* Watkins, 30 La. Ann. 21), where an agent to whom money has been sent by the maker for the payment of a note persuades the holder to take his note in settlement (Baker *v.* Gavitt, 128 Mass. 93), and where a check belonging to the government is paid by a collector to the treasurer by a bank certificate of deposit which is duly paid, although the check itself which has been discounted by the bank is dishonored and taken up by the collector and surrendered to the drawer of the check for a note made by him (U. S. *v.* Thompson, 33 Md. 575).

Where money is deposited in the hands of a mercantile firm and there is no specific direction as to its application, there is no authority conferred upon the firm to apply such money to the payment of a note executed by the depositor, which has been indorsed to it for collection by the holder. Vance *v.* Geib, 27 Tex. 272.

9. Moore *v.* Meyer, 57 Ala. 20; Sutherland *v.* Ypsilanti First Nat. Bank, 31 Mich. 230.

Larceny from agent.— He may also recover where money which has been deposited with an agent for the payment of a note has been stolen. Albia First Nat. Bank *v.* Free, 67 Iowa 11, 24 N. W. 566.

Where money is tendered by an agent and the note has been mislaid and is not found until after the agent fails it may be a sufficient tender to stop the running of interest. Dent *v.* Dunn, 3 Campb. 296, 13 Rev. Rep. 809.

10. **Partial payment by joint maker** see *supra*, XI, A, 15, b.

11. *Alabama.*— Jackson *v.* Wood, 108 Ala. 209, 19 So. 312.

California.— Gordon *v.* Wansey, 21 Cal. 77.

Colorado.— Swem *v.* Newell, 19 Colo. 397, 35 Pac. 734.

Illinois.— Gillett *v.* Sweat, 6 Ill. 475.

Indiana.— Cox *v.* Hodge, 7 Blackf. (Ind.) 146.

Louisiana.— Schinkel *v.* Hanewinkel, 19 La. Ann. 260.

Michigan.— Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874.

Mississippi.—Lenoir *v.* Moore, 61 Miss. 400.

New Hampshire.— Hopkins *v.* Farwell, 32 N. H. 425; Rockingham Bank *v.* Claggett, 29 N. H. 292; Davis *v.* Stevens, 10 N. H. 186.

New York.— Dillenbeck *v.* Dygert, 97 N. Y. 303, 49 Am. Dec. 525.

Vermont.— Sprague *v.* Ainsworth, 40 Vt. 47.

England.— Beaumont *v.* Greathead, 2 C. B. 494, 3 D. & L. 631, 15 L. J. C. P. 130, 52 E. C. L. 494.

See 7 Cent. Dig. tit. "Bills and Notes," § 1227.

Assignment to joint maker.— An assignment of a joint and several negotiable promissory note by the payee to one of the makers before its maturity amounts to payment, and the right of action against the makers is not revived by a subsequent assignment to a third person after maturity; but if the subsequent assignment were made before maturity to an innocent person a right of action would exist in his favor against the makers. Gordon *v.* Wansey, 21 Cal. 77. See also Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874; Kneeland *v.* Miles, (Tex. Civ. App. 1894) 24 S. W. 1113.

Partners and members of unincorporated associations.— One partner may invest his private means in the purchase of partnership securities and hold them as valid obligations; and the fact that such partner cannot enforce such obligations against his firm in a court of law, for the reason that he cannot be both plaintiff and defendant, is a difficulty affecting the remedy only and not the right; and when he indorses such negotiable securities to a third person not subject to such exception, the difficulty even as to the remedy ceases and such person may maintain an action on the same. Kipp *v.* McChesney, 66 Ill. 460. *Compare*, however, Easton *v.* Strother, 57 Iowa 506, 10 N. W. 877. It has been held therefore that where the note of an unincorporated company is by the payee indorsed to one of the partners composing the company, and by him to a stranger, the transfer to one of the makers does not necessarily operate in law as a payment or extinguishment of the note. The right of the holder to recover depends upon the question whether there was a payment in fact or a purchase, and this is a question of intention. Kipp *v.* McChesney, 66 Ill. 460.

12. Harrison *v.* Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; Winslow *v.* Brown, 7 R. I. 95, 80 Am. Dec. 638; Turner *v.* Ross, 1 R. I. 88.

Payment in an attempted compromise will operate only as a discharge *pro tanto*. Easton *v.* Strother, 57 Iowa 506, 10 N. W. 877.

parties;[13] but a joint maker may, where he has paid a part or all of the obligation, have his action against his co-makers for contribution.[14]

d. Maker as Agent of Third Person. Where the maker of a note, acting as the agent of a third person, pays the same with money furnished by the latter to the holder or payee, this will operate as a payment and will extinguish the note as to such payee or holder.[15]

8. By Payee. Where the payee of a note has paid the same it will have the effect of reinstating him as owner of the note and enable him to recover thereon the same as if it had not been negotiated.[16] So where the payee of a bill of exchange or promissory note, having indorsed it in blank, again becomes the holder, he may recover on it, although there be subseqnent indorsements in full thereon, without showing any receipt or indorsement back to him from any of the indorsers, whose names he may strike out or not as he pleases.[17] Where a payee takes up a note which he has assigned to another, he can only recover against the maker what the assignee might have recovered.[18]

9. By Principal or Surety. The payment of a bill or note by the principal debtor will operate to discharge the surety, except where the payment is subsequently declared to be void.[19] A surety, on payment, is entitled to maintain an action against the maker.[20] The principal, however, becomes liable to the surety

13. Frost *v.* Martin, 26 N. H. 422, 59 Am. Dec. 353.

A joint maker after payment of the note cannot reissue it so as to bind his co-maker. James *v.* Yaeger, 86 Cal. 184, 24 Pac. 1005; Gordon *v.* Wansey, 21 Cal. 77; Patch *v.* King, 29 Me. 448; Hopkins *v.* Farwell, 32 N. H. 425.

14. See, generally, Contribution.

15. Cason *v.* Heath, 86 Ga. 438, 12 S. E. 678; White *v.* Fisher, 62 Ill. 258. *Compare* Du Bois *v.* Stoner, 11 Ill. App. 403; Eastman *v.* Plumer, 32 N. H. 238.

It will not defeat recovery thereon by the party for whom the maker acted. Bowman *v.* St. Louis Times, 87 Mo. 191.

16. *Alabama.*— Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635.

Connecticut.— Merrills *v.* Swift, 18 Conn. 257, 46 Am. Dec. 315.

Illinois.— Palmer *v.* Gardiner, 77 Ill. 143.

Indiana.— Dickerson *v.* Turner, 15 Ind. 4.

Kentucky.— Bradford *v.* Ross, 3 Bibb (Ky.) 238.

Massachusetts.— West Boston Sav. Bank *v.* Thompson, 124 Mass. 506; Pinney *v.* McGregory, 102 Mass. 186.

New York.— Havens *v.* Huntington, 1 Cow. (N. Y.) 387.

Tennessee.— Bachus *v.* Richmond, 5 Yerg. (Tenn.) 109.

Vermont.— Norton *v.* Downer, 33 Vt. 26.

Compare Randall *v.* Weld, 86 Pa. St. 357.

See 7 Cent. Dig. tit. "Bills and Notes," § 1229.

The statute of limitations is a bar to an action by a payee against the maker, although the former paid the note after the statute of limitations had taken effect. Woodruff *v.* Moore, 8 Barb. (N. Y.) 171.

17. Hebrard *v.* Bollenhagen, 9 Rob. (La.) 155. See also *infra*, XIV, C [8 Cyc.].

18. Wright *v.* Taylor, 8 Ill. 193. See also Coghlin *v.* May, 17 Cal. 515.

19. Cason *v.* Heath, 86 Ga. 438, 12 S. E. 678; Petty *v.* Cooke, L. R. 6 Q. B. 790, 40 L. J. Q. B. 281, 25 L. T. Rep. N. S. 90, 19 Wkly. Rep. 1112. See also Day *v.* Humphrey, 79 Ill. 452.

20. *Illinois.*— King *v.* Hannah, 6 Ill. App. 495.

Kansas.— Teberg *v.* Swenson, 32 Kan. 224, 4 Pac. 83.

Maine.— Bishop *v.* Rowe, 71 Me. 263.

New Hampshire.— Low *v.* Blodgett, 21 N. H. 121.

New York.— Cincinnati Fifth Nat. Bank *v.* Woolsey, 31 N. Y. App. Div. 61, 52 N. Y. Suppl. 827.

See, generally, Principal and Surety.

The recovery has been held to be for money paid and not on the instrument itself. Frevert *v.* Henry, 14 Nev. 191. *Contra*, Tutt *v.* Thornton, 57 Tex. 35; Sublett *v.* McKinney, 19 Tex. 438.

A payment by one of the makers of a joint and several note, who is in reality a surety for the other, will not operate as a payment unless so intended, and an action for his benefit may be brought on a note in the name of the payee. Rockingham Bank *v.* Claggett, 29 N. H. 292.

Part payment by surety in consideration of his release as surety by the holder does not inure to the benefit of the maker. Gilstrap *v.* Smith, 101 Ga. 120, 28 S. E. 608, 65 Am. St. Rep. 290.

A tender by the surety after suit begun against the principal maker will only effect his discharge if indemnity against costs is provided. Hampshire Manufacturers' Bank *v.* Billings, 17 Pick. (Mass.) 87.

Payment as indemnity.— Where, after the maturity of a note, money is paid by the surety to the payee on an agreement that it is to be considered as indemnity, and that the payee shall sue the maker in his own name at the expense of and for the benefit of the surety, there is no payment of the

for the amount of the debt only when the latter has actually paid it, and payment by him is therefore a prerequisite to recovery.[21] A surety is also entitled to be subrogated upon payment by him to the collateral securities.[22] Where a bill or note is paid by one of several sureties, he is entitled to contribution from his cosureties, in the absence of agreement to the contrary.[23]

10. By Third Person. If a bill or note is paid after its maturity by a stranger to the paper it will in general be held to be a purchase and not a payment of the instrument.[24] Whether it is a payment or a purchase is, however, a question of intention to be determined as a fact from the acts and declarations of the parties and the surrounding circumstances.[25] If the parties to the transaction clearly

note, and an action by the payee is not barred thereby. Brown *v.* Whittington, 39 Oreg. 300, 64 Pac. 649.

Payment by the surety's own note is sufficient to support an action.

Connecticut.— Wright *v.* Lawton, 37 Conn. 167.

Iowa.— Hardin *v.* Branner, 25 Iowa 364.

Kansas.— Rizer *v.* Callen, 27 Kan. 339.

Massachusetts.— Doolittle *v.* Dwight, 2 Metc. (Mass.) 561.

Minnesota.— Keough *v.* McNitt, 6 Minn. 513.

New York.— Witherby *v.* Mann, 11 Johns. (N. Y.) 518.

Vermont.— Prescott *v.* Newell, 39 Vt. 82.

Where the owner of mortgaged premises pays off notes secured by the mortgage for his own security, he will be held to have done so as a purchaser without discharging the maker of the notes, and he is subrogated to the rights of the holder as against the maker. Allen *v.* Dermott, 80 Mo. 56. *Compare* Rugg *v.* Brainerd, 57 Vt. 364.

21. Sapp *v.* Aiken, 68 Iowa, 699, 28 N. W. 24; Gannett *v.* Blodgett, 39 N. H. 150; Powell *v.* Smith, 8 Johns. (N. Y.) 249; Newell *v.* Morrow, 9 Wyo. 1, 59 Pac. 429 [*following* Dennison *v.* Soper, 33 Iowa 183]. And see, generally, Principal and Surety.

22. Fields *v.* Sherrill, 18 Kan. 365; Lien *v.* Sioux Falls Sav. Bank, 12 S. D. 317, 81 N. W. 628. And see, generally, Principal and Surety.

23. Golsen *v.* Brand, 75 Ill. 148; Holliman *v.* Rogers, 6 Tex. 91. And see, generally, Principal and Surety.

A surety signing as co-maker cannot claim contribution from another signing as accommodation indorser. Dawson *v.* Pettway, 20 N. C. 531; Smith *v.* Smith, 16 N. C. 173.

24. *Alabama.*— Flournoy *v.* Harper, 81 Ala. 494, 1 So. 545.

California.— Frank *v.* Brady, 8 Cal. 47.

Illinois.— Voltz *v.* National Bank, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155.

Kansas.— Champion *v.* Hartford Invest. Co., 45 Kan. 103, 25 Pac. 590, 10 L. R. A. 754.

Maine.— Casco Nat. Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; Roberts *v.* Lane, 64 Me. 108, 18 Am. Rep. 242; Eaton *v.* McKown, 34 Me. 510.

Massachusetts.—Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438, 37 Am. Rep. 376; Pacific Bank *v.* Mitchell, 9 Metc. (Mass.) 297.

Minnesota.— Fogarty *v.* Wilson, 30 Minn. 289, 15 N. W. 175.

Missouri.— Swope *v.* Leffingwell, 72 Mo. 348; Vansandt *v.* Hobbs, 84 Mo. App. 628; Campbell *v.* Allen, 38 Mo. App. 27.

New Hampshire.— Barney *v.* Clark, 46 N. H. 514.

New York.— Irving Bank *v.* Wetherald, 36 N. Y. 335 [*affirming* 34 Barb. (N. Y.) 323]; Warner *v.* Chappell, 32 Barb. (N. Y.) 309; Hartshorn *v.* Brace, 25 Barb. (N. Y.) 126.

North Carolina.— Wilcoxon *v.* Logan, 91 N. C. 449; Brem *v.* Allison, 68 N. C. 412.

Texas.— Horton *v.* Manning, 37 Tex. 23.

United States.— Carter *v.* Burr, 113 U. S. 737, 5 S. Ct. 713, 28 L. ed. 1147; Dodge *v.* Freedmans Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920; Holm *v.* Atlas Nat. Bank, 84 Fed. 119, 55 U. S. App. 570, 28 C. C. A. 297; McDonnell *v.* Burns, 83 Fed. 866, 55 U. S. App. 233, 28 C. C. A. 174; *Ex p.* Balch, 2 Lowell (U. S.) 440, 2 Fed. Cas. No. 789, 13 Nat. Bankr. Reg. 760.

England.— Jones *v.* Broadhurst, 9 C. B. 173, 67 E. C. L. 173; Deacon *v.* Stodhart, 9 C. & P. 685, 38 E. C. L. 398, 2 M. & G. 317, 40 E. C. L. 620, 2 Scott N. R. 557; Thomas *v.* Fenton, 5 D. & L. 28, 11 Jur. 633, 16 L. J. Q. B. 362, 2 Saund. & C. 68.

See 7 Cent. Dig. tit. "Bills and Notes," § 1231.

25. *California.*— Moran *v.* Abbey, 58 Cal. 163, 63 Cal. 56.

District of Columbia.— Ramsey *v.* Daniels, 1 Mackey (D. C.) 16.

Georgia.— Childress *v.* Stone, Ga. Dec., Pt. II, 157.

Illinois.— Stiger *v.* Bent, 111 Ill. 328; Shinn *v.* Fredericks, 56 Ill. 439.

Indiana.— Binford *v.* Adams, 104 Ind. 41, 3 N. E. 753; Lemans *v.* Wiley, 92 Ind. 436; Russell *v.* Drummond, 6 Ind. 216.

Iowa.— Riddle *v.* Russell, (Iowa 1902) 91 N. W. 810; Kennedy *v.* Hensley, 94 Iowa 629, 63 N. W. 343; Bissell *v.* Lewis, 56 Iowa 231, 9 N. W. 177; Dougherty *v.* Deeney, 45 Iowa 443; Lawson *v.* McKenzie, 44 Iowa 663.

Louisiana.— Levy *v.* Baer, 19 La. Ann. 468.

Maine.— Bishop *v.* Rowe, 71 Me. 263; Willis *v.* Hobson, 37 Me. 403; Williams *v.* Thurlow, 31 Me. 392.

Maryland.— Kennedy *v.* Chapin, 67 Md. 454, 10 Atl. 243.

Massachusetts.—Dodge *v.* Brown, 113 Mass. 323; Borden *v.* Cuyler, 10 Cush. (Mass.) 476; Merrimack Bank *v.* Parker, 7 Pick. (Mass.) 88.

intended to purchase it will operate as such without regard to the mode adopted of accomplishing the result.[26] Where the maker of a note borrows money from a third party, with which he pays the note, it will operate as a payment, and the sureties will be discharged;[27] and it has been held that payment by a stranger to a collecting agent, at the maker's request, discharges the contract and extinguishes the note, so that a subsequent indorsement by the payee will be ineffectual as a transfer.[28]

11. Discount by Drawee. The discounting of a bill by a drawee, where he has not accepted it, does not operate as a payment or as a promise to pay, but places him in the position of an indorsee for value with the right to recover from the drawer and indorser.[29]

12. Payment Supra Protest. If the payment of a third party is made *supra protest* for the honor of another party, the former is considered as taking the bill through an indorsement of such party with all the rights and remedies belonging to him,[30] and one who pays a bill for the honor of an indorser, at

Michigan.— Fuller *v.* Bennett, 55 Mich. 357, 21 N. W. 433; Hale *v.* Holmes, 8 Mich. 37.

Minnesota.— Fogarty *v.* Wilson, 30 Minn. 289, 15 N. W. 175.

Missouri.— Swope *v.* Leffingwell, 72 Mo. 348; Kyne *v.* Erskine, 7 Mo. App. 591.

New Hampshire.— Rolfe *v.* Wooster, 58 N. H. 526; Tucker *v.* Peaslee, 36 N. H. 167; Rockingham Bank *v.* Claggett, 29 N. H. 292; Eaton *v.* George, 2 N. H. 300.

New York.— Lancey *v.* Clark, 64 N. Y. 209, 21 Am. Rep. 604; Hartshorn *v.* Brace, 25 Barb. (N. Y.) 126; Burr *v.* Smith, 21 Barb. (N. Y.) 262; Goldsmid *v.* Lewis County Bank, 12 Barb. (N. Y.) 407; Geyer *v.* Brewster, 2 N. Y. Suppl. 801, 19 N. Y. St. 351; Powers *v.* Fouche, 14 N. Y. St. 406; Borst *v.* Bovee, 5 Hill (N. Y.) 219; McCoon *v.* Biggs, 2 Hill (N. Y.) 121; Bean *v.* Canning, 10 N. Y. Leg. Obs. 248.

North Carolina.— Wallace *v.* Grizzard, 114 N. C. 488, 19 S. E. 760; Wilcoxon *v.* Logan, 91 N. C. 449; Jones *v.* Bobbitt, 90 N. C. 391; Brem *v.* Allison, 68 N. C. 412.

Ohio.— People's, etc., Bank *v.* Craig, 63 Ohio St. 374, 59 N. E. 102, 81 Am. St. Rep. 639, 52 L. R. A. 872; McFarland *v.* Norton, 5 Ohio Dec. (Reprint) 585, 6 Am. L. Rec. 760, 3 Cinc. L. Bul. 368.

South Carolina.— Boyce *v.* Shiver, 3 S. C. 515.

South Dakota.— Kirby *v.* Scanlan, 8 S. D. 623, 67 N. W. 828.

Texas.— Dillon *v.* Kauffman, 58 Tex. 696; Grogan *v.* Smith, (Tex. Civ. App. 1895) 33 S. W. 276.

Vermont.— Ellis *v.* Allen, 48 Vt. 545.

Virginia.— Young *v.* Johnston, 10 Gratt. (Va.) 269.

United States.— Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416, 9 S. Ct. 131, 32 L. ed. 472; Dodge *v.* Freedmans Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920; United Waterworks Co. *v.* Farmers' L. & T. Co., 82 Fed. 144, 49 U. S. App. 493, 27 C. C. A. 92; Ferree *v.* New York Security, etc., Co., 74 Fed. 769, 21 C. C. A. 83; Patriotic Bank *v.* Wilson, 4 Cranch C. C. (U. S.) 253, 18 Fed. Cas. No. 10,810; Dooley *v.* Virginia F. & M. Ins. Co., 3 Hughes (U. S.) 221, 7 Fed. Cas. No. 3,999.

England.— Graves *v.* Key, 3 B. & Ad. 313, 23 E. C. L. 143; Hubbard *v.* Jackson, 4 Bing. 390, 13 E. C. L. 555, 3 C. & P. 134, 14 E. C. L. 489, 6 L. J. C. P. O. S. 4, 1 M. & P. 11; Pollard *v.* Ogden, 2 E. & B. 459, 22 L. J. Q. B. 439, 1 Wkly. Rep. 387, 75 E. C. L. 459; Hull *v.* Pitfield, 1 Wils. C. P. 46.

See 7 Cent. Dig. tit. "Bills and Notes," § 1231.

Part payment by a third person, where it is expressly received in full satisfaction, constitutes payment. Welby *v.* Drake, 1 C. & P. 557, 28 Rev. Rep. 787, 12 E. C. L. 319.

Discharge of indorser.— The payment by a third person of the amount due on a note to the payee after maturity and protest at the request of the first indorser operates as a discharge of the second indorser. Krautman *v.* Friedman, 57 N. Y. Suppl. 84.

26. Swope *v.* Leffingwell, 72 Mo. 348. See also Lyon *v.* Maxwell, 18 L. T. Rep. N. S. 28, 16 Wkly. Rep. 437, holding that the payment of a bill by a stranger may operate as a purchase, although not so understood at the time by the holder, who supposed it to be made on behalf of the accepter. *Compare* Farmers' L. & T. Co. *v.* Iowa Water Co., 78 Fed. 881.

27. Bailey *v.* Malvin, 53 Iowa 371, 5 N. W. 515; Eastman *v.* Plumer, 32 N. H. 238.

Where a borrowed note is taken up with funds furnished by the lender of the note it is held not to discharge another note held with it as collateral. Smith *v.* Johnson, 2 Cranch C. C. (U. S.) 645, 22 Fed. Cas. No. 13,067.

28. Moran *v.* Abbey, 63 Cal. 56; Johnson *v.* Glover, 121 Ill. 283, 12 N. E. 257. See also Coykendall *v.* Constable, 19 N. Y. Wkly. Dig. 169.

29. Desha *v.* Stewart, 6 Ala. 852; Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567.

30. *California.*— Pratalongo *v.* Larco, 47 Cal. 378.

Kentucky.— Gazzam *v.* Armstrong, 3 Dana (Ky.) 554.

his request, may bring an action against the drawer as a purchaser for value.[31] So if a bill is paid for the honor of an accepter he or his estate will be liable to the party paying, even though there has been no formal protest of the bill or its payment *supra protest*.[32] Where a bill has been paid *supra protest* by the holder for the honor of the drawer, the former may at once and before payment surrender it to the drawer so as to confer upon him all the rights of the holder.[33]

13. Right to Reissue Paper.[34] A bill or note may be negotiated after it has been paid, if no person would thereby be made liable on it who would otherwise be discharged.[35] Thus a surety may reissue a note as often as he takes it up.[36] Again where an indorser takes up a note the transaction is in effect a repurchase and not a payment, and he is reinvested, with all his original rights and placed, in regard to the parties on the note prior to himself, in the same situation in which he was before;[37] and where a bill is paid and taken up at matu-

Louisiana.— Leake *v.* Burgess, 13 La. Ann. 156.

Massachusetts.— Greene *v.* Goddard, 9 Metc. (Mass.) 212; Grosvenor *v.* Stone, 8 Pick. (Mass.) 79.

Ohio.— Wood *v.* Pugh, 7 Ohio, Pt. II, 156.

Pennsylvania.— Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567.

South Carolina.— Mitchell *v.* Byrne, 6 Rich. (S. C.) 171.

Tennessee.— Bachus *v.* Richmond, 5 Yerg. (Tenn.) 109.

United States.— Konig *v.* Bayard, 1 Pet. (U. S.) 250, 7 L. ed. 132.

England.— Mertens *v.* Winnington, 1 Esp. 113.

See 7 Cent. Dig. tit. "Bills and Notes," § 1232.

31. Wood *v.* Pugh, 7 Ohio, Pt. II, 156; Konig *v.* Bayard, 1 Pet. (U. S.) 250, 7 L. ed. 132; *In re* Overend, L. R. 6 Eq. 344, 18 L. T. Rep. N. S. 230, 16 Wkly. Rep. 560; Goodall *v.* Polhill, 1 C. B. 233, 9 Jur. 554, 14 L. J. C. P. 146, 50 E. C. L. 233; Mertens *v.* Winnington, 1 Esp. 113.

A payment without the indorser's request, for his honor, by a stranger, confers no rights upon the latter as against prior parties. Smith *v.* Sawyer, 55 Me. 139, 92 Am. Dec. 576. So one who has paid a bill *supra protest* for the honor of the indorser cannot recover from the latter unless he has given reasonable notice that he has made such payment to his creditor. Wood *v.* Pugh, 7 Ohio, Pt. II, 156. See also Gazzam *v.* Armstrong, 3 Dana (Ky.) 554; Grosvenor *v.* Stone, 8 Pick. (Mass.) 79.

32. *Ex p.* Wyld, 2 De G. F. & J. 642, 7 Jur. N. S. 294, 30 L. J. Bankr. 10, 3 L. T. Rep. N. S. 934, 9 Wkly. Rep. 421, 63 Eng. Ch. 500.

33. Mitchell *v.* Byrne, 6 Rich. (S. C.) 171.

Where a bill is taken up at maturity by a third person for the honor of the drawer, and at his request, the accommodation accepter is discharged. McDowell *v.* Cook, 6 Sm. & M. (Miss.) 420, 45 Am. Dec. 289.

34. Transfer after payment generally see *supra*, VI, B, 1, b, (III).

35. *Maine.*— Eaton *v.* McKown, 34 Me. 510; Warren *v.* Gilman, 15 Me. 70; Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62.

Massachusetts.—Gardner *v.* Maynard, 7 Allen (Mass.) 456, 83 Am. Dec. 699; Guild *v.* Eager, 17 Mass. 615.

New Hampshire.— Cochran *v.* Wheeler, 7 N. H. 202, 26 Am. Dec. 732.

New York.— Havens *v.* Huntington, 1 Cow. (N. Y.) 387.

North Carolina.— Price *v.* Sharp, 24 N. C. 417.

England.— Hubbard *v.* Jackson, 4 Bing. 390, 13 E. C. L. 555, 3 C. & P. 134, 14 E. C. L. 489, 6 L. J. C. P. O. S. 4, 1 M. & P. 11; Callow *v.* Lawrence, 3 M. & S. 95, 15 Rev. Rep. 423; Gomezserra *v.* Berkley, 1 Wils. C. P. 46.

The maker of a note, after being discharged in bankruptcy and being no longer legally liable thereon, cannot purchase the note and enforce it against his sureties. Mattix *v.* Leach, 16 Ind. App. 112, 43 N. E. 969.

Where the maker has been discharged by a surrender to the payee of the original consideration the payee only will be liable upon the reissue of the note. Kelly *v.* Staed, 136 Mo. 430, 37 S. W. 1110, 58 Am. St. Rep. 648; Howell *v.* McCracken, 87 N. C. 399.

36. Wilkerson *v.* Daniels, 1 Greene (Iowa) 179. *Compare* Hopkins *v.* Farwell, 32 N. H. 425; Davis *v.* Stevens, 10 N. H. 186.

37. *Alabama.*— Kirksey *v.* Bates, 1 Ala. 303.

Connecticut.— French *v.* Jarvis, 29 Conn. 347.

Maine.— Woodman *v.* Boothby, 66 Me. 389; Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62.

Massachusetts.— Ward *v.* Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387; Eaton *v.* Carey, 10 Pick. (Mass.) 211; Guild *v.* Eager, 17 Mass. 615; Emerson *v.* Cutts, 12 Mass. 78.

Michigan.— Stevens *v.* Hannan, 88 Mich. 13, 49 N. W. 874.

New Hampshire.— Hopkins *v.* Farwell, 32 N. H. 425; Davis *v.* Stevens, 10 N. H. 186.

New York.— Kelly *v.* Burroughs, 102 N. Y. 93, 6 N. E. 109; Havens *v.* Huntington, 1 Cow. (N. Y.) 387.

Pennsylvania.— Ward *v.* Tyler, 52 Pa. St. 393.

Virginia.— Davis *v.* Miller, 14 Gratt. (Va.) 1.

United States.—McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162.

rity by an indorser, it may be put into circulation by him, and the accepter remains liable to his indorsee.[38] Where an accepter discounts and reissues a bill of exchange before maturity it does not operate as a payment.[39] So where payment is made by a drawer of a bill, it is not extinguished as against an accepter for valuable consideration, but he will be liable to a subsequent indorsee as he was to the drawer.[40] A demand note paid by the maker at maturity cannot be reissued by him so as to bind an indorser at the suit of a subsequent *bona fide* holder.[41]

C. To Whom Payment Should Be Made — 1. In General. Payment of a bill or note should be made to the rightful holder or to his authorized agent,[42] and is valid as against other parties only when made in good faith and in ignorance of facts which impair the holder's title.[43] Payment to a person who is not in

England.— Woodward *v.* Pell, L. R. 4 Q. B. 55, 9 B. & S. 994, 38 L. J. Q. B. 30, 19 L. T. Rep. N. S. 557, 17 Wkly. Rep. 117; Hubbard *v.* Jackson, 4 Bing. 390, 13 E. C. L. 555, 3 C. & P. 134, 14 E. C. L. 489, 6 L. J. C. P. O. S. 4, 1 M. & P. 11; Gomezserra *v.* Berkley, 1 Wils. C. P. 46.

An accommodation maker is not liable where an indorser takes up a note at maturity and afterward reissues it. Blenn *v.* Lyford, 70 Me. 149; Gardner *v.* Maynard, 7 Allen (Mass.) 456, 83 Am. Dec. 699; Bartrum *v.* Caddy, 9 A. & E. 275, 8 L. J. Q. B. 31, 1 P. & D. 207, 1 W. W. & H. 724, 36 E. C. L. 160; Parr *v.* Jewell, 16 C. B. 684, 81 E. C. L. 684; Beck *v.* Robley, 1 H. Bl. 89, note *a*; Pyper *v.* McKay, 16 U. C. C. P. 67.

One who indorses a note before its delivery to the payee and pays the same at maturity cannot reissue so as to render the maker liable. Pray *v.* Maine, 7 Cush. (Mass.) 253.

A personal representative of an indorser can only take up a bill or note as such representative and not as an individual purchaser. Burton *v.* Slaughter, 26 Gratt. (Va.) 914.

38. Havens *v.* Huntington, 1 Cow. (N. Y.) 387; Davis *v.* Miller, 14 Gratt. (Va.) 1; Woodward *v.* Pell, L. R. 4 Q. B. 55, 9 B. & S. 994, 38 L. J. Q. B. 30, 19 L. T. Rep. N. S. 557, 17 Wkly. Rep. 117; Hubbard *v.* Jackson, 4 Bing. 390, 13 E. C. L. 555, 3 C. & P. 134, 14 E. C. L. 489, 6 L. J. C. P. O. S. 4, 1 M. & P. 11.

A subsequent indorser cannot be made liable by a subsequent negotiation of a note. West Boston Sav. Bank *v.* Thompson, 124 Mass. 506. See also Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62; Guild *v.* Eager, 17 Mass. 615.

39. Rogers *v.* Gallagher, 49 Ill. 182, 95 Am. Dec. 583; Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567; Burbridge *v.* Manners, 3 Campb. 193, 13 Rev. Rep. 789; Morley *v.* Culverwell, 1 Hurl. & W. 13, 4 Jur. 1163, 10 L. J. Exch. 35, 7 M. & W. 174; Attenborough *v.* Mackenzie, 36 Eng. L. & Eq. 562.

The negotiability of a bill is not destroyed by reason of its coming into the possession of the accepter as his property before maturity. Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294.

Where a bill of exchange is put into circulation by the accepter after it has come to his hands he admits it to be a subsisting bill, and in an action against him he will not be permitted to allege that it was paid before that time. Hinton *v.* Columbus Bank, 9 Port. (Ala.) 463.

40. Hubbard *v.* Jackson, 4 Bing. 390, 13 E. C. L. 555, 3 C. & P. 134, 14 E. C. L. 489, 6 L. J. C. P. O. S. 4, 1 M. & P. 11; Jones *v.* Broadhurst, 9 C. B. 173, 67 E. C. L. 173; Callow *v.* Lawrence, 3 M. & S. 95, 15 Rev. Rep. 423.

41. Bartrum *v.* Caddy, 9 A. & E. 275, 8 L. J. Q. B. 31, 1 P. & D. 207, 1 W. W. & H. 724, 36 E. C. L. 160. See also Bishop *v.* Buckeye Pub. Co., 57 Minn. 219, 58 N. W. 872.

42. *Colorado.*— Stuart *v.* Asher, 15 Colo. App. 403, 62 Pac. 1051.

Indiana.— Woodward *v.* Elliott, 13 Ind. 516.

Kansas.— Walter *v.* Logan, 63 Kan. 193, 65 Pac. 225.

Mississippi.— Enochs *v.* Therrell, 61 Miss. 178.

Missouri.— White *v.* Kehlor, 85 Mo. App. 557.

Nebraska.— Chicago, etc., R. Co. *v.* Burns, 61 Nebr. 793, 86 N. W. 483.

North Carolina.— Edwards *v.* Parks, 60 N. C. 598.

North Dakota.— Drinkall *v.* Movius State Bank, (N. D. 1901) 88 N. W. 724.

England.— Becke *v.* Smith, 2 M. & W. 191.

See 7 Cent. Dig. tit. "Bills and Notes," § 1233.

43. University Bank *v.* Tuck, 101 Ga. 104, 28 S. E. 168; Richards *v.* Waller, 49 Nebr. 639, 68 N. W. 1053; South Branch Lumber Co. *v.* Littlejohn, 31 Nebr. 606, 48 N. W. 476.

Payment through negligence to one who is neither the rightful holder of the paper nor a *bona fide* purchaser before maturity, after notice of loss or theft of the paper, is not sufficient to discharge the maker from his liability to the real owner. Bainbridge *v.* Louisville, 83 Ky. 285, 4 Am. St. Rep. 153; Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297; Coffman *v.* Kentucky Bank, 41 Miss. 212, 90 Am. Dec. 371; Lovell *v.* Martin, 4 Taunt. 799, 14 Rev. Rep. 668.

Payment with knowledge that the holder has no right to receive payment is voluntary and does not discharge the note. Netterville

possession of the instrument is at the risk of the payer;[44] but payment to one who is the legal owner, although not the actual holder, is sufficient.[45] Payment by consent of the actual holder to a third person is sufficient.[46]

2. Agent of Holder — a. In General. Payment of a bill or note may be rightly made to a properly authorized agent of the owner;[47] but payment to one

v. Stevens, 2 How. (Miss.) 642. So payment by the maker to an unknown holder or stranger, who has no right to collect it, either as agent in fact or as a *bona fide* owner, in the face of a special indorsement for collection to a bank or other person, is made at the risk of the payer, as the possession with such an indorsement is notice to him that none but the special indorsee or his agent is authorized either to present the note or receive the money. Barnett *v.* Ringgold, 80 Ky. 289.

Payment may be rightfully made by the maker of a note to one holding the same where the former acts in good faith and has no reason to suspect that the latter is not the rightful owner. Vinson *v.* Vives, 24 La. Ann. 336; Stevens *v.* Hill, 29 Me. 133; Greve *v.* Schweitzer, 36 Wis. 554.

44. *Georgia.*— Holland *v.* Van Beil, 89 Ga. 223, 15 S. E. 302; Paris *v.* Moe, 60 Ga. 90; Howard *v.* Rice, 54 Ga. 52.

Illinois.— Stiger *v.* Bent, 111 Ill. 328; McClelland *v.* Bartlett, 3 Ill. App. 481.

Iowa.— Draper *v.* Rice, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. Rep. 88.

Kansas.— Fowle *v.* Outcalt, 64 Kan. 352, 67 Pac. 889.

Louisiana.— Tew *v.* Labiche, 4 La. Ann. 526; Welsh *v.* Brown, 10 Mart. (La.) 310.

Massachusetts.— Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231.

Missouri.— Upton *v.* Jameson, 67 Mo. 234.

Nebraska.—Garnett *v.* Myers, (Nebr. 1902) 91 N. W. 400; Lay *v.* Honey, (Nebr. 1902) 89 N. W. 998; Campbell *v.* O'Connor, 55 Nebr. 638, 76 N. W. 167; South Branch Lumber Co. *v.* Littlejohn, 31 Nebr. 606, 48 N. W. 476.

New York.— Dunn *v.* Hornbeck, 72 N. Y. 80; Scranton *v.* Clark, 39 Barb. (N. Y.) 273 [*affirmed* in 39 N. Y. 220, 100 Am. Dec. 430].

North Dakota.— Winona Second Nat. Bank *v.* Spottswood, 10 N. D. 114, 86 N. W. 359; Corey *v.* Hunter, 10 N. D. 5, 84 N. W. 570.

Oregon.— Swegle *v.* Wells, 7 Oreg. 222.

United States.— Exchange Nat. Bank *v.* Johnson, 30 Fed. 588.

See 7 Cent. Dig. tit. "Bills and Notes," § 1239.

If the drawer of a bill has notice of the fact that it has been transferred by the discounting bank to another for collection and that the holder has a lien thereon for advances before maturity, and makes payment thereof to the discounting bank, the payment is wrongfully made. Williams *v.* Jones, 77 Ala. 294.

Ostensible agent not having possession of paper.—Where a person who has previously acted as agent of the holder of a note, with apparent authority to receive payment, continues so to act with the knowledge of the principal, the principal will be estopped by his negligence in not repudiating the agency to deny the same, although the ostensible agent may not have possession of the note at the time of payment. Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138. See also Fowle *v.* Outcalt, 64 Kan. 352, 67 Pac. 889. And see as to payment to an agent or ostensible agent, *infra*, XI, C, 2.

45. Wetzstein *v.* Joy, 13 Mont. 444, 34 Pac. 876.

46. Groves *v.* Brown, 11 Mass. 334; Matter of Baker, 72 N. Y. App. Div. 211, 76 N. Y. Suppl. 61.

47. *Georgia.*— Johnson *v.* Hall, 5 Ga. 384.

Illinois.— Padfield *v.* Green, 85 Ill. 529.

Kentucky.— Ely *v.* Harvey, 6 Bush (Ky.) 620.

Louisiana.— Baker *v.* Elstner, 24 La. Ann. 464.

Maine.— Patten *v.* Fullerton, 27 Me. 58.

Missouri.— Bonner *v.* Lisenby, 86 Mo. App. 666.

Nebraska.— Boyd *v.* Pape, (Nebr. 1902) 90 N. W. 646; Union Stock Yards Nat. Bank *v.* Haskell, (Nebr. 1902) 90 N. W. 233; Pochin *v.* Knoebel, 63 Nebr. 768, 89 N. W. 264; Cheshire Provident Inst. *v.* Feusner, 63 Nebr. 682, 88 N. W. 849; Stuart *v.* Stonebraker, 63 Nebr. 554, 88 N. W. 653.

New York.— Bliss *v.* Cutter, 19 Barb. (N. Y.) 9; Filley *v.* Gilman, 34 N. Y. Super. Ct. 339.

Pennsylvania.— Devereux *v.* Philadelphia Bank, 1 Phila. (Pa.) 477, 11 Leg. Int. (Pa.) 38.

South Dakota.— Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687.

Tennessee.— King *v.* Fleece, 7 Heisk. (Tenn.) 273; Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360.

Vermont.— Williams *v.* Baldwin, 7 Vt. 503.

Wisconsin.— Kasson *v.* Noltner, 43 Wis. 646.

England.—Coles *v.* Bell, 1 Campb. 478 note; Favenc *v.* Bennett, 11 East 36; Coore *v.* Callaway, 1 Esp. 115.

See, generally, Principal and Agent; and 7 Cent. Dig. tit. "Bills and Notes," § 1236.

Payment on authority of a letter to an agent is good. Shane *v.* Palmer, 43 Kan. 481, 23 Pac. 594.

The delivery of money for the payment of a note to an agent of the maker with instructions to pay such note does not constitute payment, but to have this effect it must appear either that the money was received by the payee or that the latter agreed to accept the same in the hands of the agent as payment. Sledge *v.* Tubb, 11 Ala. 383; Security Co. *v.* Ball, 107 Ind. 165, 1 N. E. 567; Sutherland *v.* Ypsilanti First Nat. Bank, 31

assuming to act as agent, who has neither actual authority to collect nor possession of the note with the holder's consent, is at the risk of the payer,[48] unless the holder is estopped by having otherwise clothed such person with apparent authority.[49] An agent cannot without special authority receive payment of a bill or note in anything except coin or legal tender paper.[50] Thus an agent cannot, unless the power is expressly conferred, accept in payment a note,[51] a bill of an insolvent drawer,[52] a certificate of deposit,[53] a county warrant,[54] Confederate currency,[55]

Mich. 230; Hannah *v.* Long, (Miss. 1893) 14 So. 530.

48. *Connecticut.*— Bristol Knife Co. *v.* Hartford First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

Illinois.— Fortune *v.* Stockton, 182 Ill. 454, 55 N. E. 367.

Missouri.— White *v.* Kehlor, 85 Mo. App. 557.

Nebraska.— Walsh *v.* Peterson, 59 Nebr. 645, 81 N. W. 853.

New Hampshire.— Davis *v.* Lane, 11 N. H. 512.

New York.— Sims *v.* U. S. Trust Co., 103 N. Y. 472, 9 N. E. 605; Doubleday *v.* Kress, 50 N. Y. 410, 10 Am. Rep. 502 [*reversing* 60 Barb. (N. Y.) 181].

Tennessee.— Jackson *v.* McMinnville Nat. Bank, 92 Tenn. 154, 20 S. W. 820, 36 Am. St. Rep. 81, 18 L. R. A. 663.

Wisconsin.— Winkelmann *v.* Brickert, 102 Wis. 50, 78 N. W. 164.

United States.— Mutual Ben. L. Ins. Co. *v.* Miles, 81 Fed. 32.

England.— Featherstone *v.* Hunt, 1 B. & C. 113, 2 D. & R. 233, 1 L. J. K. B. O. S. 49, 8 E. C. L. 49.

See, generally, PRINCIPAL AND AGENT; and 7 Cent. Dig. tit. "Bills and Notes," § 1236.

The heirs of a payee will not be bound by a payment of the note after its maturity and the death of the payee, on the order of a person who is not shown to have authority to act in the premises. Renfro *v.* Waco, (Tex. Civ. App. 1896) 33 S. W. 766.

One of two joint makers, the makers being partners, cannot pay the money due the payee to the other partner and discharge himself from liability thereon, on the representation by the other partner that he is agent for the payee. Nelson *v.* Tumlin, 74 Ga. 171.

Where a wife transfers a note without any authority from her husband and while he is insensible on his death-bed, no title will pass to the transferee and payment to him will not discharge the note. Davis *v.* Lane, 11 N. H. 512.

49. Implied and ostensible authority see *infra*, XI, C, 2, b.

50. *California.*— Mudgett *v.* Day, 12 Cal. 139.

Georgia.— Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. 469.

Illinois.— Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265; Lochenmeyer *v.* Fogarty, 112 Ill. 572.

Iowa.— Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351; Graydon *v.* Patterson, 13 Iowa 256, 81 Am. Dec. 432. *Compare* British, etc., Mortg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319.

Kentucky.— Woodruff *v.* American Road Mach. Co., 23 Ky. L. Rep. 1551, 65 S. W. 600.

Nebraska.— Gilbert *v.* Garber, 62 Nebr. 464, 87 N. W. 179; Moore *v.* Pollock, 50 Nebr. 900, 70 N. W. 541.

New York.— Whipple *v.* Walker, 2 Thomps. & C. (N. Y.) 456.

Pennsylvania.— Crane *v.* Fourth St. Nat. Bank, 173 Pa. St. 566, 34 Atl. 296.

United States.— Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818; Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207; Essex County Nat. Bank *v.* Montreal Bank, 7 Biss. (U. S.) 193, 8 Fed. Cas. No. 4,532, 5 Am. L. Rec. 49, 15 Am. L. Reg. N. S. 418, 11 Bankr. Mag. (3d S.) 142, 3 Month. Jur. 93, 1 L. & Eq. Rep. 617; Levi *v.* Missouri Nat. Bank, 5 Dill. (U. S.) 104, 15 Fed. Cas. No. 8,289, 7 Am. L. Rec. 283, 7 Centr. L. J. 249; German-American Bank *v.* Missouri Third Nat. Bank, 10 Fed. Cas. No. 5,359, 18 Alb. L. J. 252, 11 Chic. Leg. N. 7, 3 Cinc. L. Bul. 794, 24 Int. Rev. Rec. 316, 6 Reporter 484, 7 N. Y. Wkly. Dig. 279, 2 Tex. L. J. 150.

See also BANKS AND BANKING, 5 Cyc. 505, note 74 *et seq.*

51. *Georgia.*— Central Georgia Bank *v.* Cleveland Nat. Bank, 59 Ga. 667.

Illinois.— Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265.

Indiana.— Robinson *v.* Anderson, 106 Ind. 152, 6 N. E. 12; Jones *v.* Ransom, 3 Ind. 327.

Iowa.— Drain *v.* Doggett, 41 Iowa 682.

New York.— De Mets *v.* Dagron, 53 N. Y. 635; Allen *v.* Brown, 51 Barb. (N. Y.) 86.

Texas.— Cundiff *v.* McLean, 40 Tex. 391; Scott *v.* Atchison, 38 Tex. 384; Browning *v.* Sledge, 38 Tex. 192.

West Virginia.— Spence *v.* Rose, 28 W. Va. 333.

United States.— Moore *v.* Newbury, 6 McLean (U. S.) 472, 17 Fed. Cas. No. 9,772, Newb. Adm. 49, 18 Law Rep. 50.

England.— Popley *v.* Ashly, 6 Mod. 147; Scott *v.* Surman, Willes 400.

52. Goldsborough *v.* Turner, 67 N. C. 403.

53. Essex County Nat. Bank *v.* Montreal Bank, 7 Biss. (U. S.) 193, 8 Fed. Cas. No. 4,532, 5 Am. L. Rec. 49, 15 Am. L. Reg. N. S. 418, 11 Bankr. Mag. (3d S.) 142, 1 L. & Eq. Rep. 617, 3 Month. Jur. 93.

54. Herriman *v.* Shomon, 24 Kan. 387, 36 Am. Rep. 261.

55. *Louisiana.*— Waterhouse *v.* Citizens' Bank, 25 La. Ann. 77.

Mississippi.— Mangum *v.* Ball, 43 Miss. 288, 5 Am. Rep. 488.

Tennessee.— King *v.* Fleece, 7 Heisk. (Tenn.) 273.

or goods.[56] Payment by a check, however, where it is made in accordance with reasonable and established usage, is good.[57] Authority of an agent to receive payment may be revoked by the principal, and after notice of revocation payment cannot properly be made to such agent.[58]

b. Implied and Ostensible Authority. Express authority is not necessary to render payment to a person as agent effectual, but authority to receive payment may be implied from facts and circumstances existing prior to or in connection with the payment, and the holder of paper may be estopped to deny the authority of one whom he has clothed, intentionally or through negligence, with ostensible authority.[59] Authority to receive payment will not be implied, however, from

Texas.— Rodgers *v.* Bass, 46 Tex. 505. *Compare* Reed *v.* Nelson, 33 Tex. 471.

Virginia.—Alley *v.* Rogers, 19 Gratt. (Va.) 366.

United States.— Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769.

56. Howard *v.* Chapman, 4 C. & P. 508, 19 E. C. L. 624.

Where a bank president has general authority to accept property other than cash in settlement of a bill or note his doing so in a particular case will bind the bank. Merchants' Nat. Bank *v.* Camp, 110 Ga. 780, 36 S. E. 201.

57. Welge *v.* Batty, 11 Ill. App. 461; Jefferson County Sav. Bank *v.* Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338; Russell *v.* Hankey, 6 T. R. 12. But see Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

Where there is no authority or uniform custom to receive a check in payment of such an obligation an agent who so receives one in payment of a draft may be liable where the check is not paid. Whitney *v.* Esson, 99 Mass. 308, 96 Am. Dec. 762; Meadville First Nat. Bank *v.* New York City Fourth Nat. Bank, 89 N. Y. 412; Nunnemaker *v.* Lanier, 48 Barb. (N. Y.) 234; Jefferson County Sav. Bank *v.* Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338; Walker *v.* Walker, 5 Heisk. (Tenn.) 425.

Where an agent accepts a check in payment of a bill or note, acceptance of the same by the principal, who transmits it for collection, will amount to a ratification of his act and the payment will be good. Rathbun *v.* Citizens' Steamboat Co., 76 N. Y. 376, 32 Am. Rep. 321.

58. Lochenmeyer *v.* Fogarty, 112 Ill. 572; Lee *v.* Zagury, 1 Moore C. P. 556, 8 Taunt. 114, 4 E. C. L. 66.

A payment without notice of any revocation of the agent's authority will be good. Howe Mach. Co. *v.* Simler, 59 Ind. 307.

A mortgagor whose note and mortgage a bank holds for collection has no right to presume that its agency still continues, where he knows that such instruments are no longer in its possession. Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331. But see Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

59. *California.*— Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

Kansas.— Fowle *v.* Outcalt, 64 Kan. 352, 67 Pac. 889.

Nebraska.— Thomson *v.* Shelton, 49 Nebr. 644, 68 N. W. 1055.

South Dakota.— Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687.

Vermont.— Enright *v.* Beaumond, 68 Vt. 249, 35 Atl. 57.

United States.— Exchange Nat. Bank *v.* Johnson, 30 Fed. 588.

England.— Feild *v.* Carr, 5 Bing. 13, 6 L. J. C. P. O. S. 203, 2 M. & P. 46, 15 E. C. L. 447.

See, generally, PRINCIPAL AND AGENT.

Illustrations.— Payment to a person apparently in charge of the counting-house of the payee and at such place is sufficient. Corfield *v.* Parsons, 1 Cr. & M. 730, 2 L. J. Exch. 262, 3 Tyrw. 806; Barrett *v.* Deere, 2 M. & M. 200, 22 E. C. L. 507. *Compare* Ulrich *v.* McCormick, 66 Ind. 243. The same is true of payment to a wife possessing a general authority as agent to lend and receive money for her husband, and who is in possession of the paper and surrenders it (White *v.* Genobles, 12 Rich. (S. C.) 311) and of payment to an attorney having possession for the purpose of a suit, as such possession for that purpose implies a power to collect (McIniffe *v.* Wheelock, 1 Gray (Mass.) 600; Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360). Generally, authority to collect may be implied from possession of an instrument payable to bearer (Cone *v.* Brown, 15 Rich. (S. C.) 262), or even under some circumstances of a note payable to a particular person and not indorsed by him (Paulman *v.* Claycomb, 75 Ind. 64). *Compare infra,* XI, C, 12. The authority, however, which may be implied from the possession of an instrument by an agent ceases with his possession of the same. Dwight *v.* Lenz, 75 Minn. 78, 77 N. W. 546.

Apparent agency without possession of paper.— Where the holder of a note permits one who has previously acted as his agent to continue so to act, with apparent authority to receive payment of notes, and the maker of a note pays the same to him in reliance on his apparent authority, the holder will be estopped to deny such authority; and it can make no difference in such a case that the agent has not possession of the note when he receives the payment. Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138. See also Fowle *v.* Outcalt, 64 Kan. 352, 67 Pac. 889; Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687.

A statutory provision that a person paying a negotiable instrument may require that

the mere fact that an agent has authority to sell goods and take a note in payment thereof in the principal's name;[60] and authority to collect interest confers no authority to collect the principal.[61]

e. Ratification. The owner may by subsequent ratification of payment to one who had no authority to receive the same render it sufficient and binding.[62]

3. Attaching Creditor of Holder. Payment to an attaching creditor of the payee may in some cases be rightfully made, so as to constitute a defense in an action by an indorsee of the payee.[63]

4. Designated Payee. Where a bill or note is payable to a certain designated person and there are no words of transfer payment may and should be to such person.[64]

5. Drawer. Payment by the accepter to the drawer will not operate to discharge a bill.[65]

6. Indorsee or Assignee. An indorsement or assignment generally transfers to the indorsee or assignee the right of the indorser or assignor to receive payment, and payment may be rightfully made to an indorsee or assignee, even though the transfer to him has been rescinded, unless the maker has notice of

the same be surrendered as a condition precedent to payment will not render a payment to one who has the ostensible authority to receive the same ineffectual by reason of the fact that no demand was made for the surrender of the instrument. Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687.

Payment in pursuance of an order directed to the payer is sufficient, although the agent has not the possession of the note. Early *v.* Patterson, 4 Blackf. (Ind.) 449.

60. *Georgia.*— Holland *v.* Van Beil, 89 Ga. 223, 15 S. E. 302.

Iowa.— Draper *v.* Rice, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. Rep. 88.

Nebraska.— Seiberling *v.* Demaree, 27 Nebr. 854, 44 N. W. 46.

Oregon.— Rhodes *v.* Belchee, 36 Oreg. 141, 59 Pac. 117, 1119.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

See, generally, Principal and Agent.

Authority to lend money for another does not carry with it authority to collect a note taken for money loaned. Hannon *v.* Sullivan, 3 Mo. App. 583.

61. *Iowa.*— Sax *v.* Drake, 69 Iowa 760, 28 N. W. 423.

Minnesota.— Trull *v.* Hammond, 71 Minn. 172, 73 N. W. 642.

Nebraska.— Connecticut Trust, etc., Co. *v.* Trumbo, (Nebr. 1902) 90 N. W. 216; Gilbert *v.* Garber, 62 Nebr. 464, 87 N. W. 179; Campbell *v.* O'Connor, 55 Nebr. 638, 76 N. W. 167; Richards *v.* Waller, 49 Nebr. 639, 68 N. W. 1053.

New York.— Doubleday *v.* Kress, 50 N. Y. 410, 10 Am. Rep. 502.

North Dakota.— Corey *v.* Hunter, 10 N. D. 5, 84 N. W. 570.

Washington.— Western Security Co. *v.* Douglass, 14 Wash. 215, 44 Pac. 257.

United States.— Ilgenfritz *v.* Newark Mut. Ben. L. Ins. Co., 81 Fed. 27.

See, generally, Principal and Agent.

62. *California.*—Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

Georgia.— Murray *v.* Walker, 44 Ga. 58.

Illinois.—Shaffner *v.* Edgerton, 13 Ill. App. 132.

Iowa.— Sax *v.* Drake, 69 Iowa 760, 28 N. W. 423.

Mississippi.— Baughn *v.* Shackleford, 48 Miss. 255.

New York.— Johnson *v.* Donnell, 90 N. Y. 1; Wardrop *v.* Dunlop, 1 Hun (N. Y.) 325.

England.— Baker *v.* Birch, 3 Campb. 107, 13 Rev. Rep. 767.

See, generally, Principal and Agent.

Where payment to a person as agent is ratified by the principal it will be sufficient, although the money does not come into the hands of the principal. Keene Five-Cents Sav. Bank *v.* Archer, 109 Iowa 419, 80 N. W. 505.

63. Somers *v.* Losey, 48 Mich. 294, 12 N. W. 188; Weinwick *v.* Bender, 33 Mo. 80; Clark *v.* Yale, 12 Wend. (N. Y.) 470. See also Prescott *v.* Hull, 17 Johns. (N. Y.) 284.

The note should be in payee's possession at the time of the attachment. Denham *v.* Pogue, 20 La. Ann. 195.

After transfer.— Payment to an attaching creditor of the payee in a proceeding which attacks the good faith of a transfer by him without making the holder a party will not bind the latter, although he had notice of the proceeding and of the payment made in it. Newman *v.* Manning, 79 Ind. 218; Holland *v.* Smit, 11 Mo. App. 6.

Payment to a sheriff who has an execution in his hands against the owner and holder of the note may have the same effect as payment to the holder directly. Dunbar *v.* Harnesberger, 12 Wis. 373.

64. Draper *v.* Rice, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. Rep. 88; Sigourney *v.* Lloyd, 8 B. & C. 622, 7 L. J. K. B. O. S. 73, 3 M. & R. 58, 32 Rev. Rep. 504, 15 E. C. L. 308 [*affirmed* in 5 Bing. 525, 3 M. & P. 229, 3 Y. & J. 220, 30 Rev. Rep. 728, 15 E. C. L. 704].

65. Woodward *v.* Elliott, 13 Ind. 516.

this fact;[66] but where an instrument is payable to several persons who are not partners an indorsee holding under an indorsement by one of such persons only is not entitled to receive payment;[67] and where an indorsement is void under a statute because made for a gambling consideration, to the knowledge of the maker or drawee, he is not discharged by a payment to the indorsee.[68]

7. JOINT PAYEE. Where a bill or note is payable to two or more persons jointly, payment may be made to either of them[69] or to the survivor;[70] and where a firm is designated as the payee payment may be made to either of the partners.[71]

8. PLEDGEE. Where a note has been pledged as collateral, payment may and should be made to the person who holds it as such;[72] and where a note is once pledged, and the pledgee has possession, payment to the pledgor without authority from the pledgee will not discharge or satisfy it as against the pledgee, even though the payment be made without notice or knowledge of the transfer.[73] As

66. Collier *v.* Hershey, 21 Ark. 482.

Assignment by separate instrument.— In Pease *v.* Warren, 29 Mich. 9, 18 Am. Rep. 58, it is held that a note secured by a mortgage may be paid to one who holds it without indorsement, but by a separate assignment of the note and mortgage.

Although an indorsement by a corporate payee is ultra vires, a payment by the maker to the indorsee thereunder is sufficient. Vanarsdall *v.* State, 65 Ind. 176.

One who accepts and pays a check expressly payable or indorsed to the order of a certain person must see to it at his peril that he pays according to the terms of the order and to the party named therein or to one holding it under genuine indorsement of such payee. Dodge *v.* National Exch. Bank, 30 Ohio St. 1.

Where a bill of exchange payable to order is indorsed as collateral security before maturity for a debt contracted at the time of the indorsement the indorsee is a *bona fide* holder for value and the bill will not be discharged by payment made to the indorser by the accepter without authority from the indorsee. State Sav. Assoc. *v.* Hunt, 17 Kan. 532.

67. Ryhiner *v.* Feickert, 92 Ill. 305, 34 Am. Rep. 130; Carvick *v.* Vickery, Dougl. (3d ed.) 653 note.

68. Commercial Nat. Bank *v.* Spaids, 8 Ill. App. 493.

69. *California.*— Delano *v.* Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201; Moulton *v.* Harris, 94 Cal. 420, 29 Pac. 706.

Georgia.— Wright *v.* Ware, 58 Ga. 150.

Massachusetts.— Bruce *v.* Bonney, 12 Gray (Mass.) 107, 71 Am. Dec. 739.

New Hampshire.—Frost *v.* Martin, 26 N. H. 422, 59 Am. Dec. 353.

New York.— Todd *v.* Crookshanks, 3 Johns. (N. Y.) 432.

See 7 Cent. Dig. tit. "Bills and Notes," § 1238.

70. Perry *v.* Perry, 98 Ky. 242, 17 Ky. L. Rep. 868, 32 S. W. 755; Allen *v.* Tate, 58 Miss. 585.

71. Bigelow *v.* Henniger, 33 Kan. 362, 6 Pac. 593; Craig *v.* Hulschizer, 34 N. J. L. 363; Stewart *v.* Lee, M. & M. 158, 22 E. C. L. 493; Duff *v.* East India Co., 15 Ves. Jr. 198. And see, generally, PARTNERSHIP.

Payment to a partner after dissolution of a firm will inure to the firm and is sufficient. See Gannett *v.* Cunningham, 34 Me. 56.

If a firm note is indorsed by the firm to one of the partners payment to another partner after notice of such indorsement is insufficient. Stevenson *v.* Woodhull, 19 Fed. 575.

72. Butts *v.* Whitney, 96 Ga. 445, 23 S. E. 397; Lapice *v.* Clifton, 17 La. 152; Huyler *v.* Dahoney, 48 Tex. 234; Ransom *v.* Alexander, 31 Tex. 443; Sawyer *v.* Cutting, 23 Vt. 486.

Although the debt secured by the transfer has been paid, the pledgee may recover on the note, such recovery being for the use of the obligor. Logan *v.* Cassell, 88 Pa. St. 288, 32 Am. Rep. 453.

Where the amount of the debt is paid by the maker to the pledgee while he holds the note as security, such payment will be a defense *pro tanto* against the payee on the retransfer to him. Jones *v.* Hawkins, 17 Ind. 550.

Where a note is left for collection, with directions to apply the proceeds to an existing debt, the right of the payee to collect the note is not impaired. Payne *v.* Flournoy, 29 Ark. 500.

73. *Georgia.*— University Bank *v.* Tuck, 96 Ga. 456, 23 S. E. 467.

Iowa.— City Bank *v.* Taylor, 60 Iowa 66, 14 N. W. 128.

Kansas.— Best *v.* Crall, 23 Kan. 482, 33 Am. Rep. 185; State Sav. Assoc. *v.* Hunt, 17 Kan. 532.

Maine.— Hunt *v.* Bessey, 96 Me. 429, 52 Atl. 905.

Maryland.— Hoffacker *v.* Manufacturers' Nat. Bank, (Md. 1892) 23 Atl. 579; Williams *v.* Baltimore Nat. Bank, 72 Md. 441, 20 Atl. 191.

Mississippi.—Fennell *v.* McGowan, 58 Miss. 261.

Nebraska.— Connecticut Trust, etc., Co. *v.* Trumbo, (Nebr. 1902) 90 N. W. 216.

New Hampshire.— Mead *v.* Leavitt, 59 N. H. 476.

New York.— Manhattan Co. *v.* Reynolds, 2 Hill (N. Y.) 140.

a general rule, however, the pledgee should be paid only the amount of his debt and in case of any balance it should be paid to the owner of the note.[74]

9. Trustee. Payment of a note which is made payable to one person in trust for, or for the use of, another should be made to the trustee.[75] So if a note is payable to a person as guardian, payment made to such person will extinguish the obligation, although he continues to remain in possession of the note.[76]

10. Forged Indorsement. Where an indorsement on a bill or note is forged, payment to one who holds thereunder will not generally be a defense against the lawful owner.[77] A banker who pays a draft or check upon himself pays it at his peril to any one but the payee or one who is able to trace his title back to the payee through genuine indorsements.[78] So where a note or bill is held by a bank

Tennessee.— Gosling *v.* Griffin, 85 Tenn. 737, 3 S. W. 642. See also Richardson *v.* Rice, 9 Baxt. (Tenn.) 290, 40 Am. Rep. 92.

Vermont.— Griswold *v.* Davis, 31 Vt. 390.

Virginia.—Davis *v.* Miller, 14 Gratt. (Va.) 1.

Compare Winona Second Nat. Bank *v.* Spottswood, 10 N. D. 114, 86 N. W. 359.

See, generally, Pledges.

If pledged after maturity payment prior thereto will be good as against the pledgee. Stockton Bank *v.* Jones, 65 Cal. 437, 4 Pac. 418.

Where transfer is as collateral for a usurious debt, payment by the maker to the assignor before notice of such transfer may be set up in defense by the former. Caswell *v.* Central R., etc., Co., 50 Ga. 70.

74. Wofford *v.* Ashcraft, 47 Miss. 641.

If after levy upon the pledgor's interest and notice of such levy payment is made by the maker to the pledgee he is not discharged as to the balance in excess of the debt for which it is pledged. Mower *v.* Stickney, 5 Minn. 397.

75. Thomassen *v.* Van Wyngaarden, 65 Iowa 687, 22 N. W. 927; Marchington *v.* Vernon, 1 B. & P. 101, note *b*; Smith *v.* Kendal, 1 Esp. 231, 6 T. R. 123; Cramlington *v.* Evans, 2 Vent. 307. But see Minell *v.* Reed, 26 Ala. 730, holding that, although a negotiable note secured by a trust deed provided for payment to the trustee named in the deed, payment to him will not, as against a *bona fide* holder, be a defense. *Compare* Goodfellow *v.* Stillwell, 73 Mo. 17.

Where a note is collected by the widow of the payee upon representation by her that she is entitled so to collect and the proceeds are appropriated by her to her own use she will be liable as trustee *de son tort* to the *bona fide* holder. Burton *v.* Archinard, (Tex. Civ. App. 1899) 49 S. W. 684.

76. Bradley *v.* Graves, 46 Ala. 277.

Note belonging to ward.— Where all the parties have acknowledged that notes are the property of a ward, and that the guardian has legal title to them as trustee, possession of them by a third party is not of itself sufficient to show his authority to receive payment so as to render payment to him a valid discharge of the makers. Tarpley *v.* McWhorter, 56 Ga. 410.

77. *California.*— Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131.

Kansas.— Rumsey *v.* Schmitz, 14 Kan. 542.

Massachusetts.— Belknap *v.* National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105.

New Hampshire.— Davis *v.* Lane, 8 N. H. 224.

Ohio.— Dodge *v.* National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648.

South Carolina.— Browne *v.* Depau, Harp. (S. C.) 251.

United States.— Hortsman *v.* Henshaw, 11 How. (U. S.) 177, 13 L. ed. 653.

England.— Johnson *v.* Windle, 3 Bing. N. Cas. 225, 2 Hodges 202, 6 L. J. C. P. 5, 3 Scott 608, 32 E. C. L. 112; Long *v.* Bailie, 2 Camph. 214 note; Mead *v.* Young, 4 T. R. 28, 2 Rev. Rep. 314.

See also Banks and Banking, 5 Cyc. 548, note 44; and 7 Cent. Dig. tit. "Bills and Notes," § 1235.

Owner may waive forgery and sue person receiving the money as paid to his use. Indiana Nat. Bank *v.* Holtsclaw, 98 Ind. 85. But see Hensel *v.* Chicago, etc., R. Co., 37 Minn. 87, 33 N. W. 329, holding that the maker could not sue in such case.

Where an accepter pays a bill by check and subsequently pays the check to one who finds it or holds it under indorsement the original bill will not be considered as paid. Thomson *v.* Bank of British North America, 82 N. Y. 1.

Payment to innocent purchaser.— An accepter who pays the bill on a forged indorsement to an innocent purchaser is still liable to the lawful owner. Jackson *v.* Commercial Bank, 2 Rob. (La.) 128, 38 Am. Dec. 204; Dick *v.* Leverich, 11 La. 573.

78. *Louisiana.*— Brown *v.* Mechanics', etc., Bank, 8 Rob. (La.) 143.

Massachusetts.— Winslow *v.* Everett Nat. Bank, 171 Mass. 534, 51 N. E. 16.

New Hampshire.— Star F. Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442.

New Jersey.— Harter *v.* Mechanics' Nat. Bank, 63 N. J. L. 578, 44 Atl. 715, 76 Am. St. Rep. 224.

New York.— Adler *v.* Broadway Bank, 30 Misc. (N. Y.) 382, 62 N. Y. Suppl. 402.

Rhode Island.— Tolman *v.* American Nat. Bank, 22 R. I. 462, 48 Atl. 480, 84 Am. St. Rep. 850, 52 L. R. A. 877.

See also Banks and Banking, 5 Cyc. 547; and 7 Cent. Dig. tit. "Bills and Notes," § 1235.

for collection under a forged indorsement, and the amount thereof is collected and paid over by the bank to its principal, it will be liable to the real owner for the same.[79]

11. NOTE PAYABLE AT PARTICULAR PLACE. Making a note payable at a particular place, as at a designated office or bank, does not make a person in charge thereof the agent of the holder of such note to receive payment, unless he has actual possession of the same.[80] A payment to a bank therefore of the amount of the note which is there payable, but which has not been left or presented there, is not a satisfaction thereof, for the bank in such case is the agent of the maker and not of the payee.[81]

12. NOTE PAYABLE TO BEARER OR ORDER OR INDORSED IN BLANK. Where a note is payable to bearer, its actual possession is *prima facie* evidence of the possessor's authority to receive payment[82] thereon and the note will be discharged by payment to him in good faith.[83] A similar rule prevails where a note is indorsed in

79. Laue *v.* Nuffer, 5 N. Y. Suppl. 421, 25 N. Y. St. 823. *Compare* Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229; Arnold *v.* Cheque Bank, 1 C. P. D. 578, 45 L. J. C. P. 562, 34 L. T. Rep. N. S. 729, 24 Wkly. Rep. 759.

80. *Indiana.*— Glatt *v.* Fortman, 120 Ind. 384, 22 N. E. 300.

Iowa.— Keene Five-Cents Sav. Bank *v.* Archer, 109 Iowa 419, 80 N. W. 505; Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351; Klindt *v.* Higgins, 95 Iowa 529, 64 N. W. 414; Callanan *v.* Williams, 71 Iowa 363, 32 N. W. 383; Albia First Nat. Bank *v.* Free, 67 Iowa 11, 24 N. W. 566.

Kentucky.— Caldwell *v.* Evans, 5 Bush (Ky.) 380, 96 Am. Dec. 358.

Louisiana.— Rowland *v.* Levy, 14 La. Ann. 223; Aguilar *v.* Bourgeois, 12 La. Ann. 122.

Michigan.— Pease *v.* Warren, 29 Mich. 9, 18 Am. Rep. 58.

Minnesota.— Dwight *v.* Lenz, 75 Minn. 78, 77 N. W. 546.

Nebraska.— Omaha First Nat. Bank *v.* Chilson, 45 Nebr. 257, 63 N. W. 362.

New York.— Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568.

North Dakota.— Corey *v.* Hunter, 10 N. D. 5, 84 N. W. 570; Stolzman *v.* Wyman, 8 N. D. 108, 77 N. W. 285.

Virginia.— Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

United States.— Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818.

See 7 Cent. Dig. tit. "Bills and Notes," § 1243.

If a person at the place designated has possession of the note payment to him will be good.

Illinois.— Scott *v.* Gilkey, 49 Ill. App. 116.

Iowa.— Lazier *v.* Horan, 55 Iowa 75, 7 N. W. 457, 39 Am. Rep. 167.

Maine.— Ingalls *v.* Fiske, 34 Me. 232.

Maryland.— Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

Wisconsin.— Osborne *v.* Baird, 45 Wis. 189, 30 Am. Rep. 710.

United States.— Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207.

See 7 Cent. Dig. tit. "Bills and Notes," § 1243.

81. *Minnesota.*— St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

Nebraska.— Omaha First Nat. Bank *v.* Chilson, 45 Nebr. 257, 63 N. W. 362.

New Jersey.— Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406.

New York.— Hill *v.* Place, 7 Rob. (N. Y.) 389, 5 Abb. Pr. N. S. (N. Y.) 18, 36 How. Pr. (N. Y.) 26.

United States.— Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207.

See 7 Cent. Dig. tit. "Bills and Notes," § 1243.

Where a note is payable at a particular bank if payment is made at a different place, to another person, who does not have possession of the note, and who is not shown to possess any authority to represent the holder and owner in the collection of the same, it will not be binding upon such holder. Hall *v.* Smith, 3 Kan. App. 685, 44 Pac. 908.

82. **As to possession as evidence of ownership** see *infra*, XIV, E [8 Cyc.].

83. *Georgia.*— Greer *v.* Woolfolk, 60 Ga. 623; Paris *v.* Moe, 60 Ga. 90.

Iowa.— Shelton *v.* Sherfey, 3 Greene (Iowa) 108. See also Stoddard *v.* Burton, 41 Iowa 582.

Kansas.— Chinberg *v.* Gale Sulky Harrow Mfg. Co., 38 Kan. 228, 16 Pac. 462.

Kentucky.— Barnett *v.* Ringgold, 80 Ky. 289.

Massachusetts.— Pettee *v.* Prout, 3 Gray (Mass.) 502, 63 Am. Dec. 778.

Minnesota.— Sweet *v.* Carver County Com'rs, 16 Minn. 106; Woodbury *v.* Larned, 5 Minn. 339.

Missouri.— Alexander *v.* Rollins, 84 Mo. 657.

New York.— Merritt *v.* Cole, 9 Hun (N. Y.) 98, 14 Hun (N. Y.) 324.

South Carolina.— Cone *v.* Brown, 15 Rich. (S. C.) 262.

Tennessee.— Gosling *v.* Griffin, 85 Tenn. 737, 3 S. W. 642.

Vermont.— Lamb *v.* Matthews, 41 Vt. 42.

Wisconsin.— Greve *v.* Schweitzer, 36 Wis. 554.

blank.[84] Where a note is payable to bearer payment by the maker to one who was a joint owner with the holder of property for which the note was given and the taking of his receipt does not discharge the note;[85] and where a note is payable to the order of a person payment to a person holding the same without indorsement, and who is not the owner or the agent of the owner, is insufficient.[86] If a bill or note is payable to a person or his order the accepter, drawee, or maker is bound to ascertain that the person presenting it is the one entitled to receive payment, and if he be deceived and make payment to one not entitled to receive it the real owner of the bill or note may recover its amount again from such accepter, drawee, or maker.[87]

13. Payment to Original Holder After Indorsement or Transfer. Payment to the payee should generally be made only before indorsement by him, and where the maker of a note pays the same to the payee after an indorsement by him before maturity, such payment will as a rule be unavailing as against the indorsee.[88] If a payment is made to the payee after notice of an assignment or

United States.— Long *v.* Thayer, 150 U. S. 520, 14 S. Ct. 189, 37 L. ed. 1167.

See 7 Cent. Dig. tit. "Bills and Notes," § 1237.

Payment to a fraudulent holder may be good. Alexander *v.* Rollins, 14 Mo. App. 109.

Payment to a thief or finder of such a note in actual possession has been held good. Smith *v.* Sheppard, Sel. Cas. Ch. 243.

Payment by the maker with knowledge that the "bearer" has no authority to receive payment is not good. Chappelear *v.* Martin, 45 Ohio St. 126, 12 N. E. 448.

84. *Illinois.*— Yates *v.* Valentine, 71 Ill. 643; Loomis *v.* Downs, 26 Ill. App. 257.

Kentucky.— Barnett *v.* Ringgold, 80 Ky. 289.

Louisiana.— Dorr *v.* Jouet, 20 La. Ann. 27; Davis *v.* Lusitanian Portuguese Benev. Assoc., 20 La. Ann. 24; Hunt *v.* Stone, 19 La. Ann. 526.

New Hampshire.— Ames *v.* Drew, 31 N. H. 475; Howland *v.* Spencer, 14 N. H. 580.

Vermont.— Ellsworth *v.* Fogg, 35 Vt. 355.

England.— Owen *v.* Barrow, 1 B. & P. N. R. 101.

See 7 Cent. Dig. tit. "Bills and Notes," § 1237.

85. Enochs *v.* Therrell, 61 Miss. 178.

86. Rumsey *v.* Schmitz, 14 Kan. 542; Barnett *v.* Ringgold, 80 Ky. 289; Hannon *v.* Sullivan, 3 Mo. App. 583; Dodge *v.* National Exch. Bank, 30 Ohio St. 1. *Compare* Paulman *v.* Claycomb, 75 Ind. 64.

An agent for collection is not *prima facie* authorized to receive payment of a note or bill without indorsement. Wardrop *v.* Dunlop, 1 Hun (N. Y.) 325.

Mere possession of an unindorsed note payable to another will not authorize a payment to the holder, when the note is not exhibited to the maker. Hannon *v.* Sullivan, 3 Mo. App. 583.

87. Commercial Nat. Bank *v.* Spaids, 8 Ill. App. 493.

88. *Alabama.*— Capital City Ins. Co. *v.* Quinn, 73 Ala. 558; Barbour *v.* Washington F. & M. Ins. Co., 60 Ala. 433.

Arkansas.— Block *v.* Kirtland, 21 Ark. 393. And see Newman *v.* Henry, 29 Ark. 496, holding that where one person delivered his note to another, under an agreement that it was to be received in discharge of a prior note executed by the former to the latter, which the latter had assigned without the former's knowledge, it did not discharge the original note.

Georgia.— Perry *v.* Bray, 68 Ga. 293; Wilcox *v.* Aultman, 64 Ga. 544, 37 Am. Rep. 92; Paris *v.* Moe, 60 Ga. 90.

Illinois.— McClelland *v.* Bartlett, 13 Ill. App. 236.

Indiana.— McWhorter *v.* Norris, 9 Ind. App. 490, 34 N. E. 854, 37 N. E. 21.

Indian Territory.— Barton *v.* Ferguson, 1 Indian Terr. 263, 37 S. W. 49.

Iowa.— City Bank *v.* Taylor, 60 Iowa 66, 14 N. W. 128; Lathrop *v.* Donaldson, 22 Iowa 234; Wilkinson *v.* Sargent, 9 Iowa 521. And see Brayley *v.* Ellis, 71 Iowa 155, 32 N. W. 254.

Kansas.— Burhans *v.* Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Best *v.* Crall, 23 Kan. 482, 33 Am. Dec. 185.

Louisiana.— Murray *v.* Gibson, 2 La. Ann. 311.

Maine.— Salem First Nat. Bank *v.* Grant, 71 Me. 374, 36 Am. Rep. 334.

Massachusetts.— Murphy *v.* Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; Biggerstaff *v.* Marston, 161 Mass. 101, 36 N. E. 785; Webster *v.* Lee, 5 Mass. 334.

Minnesota.— Blumenthal *v.* Jassoy, 29 Minn. 177, 12 N. W. 517.

Mississippi.— Enochs *v.* Therrell, 61 Miss. 178.

Missouri.— Bates *v.* Martin, 3 Mo. 367.

Nebraska.— Bull *v.* Mitchell, 47 Nebr. 647, 66 N. W. 632.

New Hampshire.— Dow *v.* Rowell, 12 N. H. 49.

New York.— Carr *v.* Lewis, 20 N. Y. 138; Harpending *v.* Gray, 76 Hun (N. Y.) 351, 27 N. Y. Suppl. 762, 59 N. Y. St. 92; Mitchell *v.* Bristol, 10 Wend. (N. Y.) 492.

North Carolina.— Clinton Loan Assoc. *v.* Merritt, 112 N. C. 243, 17 S. E. 296; Salisbury First Nat. Bank *v.* Michael, 96 N. C. 53, 1 S. E. 855.

transfer, whether the transfer or assignment was before or after maturity and whether the instrument was negotiable or non-negotiable, it will not be good as against the transferee.[89] Where an instrument is assigned after maturity, payment before notice of such assignment will be sufficient;[90] and payment of a non-negotiable instrument to the assignor after the same has been transferred,

Pennsylvania.— Morton *v.* Morton, 13 Serg. & R. (Pa.) 107.

Tennessee.— Gosling *v.* Griffin, 85 Tenn. 737, 3 S. W. 642; Robinson *v.* Keys, 9 Humphr. (Tenn.) 144.

United States.— Cox *v.* Simms, 1 Cranch C. C. (U. S.) 238, 6 Fed. Cas. No. 3,306.

See 7 Cent. Dig. tit. "Bills and Notes," § 1240.

A bona fide holder of notes received for premiums by an insurance company is not affected by any subsequent arrangement between the company and the maker in respect to its payment, of which the assignee had no knowledge. Farmers' Bank *v.* Maxwell, 32 N. Y. 579.

Payment may be admissible as a defense against a subsequent purchaser who had notice of the same. White *v.* Kibling, 11 Johns. (N. Y.) 128; Roberts *v.* Eden, 1 B. & P. 398.

Payment made to an intermediate holder of a note indorsed in blank, whose name does not appear on the note, such holder being really the owner at the time, is good. Richardson *v.* Farnsworth, 1 Stew. (Ala.) 55.

89. *Alabama.*— Barbour *v.* Washington F. & M. Ins. Co., 60 Ala. 433; Leslie *v.* Merrill, 58 Ala. 322; Gildersleeve *v.* Caraway, 19 Ala. 246.

Connecticut.— Goodrich *v.* Stanley, 23 Conn. 79.

Illinois.— Butler *v.* Chapin, 28 Ill. 230.

Indiana.— Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391; Woodward *v.* Elliott, 13 Ind. 516.

Iowa.— Gregg *v.* McCollock, 1 Greene (Iowa) 274. And see Hickok *v.* Labussier, Morr. (Iowa) 115.

Kentucky.— Johnston *v.* Lewis, 1 A. K. Marsh. (Ky.) 401.

Maine.— Clark *v.* Rogers, 2 Me. 143.

Maryland.— Shriner *v.* Lamborn, 12 Md. 170.

Massachusetts.— Merriam *v.* Bacon, 5 Metc. (Mass.) 95; Jones *v.* Witter, 13 Mass. 304.

Michigan.— Cox *v.* Cayan, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585.

Mississippi.— See Coffman *v.* Kentucky Bank, 41 Miss. 212, 90 Am. Dec. 371.

Missouri.— Kellogg *v.* Morgan, 45 Mo. App. 245.

New York.— Dawson *v.* Coles, 16 Johns. (N. Y.) 51. And see Fay *v.* Jones, 18 Barb. (N. Y.) 340.

North Dakota.— Hollinshead *v.* Stuart, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659.

Pennsylvania.— Reed *v.* Mitchell, 18 Pa. St. 405.

Rhode Island.— Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881.

Tennessee.— South Carolina Bank *v.* Estell, 4 Baxt. (Tenn.) 413; Sawyer *v.* Moran, 3 Tenn. Ch. 35.

Vermont.— Campbell *v.* Day, 16 Vt. 558. See also Blake *v.* Buchanan, 22 Vt. 548. *Compare* Adams *v.* Johnson, Brayt. (Vt.) 55; Beckwith *v.* Hayward, Brayt. (Vt.) 55.

Wisconsin.— Holden *v.* Kirby, 21 Wis. 149. See also Pier *v.* Bullis, 48 Wis. 429, 4 N. W. 381.

United States.— Stevenson *v.* Woodhull, 19 Fed. 575.

See 7 Cent. Dig. tit. "Bills and Notes," § 1241.

Where an assignment of a note and mortgage is duly recorded the maker must take notice thereof, although he had no actual knowledge of the transfer, and any payment thereafter is at his risk. Detwilder *v.* Heckenlaible, 63 Kan. 627, 66 Pac. 653.

90. *Alabama.*— Eads *v.* Murphy, 52 Ala. 520.

California.— Stockton Bank *v.* Jones, 65 Cal. 437, 4 Pac. 418.

Illinois.— See Lazell *v.* Francis, 5 Ill. 421.

Indiana.— Helms *v.* Sisk, 8 Blackf. (Ind.) 503.

Iowa.— Haywood *v.* Seeber, 61 Iowa 574, 16 N. W. 727 [*distinguishing* Martindale *v.* Burch, 57 Iowa 291, 10 N. W. 670].

Maine.— Lithgow *v.* Evans, 8 Me. 330; Hackett *v.* Martin, 8 Me. 77.

Massachusetts.— Sargent *v.* Southgate, 5 Pick. (Mass.) 312, 16 Am. Dec. 409.

Missouri.— Topeka Bank, etc., Inst. *v.* Jilz, 3 Mo. App. 598.

New York.— Merrick *v.* Butler, 2 Lans. (N. Y.) 103.

Tennessee.— Vatterlien *v.* Howell, 5 Sneed (Tenn.) 441.

Wisconsin.— Dunbar *v.* Harnesberger, 12 Wis. 373.

England.— Lewis *v.* Lyster, 2 C. M. & R. 704, 4 Dowl. P. C. 377, 1 Gale 320, 1 Tyrw. & G. 185; Brown *v.* Davies, 3 T. R. 80.

See 7 Cent. Dig. tit. "Bills and Notes," § 1242.

If a note is taken up at maturity by the payee and indorser, and is subsequently transferred by him, the maker cannot set up as a defense against an action by the indorsee a payment made by him to the payee after the transfer, although without knowledge of the same. Davis *v.* Miller, 14 Gratt. (Va.) 1; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Where the indorsee had no notice of the payment the burden is on the maker to show that the payment was made before the transfer. Capps *v.* Gorham, 14 Ill. 198; Wilbour *v.* Turner, 5 Pick. (Mass.) 526.

whether before or after maturity, but before notice of the transfer, will be good.[91] If the transferee of a note by his conduct permits the maker to believe that the ownership has not been changed, and the maker has in fact no notice of a transfer, payment to the payee will discharge the instrument.[92]

D. Time for Making Payment — 1. Before Maturity. The maker of a note has no right to pay the same before maturity without the consent of the holder.[93] Payment before maturity, without taking up the paper, is at the risk of the party who makes such payment and is no defense against a subsequent *bona fide* transferee for value.[94]

2. At Maturity. Payment should be made at the time the obligation becomes due, although it may be valid if made before that time or afterward as between the immediate parties thereto.[95] The party under obligation to pay has the whole of the day on which the instrument falls due to pay the same.[96]

3. After Maturity. Of course payment of a bill or note after maturity, if made to the holder of the paper and accepted by him, will be a discharge. A good tender after maturity will stop the accrual of further interest[97] and will be available in bar of damages and costs,[98] if the party is not merely willing but ready to pay;[99] but it is no defense to an action upon a bill or note that the party liable made a tender of the amount after the day of maturity, although before suit.[1]

91. *Alabama.*— Vann *v.* Marbury, 100 Ala. 438, 14 So. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325.

Indiana.— Shade *v.* Creviston, 93 Ind. 591.

Kansas.— Wright *v.* Shimek, 8 Kan. App. 350, 55 Pac. 464; Warren *v.* Gruwell, 5 Kan. App. 523, 48 Pac. 205.

Kentucky.— Barnett *v.* Ringgold, 80 Ky. 289. And see Gibson *v.* Pew, 3 J. J. Marsh. (Ky.) 222.

Massachusetts.— Stevens *v.* Parker, 5 Allen (Mass.) 333.

Mississippi.— Allein *v.* Agricultural Bank, 3 Sm. & M. (Miss.) 48.

Missouri.—Weinwick *v.* Bender, 33 Mo. 80; Heath *v.* Powers, 9 Mo. 774.

New Hampshire.— Dunn *v.* Meserve, 58 N. H. 429.

Pennsylvania.— Bury *v.* Hartman, 4 Serg. & R. (Pa.) 175.

See 7 Cent. Dig. tit. "Bills and Notes," § 1242.

92. Morgan *v.* Neal, (Ida. 1901) 65 Pac. 66; Fowle *v.* Outcalt, 64 Kan. 352, 67 Pac. 889; Garza *v.* Manchke, (Tex. Civ. App. 1893) 23 S. W. 836.

93. New Havens Sav. Bank *v.* Bates, 8 Conn. 505; Ebersole *v.* Redding, 22 Ind. 232; Kelly *v.* Collins, (Tex. Civ. App. 1900) 56 S. W. 997; Burns *v.* True, 5 Tex. Civ. App. 74, 24 S. W. 338. See also Crowley *v.* Kolsky, (Tenn. Ch. 1900) 57 S. W. 386.

Leave to pay before maturity may be implied where there is a condition in the note that the maker shall be entitled to interest on all payments made before maturity. Crocker *v.* Green, 54 Ga. 494.

Where paper is payable on demand, it may be paid at any time. Stover *v.* Hamilton, 21 Gratt. (Va.) 273; Bartrum *v.* Caddy, 9 A. & E. 275, 8 L. J. Q. B. 31, 1 P. & D. 207, 1 W. W. & H. 724, 36 E. C. L. 160.

94. See *supra*, XI, A, 17.

95. Leighton *v.* Cummings, 89 Ill. 520.

Payment by the accepter in order to discharge him should be made at or after the maturity of the note. Stark *v.* Alford, 49 Tex. 260.

96. See *supra*, VII, A, 3, f, (IV), (B).

97. Woodruff *v.* Trapnall, 12 Ark. 640; Strafford *v.* Welch, 59 N. H. 46.

98. Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271.

The accepter of a bill may even after demand make a tender on the day of maturity and he will not in such a case be liable for protest fees. Leftley *v.* Mills, 4 T. R. 170.

Tender without interest.— A tender by the indorser of a promissory note on the day next after it has become due is not sufficient without a tender of interest. City Bank *v.* Cutter, 3 Pick. (Mass.) 414.

99. *Florida.*— Matthews *v.* Lindsay, 20 Fla. 962.

Louisiana.— Walker *v.* Brown, 12 La. Ann. 266.

Minnesota.—Balme *v.* Wambaugh, 16 Minn. 116.

New Hampshire.— Otis *v.* Barton, 10 N. H. 433.

England.— Siggers *v.* Lewis, 1 C. M. & R. 370, 2 Dowl. P. C. 681, 3 L. J. Exch. 312, 4 Tyrw. 847.

See, generally, Tender.

1. City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Poole *v.* Crompton, 5 Dowl. P. C. 468, 1 Jur. 23, 6 L. J. Exch. 74, 2 M. & W. 223; Hume *v.* Peploe, 8 East 168, 9 Rev. Rep. 399; Dohie *v.* Larkan, 10 Exch. 776, 3 Wkly. Rep. 247; Walker *v.* Barnes, 1 Marsh. 36, 5 Taunt. 240, 15 Rev. Rep. 655, 1 E. C. L. 131.

Paper payable at a particular place.— The fact that the maker of a note after its maturity had funds at the place where it was payable is no defense in an action on the note. McCreary *v.* Newberry, 25 Ill. 496.

E. Indorsement of Payments[2]— **1. Necessity of.** The fact that a note is not indorsed as paid by the payee when payment is made at maturity is of no importance, as this is not essential to the validity of a payment,[3] but part payments made on a bill or note before maturity should be indorsed thereon to render the payments good as against subsequent *bona fide* transferees.[4] It has been held, however, that the holder of a note by purchase after maturity from the payee takes it subject to an agreement of the holder to indorse on it money which he agreed to collect for the maker and which he actually did collect.[5]

2. Erasure of. Parties to a note may agree to an erasure of credits which have been indorsed thereon, although not so as to affect the rights of third persons;[6] and the payee or holder of a note may erase credits which have been indorsed on the note by mistake or without authority,[7] or which have not become absolute because of the non-performance of a condition on which they were indorsed.[8] An erasure of a credit by a payee corruptly made is as criminal as an alteration of the face of the note itself, and the holder of a note must explain such an erasure before he will be permitted to recover.[9]

F. Recovery of Payments — 1. Duress. Where a note is paid under duress, the party paying the same is entitled to recover such payment.[10]

2. Failure of Consideration. The general principle that money or property paid or delivered on a consideration which has entirely failed may be recovered

2. As to presumption of payment from indorsement see *infra*, XIV, E [8 Cyc.].

3. Doubleday *v.* Kress, 60 Barb. (N. Y.) 181; Palmer *v.* Blight, 2 Wash. (U. S.) 96, 18 Fed. Cas. No. 10,684. *Compare* Potter *v.* Bartlett, 6 Vt. 248.

The payee of a check is under no obligation to indorse it in blank when it is paid to him as a voucher for the payment. Osborn *v.* Gheen, 5 Mackey (D. C.) 189.

4. Brayley *v.* Ellis, 71 Iowa 155, 32 N. W. 254; Kernohan *v.* Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41; Cooper *v.* Davies, 1 Esp. 463. *Compare* Storey *v.* Kerr, (Nebr. 1902) 89 N. W. 601. See also *supra*, XI, A, 17.

Money paid by the maker of a note after the date of the same which is not indorsed thereon will not be allowed as a credit, where there is nothing in the record to show that it was paid for this purpose. Craig *v.* Young, 2 Colo. 112.

5. Shove *v.* Martine, 85 Minn. 29, 88 N. W. 254, 412; Kernohan *v.* Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41.

As against the payee of a note there may be an allowance of payments actually made but not indorsed, although there is a stipulation in the note that no credit shall be allowed on it, unless indorsed thereon by the payee. Kasson *v.* Noltner, 43 Wis. 646.

6. Coggins *v.* Stockard, 64 Miss. 301, 1 So. 245; Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

An unconditional payment by the maker of a note secured by a deed of trust is an extinguishment *pro tanto* of the trust debt, and where there is an indorsement of such a payment on the note, the lien of the trust deed cannot be revived, by an agreement between the debtor and creditor to erase the indorsement, as against third persons who have liens on the property, but it may be erased, where rights of third persons are not affected, by an express agreement between the creditor, the debtor, and a party to whom the note is then assigned. Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

Where a creditor holds several notes of his debtor and payment is made by the latter with no direction as to its appropriation, and is applied by the creditor upon one of the notes, the parties, between themselves, may agree to erase the indorsement of such credit and apply it to another note, but they cannot erase the same so as to revive this part of the debt against an indorser of the note on which it has been applied, unless the indorser consents. Harding *v.* Wormley, 8 Baxt. (Tenn.) 578.

7. Tubb *v.* Madding, Minor (Ala.) 129; Burtch *v.* Dent, 13 Ind. 542; Kimball *v.* Lamson, 2 Vt. 138.

8. Chamberlin *v.* White, 79 Ill. 549; Dodge *v.* Greeley, 31 Me. 343.

9. Carson *v.* Duncan, 1 Greene (Iowa) 466.

10. Schultz *v.* Culbertson, 49 Wis. 122, 4 N. W. 1070.

There can be no recovery of a payment on the ground that it was made under duress where it was voluntarily made (Teem *v.* Ellijay, 89 Ga. 154, 15 S. E. 33), as where the person liable made the payment merely under fear that his credit would be destroyed if he did not pay (Coleman *v.* Merchants' Nat. Bank, 6 Ohio Dec. (Reprint) 1063, 10 Am. L. Rec. 49; Slack *v.* Kirk, 67 Pa. St. 380, 5 Am. Rep. 438), or where payment was made under threat of attachment proceedings (Flack *v.* National Bank of Commerce, 8 Utah 193, 30 Pac. 746, 17 L. R. A. 583).

Recovery of payments made under duress generally see Payment.

back is applicable to a payment made of a bill or note, the consideration for which has failed.[11]

3. FRAUD. Where a person has been induced by fraud to make a payment of a bill or note such payment may be recovered by him.[12]

4. MISTAKE. One who has paid a bill or note under a mistake of fact may, where no negligence is imputable to him in connection with such payment, recover the amount thereof from the owner receiving the same,[13] but negligence

11. Darst *v.* Brockway, 11 Ohio 462. But see Jolliffe *v.* Collins, 21 Mo. 338, holding that where money paid on a note given for a patent which is void is not pleaded by way of set-off in an action to recover the balance on the note defendant will not be entitled to a judgment for the money so paid.

Where the maker of a note which has been transferred by the payee to a *bona fide* holder is entitled to rescind the contract on the ground of failure of consideration, he may recover from the payee the amount thereof in an action for money had and received. Colville *v.* Besly, 2 Den. (N. Y.) 139; Wilson *v.* Lazier, 11 Gratt. (Va.) 477.

Illegality of consideration.—Where a note was given for an illegal consideration, there can be no recovery by him from the payee, although he has paid under coercion resulting from transfer of the note to a *bona fide* holder. Haynes *v.* Rudd, 83 N. Y. 251 [*reversing* 17 Hun (N. Y. 477]; Solinger *v.* Earle, 82 N. Y. 393; Daimouth *v.* Bennett, 15 Barb. (N. Y.) 541; Goldsmid *v.* Lewis County Bank, 12 Barb. (N. Y.) 407.

12. *Massachusetts.*— Union Bank *v.* U. S. Bank, 3 Mass. 74.

Minnesota.— Schaller *v.* Borger, 47 Minn. 357, 50 N. W. 247.

New York.— Watson *v.* Cabot Bank, 5 Sandf. (N. Y.) 423. *Compare* Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420; Nassau Bank *v.* Newburgh Nat. Bank, 32 N. Y. App. Div. 268, 52 N. Y. Suppl. 1118; Iselin *v.* Chemical Nat. Bank, 6 N. Y. App. Div. 532, 40 N. Y. Suppl. 390.

Vermont.— Connecticut, etc., R. Co. *v.* Newell, 31 Vt. 364.

England.— Martin *v.* Morgan, 1 B. & B. 289, 5 E. C. L. 640, Gow 123, 5 E. C. L. 892, 3 Moore C. P. 635, 21 Rev. Rep. 603; Bell *v.* Buckley, 11 Exch. 631, 25 L. J. Exch. 163, 4 Wkly. Rep. 251.

See, generally, PAYMENT; and 7 Cent. Dig. tit. "Bills and Notes," § 1269.

Payment to an agent who has misrepresented his authority may be recovered. Braithwait *v.* Bain, 66 Minn. 325, 69 N. W. 4.

Ignorance of fraud.— It should appear that the party was ignorant of the fraud at the time of making the payment. Baldwin *v.* Foss, 71 Iowa 389, 32 N. W. 389.

13. *Alabama.*— Young *v.* Lehman, 63 Ala. 519.

Connecticut.— Camp *v.* Tompkins, 9 Conn. 545.

Indiana.— See Stotsenburg *v.* Fordice, 142 Ind. 490, 41 N. E. 313, 810.

Kansas.— Fraker *v.* Little, 24 Kan. 598, 36 Am. Rep. 262.

Kentucky.—Keene *v.* Collier, 1 Metc. (Ky.) 415.

Louisiana.— Dick *v.* Leverich, 11 La. 573.

Massachusetts.— Cardinal *v.* Hadley, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492. See also Hunt *v.* Nevers, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; Whitcomb *v.* Williams, 4 Pick. (Mass.) 228.

Missouri.— Gardner *v.* Mathews, 81 Mo. 627.

Nebraska.— De Nayer *v.* State Nat. Bank, 8 Nebr. 104.

New York.— Security Bank *v.* National Bank of Republic, 67 N. Y. 458, 23 Am. Rep. 129; National Bank of Commerce *v.* National Mechanics' Banking Assoc., 55 N. Y. 211, 14 Am. Rep. 232; Union Nat. Bank *v.* Sixth Nat. Bank, 43 N. Y. 452, 3 Am. Rep. 718 [*affirming* 1 Lans. (N. Y.) 13]; Munroe *v.* Bonanno, 16 N. Y. App. Div. 421, 45 N. Y. Suppl. 61; Orleans Bank *v.* Smith, 3 Hill (N. Y.) 560; Franklin Bank *v.* Raymond, 3 Wend. (N. Y.) 69; Durkin *v.* Cranston, 7 Johns. (N. Y.) 442.

North Carolina.— Mitchell *v.* Walker, 30 N. C. 243.

South Carolina.— Broun *v.* Boyce, 4 Rich. (S. C.) 385.

Tennessee.— Fitts *v.* Gilmore, (Tenn. Ch. 1899) 54 S. W. 681.

Texas.— Bowden *v.* Kelley, 1 Tex. App. Civ. Cas. § 480.

United States.— Grotian *v.* Guaranty Trust Co., 105 Fed. 566; U. S. *v.* National Park Bank, 6 Fed. 852.

England.— Kendal *v.* Wood, L. R. 6 Exch. 243, 39 L. J. Exch. 167, 23 L. T. Rep. N. S. 309; Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198; Mills *v.* Guardians of Poor, 3 Exch. 590; East India Co. *v.* Prince, R. & M. 407, 21 E. C. L. 781.

See, generally, PAYMENT; and 7 Cent. Dig. tit. "Bills and Notes," § 1269.

A collecting bank or agent who under the mistaken supposition that the note has been paid to a subagent pays the same to the principal may recover from the latter. East Haddam Bank *v.* Scovil, 12 Conn. 303; Wilson *v.* Carlinville Nat. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632; Appleton Bank *v.* McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92; Orleans Bank *v.* Smith, 3 Hill (N. Y.) 560.

The obligation to repay can only arise after notification of the mistake and demand for repayment. Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420.

on his part may preclude a recovery by him.[14] As every person is chargeable with knowledge of the law, where a payment is made under ignorance or mistake of law, there can be no recovery thereof.[15]

5. Payments Not Indorsed or Applied. Where payment has been made to the payee or holder of a note, and the latter refuses either to indorse the same or to allow it in payment, the party paying the same is entitled to recover the amount thereof from him.[16] It has been held, however, that if defendant, when sued on the note, fails to set up in defense the fact that he has made payments thereon, and judgment is rendered against him for the full amount of the note, he cannot subsequently recover such payments in a separate action.[17]

6. Payments on Forged or Altered Instruments. Where a party has by mistake made a payment on a forged instrument, such payment may generally be recovered from the party receiving the same,[18] but where one accepts forged

14. East India Co. *v.* Tritton, 3 B. & C. 280, 5 D. & R. 214, 3 L. J. K. B. O. S. 24, 27 Rev. Rep. 353, 10 E. C. L. 134.

Clearing-house rules providing that checks not good shall be returned by a certain hour may prevent a recovery by a bank which has paid by mistake. Atlas Nat. Bank *v.* National Exch. Bank, (Mass. 1901) 60 N. E. 121; Preston *v.* Canadian Bank of Commerce, 23 Fed. 179. *Compare* Merchants' Nat. Bank *v.* National Bank, 139 Mass. 513, 2 N. E. 89, where it is held that a bank is not restricted by such a rule to the exact hour designated, where in the meantime there has been no such change in the situation of the parties as will cause a loss to the bank to which the paper is returned. And see Merchants' Nat. Bank *v.* National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120.

Mistake as to nature or value of security. — That a bill was paid by the drawees to the payee under a mistake of fact as to the nature or value of security from the drawer, where the security accompanied the bill and has proved to be fictitious, is no ground for a recovery by them of the amount of such payment. Detroit First Nat. Bank *v.* Burkham, 32 Mich. 328.

A bank cannot recover from the payee of a check or note the amount which it has paid on such instrument through negligent misapprehension as to the maker's account with the bank.

Colorado.— Denver First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

Massachusetts.— Boylston Nat. Bank *v.* Richardson, 101 Mass. 287.

New York.— Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160.

South Carolina.— State Bank *v.* Hull, Dudley (S. C.) 259.

United States.— Riverside Bank *v.* Shenandoah First Nat. Bank, 74 Fed. 276, 38 U. S. App. 674, 20 C. C. A. 181. *Compare* U. S. Bank *v.* Washington, 3 Cranch C. C. (U. S.) 295, 2 Fed. Cas. No. 940.

England.— Hall *v.* Fuller, 5 B. & C. 750, 8 D. & R. 464, 4 L. J. K. B. O. S. 297, 29 Rev. Rep. 383, 11 E. C. L. 665.

15. *Massachusetts.*—Alton *v.* Webster First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285, 18 L. R. A. 144.

New Hampshire.— Evans *v.* Gale, 17 N. H. 573, 43 Am. Dec. 614.

New York.— Petrie *v.* Feeter, 21 Wend. (N. Y.) 172.

West Virginia.— Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394.

United States.— U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 9 L. ed. 989.

England.— Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 12 Jur. N. S. 928, 15 L. T. Rep. N. S. 185, 15 Wkly. Rep. 72; Rogers *v.* Ingham, 3 Ch. D. 351, 35 L. T. Rep. N. S. 677, 25 Wkly. Rep. 338.

See, generally, Payment; and 7 Cent. Dig. tit. "Bills and Notes," § 1269.

16. Osgood *v.* Jones, 23 Me. 312; Eastman *v.* Hodges, 1 D. Chipm. (Vt.) 101.

It is essential to a recovery that it appear that the payment has not been indorsed and that there has been a request and refusal either to allow the same or to repay it. Gossett *v.* Hollingsworth, 5 Blackf. (Ind.) 394; Sawyer *v.* Tappan, 14 N. H. 352.

An offer to indorse at the time of trial does not affect the rights of the parties. Osgood *v.* Jones, 23 Me. 312.

17. Loveless *v.* Mechling, 4 Ill. App. 353; Weeks *v.* Thomas, 21 Me. 465; Jordan *v.* Phelps, 3 Cush. (Mass.) 545, 50 Am. Dec. 747; Loring *v.* Mansfield, 17 Mass. 394; Corey *v.* Gale, 13 Vt. 639. But see Rowe *v.* Smith, 16 Mass. 306; Fowler *v.* Shearer, 7 Mass. 14.

18. *Iowa.*— Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708.

Kansas.— Fraker *v.* Little, 24 Kan. 598, 36 Am. Rep. 262.

Louisiana.—McCall *v.* Corning, 3 La. Ann. 409, 48 Am. Dec. 454. See also Bullitt *v.* Hewitt, 11 La. Ann. 327.

Maryland.— Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300.

Massachusetts.— Welch *v.* Goodwin, 123 Mass. 71, 25 Am. Rep. 24; Carpenter *v.* Northborough Nat. Bank, 123 Mass. 66.

New York.— Goddard *v.* Merchants' Bank, 4 N. Y. 147 [*affirming* 2 Sandf. (N. Y.) 247]; Bloomingdale *v.* National Butchers', etc., Bank, 33 Misc. (N. Y.) 594, 68 N. Y. Suppl. 35; Gombossy *v.* Katz, 18 Misc. (N. Y.) 359, 41 N. Y. Suppl. 411, 75 N. Y. St. 815.

Pennsylvania.— Tradesmen's Nat. Bank *v.* Pittsburg Third Nat. Bank, 66 Pa. St. 435.

paper purporting to be his own and pays it to a holder for value he cannot recover the payment;[19] and as it is incumbent upon the drawee of a bill or check to be satisfied that the signature of the drawer is genuine, if he pays an instrument to which the drawer's name has been forged to a *bona fide* holder, he is bound by his act and cannot recover the money so paid.[20] A bank, however, is not bound to know the genuineness of the body of the instrument, and if it has been raised, and the bank has paid the same as altered, the amount so paid may be recovered by it.[21] Since the holder of paper is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear on the bill or are duly authorized by them, and by his indorsement warrants the genuineness of prior indorsements, where payment is made to a person holding an instrument under a forged indorsement, the per-

See 7 Cent. Dig. tit. "Bills and Notes," § 1272.

Payments on forged treasury notes may be recovered by the government. Cooke *v.* U. S., 12 Blatchf. (U. S.) 43, 6 Fed. Cas. No. 3,178, 19 Int. Rev. Rec. 181.

Payment on a forged indorsement of a check may be recovered. U. S. *v.* Clinton Nat. Bank, 28 Fed. 357.

Where a draft is stolen from the mails and a forged indorsement of the payee's name is made thereon and a bank pays the same to one to whom the draft is subsequently negotiated, the payee may recover the same from such person. Shaffer *v.* McKee, 19 Ohio St. 526.

19. Johnston *v.* Commercial Bank, 27 W. Va. 343, 55 Am. Rep. 315; Cooke *v.* U. S., 91 U. S. 389, 23 L. ed. 237. See also Lewis *v.* White's Bank, 27 Hun (N. Y.) 396. *Compare* Welch *v.* Goodwin, 123 Mass. 71, 25 Am. Rep. 24, where it is held that if he has not been guilty of laches as a result of which the holder has changed his position to his injury there may be a recovery.

The rule has been held to apply to a bank which pays its own notes where they have been raised. Gloucester Bank *v.* Salem Bank, 17 Mass. 33; U. S. Bank *v.* Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. ed. 334.

20. Marshalltown First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131; Howard *v.* Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105. See also BANKS AND BANKING, 5 Cyc. 546.

The accepter's banker should know his signature and payment made by the former on a forged acceptance cannot be recovered. Pooley *v.* Brown, 11 C. B. N. S. 566, 8 Jur. N. S. 938, 31 L. J. C. P. 134, 5 L. T. Rep. N. S. 750, 10 Wkly. Rep. 345, 103 E. C. L. 566; Smith *v.* Mercer, 1 Marsh. 453, 6 Taunt. 76, 16 Rev. Rep. 576, 1 E. C. L. 515.

Under a statutory provision that the mere acceptance or payment of forged paper is not of itself a bar to the recovery of the money by the party paying the same, although it be a bank or other drawee, and that it is not necessary to discover and give notice of payment on the day of payment, it has been decided that a bank is guilty of negligence and is not entitled to recover a payment of such an instrument where five days afterward its attention is called to the check and an investigation is made showing that the drawer's name had been forged, and defendant has in the meantime received the money and paid it out. Iron City Nat. Bank *v.* Ft. Pitt Nat. Bank, 159 Pa. St. 46, 28 Atl. 195, 23 L. R. A. 615.

Effect of negligence of holder upon right to recover.— The rule that the drawee is presumed to know the signature of his drawer will not apply where the holder by his own negligence contributes to the success of the fraud practised. Woods *v.* Colony Bank, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929; Brennan *v.* Merchants,' etc., Bank, 62 Mich. 343, 28 N. W. 881; Myers *v.* Southwestern Nat. Bank, 193 Pa. St. 1, 44 Atl. 280, 74 Am. St. Rep. 672; People's Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 17 Am. St. Rep. 884, 6 L. R. A. 724. See also BANKS AND BANKING, 5 Cyc. 546, note 40; 547, note 41.

21. White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; National Bank of Commerce *v.* National Mechanics' Banking Assoc., 55 N. Y. 211, 14 Am. Rep. 232; National Park Bank *v.* Eldred Bank, 90 Hun (N. Y.) 285, 35 N. Y. Suppl. 752, 70 N. Y. St. 497; National Park Bank *v.* Ninth Nat. Bank, 55 Barb. (N. Y.) 87, 7 Abb. Pr. N. S. (N. Y.) 120 [*affirmed* in 46 N. Y. 77, 7 Am. Rep. 310]; Oppenheim *v.* West Side Bank, 22 Misc. (N. Y.) 722, 50 N. Y. Suppl. 148.

As between the drawer and drawee.— Where the drawee has paid a draft or check fraudulently altered after the same was due by raising the amount thereof, the drawer can only be charged on his account with the original amount. Dunbar *v.* Armor, 5 Rob. (La.) 1, 39 Am. Dec. 528; National Bank of Commerce *v.* Manufacturers', etc., Bank, 15 N. Y. St. 630.

Effect of negligence.— Where a draft has been altered the right of the payee to recover back a payment may depend upon the negligence of the owners of such draft and of the agents to whom it was transmitted for collection. National Park Bank *v.* New York Fourth Nat. Bank, 7 Abb. Pr. N. S. (N. Y.) 138. The drawee bank, to recover money mistakenly paid on a raised draft, must have acted without culpable negligence on its part in making the payment. Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 36 N. Y. App. Div. 112, 55 N. Y. Suppl. 545.

son paying the same may recover the payment from him.[22] The right, however, of one who has paid a forged bill or check to recover the same may depend upon his diligence in giving notice after discovering the forgery. Where there has been a neglect to give notice of such fact, and the party receiving payment is injured by losing his opportunity of recourse and indemnity, there can be no recovery of the payment.[23]

22. *California.*— Mills *v.* Barney, 22 Cal. 240.

Illinois.— Quincy First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104.

Kentucky.— Ware *v.* McCormack, 96 Ky. 139, 16 Ky. L. Rep. 385, 28 S. W. 157, 959.

Massachusetts.— National Bank of North America *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

Minnesota.— Germania Bank *v.* Boutell, 60 Minn. 189, 62 N. W. 327, 51 Am. St. Rep. 519, 27 L. R. A. 635.

Missouri.— Northwestern Nat. Bank *v.* Bank of Commerce, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102.

Nebraska.— Levy *v.* Hastings First Nat. Bank, 27 Nebr. 557, 43 N. W. 354.

New York.— Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Holt *v.* Ross, 54 N. Y. 472, 13 Am. Rep. 615 [*affirming* 59 Barb. (N. Y.) 554]; Lennon *v.* Grauer, 2 N. Y. App. Div. 513, 38 N. Y. Suppl. 22, 74 N. Y. St. 451; New York City Third Nat. Bank *v.* Merchants' Nat. Bank, 76 Hun (N. Y.) 475, 27 N. Y. Suppl. 1070, 59 N. Y. St. 359; Goddard *v.* Merchants' Bank, 2 Sandf. (N. Y.) 247.

Tennessee.— People's Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 17 Am. St. Rep. 884, 6 L. R. A. 724.

Texas.— Vogel *v.* Ball, 69 Tex. 604, 7 S. W. 101; Rouvant *v.* San Antonio Nat. Bank, 63 Tex. 610; Houston City Bank *v.* Houston First Nat. Bank, 45 Tex. 203.

United States.— Hortsman *v.* Henshaw, 11 How. (U. S.) 177, 13 L. ed. 653; Onondaga County Sav. Bank *v.* U. S., 64 Fed. 703, 26 U. S. App. 377, 12 C. C. A. 407 [*affirming* 39 Fed. 259].

England.— London, etc., Bank *v.* Liverpool Bank, [1896] 1 Q. B. 7, 65 L. J. Q. B. 80, 73 L. T. Rep. N. S. 473.

See also BANKS AND BANKING, 5 Cyc. 549; and 7 Cent. Dig. tit. "Bills and Notes," § 1273.

A payment by the holder of paper under a forged indorsement, made to a bank which had paid him the amount of the paper, cannot be recovered from a prior innocent holder for value. Neal *v.* Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495.

Unauthorized indorsement as payee's agent. — Where payment is made to one holding a note under an unauthorized indorsement by a person as the payee's agent, he will be liable to the payee for the amount received, although he may be a *bona fide* purchaser. Johnson *v.* Hoboken First Nat. Bank, 6 Hun (N. Y.) 124.

23. *Indiana.*—Samuels *v.* King, 50 Ind. 527.

Louisiana.— McCall *v.* Corning, 3 La. Ann. 409, 48 Am. Dec. 454.

Massachusetts.— Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

New York.— Allen *v.* New York Fourth Nat. Bank, 59 N. Y. 12 [*affirming* 37 N. Y. Super. Ct. 137]; Oppenheim *v.* West Side Bank, 22 Misc. (N. Y.) 722, 50 N. Y. Suppl. 148.

Pennsylvania.— Raymond *v.* Baar, 13 Serg. & R. (Pa.) 318, 15 Am. Dec. 603.

Virginia.— Pindall *v.* Northwestern Bank, 7 Leigh (Va.) 617.

United States.— U. S. *v.* National Park Bank, 6 Fed. 852; U. S. *v.* Cooke, 25 Fed. Cas. No. 14,855, 5 Am. L. T. 166, 16 Int. Rev. Rec. 143, 9 Phila. (Pa.) 468, 29 Leg. Int. (Pa.) 221.

See 7 Cent. Dig. tit. "Bills and Notes," § 1273.

The diligence required is not in making the discovery but in giving notice thereafter. Frank *v.* Lanier, 91 N. Y. 112; New York City Third Nat. Bank *v.* Merchants' Nat. Bank, 76 Hun (N. Y.) 475, 27 N. Y. Suppl. 1070, 59 N. Y. St. 359; Iron City Nat. Bank *v.* Ft. Pitt Nat. Bank, 159 Pa. St. 46, 28 Atl. 195, 23 L. R. A. 615; U. S. *v.* Clinton Nat. Bank, 28 Fed. 357; U. S. *v.* Philadelphia Cent. Nat. Bank, 6 Fed. 134.

Time for giving notice.— It is sufficient to give notice when the forgery is discovered. Young *v.* Adams, 6 Mass. 182; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610; Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198. And it is the duty of the party to give notice at such time. National Bank of Commerce *v.* National Mechanics' Banking Assoc., 35 N. Y. Super. Ct. 282, 46 How. Pr. (N. Y.) 374 [*affirmed* in 55 N. Y. 211, 14 Am. Rep. 232]; Canal Bank *v.* Albany Bank, 1 Hill (N. Y.) 287; Boyd *v.* Emmerson, 2 A. & E. 184, 4 L. J. K. B. 43, 4 N. & M. 99, 29 E. C. L. 102; Kilsby *v.* Williams, 5 B. & Ald. 815, 1 D. & R. 476, 24 Rev. Rep. 564, 7 E. C. L. 443; Cocks *v.* Masterman, 9 B. & C. 902, 8 L. J. K. B. O. S. 77, 4 M. & R. 676, 17 E. C. L. 398; Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198; Mather *v.* Maidstone, 18 C. B. 273, 25 L. J. C. P. 310, 86 E. C. L. 273; Bruce *v.* Bruce, 1 Marsh. 165, 5 Taunt. 495 note, 15 Rev. Rep. 566 note, 1 E. C. L. 256; Jones *v.* Ryde, 1 Marsh. 157, 5 Taunt. 488, 15 Rev. Rep. 561, 1 E. C. L. 252.

Bank and clearing-house rules.— The question of diligence may be controlled by bank and clearing-house rules. Merchants' Nat. Bank *v.* National Bank, 139 Mass. 513, 2 N. E. 89; Merchants' Nat. Bank *v.* National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120.

7. Payment After Discharge. Where a drawer of a bill or indorser of a bill or note pays the same, without negligence, and without knowledge of the fact that he has been discharged,[24] such payment may be recovered by him.[25]

8. As Affected by Knowledge of Defenses. Where payment is made by parties voluntarily with full knowledge of all facts or defenses of which they might avail themselves, and there has been no deceit or unfair practice on the part of the payee, and he may with good conscience receive and retain such payment, there can be no recovery thereof by the party paying the same.[26] Payment voluntarily made by an indorser with actual or imputed knowledge of his discharge cannot be recovered by him.[27] So where the drawer of a bill of exchange who has been discharged by the laches of the bank to which it was given for collection voluntarily takes up the same there can be no recovery of the amount so paid.[28]

G. Discharge — 1. Who May Discharge. It may be laid down as a general rule that, except in the case of a discharge by operation of law, liability on a bill or note cannot be discharged except by the payee or holder or by one authorized by him;[29] but an assigned note which belongs jointly to two or more assignees may be released by either of them.[30] An indorser may release all right of action which by subsequent payment of the note he might have against the maker.[31] If

24. Knowledge of discharge as affecting right to recover payments see *infra*, XI, F, 8.

25. *Kentucky.*— Ray *v.* Commonwealth Bank, 3 B. Mon. (Ky.) 510, 39 Am. Dec. 479.

Louisiana.— Citizens' Bank *v.* Dugue, 5 La. Ann. 12; Oakey *v.* State Bank, 17 La. 386. *Compare* Jamison *v.* Pothaus, 26 La. Ann. 63.

Maine.— Sheridan *v.* Carpenter, 61 Me. 83.

Maryland.— Merchants' Bank *v.* Bank of Commerce, 24 Md. 12; Chase *v.* Taylor, 4 Harr. & J. (Md.) 54.

Massachusetts.— Talbot *v.* Commonwealth Nat. Bank, 129 Mass. 67, 37 Am. Rep. 302; Garland *v.* Salem Bank, 9 Mass. 408, 6 Am. Dec. 86.

Mississippi.— Offit *v.* Vick, Walk. (Miss.) 99.

New York.— Lake *v.* Artisans' Bank, 3 Abb. Dec. (N. Y.) 10, 3 Keyes (N. Y.) 276, 1 Transcr. App. (N. Y.) 71, 3 Abb. Pr. N. S. (N. Y.) 209 [*reversing* 17 Abb. Pr. (N. Y.) 232]; Johnson *v.* Bank of North America, 5 Rob. (N. Y.) 554; Brown *v.* Williams, 4 Wend. (N. Y.) 360.

South Carolina.— Halls *v.* State Bank, 3 Rich. (S. C.) 366; Kirkpatrick *v.* State Bank, 2 Hill (S. C.) 577.

United States.— Andressen *v.* Northfield First Nat. Bank, 1 McCrary (U. S.) 252, 2 Fed. 122.

England.— Milnes *v.* Duncan, 6 B. & C. 671, 9 D. & R. 731, 5 L. J. K. B. O. S. 239, 30 Rev. Rep. 498, 13 E. C. L. 302.

See 7 Cent. Dig. tit. "Bills and Notes," § 1270.

To recover money as paid in ignorance of discharge the party who seeks such recovery must show that he was discharged, as actual payment furnishes a presumption of indebtedness. Union Bank *v.* Hyde, 7 Rob. (La.) 418, 41 Am. Dec. 290.

26. *Connecticut.*— Gay *v.* Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818; Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580.

Louisiana.— Woods *v.* Halsey, 42 La. Ann. 245, 7 So. 451.

Maine.— Gooding *v.* Morgan, 37 Me. 419.

Missouri.— Greenabaum *v.* Elliott, 60 Mo. 25.

Nebraska.— Boyer *v.* Richardson, 52 Nebr. 156, 71 N. W. 981.

New Hampshire.— Sessions *v.* Meserve, 46 N. H. 167.

Pennsylvania.— Oil-Well Supply Co. *v.* Exchange Nat. Bank, 131 Pa. St. 100, 18 Atl. 935; Morris *v.* Tarin, 1 Dall. (Pa.) 147, 1 L. ed. 76, 1 Am. Dec. 233.

Texas.— Coates *v.* Clayton, 23 Tex. Civ. App. 62, 56 S. W. 118.

United States.— Boston State Nat. Bank *v.* U. S., 17 Ct. Cl. 329.

See 7 Cent. Dig. tit. "Bills and Notes," § 1268.

27. Bachellor *v.* Priest, 12 Pick. (Mass.) 399; Parsons *v.* Gloucester Bank, 10 Pick. (Mass.) 533; Oil-Well Supply Co. *v.* Exchange Nat. Bank, 131 Pa. St. 100, 18 Atl. 935; Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202.

28. Harvey *v.* Girard Nat. Bank, 119 Pa. St. 212, 13 Atl. 202.

29. Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123.

Release by cestui que trust.— Where a note is made payable to a designated person for the use of another, and it is agreed by all the parties that it shall not be paid except to the former, a release of the same by the latter does not discharge the same. Stevenson *v.* Rogers, 2 Hill (S. C.) 291.

30. Weston *v.* Weston, 35 Me. 360.

31. Guynemer *v.* Lopez, 11 Rich. (S. C.) 199, holding that where the indorser of a note, while it was yet in the hands of the indorsee, released the drawer "from all claims, causes of action in law or equity," etc., and shortly afterward paid the indorsee and took the note back, the release covered the in-

the payee of a note assigns the same after it has been dishonored to a debtor of the maker, and then gives the maker a release upon his surrendering all his effects to a trustee for the benefit of his creditors, and the maker has no knowledge of the prior assignment until the deed of trust and release have been executed, such release will be binding upon the assignee and will discharge the maker.[32]

2. What Constitutes Discharge[33] — a. In General. By the death of one of the makers of a joint note the remedy at law is extinguished as against the representatives of the deceased maker, although not as against the other makers;[34] and the maker of a note, at common law, is discharged from his liability to the payee by his intermarriage with her.[35] Where plaintiff's right in an action on a draft is purchased *pendente lite*, defendant may, upon paying the consideration of the transfer, with interest from date, claim to be released thereon.[36] The maker of a note will be discharged where the holder takes another and higher security and makes an improper disposition of it by release and sale.[37] So one who agrees to furnish his accommodation indorsement to the payee of a note on certain conditions is discharged from further performance by the failure of the condition.[38]

b. Refusal to Receive Part Payment. If the holder of a note refuses to receive part payment thereof from the maker, his refusal releases the indorser from liability to the amount refused, although the holder does not obtain the same afterward.[39]

c. Acceptance of Security. Where property or securities are accepted by the payee or holder in payment of a bill or note, such acceptance will operate as a discharge of the indorser;[40] but the mere acceptance of collateral security for a bill or note will not discharge indorsers or sureties,[41] unless the time of payment is extended.[42]

d. Refusal to Accept Security. The indorser of a note is not discharged by a

dorser's contingent right to the note and extinguished it.

32. Gelston *v.* Adams, 2 Cranch C. C. (U. S.) 440, 10 Fed. Cas. No. 5,302.

A discharge obtained from the payee subsequently to an assignment by him will not discharge the maker as against the assignee, where the maker had notice of the assignment. Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123.

33. **Discharge by failure to present** see *supra*, X.

Discharge by failure to give notice of dishonor see *infra*, XIII.

Discharge by extension or laches in suing see *supra*, VIII.

34. Osgood *v.* Spencer, 2 Harr. & G. (Md.) 133.

35. Curtis *v.* Brooks, 37 Barb. (N. Y.) 476.

36. Farrell *v.* Austin, 3 La. Ann. 626, under La. Rev. Civ. Code, § 2622, as a sale of a "litigious right."

37. Hall *v.* Hopkins, 14 Mo. 450.

If the payee of a note executes a bond to the maker which is equivalent to a covenant not to sue the latter upon any demand then existing such covenant will amount to an absolute release of the maker. Cuyler *v.* Cuyler, 2 Johns. (N. Y.) 186.

38. Brisbane *v.* Beebe, 48 N Y. 631, where the agreement was from time to time to indorse A's note for B until B was able to meet it, and B was able to meet the first note at its maturity and no new note of A's was then offered for defendant's indorsement and A afterward took up a later renewal and sued defendant on the agreement.

39. Hightower *v.* Ivy, 2 Port. (Ala.) 308, holding that this is true even though such refusal is pending a suit by the holder against the maker.

40. Airy *v.* Nelson, 39 Ark. 43; McGuire *v.* Wooldridge, 6 Rob. (La.) 47; Ives *v.* Lansingburgh Bank, 12 Mich. 361; Stokes *v.* Brooks, 1 Phila. (Pa.) 35, 7 Leg. Int. (Pa.) 26.

41. Ford *v.* Decatur Branch State Bank, 6 Ala. 286, holding that where a bank accepts a proposition from the drawer of a bill to take into its possession a stock of goods to be applied *pro rata* to all his debts it is not a discharge of the indorsers, although the goods are afterward taken and sold by the bank, but that the sum received is an extinguishment *pro tanto*.

That acceptance of collateral security for a bill or note, without extending the time of payment, does not discharge indorsers or sureties see *supra*, VIII, A, 4, c.

Guaranty.— Where the liability of an indorser has been fixed — as by bringing suit within the time prescribed by law — he is not discharged by a third party becoming guarantor. Tooke *v.* Taylor, 31 Tex. 1.

42. See *supra*, VIII, A, 4, c.

refusal of the holder to receive from the maker a conveyance of sufficient real estate as security, and to give day of payment.[43]

e. Failure to Enforce Security. In the absence of special circumstances making prompt action a duty, mere failure to enforce collateral security or a mortgage does not discharge an indorser or surety on a note[44] or the maker,[45] if there is no release or impairment of the security.

f. Release, Surrender, or Impairment of Security. Where, however, the holder of a note or bill holds other paper as collateral, or a mortgage or other security, an indorser or surety who does not consent will be discharged if the security is released or surrendered by the holder,[46] or other and different security submitted,[47] or if the security is impaired by the act or negligence of the holder to the injury of the surety or indorser,[48] as where there is an improper sale of

43. Lane *v.* Steward, 20 Me. 98.

44. See *supra*, VIII, B, 1, h.

45. Granite Bank *v.* Richardson, 7 Metc. (Mass.) 407.

46. *Georgia.*— Atlanta Nat. Bank *v.* Douglass, 51 Ga. 205, 21 Am. Rep. 234.

Illinois.— Pbares *v.* Barbour, 49 Ill. 370.

Louisiana.— Union Nat. Bank *v.* Cooley, 27 La. Ann. 202.

Massachusetts.— American Bank *v.* Baker, 4 Metc. (Mass.) 164.

Michigan.— Ives *v.* Lansingburgh Bank, 12 Mich. 361.

Minnesota.— Bishop *v.* Buckeye Pub. Co., 57 Minn. 219, 58 N. W. 872.

Mississippi.— Clopton *v.* Spratt, 52 Miss. 251.

New Hampshire.— City Bank *v.* Young, 43 N. H. 457.

Pennsylvania.— Wharton *v.* Duncan, 83 Pa. St. 40.

South Carolina.— Ehrick *v.* Haslett, 1 Nott & M. (S. C.) 116.

Texas.— Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118.

Vermont.— Hurd *v.* Spencer, 40 Vt. 581.

Discharge of surety generally see PRINCIPAL AND SURETY.

If the holder voluntarily postpones to a later mortgage a mortgage given to indemnify the indorser the latter is discharged. Nassau Bank *v.* Campbell, 63 Hun (N. Y.) 229, 17 N. Y. Suppl. 737, 44 N. Y. St. 191, 74 Hun (N. Y.) 616, 26 N. Y. Suppl. 831, 57 N. Y. St. 202 [*reversed* on other grounds in 147 N. Y. 694, 41 N. E. 502].

A surrender of collateral received after the indorser's liability had been fixed will not discharge the latter. Hurd *v.* Little, 12 Mass. 502.

Where a note is delivered to a bank as collateral security for a note, and an action brought by such a bank on the note is dismissed, the dismissal will not operate as a discharge of an indorser who acquiesced therein. Tate *v.* New York Bank, 96 Va. 765, 32 S. E. 476.

A bank not being able to enforce a lien on stock of its shareholder, an indorser when sued on a note made by a shareholder to the bank cannot defend on the ground that the bank had permitted a sale of the maker's stock. Smith *v.* Marietta First Nat. Bank, 115 Ga. 608, 41 S. E. 983.

Release of attached property.— The indorser of a note is not discharged by the holder's releasing the property of the maker attached and taking a statutory bond, although done at the solicitation of the maker and for a valuable consideration. Lane *v.* Steward, 20 Me. 98. And see Page *v.* Webster, 15 Me. 249, 33 Am. Dec. 608.

47. Smith *v.* Harper, 5 Cal. 329; Atlanta Nat. Bank *v.* Douglass, 51 Ga. 205, 21 Am. Rep. 234.

The mere exchange of collateral for a new instrument which is practically the same security is not a discharge of an indorser. Keeler *v.* Hollweg, 23 Misc. (N. Y.) 415, 51 N. Y. Suppl. 259.

48. *Georgia.*—Atlanta Nat. Bank *v.* Douglass, 51 Ga. 205, 21 Am. Rep. 234.

Indiana.— Cummings *v.* Pfouts, 13 Ind. 144.

Louisiana.—McGuire *v.* Wooldridge, 6 Rob. (La.) 47 (holding that if the holder of a note secured by a mortgage appears at a meeting of the maker's creditors and votes for the sale of the mortgaged property on terms of credit an indorser of the note is discharged); Hereford *v.* Chase, 1 Rob. (La.) 212 (loss of vendor's lien).

Missouri.— St. Louis State Bank *v.* Bartle, 114 Mo. 276, 21 S. W. 816.

Pennsylvania.—Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359.

Compare Buffalo First Nat. Bank *v.* Wood, 71 N. Y. 405, 27 Am. Rep. 66; Fifth Ave. Bank *v.* Klauss, 193 Pa. St. 402, 44 Atl. 450.

Depreciation in value.—The mere fact that premises covered by a mortgage given to secure a note have depreciated in value since the time when the mortgage might have been enforced does not discharge an indorser from liability on the note. Wilson *v.* Binford, 81 Ind. 588.

Failure to restrain waste.— An indorser is not discharged by failure of the holder of a note, before maturity, to restrain the maker from wasting property mortgaged to secure the note. Brown *v.* Nichols, etc., Co., 123 Ind. 492, 24 N. E. 339.

Failure to record mortgage.— An indorser or surety on a note may be discharged by the holder's failure to record a mortgage given to secure the note, whereby the benefit of the mortgage security is lost (Atlanta Nat. Bank *v.* Douglass, 51 Ga. 205, 21 Am. Rep. 234);

collateral or an improper appropriation of the proceeds by the holder.[49] Where collateral is deposited by the surety on a note the fact that the payee releases such collateral will not release the principal, although the latter may have been in fact only a surety as between him and the apparent surety.[50]

g. Performance of Conditions. Where a note is given to secure the performance of certain obligations on the part of the maker and those obligations have been performed he is discharged.[51]

h. Recovery and Satisfaction of Judgment. Where a judgment is recovered against one of two promisors on a joint and several note it will operate as a discharge of the other.[52] Where the holder of a note obtains a judgment thereon against the maker and sells such judgment, without reserving in the transfer any rights or claims against the indorser, he cannot afterward enforce payment from such indorser,[53] and it has been held that the recovery of judgment against the maker of a note discharges the indorsers from liability on the instrument.[54] If an indorser has satisfied a judgment on the note and taken an assignment of it, his indorsee is entitled to have the judgment canceled as to him.[55]

i. Release of Prior Parties. If the maker, accepter, or any other party is released by the holder of the paper, this will operate as a discharge of all subsequent parties to the instrument who do not consent,[56] unless the holder's rights

but an indorser is not discharged from liability on a note because of the holder's failure to file a mortgage given as collateral security, whereby the mortgage has become valueless, where the mortgage was given on the express condition that it should not be filed until necessary, since the filing in such case is in the discretion of the holder (Allentown Nat. Bank *v.* Trexler, 174 Pa. St. 497, 38 Wkly. Notes Cas. (Pa.) 97, 34 Atl. 195).

49. Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359.

50. Turner *v.* Farmers' Bank, 22 Ky. L. Rep. 787, 58 S. W. 695.

51. Howard *v.* Stratton, 64 Cal. 487, 2 Pac. 263; Daggett *v.* Gage, 41 Ill. 465; Zimmerman *v.* Adee, 126 Ind. 15, 25 N. E. 828; Johnson *v.* Watt, 15 La. Ann. 428.

52. Coonley *v.* Wood, 36 Hun (N. Y.) 559.

53. Spies *v.* National City Bank, 68 N. Y. App. Div. 70, 74 N. Y. Suppl. 64.

54. Brown *v.* Foster, 4 Ala. 282.

55. Somerville First Nat. Bank *v.* Hoffman, (N. J. 1902) 52 Atl. 280.

56. *Louisiana.*— Union Nat. Bank *v.* Grant, 48 La. Ann. 18, 18 So. 705; Citizens' Bank *v.* Dugue, 5 La. Ann. 12.

Massachusetts.— Phœnix Cotton Mfg. Co. *v.* Fuller, 3 Allen (Mass.) 441; Reed *v.* Tarbell, 4 Metc. (Mass.) 93; Sargent *v.* Appleton, 6 Mass. 85, 4 Am. Dec. 90.

Missouri.— Priest *v.* Watson, 75 Mo. 310, 42 Am. Rep. 409; Eggemann *v.* Henschen, 56 Mo. 123; Broadway Sav. Bank *v.* Schmucker, 7 Mo. App. 171.

New York.— Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641; Lynch *v.* Reynolds, 16 Johns. (N. Y.) 41. See also Shutts *v.* Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231.

Tennessee.— Ewing *v.* Sugg, 12 Lea (Tenn.) 375.

United States.— Eldrege *v.* Chacon, Crabbe (U. S.) 296, 8 Fed. Cas. No. 4,329.

England.— Hall *v.* Cole, 4 A. & E. 577, 1 Hurl. & W. 723, 5 L. J. K. B. 100, 6 N. & M. 124, 31 E. C. L. 259; Smith *v.* Knox, 3 Esp. 46; Claridge *v.* Dalton, 4 M. & S. 226, 16 Rev. Rep. 440.

Canada.— Holliday *v.* Jackson, 22 Can. Supreme Ct. 479 [*affirming* 20 Ont. App. 298]; Mellish *v.* Green, 5 Grant Ch. (U. C.) 655. *Compare* Sifton *v.* Anderson, 5 U. C. Q. B. 305, holding that where a person makes a note to another solely for the accommodation of a third person, to whom the payee indorses the same, and who in turn indorses and negotiates it, the last indorser is not discharged by the discharge of the maker by the holder.

See 7 Cent. Dig. tit. "Bills and Notes," § 715.

The release of the maker's property from attachment will discharge an indorser. Spring *v.* George, 50 Hun (N. Y.) 227, 3 N. Y. Suppl. 43, 19 N. Y. St. 769.

Where upon a payment of a portion of the amount due the maker is discharged the indorsers will likewise be discharged. Abat *v.* Holmes, 3 La. 351; Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641; Sanders *v.* Jarman, 67 N. C. 86.

An agreement between the holder of a note and other creditors of the maker to receive a less security in satisfaction of the holder's claim on the note against the maker will not discharge the indorser, the maker not being a party to such agreement. Herbert *v.* Servin, 41 N. J. L. 225.

Consent of indorser.— Where a general release of a note is given to the maker of a note by his creditors, if the indorsers join therein their consent to one another's action will be presumed, and the first indorser will not be discharged by such action on the part of the second. Rockville Nat. Bank *v.* Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293; Ludwig *v.* Iglehart, 43 Md. 39; Bruen *v.* Marquand, 17 Johns. (N. Y.) 58.

against such subsequent parties are expressly reserved.[57] An indorser will be discharged by the release of a prior indorser.[58] The rule that a surety or indorser is discharged by a release or discharge of the principal only applies where the discharge is by some act or neglect of the creditor. It does not apply to a discharge in bankruptcy, or otherwise by operation of law, and without the creditor's consent.[59]

j. Release of Subsequent Parties. The maker of a note will not be discharged by a release of an indorser.[60] Nor will the liability of prior indorsers be affected by the release of a subsequent indorser.[61] A covenant with an accommodation payee not to sue him is no discharge of the maker for whose accommodation the payee indorsed.[62]

k. Rescission of Contract. Where a bill or note is given in pursuance of some contract obligation and subsequently the parties by agreement rescind the contract, the notes will be discharged thereby.[63]

l. Surrender or Cancellation of Instrument. Where the holder of a bill or note delivers up the obligation with the intent and for the purpose of discharging

57. *Louisiana.*— Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

Maine.— Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461.

Massachusetts.— Tohey *v.* Ellis, 114 Mass. 120; Sohier *v.* Loring, 6 Cush. (Mass.) 537; Gloucester Bank *v.* Worcester, 10 Pick. (Mass.) 528.

North Carolina.— Commercial Nat. Bank *v.* Simpson, 90 N. C. 467.

Canada.— Bell *v.* Manning, 11 Grant Ch. (U. C.) 142; Wood *v.* Brett, 9 Grant Ch. (U. C.) 452.

A covenant not to sue the maker will not relieve the indorser where the holder reserves the right to sue him. Kenworthy *v.* Sawyer, 125 Mass. 28. See also Thimblehy *v.* Barron, 7 L. J. Exch. 128, 3 M. & W. 210.

The release of one joint maker, the principal debtor, will not discharge the surety where all rights against the latter are reserved. Potter *v.* Green, 6 Allen (Mass.) 442. See also Nashua Sav. Bank *v.* Abbott, 181 Mass. 531, 63 N. E. 1058.

58. *Michigan.*— Brewer *v.* Boynton, 71 Mich. 254, 39 N. W. 49.

New York.— Newcomb *v.* Raynor, 21 Wend. (N. Y.) 108, 34 Am. Dec. 219. See also Brown *v.* Williams, 4 Wend. (N. Y.) 360.

Tennessee.—State Bank *v.* Johnson, 1 Swan (Tenn.) 217.

Wisconsin.— Plankinton *v.* Gorman, 93 Wis. 560, 67 N. W. 1128.

United States.— Hawkins *v.* Thompson, 2 McLean (U. S.) 111, 11 Fed. Cas. No. 6,246.

Canada.— Jenkins *v.* Mackenzie, 6 U. C. Q. B. 544.

59. Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677. And see Phillips *v.* Solomon, 42 Ga. 192. See also BANKRUPTCY, 5 Cyc. 401, note 50.

The fact that the holder consents to the maker's discharge in bankruptcy will not discharge the indorser. Guild *v.* Butler, 122 Mass. 498, 23 Am. Rep. 378.

60. *Arkansas.*— Ruddell *v.* Walker, 7 Ark. 457.

California.— Tomlinson *v.* Spencer, 5 Cal. 291.

Iowa.— Foster *v.* Russ, 14 Iowa 61.

Pennsylvania.— Love *v.* Brown, 38 Pa. St. 307.

England.— Harrison *v.* Courtauld, 3 B. & Ad. 36, 23 E. C. L. 25; Carstairs *v.* Rolleston, 1 Marsh. 207, 5 Taunt. 551, 1 E. C. L. 283; Hayling *v.* Mulhall, 2 W. Bl. 1235.

Receiving part payment from the indorser and releasing him does not discharge the maker from the balance due. Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322.

61. *Alabama.*— Kennon *v.* McRea, 7 Port. (Ala.) 175.

Arkansas.— Ruddell *v.* Walker, 7 Ark. 457.

Iowa.— Knight *v.* Dunsmore, 12 Iowa 35.

Kentucky.— Commonwealth Bank *v.* Floyd, 4 Metc. (Ky.) 159.

Ohio.— Perry *v.* Carneal, Wright (Ohio) 197.

See 7 Cent. Dig. tit. "Bills and Notes," § 716.

Payment by a later indorser will not discharge a prior one. Commonwealth Bank *v.* Floyd, 4 Metc. (Ky.) 159; State Bank *v.* Roberts, 4 La. 530.

62. Maltby *v.* Carstairs, 7 B. & C. 735, 6 L. J. K. B. O. S. 196, 1 M. & R. 549, 14 E. C. L. 330; Mallet *v.* Thompson, 5 Esp. 178.

63. *Illinois.*— Shinn *v.* Fredericks, 56 Ill. 439.

Indiana.— Caldwell *v.* Ward, 15 Ind. 214.

Michigan.— Campbell *v.* Skinner, 30 Mich. 32.

North Carolina.— Miller *v.* Tharel, 75 N. C. 148. *Compare* Churchill *v.* Speight, 3 N. C. 338.

Wisconsin.— Hutchins *v.* Da Costa, 88 Wis. 371, 60 N. W. 427.

See 7 Cent. Dig. tit. "Bills and Notes," § 1279.

Where a note is given for the price of chattels, and it is agreed upon the acceptance of the same that if the chattels are not satisfactory the maker of the note may return them, and they are returned in accordance with the agreement, the note will be extinguished. Cushman *v.* De Mallie, 46 N. Y. App. Div. 379, 61 N. Y. Suppl. 878.

the same, and there is no fraud or mistake alleged or proven, such surrender operates in law as a release and discharge of liability thereon, even though there is no consideration to support the same;[64] and where the first indorser is an accommodation indorser for the second, and therefore not primarily liable, he will be released by a surrender of the note to the second.[65] Where, however, the intention of the party is not to surrender the note as a discharge of the same, it will not so operate;[66] and the maker of a note will not be discharged by a surrender or cancellation which is fraudulent[67] or the result of mistake.[68]

m. Discharge of Accepter — (i) *In General.* At common law, if the accepter of a bill is appointed as executor of the holder, it will release him from liability on the acceptance.[69] A release of an accepter may be implied where the

64. *Arkansas.*— Beebe *v.* Real Estate Bank, 4 Ark. 546.

Georgia.— Mickelberry *v.* Shannon, 25 Ga. 237.

Indiana.— Sherman *v.* Sherman, 3 Ind. 337; Cox *v.* Hodge, 7 Blackf. (Ind.) 146.

Louisiana.— Foerster's Succession, 43 La. Ann. 190, 9 So. 17; Hall *v.* Chachere, 25 La. Ann. 493; Schinkel *v.* Hanewinkel, 19 La. Ann. 260.

Massachusetts.— Slade *v.* Mutrie, 156 Mass. 19, 30 N. E. 168; Tarbell *v.* Parker, 101 Mass. 165; Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540; Bryant *v.* Smith, 10 Cush. (Mass.) 169.

New Jersey.— Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265.

New York.— Larkin *v.* Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176; Streever *v.* Ft. Edward Bank, 34 N. Y. 413; Edwards *v.* Campbell, 23 Barb. (N. Y.) 423.

North Carolina.— Miller *v.* Tharel, 75 N. C. 148.

Pennsylvania.— Ingraham *v.* Gibbs, 2 Dall. (Pa.) 134, 1 L. ed. 320.

Vermont.— Ellsworth *v.* Fogg, 35 Vt. 355.

United States.— Wilson *v.* Cromwell, 1 Cranch C. C. (U. S.) 214, 30 Fed. Cas. No. 17,799.

See 7 Cent. Dig. tit. "Bills and Notes," § 1277.

A gift by the owner of a note to the maker extinguishes the debt evidenced thereby (Hale *v.* Rice, 124 Mass. 292; Stewart *v.* Hidden, 13 Minn. 43); but to constitute a gift there must be a delivery by the owner with the intention of passing title (Edwards *v.* Woodbury, 156 Mass. 21, 30 N. E. 175. See also *In re* Campbell, 7 Pa. St. 100, 47 Am. Dec. 503).

A mere promise to surrender does not discharge. Greenabaum *v.* Elliott, 60 Mo. 25.

A voluntary destruction of a note by the payee and owner will discharge the maker. Booth *v.* Smith, 3 Woods (U. S.) 19, 2 Fed. Cas. No. 1,649.

Where notes are surrendered to a firm of which the maker is a member it is not necessarily a surrender so as to extinguish the obligation. Dolhonde's Succession, 21 La. Ann. 3.

65. Shelton *v.* Hurd, 7 R. I. 403, 84 Am. Dec. 564.

66. *Alabama.*— Smith *v.* Awbrey, 19 Ala. 63.

Indiana.— Fellows *v.* Kress, 5 Blackf. (Ind.) 536.

Kentucky.— Hewitt *v.* Dodd, 21 Ky. L. Rep. 392, 51 S. W. 795.

Massachusetts.— Emerson *v.* Cutts, 12 Mass. 78.

Missouri.— Bank of Commerce *v.* Hoeber, 8 Mo. App. 171.

See 7 Cent. Dig. tit. "Bills and Notes," § 1277.

Promise to return.— Where a note is delivered to the maker to pledge on his promise to return the same when it shall have performed this function, such delivery will not extinguish the note. Cahn *v.* Ford, 42 La. Ann. 965, 8 So. 477.

A surrender on part payment without the consent of the owner has been held not to be a discharge. McLemore *v.* Hawkins, 46 Miss. 715.

67. *Iowa.*—Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998.

Michigan.— Liesemer *v.* Burg, 106 Mich. 124, 63 N. W. 999.

Tennessee.— Shurer *v.* Green, 3 Coldw. (Tenn.) 419.

Vermont.— Reynolds *v.* French, 8 Vt. 85, 30 Am. Dec. 456.

Wisconsin.— Webster *v.* Stadden, 14 Wis. 277.

United States.— Crawford *v.* Moore, 28 Fed. 824.

See 7 Cent. Dig. tit. "Bills and Notes," § 1277.

68. *California.*— Banks *v.* Marshall, 23 Cal. 223.

Massachusetts.—Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438, 37 Am. Rep. 376.

Missouri.— Boulware *v.* State Bank, 12 Mo. 542.

North Carolina.— Dewey *v.* Bowers, 26 N. C. 538.

Vermont.— Blodgett *v.* Bickford, 30 Vt. 731, 73 Am. Dec. 334; Vermont State Bank *v.* Stoddard, Brayt. (Vt.) 24.

See 7 Cent. Dig. tit. "Bills and Notes," § 1277.

69. Bartrum *v.* Caddy, 9 A. & E. 275, 8 L. J. Q. B. 31, 1 P. & D. 207, 1 W. W. & H. 724, 36 E. C. L. 160; Freakley *v.* Fox, 9 B. & C. 130, 7 L. J. C. P. O. S. 148, 4 M. & R. 18, 17 E. C. L. 66. See also Jenkins *v.* Mackenzie, 6 U. C. Q. B. 544. *Contra*, Needham's Case, 8 Coke 135*a*.

holder accepts a new and different security.[70] A release will not in general discharge a subsequent acceptance,[71] and where the accepter of a bill is released by the drawer of the same before maturity, the liability of the former to a *bona fide* holder for value before maturity will not be discharged.[72] Where the drawer is released by the holder for value of an accommodation bill, the accommodation accepter will not thereby be discharged, although the holder may have known when the release was given that the acceptance was without consideration.[73] Nor will an accepter be discharged by reason of the indorsee's failure to retain collateral security received from his indorser.[74]

(11) *By Waiver.* The liability of an accepter upon a bill may be extinguished by waiver.[75] A waiver, however, must be an unconditional renunciation as holder of the bill of all claims in respect thereto upon the drawee as accepter.[76]

n. Discharge of Drawer by Release of Accepter. If the holder of a bill releases the accepter this will operate to discharge the drawer,[77] except where the accepter has no funds in his hands[78] or where the draft or bill was accepted for the accommodation of the drawer.[79] Where an accepter accepts a release from the holder with a reservation of the latter's right to sue the drawer he in effect assents to remain bound to the drawer and such release will not discharge the latter.[80] Again where the holder of an overdue bill of exchange agrees by parol to

70. Mason *v.* Hunt, Dougl. 284.

The taking of a new security will not amount to a release where the bill of exchange is still recognized as existing (Twopenny *v.* Young, 3 B. & C. 208, 5 D. & R. 259, 10 E. C. L. 103) or where the giver of the same has knowledge that the security is void (Sweeting *v.* Halse, 9 B. & C. 365, 4 M. & R. 287, 17 E. C. L. 167).

To release two accepters it is not necessary that the security should be given by both of them, but the separate bill of either may have that effect. Evans *v.* Drummond, 4 Esp. 89.

71. Drage *v.* Netter, 1 Ld. Raym. 65.

72. Scott *v.* Lifford, 1 Campb. 246, 9 East 347; Dod *v.* Edwards, 2 C. & P. 602, 12 E. C. L. 757.

73. Howard Banking Co. *v.* Welchman, 6 Bosw. (N. Y.) 280.

74. Fowler *v.* Gate City Nat. Bank, 88 Ga. 29, 13 S. E. 831.

75. Fitch *v.* Sutton, 5 East 230, 1 Smith K. B. 415.

What constitutes waiver.— An agreement to consider an acceptance at an end (Walpole *v.* Pulteney [*cited* in Dingwall *v.* Dunster, Dougl. 235, 236]) or a message to an accommodation accepter from the holder that the business has been settled with the drawer and that the accepter need not give himself any further trouble (Black *v.* Peele [*cited* in Dingwall *v.* Dunster, Dougl. 235, 236]) is sufficient; but mere negligence on the holder's part (Farquhar *v.* Southey, 2 C. & P. 497, 12 E. C. L. 697, M. & M. 14, 22 E. C. L. 460, 31 Rev. Rep. 689), a statement to the accommodation accepter that he shall not be troubled, coupled with refusal to surrender the acceptance (Adams *v.* Gregg, 2 Stark. 531, 3 E. C. L. 518), a statement by the holder at a meeting of the accepter's creditors that he will look to the drawer and not come upon the accepter (Whatley *v.* Tricker, 1 Campb. 35, 10 Rev. Rep. 623), an agreement not to sue the accepter, provided he will make an affidavit that the acceptance is a forgery (Stevens *v.* Thacker, Peake 187; Lloyd *v.* Willen, 1 Esp. 178), receiving from the accepter a partial payment coupled with a promise to pay the balance at a future time (Ellis *v.* Galindo, Dougl. (3d ed.) 250 note), or receiving interest from the drawer and delaying for a long time to apply for payment to the accepter (Farquhar *v.* Southey, 2 C. & P. 497, 12 E. C. L. 697, M. & M. 14, 22 E. C. L. 460, 31 Rev. Rep. 689) will not release.

A legal consideration is necessary to support a waiver of an acceptance. Perfect *v.* Musgrave, 6 Price 111; Badnall *v.* Samuel, 3 Price 521; Parker *v.* Leigh, 2 Stark. 228, 3 E. C. L. 388. *Compare* Dobson *v.* Espie, 2 H. & N. 79, 3 Jur. N. S. 470, 26 L. J. Exch. 240, 5 Wkly. Rep. 560.

76. Whatley *v.* Tricker, 1 Campb. 35, 10 Rev. Rep. 623.

Although a waiver may be by parol (Wintermute *v.* Post, 24 N. J. L. 420), yet it should be either in express words, or by means of language or actions which are equivalent to such words (Dingwall *v.* Dunster, Dougl. 235).

77. Decorah First Nat. Bank *v.* Day, 64 Iowa 118, 19 N. W. 882; Lysaght *v.* Phillips, 5 Duer (N. Y.) 106; Mottram *v.* Mills, 2 Sandf. (N. Y.) 189; Heckscher *v.* Robertson, 2 Speers (S. C.) 398.

78. Sargent *v.* Appleton, 6 Mass. 85, 4 Am. Dec. 90.

79. Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153; Glasgow Bank *v.* Murdock, 11 U. C. C. P. 138.

Where an indorser and accommodation accepter are released in order to use their testimony in an action against the drawer the latter will not be discharged thereby. Watt *v.* Rice, 1 La. Ann. 280.

80. Lysaght *v.* Phillips, 5 Duer (N. Y.) 106.

receive payment thereof in instalments the drawer is not released on the failure of the accepter to carry out his contract.[81]

3. WHAT LAW GOVERNS. The law which determines the validity and construction of the contract will also generally determine what will avail to discharge the parties.[82] If a discharge of an acceptance by payment is in accordance with the law of the place where the acceptance is given and payable it will be valid everywhere.[83]

XII. DISHONOR AND PROTEST.

A. Dishonor.[84] Generally speaking commercial paper may be said to be dishonored when, upon due presentation to the proper party either for acceptance or payment, such acceptance or payment is refused,[85] or without the consent of the drawer acceptance is offered conditionally[86] or qualifiedly.[87]

B. Protest — 1. DEFINITION AND SCOPE OF TERM. Strictly speaking a protest is only a formal declaration executed by the notary[88] and does not include either the presentment of a bill or the notice of dishonor.[89] In its popular sense, however, it means all the steps or acts accompanying the dishonor of a bill or note necessary to charge an indorser.[90]

81. Trotter *v.* Phillips, 2 Pa. Dist. 279.

Where there is a receipt of part of the amount of an order from the accepter after protest for non-payment, although without the consent or knowledge of the drawer, the latter is not discharged for the balance. Motte *v.* Kennedy, 3 McCord (S. C.) 13.

82. Stevens *v.* Norris, 30 N. H. 466; Green *v.* Sarmiento, Pet. C. C. (U. S.) 74, 3 Wash. (U. S.) 17, 10 Fed. Cas. No. 5,760.

The sufficiency of payment is to be determined by the law of the place of payment. Bartsch *v.* Atwater, 1 Conn. 409; Winslow *v.* Brown, 7 R. I. 95, 80 Am. Dec. 638; Searight *v.* Calhraight, 4 Dall. (U. S.) 325, 1 L. ed. 853, 21 Fed. Cas. No. 12,585. So if part payment is a discharge by the law of the place of demand it will be a sufficient discharge everywhere. Ralli *v.* Dennistoun, 6 Exch. 483, 20 L. J. Exch. 278.

83. Robertson *v.* Franch, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535; Burrows *v.* Jemino, 2 Str. 733.

84. **Effect of dishonor on accrual of right of action** see *infra*, XIV, A [8 Cyc.].

85. Merchants' Nat. Bank *v.* McCarger, 9 Heisk. (Tenn.) 401; Gray *v.* Milner, 3 Moore C. P. 90, 2 Stark. 336, 3 E. C. L. 434, 8 Taunt. 739, 4 E. C. L. 361, 21 Rev. Rep. 525; Neg. Instr. L. §§ 221, 230.

86. **Conditional acceptance as refusal** see *supra*, V, B, 2.

87. **Qualified acceptance as refusal** see *supra*, V, B, 1.

If an acceptance is rendered invalid by some public act, event, or calamity, as for instance the outbreak of war, the bill cannot afterward be treated with regard to the drawer as having been dishonored. Chitty Bills 383.

88. Townsend *v.* Lorain Bank, 2 Ohio St. 345; Sprague *v.* Fletcher, 8 Oreg. 367, 34 Am. Rep. 587.

It has been defined as follows: "A formal statement in writing, by a public notary, under seal, that a certain bill of exchange or promissory note (describing it) was on a certain day presented for payment, or acceptance, and that such payment or acceptance was refused." Burrill L. Dict. [*quoted* in Swayze *v.* Britton, 17 Kan. 625, 629].

89. Walker *v.* Turner, 2 Gratt. (Va.) 534.

90. *Alabama.*— White *v.* Keith, 97 Ala. 668, 12 So. 611.

Michigan.— Spies *v.* Newberry, 2 Dougl. (Mich.) 425.

Nebraska.— Wood River Bank *v.* Omaha First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

New York.— Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489.

Ohio.— Townsend *v.* Lorain Bank, 2 Ohio St. 345.

Oregon.— Sprague *v.* Fletcher, 8 Oreg. 367, 34 Am. Rep. 587.

Virginia.— Brown *v.* Hull, 33 Gratt. (Va.) 23.

See 7 Cent. Dig. tit. "Bills and Notes," § 1113.

Protesting a bill consists of two steps: that is to say, the "noting" of the bill and then afterward the extending of the note into a full and complete statement properly called the protest. The noting is merely a preliminary step to the protest (Leftley *v.* Mills, 4 T. R. 170) and consists of a memorandum made by the protesting officer, usually containing his initials, the date, and a memorandum of the notarial charges (Gale *v.* Walsh, 5 T. R. 239, 2 Rev. Rep. 580; Leftley *v.* Mills, 4 T. R. 170; Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605). Such noting is, however, merely an incipient protest or memorandum from which the formal statement is to be made afterward, and is unknown to the law as distinguished from the protest proper (Leftley *v.* Mills, 4 T. R. 170), although it would seem that at one time noting was the form of protest usually employed in case of the dishonor for non-acceptance of an inland bill (Kendrick *v.* Lomax, 2 Cr. & J. 405, 1 L. J. Exch. 145, 2 Tyrw. 438; Gale *v.* Walsh, 5 T. R. 239, 2 Rev. Rep. 580; Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605).

2. Necessity of — a. On Negotiable Paper — (i) *Bills of Exchange* — (A) *In General* — (1) Foreign Bills. By the law merchant protest for non-payment or non-acceptance was necessary to charge the drawee or indorsers on all foreign bills of exchange and could not be dispensed with.[91]

(2) Inland Bills — (a) In General. With regard to domestic or inland bills of exchange, however, the rule is otherwise, and in the absence of a statute requiring it[92] no protest is necessary,[93] although it constitutes no wrong against the drawer, none of the costs thereof being charged against him.[94] The statutes, both in England[95] and the United States, have, however, modified the common-law rule and it is now usually necessary to protest such bills to enable the holder to recover costs and damages for their dishonor.[96]

91. *Alabama.*— Cullum *v.* Casey, 9 Port. (Ala.) 131, 33 Am. Dec. 304.

Florida.— Joseph *v.* Salomon, 19 Fla. 623.

Indiana.— State Bank *v.* Hayes, 3 Ind. 400.

Kentucky.— Piner *v.* Clary, 17 B. Mon. (Ky.) 645; Smith *v.* Roach, 7 B. Mon. (Ky.) 17; Higgins *v.* Morrison, 4 Dana (Ky.) 100.

Mississippi.— Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408.

Missouri.—Commercial Bank *v.* Barksdale, 36 Mo. 563.

New York.— Commercial Bank *v.* Varnum, 49 N. Y. 269 [*reversing* 3 Lans. (N. Y.) 86]; Wells *v.* Whitehead, 15 Wend. (N. Y.) 527.

North Carolina.— Austin *v.* Rodman, 8 N. C. 194, 9 Am. Dec. 630.

South Carolina.— Fleming *v.* McClure, 1 Brev. (S. C.) 428, 2 Am. Dec. 671.

Tennessee.— Carter *v.* Union Bank, 7 Humphr. (Tenn.) 548, 46 Am. Dec. 89.

England.— Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; Brough *v.* Parkings, 2 Ld. Raym. 992, 1 Salk. 131; Gale *v.* Walsh, 5 T. R. 239, 2 Rev. Rep. 580.

See 7 Cent. Dig. tit. "Bills and Notes," § 1021.

A bill drawn in one of the United States and payable in another is a foreign bill. See *supra*, I, B, 2, a, (III), (B). But see Estep *v.* Cecil, 6 Ohio St. 536; McMurchey *v.* Robinson, 10 Ohio 496, which hold that by the statutes of Ohio a protest upon a bill drawn in one state upon a party in another is only necessary when statutory damages are claimed.

92. **In Nebraska** by statute (Nebr. Comp. Stat. c. 61, § 6) authority is conferred upon a notary public "to demand acceptance, or payment of any foreign, inland, or domestic bill of exchange, promissory note, or other obligation, in writing, and to protest the same for non-acceptance or non-payment, as the case may be, and give notice to indorsers, makers, drawers, or acceptors, of such demand, non-acceptance, or non-payment." German Nat. Bank *v.* Beatrice Nat. Bank, 63 Nebr. 246, 88 N. W. 480.

93. *Alabama.*— Knott *v.* Venable, 42 Ala. 186; Winter *v.* Coxe, 41 Ala. 207; Leigh *v.* Lightfoot, 11 Ala. 935.

Arkansas.— Turner *v.* Greenwood, 9 Ark. 44.

Illinois.— Smith *v.* Curlee, 59 Ill. 221; Bond *v.* Bragg, 17 Ill. 69.

Iowa.— Smith *v.* Ralston, Morr. (Iowa) 87.

Kentucky.— Citizens' Sav. Bank *v.* Hays, 96 Ky. 365, 15 Ky. L. Rep. 505, 29 S. W. 20; Young *v.* Bennett, 7 Bush (Ky.) 474; U. S. Bank *v.* Leathers, 10 B. Mon. (Ky.) 64; Whiting *v.* Walker, 2 B. Mon. (Ky.) 262; Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576; Louisville Banking Co. *v.* Asher, 23 Ky. L. Rep. 1180, 65 S. W. 133 [*rehearing* denied in 23 Ky. L. Rep. 1661, 65 S. W. 831]; Murphy *v.* Citizens' Sav. Bank, 22 Ky. L. Rep. 1672, 61 S. W. 25 [*rehearing* denied in 22 Ky. L. Rep. 1872, 62 S. W. 1028].

New York.— Townsend *v.* Auld, 8 Misc. (N. Y.) 516, 28 N. Y. Suppl. 746, 59 N. Y. St. 274; Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372.

North Carolina.—Shaw *v.* McNeill, 95 N. C. 535; Hubbard *v.* Troy, 24 N. C. 134.

South Carolina.— Payne *v.* Winn, 2 Bay (S. C.) 374.

Texas.— Thatcher *v.* Mills, 14 Tex. 13, 65 Am. Dec. 95.

United States.— Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 328 (construing Mississippi statute); Union Bank *v.* Hyde, 6 Wheat. (U. S.) 572, 5 L. ed. 333; Young *v.* Bryan, 6 Wheat. (U. S.) 146, 5 L. ed. 228.

England.— Tassell *v.* Lewis, 1 Ld. Raym. 743.

Canada.— Pratt *v.* MacDougall, 12 L. C. Jur. 243.

See 7 Cent. Dig. tit. "Bills and Notes," § 1020.

94. Wittich *v.* Pensacola First Nat. Bank, 20 Fla. 843, 51 Am. Rep. 631.

95. **The original statutes** in England authorizing protest of inland bills were those of 9 & 10 Wm. III, c. 17, for non-acceptance, and 3 & 4 Anne, c. 9, for non-payment, which acts were subsequenty incorporated into the Bills of Exchange Act. Under 9 & 10 Wm. III, it was at one time held that a protest was necessary to entitle the holder to interest. Brough *v.* Parkins, 2 Ld. Raym. 992, 1 Salk. 131; Harris *v.* Benson, 2 Str. 910. This view, however, was abandoned and interest could be recovered under that statute without proof of protest. Windle *v.* Andrews, 2 B. & Ald. 696, 2 Stark. 425, 3 E. C. L. 474; Lumley *v.* Palmer, 2 Str. 1000.

96. *Alabama.*— Knott *v.* Venable, 42 Ala. 186; Leigh *v.* Lightfoot, 11 Ala. 935.

(b) CHECKS, DRAFTS, AND ORDERS. Checks have uniformly been held to be of the nature of inland bills of exchange to the extent that they are governed by the laws relating to the necessity,[97] or non-necessity[98] of protesting the latter, but a draft drawn by an agent upon a corporation for which he is acting[99] or an order drawn by a town clerk on a county treasurer[1] is not a domestic bill within the meaning of this holding.

(B) *As Against Accepter.* The object of protesting bills of exchange being to furnish proof of presentment and dishonor so that the holder may hold the parties who are secondarily liable on the bill, no protest is necessary to hold the accepter liable for the principal sum,[2] although it would be necessary to render him liable for interest after maturity.[3]

(C) *For Better Security.* Both by the law merchant and by foreign statutes, if the accepter becomes a bankrupt, absconds, or for other reasons becomes insolvent or discredited, the holder may protest a foreign bill for better security,[4] but it has been said that the holder's failure so to do will not discharge either the drawer or indorsers.[5]

(II) *PROMISSORY NOTES.* In the absence of statute[6] or usage,[7] a formal protest for the purpose of holding parties secondarily liable on promissory notes[8]

Indiana.— Griffin *v.* Kemp, 46 Ind. 172.

Kentucky.— Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576; Lawrence *v.* Ralston, 3 Bibb (Ky.) 102; Murray *v.* Clayborn, 2 Bibb (Ky.) 300.

Louisiana.— It is necessary to protest the bill in order to recover either interest or damages. Opdyke *v.* Corles, 16 La. 569; Cain *v.* Morris, 15 La. 494; Consolidated Assoc. Bank *v.* Foucher, 9 La. 476.

Ohio.— Under the Ohio act of 1858 domestic bills are put on the same footing as foreign with regard to protest. Daniel *v.* Downing, 26 Ohio St. 578.

South Carolina.— Lang *v.* Brailsford, 1 Bay (S. C.) 222.

Virginia.— Willock *v.* Riddle, 5 Call (Va.) 358.

United States.— Wanzer *v.* Tupper, 8 How. (U. S.) 234, 12 L. ed. 1060; Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 328 (construing Mississippi statute).

See 7 Cent. Dig. tit. "Bills and Notes," § 1050.

In Texas the holder may either protest the bill or in lieu thereof institute an action at once against the maker or accepter. Platzer *v.* Norris, 38 Tex. 1. If the bringing of the suit is impossible, as for instance where the courts are closed on account of war, a protest would then be necessary (Indorsement Cases, 31 Tex. 693; Green *v.* Elson, 31 Tex. 159), unless the holder commences his action immediately upon the reopening of the courts (McGary *v.* McKenzie, 38 Tex. 216).

97. Moses *v.* Franklin Bank, 34 Md. 574; Lawson *v.* Richards, 6 Phila. (Pa.) 179, 23 Leg. Int. (Pa.) 348.

98. *Florida.*— Wittich *v.* Pensacola First Nat. Bank, 20 Fla. 843, 51 Am. Rep. 631.

Indiana.— Henshaw *v.* Root, 60 Ind. 220; Pollard *v.* Bowen, 57 Ind. 232; Griffin *v.* Kemp, 46 Ind. 172.

Louisiana.— Mutual Nat. Bank *v.* Rotge, 28 La. Ann. 933, 26 Am. Rep. 126.

Nebraska.— Wood River Bank *v.* Omaha First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

Ohio.— Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

Wisconsin.— Jones *v.* Heiliger, 36 Wis. 149.

See 7 Cent. Dig. tit. "Bills and Notes," § 1020.

99. Mobley *v.* Clark, 28 Barb. (N. Y.) 390.

1. Lyell *v.* Lapeer County, 6 McLean (U. S.) 446, 15 Fed. Cas. No. 8,618.

2. Rice *v.* Hogan, 8 Dana (Ky.) 133; Lang *v.* Brailsford, 1 Bay (S. C.) 222.

3. Lang *v.* Brailsford, 1 Bay (S. C.) 222.

Protest after a conditional acceptance is a waiver of such acceptance and a discharge of the accepter from liability. Sproat *v.* Matthews, 1 T. R. 182.

4. Anonymous, 1 Ld. Raym. 743; *Ex p.* Wackerbath, 5 Ves. Jr. 574; Chitty Bills 385.

5. Chitty Bills 385.

The only advantage of such protest is to prepare the way for a second acceptance for honor (*Ex p.* Wackerbath, 5 Ves. Jr. 574) and to give the prior obligors opportunity to protect themselves against loss on reëxchange and return of the bill. Nor would such parties be liable to an action on the part of the holder before the maturity of the bill. Chitty Bills 385.

6. In some jurisdictions the statute has modified the common-law rule. Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547; Shields *v.* Farmers' Bank, 5 W. Va. 254; Burke *v.* McKay, 2 How. (U. S.) 66, 11 L. ed. 181.

7. Protest of promissory notes is, however, often made by banks as a matter of convenience and becomes in such cases allowable by usage. Knott *v.* Venable, 42 Ala. 186; Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 5 L. ed. 628.

8. *Alabama.*— Knott *v.* Venable, 42 Ala. 186; Sale *v.* Decatur Branch Bank, 1 Ala. 425; Quigley *v.* Primrose, 8 Port. (Ala.) 247.

California.— Kellogg *v.* Pacific Box Factory, 57 Cal. 327; McFarland *v.* Pico, 8 Cal. 626.

District of Columbia.— Presbrey *v.* Thomas, 1 App. Cas. (D. C.) 171.

Georgia.— Pritchard *v.* Smith, 77 Ga. 463.

is not necessary, and if such protest is unnecessarily made the costs thereof cannot be collected.[9]

b. On Non-Negotiable Paper. With regard to non-negotiable instruments a protest after dishonor is unnecessary.[10]

3. By Whom Made — a. In General. In the absence of statute[11] or local usage to the contrary protest should as a general rule be made by a notary public in person,[12] and by the same notary who presented and noted the bill,[13] and any collecting agent who is authorized to receive payment of commercial paper may act for the holder in causing it to be protested.[14] If, however, no notary can be con-

Illinois.— Bond *v.* Bragg, 17 Ill. 69.

Indiana.— Scott *v.* Shirk, 60 Ind. 160; Green *v.* Louthain, 49 Ind. 139; Shane *v.* Lowry, 48 Ind. 205.

Iowa.— Smith *v.* Ralston, Morr. (Iowa) 87.

Kansas.— German *v.* Ritchie, 9 Kan. 106.

Massachusetts.— City Bank *v.* Cutter, 3 Pick. (Mass.) 414.

Michigan.— Platt *v.* Drake, 1 Dougl. (Mich.) 296.

Minnesota.— Bryant *v.* Lord, 19 Minn. 396, holding that Minn. Rev. Stat. (1866), c. 26, § 9, did not require protesting of notes to charge the indorser, but simply provided that the notary's certificate should be *prima facie* evidence of the facts certified therein.

Missouri.— Labadie *v.* Chouteau, 37 Mo. 413 (holding that the code had not altered the rule); Williams *v.* Smith, 21 Mo. 419; Mechanics' Sav. Inst. *v.* Finn, 1 Mo. App. 36.

Nebraska.— McKay *v.* Hinman, 13 Nebr. 33, 13 N. W. 15.

New Jersey.— Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

New York.— Brennan *v.* Lowry, 4 Daly (N. Y.) 253.

North Carolina.— Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876.

Pennsylvania.— Bank of North America *v.* McKnight, 1 Yeates (Pa.) 145; Falk *v.* Lee, 8 Wkly. Notes Cas. (Pa.) 345; Eby *v.* Philadelphia Nat. F. Ins. Co., 3 Wkly. Notes Cas. (Pa.) 487; Arnold *v.* Niess, 1 Walk. (Pa.) 115.

South Carolina.— Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779; Payne *v.* Winn, 2 Bay (S. C.) 374.

United States.— Burke *v.* McKay, 2 How. (U. S.) 66, 11 L. ed. 181; Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 5 L. ed. 628; Union Bank *v.* Hyde, 6 Wheat. (U. S.) 572, 5 L. ed. 333; Young *v.* Bryan, 6 Wheat. U. S.) 146, 5 L. ed. 228.

England.— Bonar *v.* Mitchell, 5 Exch. 415, 19 L. J. Exch. 302.

Canada.— Coutu *v.* Rafferty, 7 Montreal Super. Ct. 146.

See 7 Cent. Dig. tit. "Bills and Notes," § 1119.

Where the note is made in one state and is payable in another, the courts are not agreed as to whether the protest is necessary. In some jurisdictions (Bay *v.* Church, 15 Conn. 15; Smith *v.* Little, 10 N. H. 526) it is held that such note should be treated as an inland bill and that therefore protest is unnecessary. In another (Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779) it is held that such a note should be treated as an inland bill of exchange and that therefore protest is necessary.

9. Johnson *v.* Fulton Bank, 29 Ga. 259; German *v.* Ritchie, 9 Kan. 106; McKay *v.* Hinman, 13 Nebr. 33, 13 N. W. 15.

10. Mobile Bank *v.* Brown, 42 Ala. 108; Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310; Ford *v.* Mitchell, 15 Wis. 304.

As to what are negotiable instruments see *supra*, I, B; I, C.

11. **Consuls.**— In England, by statute, authority is given to British consuls to protest bills and notes. Byles Bills 262.

Justices of the peace.— In some of the United States a justice of the peace as well as a notary is authorized by statute to protest bills. Burke *v.* McKay, 2 How. (U. S.) 66, 72, 11 L. ed. 181, where the court, by Story, J., said: "But where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc* he acts as a notary."

12. Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Cribbs *v.* Adams, 13 Gray (Mass.) 597; Ocean Nat. Bank *v.* Williams, 102 Mass. 141; Sacrider *v.* Brown, 3 McLean (U. S.) 481, 21 Fed. Cas. No. 12,205.

As a general rule protest cannot properly be made by a clerk or deputy of a notary, but that officer himself, who acts under oath and to whose official acts, duly certified, the law gives verity, must act. Commercial Bank *v.* Barksdale, 36 Mo. 563; Sacrider *v.* Brown, 3 McLean (U. S.) 481, 21 Fed. Cas. No. 12,205. See also Onondaga County Bank *v.* Bates, 3 Hill (N. Y.) 53. But see Munroe *v.* Woodruff, 17 Md. 159, holding that the rule may be modified by general local custom. And in Louisiana, special provision is made by statute (act of March 14, 1844) for the protest by the notary, reciting a presentment of the bill by his deputy. Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555; Carter *v.* Union Bank, 7 Humphr. (Tenn.) 548, 46 Am. Dec. 89; Sheegog *v.* James, 26 Tex. 501.

13. Commercial Bank *v.* Barksdale, 36 Mo. 563; Commercial Bank *v.* Varnum, 49 N. Y. 269.

14. Chitty Bills 373; 2 Edwards Bills & N. § 833. See also Banks and Banking, 5 Cyc. 509, note 95.

veniently obtained, protest may be made by any other substantial person[15] in the presence of two witnesses.[16]

b. Effect of Officer's Illegal Appointment. While protest may be made by any officer expressly authorized by statute an officer whose authority and appointment are themselves illegal cannot legally protest a bill.[17]

c. Effect of Officer's Interest in Paper. The fact that the officer making the protest has an interest in the bill or note will not render him incompetent to act.[18]

4. Where Made. The bill should be protested at the place where it is dishonored,[19] although where presentment cannot be made because of the absence of the drawee the protest may be made at the place the instrument was dated,[20] and where it is addressed to the drawee at one place and made payable at another protest may be made at either.[21]

5. Time of Making — a. In General — (i) *Noting* — (A) *Foreign Bills* — (1) In General. As stated above the protest of a bill ordinarily begins with the noting of it.[22] In the case of a foreign bill of exchange this should be done during business hours[23] of the very day it is dishonored,[24] and it has been held that

15. Read *v.* Commonwealth Bank, 1 T. B. Mon. (Ky.) 91, 15 Am. Dec. 86; Byles Bills 262; Chitty Bills 374; 2 Daniel Neg. Instr. § 934*a*.

16. Todd *v.* Neal, 49 Ala. 266; Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Commonwealth Bank *v.* Pursley, 3 T. B. Mon. (Ky.) 238; Read *v.* Commonwealth Bank, 1 T. B. Mon. (Ky.) 91, 15 Am. Dec. 86.

In England witnesses are required by statute in the case of protest of inland bills by one who is not a notary. Bayley Bills 258; Daniel Neg. Instr. § 934*a*.

In the case of a foreign bill, however, some text-book writers hold that witnesses are not necessary where it is protested by a private person. Brook Notary 103; Chitty Bills (13th Am. ed.) 374, note *u*.

17. Todd *v.* Neal, 49 Ala. 266; Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275, in which cases it was held that the courts of Alabama as then organized (1873) would not recognize as valid the official acts of a notary in New Orleans in February, 1862, assuming to act under the authority of the Confederate States government. But see Tyree *v.* Rives, 57 Ala. 173, holding, in 1876, that it was no ground of objection to a protest that "the notary before whom it was executed was an officer of" a seceding state.

18. Moreland *v.* Citizens' Sav. Bank, 97 Ky. 211, 17 Ky. L. Rep. 88, 30 S. W. 637; Read *v.* Commonwealth Bank, 1 T. B. Mon. (Ky.) 91, 15 Am. Dec. 86; Nelson *v.* Killingley First Nat. Bank, 69 Fed. 798, 32 U. S. App. 554, 16 C. C. A. 425. *Contra*, Herkimer County Bank *v.* Cox, 21 Wend. (N. Y.) 119, 34 Am. Dec. 220; Monongahela Bank *v.* Porter, 2 Watts (Pa.) 141.

Protest by maker as notary.— It has been held that the cashier of a bank who is also principal maker of a note owned by the bank may legally protest the same as a notary public, the court remarking: "Certainly there was no person better posted as to the fact than he, and the act itself is not such as violated any obligation or was inconsistent with his official duty as notary." Dykman *v.* Northbridge, 1 N. Y. App. Div. 26, 28, 36 N. Y. Suppl. 962, 72 N. Y. St. 64 [*affirmed* in 153 N. Y. 662, 48 N. E. 1104]. See, however, Pelletier *v.* Brosseau, 6 Montreal Super. Ct. 331, where it was held that a notary who is indorser of a promissory note cannot as a notary protest such note even where, being the bearer of the note, he erased his name and transferred the note to a *prete-nom*, under whose name the protest was made; that such a protest was null and void and discharged all previous indorsers.

Protest by son of holder.—It has been held that the acting notary may be a son of the holder of the bill. Eason *v.* Isbell, 42 Ala. 456; Waters *v.* Petrovic, 19 La. 584.

19. Grigsby *v.* Ford, 3 How. (Miss.) 184 (although if not protested at the place where the instrument is payable the objection cannot be taken after judgment); Neely *v.* Morris, 2 Head (Tenn.) 595, 75 Am. Dec. 753 (where, under the Tennessee act of 1835, it was held that a bill or note must be protested by a notary at the place of payment, and that the authority of a notary is confined to the county for which he was appointed and commissioned).

20. White *v.* Wilkinson, 10 La. Ann. 394.

21. Mason *v.* Franklin, 3 Johns. (N. Y.) 202; Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381.

22. See *supra*, XII, B, 1, note 90.

23. But noting the bill a few hours after the dishonor and on the same day will be sufficient. Crenshaw *v.* McKiernan, Minor (Ala.) 295; Read *v.* Commonwealth Bank, 1 T. B. Mon. (Ky.) 91, 15 Am. Dec. 86; Cookendorfer *v.* Preston, 4 How. (U. S.) 317, 11 L. ed. 992.

24. Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391 (holding that if a sight draft is not paid on the day it is presented for acceptance it should be protested on the same day); Dennistoun *v.* Stewart, 17 How. (U. S.) 606, 15 L. ed. 228; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Leftley *v.* Mills, 4 T. R. 170; Quebec Bank *v.* Ogilvy, 3 Dorion (U. C.) 200; Harriss *v.* Schwob, 3 Rev. Lég. 453.

neglect to note a bill of exchange for protest on that day will only be excused by inevitable accident.[25]

(2) Where Grace Is Allowed. Where days of grace are allowed, it has been held that in order to hold the indorser the note must be protested on the last day of grace.[26]

(3) Where Due on Sunday or Holiday. A bill of exchange should not be protested on Sunday or a legal holiday unless expressly authorized by statute, and the general rule is that a bill maturing on Sunday or a legal holiday should be protested on the day following;[27] but in the absence of statute the doctrine seems to be well settled that where days of grace are allowed, and the last day of grace falls on Sunday, then the bill is payable, and in case of dishonor should be protested on the preceding Saturday.[28]

(B) *Inland Bills.* By force of the statute in England and Canada, inland bills of exchange cannot be protested for non-payment until the day after their maturity and dishonor,[29] but in the United States an inland bill of exchange sometimes acquires by statute the properties of a foreign bill, and it must then be treated as a foreign bill and protested on the day of its dishonor.[30]

(II) *Extending Protest.* Where the protest has been once duly noted it may be extended into a full protest within a reasonable time before trial,[31] either

Effect of dating back protest.— It is not sufficient to protest a bill several months after the date of its dishonor, although the protest is dated back to the day the bill was dishonored. Commercial Bank *v.* Barksdale, 36 Mo. 563. See also Boggs *v.* Mobile Branch Bank, 10 Ala. 970.

25. Hudson *v.* State Bank, 3 Port. (Ala.) 340; Mallory *v.* Kirwan, 2 Dall. (Pa.) 192, 1 L. ed. 344.

26. Mills *v.* Rouse, 2 Litt. (Ky.) 203; Peet *v.* Zanders, 6 La. Ann. 364; Canonge *v.* Louisiana State Bank, 7 Mart. N. S. (La.) 583; Carey Lombard Lumber Co. *v.* Ballinger First Nat. Bank, 86 Tex. 299, 24 S. W. 260. See also Alexandria Bank *v.* Swann, 9 Pet. (U. S.) 33, 9 L. ed. 40.

27. Hagerty *v.* Engle, 43 N. J. L. 299; Sylvester *v.* Crohan, 138 N. Y. 494, 34 N. E. 273, 53 N. Y. St. 113 [*affirming* 63 Hun (N. Y.) 509, 18 N. Y. Suppl. 546, 45 N. Y. St. 320]; Delaware County Bank *v.* Broomhall, 38 Pa. St. 135, 80 Am. Dec. 471; Hirshfield *v.* Ft. Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639. *Contra*, Sanders *v.* Ochiltree, 5 Port. (Ala.) 73, 30 Am. Dec. 551, where it was held that a note falling due on Sunday is payable and should be protested on the preceding Saturday totally irrespective of the question of days of grace and subject only to the qualification that a note payable one day after date and executed on Saturday is not due before the following Monday.

The former rule in New York was that a bill of exchange falling due on Sunday might be protested after dishonor on the previous Saturday. Jackson *v.* Richards, 2 Cai. (N. Y.) 343.

28. Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240; Chamberlain *v.* Maitland, 5 B. Mon. (Ky.) 448; Offut *v.* Stout, 4 J. J. Marsh. (Ky.) 332; Lindenmuller *v.* People, 33 Barb. (N. Y.) 548; Campbell *v.* International L. Assur. Soc., 4 Bosw. (N. Y.) 298; West *v.* Lee, 50 How. Pr. (N. Y.) 313; Salter *v.* Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Mechanics', etc., Bank *v.* Gibson, 7 Wend. (N. Y.) 460. See Morris *v.* Bailey, 10 S. D. 507, 74 N. W. 443.

29. Leftley *v.* Mills, 4 T. R. 170; Bradbury *v.* Doole, 1 U. C. Q. B. 442.

30. Battertons *v.* Porter, 2 Litt. (Ky.) 388, where a bill was discounted at a bank whose charter made such bills in effect foreign bills.

31. *Alabama.*— Decatur Bank *v.* Hodges, 9 Ala. 631.

Iowa.— Chatham Bank *v.* Allison, 15 Iowa 357.

Mississippi.— Grimball *v.* Marshall, 3 Sm. & M. (Miss.) 359; Fleming *v.* Fulton, 6 How. (Miss.) 473.

Missouri.— Commercial Bank *v.* Barksdale, 36 Mo. 563.

New York.— Groton First Nat. Bank *v.* Crittenden, 2 Thomps. & C. (N. Y.) 118; Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635.

South Carolina.— See Aiken *v.* Cathcart, 2 Speer (S. C.) 642.

Tennessee.— Union Bank *v.* Holcomb, 5 Humphr. (Tenn.) 583.

Vermont.— Rutland, etc., R. Co. *v.* Cole, 24 Vt. 33.

United States.— Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 328.

England.— Goostrey *v.* Mead, Bull. N. P. 271; Robins *v.* Gibson, 3 Campb. 334, 1 M. & S. 288; Geralopulo *v.* Wieler, 10 C. B. 690, 15 Jur. 316, 20 L. J. C. P. 105, 3 Eng. L. & Eq. 515, 70 E. C. L. 690; Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; Chaters *v.* Bell, 4 Esp. 48; Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605.

Delay in affixing seal.— Where the protest of a bill was written and signed for the day of its dishonor, but the notary failed to affix his seal until several months afterward but before trial, it was held that the protest was

on the day that the paper is dishonored or afterward, and the same rule applies in case of payment *supra protest.*[32]

b. Premature Protest. Where a bill of exchange or note is protested prior to the date of its maturity and dishonor,[33] such protest cannot be regarded as valid to fix the liability of the indorser and is nugatory.[34]

6. Form and Requisites — a. In General. While no particular form is required for a certificate of protest[35] it should describe or identify the paper,[36] which is usually done by including therein a copy of the note or bill[37] or by annexing a copy or the original and referring thereto.[38] A slight misdescription of the bill or other irregularity, however, is immaterial if no one is misled thereby.[39]

b. Particular Statements — (i) *Presentment and Demand* — (a) *In General.* The certificate of protest should affirmatively show that a presentment and demand had been made to the proper party[40] or sufficient excuse for want

completed in time. Billingsley *v.* State Bank, 3 Ind. 375.

32. Geralopulo *v.* Wieler, 10 C. B. 690, 15 Jur. 316, 20 L. J. C. P. 105, 3 Eng. L. & Eq. 515, 70 E. C. L. 690; Vandewall *v.* Tyrrell, M. & M. 87, 22 E. C. L. 480.

33. Protest on the day of maturity, according to the terms of the bill or note, is premature, where, by law merchant or by statute, grace is allowed. Cruger *v.* Lindheim, (Tex. 1890) 16 S. W. 420.

Presumption as to protest.— Where the complaint alleged that a sight draft executed in Arkansas on the 15th of March and held in Memphis, at a time not designated, was protested for non-payment in Kansas City, Missouri, on the nineteenth of said month, it was held that this did not show a premature protest. Wards *v.* Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703.

34. Craig *v.* Price, 23 Ark. 633; Hagerty *v.* Engle, 43 N. J. L. 299; Cruger *v.* Lindheim, (Tex. 1890) 16 S. W. 420.

Premature protest actionable.—It has been held in some jurisdictions that a premature protest of a bill of exchange is actionable. Delaware County Bank *v.* Broomhall, 38 Pa. St. 135, 80 Am. Dec. 471 (where it was caused by mistake in reading an obscure date); Hirshfield *v.* Ft. Worth Nat. Bank, 33 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639.

35. Dupré *v.* Richard, 11 Rob. (La.) 495, 43 Am. Dec. 214.

Inaccurate or ungrammatical language will not vitiate the certificate if its meaning can be determined readily with reasonable certainty. New Orleans Gas Light, etc., Co. *v.* Hudson, 5 Roh. (La.) 486.

Dating of protest.—While it is proper that the protest should be dated, this may be done at, or at any time before, the trial (Chatham Bank *v.* Allison, 15 Iowa 357), although it should not bear a date prior to the time of protesting (French *v.* Campbell, 2 H. Bl. 163, 6 T. R. 200, 3 Rev. Rep. 154).

36. Vanwickle *v.* Downing, 19 La. Ann. 83 (where the variance between the certificate and the draft in question was held to be fatal so far as recovery against the indorser was concerned); Williams *v.* Smith, 48 Me. 135; Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620.

37. Mt. Pleasant Branch State Bank *v.* McLeran, 26 Iowa 306; Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620.

38. Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620; Lionberger *v.* Mayer, 12 Mo. App. 575. See also Seneca County Bank *v.* Neass, 3 N. Y. 442 [*affirming* 5 Den. (N. Y.) 329]; Colms *v.* State Bank, 4 Baxt. (Tenn.) 422.

Certificate indorsed on protest.— It was held in Lyman *v.* Boulton, 8 U. C. Q. B. 323, that a certificate of protest indorsed on a protest, instead of being written on the foot of, or embodied in it, sufficiently complies with 7 Vict. c. 4, or that the annexation of a copy of the note to the protest or affixing it to the notarial act is sufficient.

39. *Alabama.*— Decatur Bank *v.* Hodges, 9 Ala. 631; Moorman *v.* State Bank, 3 Port. (Ala.) 353.

Louisiana.— Cadillon *v.* Rodriguez, 25 La. Ann. 79.

New York.— Onondaga County Bank *v.* Bates, 3 Hill (N. Y.) 53.

Texas.— Reid *v.* Reid, 11 Tex. 585.

United States.— Dennistoun *v.* Stewart, 17 How. (U. S.) 606, 15 L. ed. 228.

If an impossible date is given, as for instance a year after the actual date, the mistake may be corrected at the trial. Ross *v.* Planters' Bank, 5 Humphr. (Tenn.) 335.

40. *Louisiana.*—Dupré *v.* Richard, 11 Rob. (La.) 495, 43 Am. Dec. 214; Warren *v.* Briscoe, 12 La. 472.

Maine.— Page *v.* Gilbert, 60 Me. 485.

Maryland.— Wetherall *v.* Claggett, 28 Md. 465; Manning *v.* Hays, 6 Md. 5; Nailor *v.* Bowie, 3 Md. 251; Crowley *v.* Barry, 4 Gill (Md.) 194.

Missouri.— Stix *v.* Matthews, 75 Mo. 96; Nave *v.* Richardson, 36 Mo. 130.

New York.— See Young *v.* Catlett, 6 Duer (N. Y.) 437, holding that a certification of a notary that he demanded payment of an assignee of the makers, who were insolvent, "at his and their place of business," is a sufficient allegation of demand, although it fails to state that the makers were not present when the demand was made.

thereof,[41] and in some jurisdictions the manner and circumstances of the demand should be shown.[42] Thus it has been held that the certificate should show that the holder had possession of and produced the bill at the time of making the demand,[43] although this would not be necessary where failure to present is excused because the maker or accepter could not be found,[44] but the name of the party to whom the presentment was made need not be stated.[45]

(B) *Time and Place of.* It is essential that the certificate of protest should show when the demand was made,[46] although it is sufficient if it shows that it was on the day prescribed by law, the exact hour of presentment not necessarily being averred.[47] It must also truly,[48] clearly, and unmistakably appear that the pre-

South Carolina.— Dobson *v.* Laval, 4 McCord (S. C.) 57.

Tennessee.— Gardner *v.* State Bank, 1 Swan (Tenn.) 420.

Wisconsin.— Duckret *v.* Von Lileinthal, 11 Wis. 56.

United States.— Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. ed. 967; Bank of Alexandria *v.* Wilson, 2 Cranch C. C. (U. S.) 5, 2 Fed. Cas. No. 856.

See 7 Cent. Dig. tit. "Bills and Notes," § 1118.

Sufficient allegation of presentment.— In determining whether or not an allegation of presentment and demand is sufficient, presumption will be in favor of the validity of the protest where mere informality is shown (McAndrew *v.* Radway, 34 N. Y. 511), and it has been held that it would be sufficient if the certificate stated that the bill was "duly presented" (Wallace *v.* Crilley, 46 Wis. 577, 1 N. W. 301. See also Commonwealth Bank *v.* Garey, 6 B. Mon. (Ky.) 626). On the other hand a mere statement that the notary had been shown a letter written by the son of the drawee to the holder declining to pay the bill is not a sufficient allegation that the sum had been presented for acceptance. Goodenham *v.* Hutchison, 6 U. C. C. P. 231.

41. Page *v.* Gilbert, 60 Me. 485.

If the accepter or maker cannot be found the certificate should set forth the nature of the inquiries made so that it will appear therefrom that due and reasonable diligence was exercised to ascertain his whereabouts. Nailor *v.* Bowie, 3 Md. 251; Baumgardner *v.* Reeves, 35 Pa. St. 250. It has been held sufficient for the notary to state that he went several times to the accepter's office to demand payment but could find no one in or about the premises (Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555); but a statement that he made inquiry in an adjoining office and was there informed that the office of the accepter had been removed, and that he made diligent inquiry therefor, without alleging that the accepter's office was closed or abandoned (Gage *v.* Dubuque, etc., R. Co., 11 Iowa 310, 77 Am. Dec. 145. See also Nailor *v.* Bowie, 3 Md. 251), or a statement that he went to various places making inquiry of divers persons for the promisor but could not find him (Porter *v.* Judson, 1 Gray (Mass.) 175) has been held insufficient.

Excuses for failure to make presentment and demand see *infra*, XIII, H.

42. Maccoun *v.* Atchafalaya Bank, 13 La. 342. See also Watson *v.* Brown, 14 Ohio 473.

If demand must be made by a notary, the statement that the demand was made by such party should appear in the certificate. Cape Fear Bank *v.* Stinemetz, 1 Hill (S. C.) 44.

A statement of such particulars will not invalidate the protest even where they are not required to be stated. Reapers' Bank *v.* Willard, 24 Ill. 439.

43. Warren *v.* Briscoe, 12 La. 472; Smith *v.* Gibbs, 2 Sm. & M. (Miss.) 479.

Sufficient statement.— It has been held that a statement in a certificate that the notary "went with the annexed draft . . . to said bank and demanded payment thereof which was refused," is a sufficient statement of demand, and his possession of the draft would be implied. Vergennes Bank *v.* Cameron, 7 Barh. (N. Y.) 143. See also Nott *v.* Beard, 16 La. 308.

44. Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555. See also Thomas *v.* Marsh, 2 La. Ann. 353 (holding that, since the object of presentation and exhibition of the paper itself is to enable the maker to know that he is paying to a party entitled to receive, and that it is ready to be delivered up to him on payment, it follows that where a cashier of a bank which is the holder of the note delivers it to the notary for the purpose of being protested, no statement in the certificate of protest that the notary exhibited the note to the cashier on presentment is necessary); Ross *v.* Bedell, 5 Duer (N. Y.) 462.

45. *Alabama.*— Curry *v.* Mobile Bank, 8 Port. (Ala.) 360.

Louisiana.—Austin *v.* Latham, 19 La. 88.

Missouri.— Stix *v.* Matthews, 75 Mo. 96.

North Dakota.—Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188.

United States.— Hildeburn *v.* Turner, 5 How. (U. S.) 69, 12 L. ed. 54.

See 7 Cent. Dig. tit. "Bills and Notes," § 1118.

46. Nailor *v.* Bowie, 3 Md. 251; Huntington Bank *v.* Hysell, 22 W. Va. 142.

Omission of statement of time of protest. — Where the notarial protest failed to state that it was made in the forenoon of the day of protest such omission was held to be fatal and the indorser discharged. Joseph *v.* Delisle, 1 L. C. Rep. 244, 3 R. J. R. Q. 3.

47. Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.) 635.

48. **For if the certificate contains an incorrect statement of the place of demand,** as

sentment and demand were made at the lawful place of payment;[49] but as a presumption is made in favor of the regularity of a notary's proceedings[50] a statement that the demand was made at the drawee's office will raise the presumption that it was made at his place of business.[51]

(II) *Dishonor of Paper.* It must also be shown in the certificate that the instrument was dishonored upon presentment,[52] and any reasons given therefor may be properly stated therein.[53] Likewise it should appear if a conditional acceptance is offered,[54] and a protest otherwise sufficient will not be vitiated because of an addition by the notary of all that transpired upon presentment.[55]

(III) *Notice of Dishonor* — (A) *In General.* While by the law merchant the certificate of protest need not state that notice of dishonor had been given to those secondarily liable,[56] yet, as the statutes have generally made a recital to that effect *prima facie* evidence that notice has been given,[57] it follows that the certificate must as a rule clearly show that such notice has been duly and properly sent.[58]

for instance that it was made at the accepter's office when it was in fact at his former and not his actual place of business, an indorser making a payment on the faith of such statement may recover it. Talbot *v.* National Bank, 129 Mass. 67, 37 Am. Rep. 302.

49. *Alabama.*— See Boit *v.* Corr, 54 Ala. 112, where the protest of a note which was made payable "at any bank in Savannah, Georgia," showed that the note was presented for payment "at the Southern bank of the State of Georgia," but did not expressly allege that such bank was in the city of Savannah. It appeared in the protest, however, that it was made in the city of Savannah, and there was a recital therein that the notary resided in that city. The protest also concluded "done and protested in the city of Savannah." It was held that there was a sufficient showing that the bank at which the payment was made was located in Savannah.

Kentucky.— See Barbaroux *v.* Waters, 3 Metc. (Ky.) 304, holding that a statement that the bill was presented to the secretary of a banking company was a sufficient allegation that the presentment was made at the company's place of business.

Louisiana.— Coleman *v.* Flint, 16 La. 250 (holding, however, that where it clearly appears from a perusal of the certificate that the demand was made at the banking house, it is sufficient without an express allegation to that effect); Warren *v.* Allnut, 12 La. 454.

Maryland.— People's Bank *v.* Brooke, 31 Md. 7, 1 Am. Rep. 11.

New York.— Brooks *v.* Higby, 11 Hun (N. Y.) 235 (holding that where a drawee had two places of business in the same city a certificate that the bill was presented "at the place of business," without specifying which place, is insufficient); Otsego County Bank *v.* Warren, 18 Barb. (N. Y.) 290. See also Seneca County Bank *v.* Neass, 5 Den. (N. Y.) 329, where it was held that while the certificate should have shown the bank at which the presentment was made, yet, under a statement that it was presented to the cashier, evidence was admissible to show that the presentment was at the proper bank.

Tennessee.— Worley *v.* Waldran, 3 Sneed (Tenn.) 548.

50. Gardner *v.* State Bank, 1 Swan (Tenn.) 420.

51. Burbank *v.* Beach, 15 Barb. (N. Y.) 326. See also Poydras *v.* Bell, 14 La. 391.

52. Sinclair *v.* Lynah, 1 Speers (S. C.) 244.

Dishonor may be implied, however, if there is a statement in the certificate that notice of protest had been given, and nothing to the contrary appears therein to show that there had not been sufficient demand and refusal. Wetherall *v.* Claggett, 28 Md. 465; Manning *v.* Hays, 6 Md. 5; Nailor *v.* Bowie, 3 Md. 251. See also Russell *v.* Crofton, 1 U. C. C. P. 428.

53. Dupré *v.* Richard, 11 Rob. (La.) 495, 43 Am. Dec. 214; Gardner *v.* State Bank, 1 Swan (Tenn.) 420; Chitty Bills 374.

54. Bentinck *v.* Dorrien, 6 East 199, 2 Smith K. B. 337; Sproat *v.* Matthews, 1 T. R. 182.

55. Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755.

56. Martin *v.* Brown, 75 Ala. 442.

57. Certificate as prima facie evidence see *infra*, XIV, E [8 Cyc.].

58. *Alabama.*— Jordan *v.* Long, 109 Ala. 414, 19 So. 843, holding that the fact that the recital of notice was written below the notary's signature and official seal did not render the certificate bad.

California.— Kellogg *v.* Pacific Box Factory, 57 Cal. 327, holding that a statement that the parties had been "duly notified" was sufficient.

Indiana.— O'Neil *v.* Dickson, 11 Ind. 253.

Louisiana.— Crane *v.* Benit, 20 La. Ann. 228. For sufficiency of such notice in this state see Union Bank *v.* Jones, 4 La. Ann. 220; Manadue *v.* Kitchen, 3 Rob. (La.) 261, 38 Am. Dec. 237.

Maine.— Page *v.* Gilbert, 60 Me. 485.

Minnesota.— Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863.

New York.— Vergennes Bank *v.* Cameron, 7 Barb. (N. Y.) 143, holding that where the certificate made no mention of service of notice of dishonor except by a memorandum at the foot of the draft, such memorandum would form no part of the official's certificate

This may usually be done by a general averment that notice of dishonor has been given, the contents of the notice not necessarily being set out,[59] although in some jurisdictions the statute requires a statement of the manner in which such notice was sent,[60] by a recital of facts constituting the giving of notice in a lawful manner,[61] or a statement showing the exercise of due diligence as an excuse for not giving it.[62]

(B) *Where Sent by Mail.* Where the notice must be sent by mail the certificate should state the post-office to which the letter containing the same was directed[63] and the day such notice was mailed.[64] Generally speaking a statement that the notice, directed to the indorser at a certain place, was deposited in the mail is sufficient,[65] and it need not be stated by whom the mailing was done.[66] While it has been held that properly speaking the certificate should state that the notice was properly stamped and addressed[67] a statement of mailing would seem to imply a proper stamping[68] and addressing.[69] On the other hand it has been

and would not be evidence of the sending of proper notice.

59. *Georgia.*— Walker *v.* Augusta Bank, 3 Ga. 486.

Iowa.— Fuller *v.* Dingman, 41 Iowa 506.

Massachusetts.— Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518.

Minnesota.— Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863.

New Hampshire.— Simpson *v.* White, 40 N. H. 540; Rushworth *v.* Moore, 36 N. H. 188.

New York.— Seneca County Bank *v.* Neass, 3 N. Y. 442 [*affirming* 5 Den. (N. Y.) 329].

Canada.— Russell *v.* Crofton, 1 U. C. C. P. 428. See also Lyman *v.* Boulton, 8 U. C. Q. B. 323.

60. Burk *v.* Shreve, 39 N. J. L. 214.

In Maine it would seem that prior to the act of 1858, the mode in which the notice was sent must be stated (Union Bank *v.* Humphreys, 48 Me. 172; Bradley *v.* Davis, 26 Me. 45), although this rule does not seem to have always been applied rigidly in that state (See Pattee *v.* McCrillis, 53 Me. 410; Orono Bank *v.* Wood, 49 Me. 26; Ticonic Bank *v.* Stackpole, 41 Me. 321, 66 Am. Dec. 246; Langley *v.* Palmer, 30 Me. 467, 50 Am. Dec. 634).

61. Coster *v.* Thomason, 19 Ala. 717; Rives *v.* Parmley, 18 Ala. 256; Planters', etc., Bank *v.* King, 9 Ala. 279; O'Neil *v.* Dickson, 11 Ind. 253; Union Bank *v.* Campbell, 2 La. Ann. 759; Menard *v.* Winthrop, 2 La. Ann. 333; Saul *v.* Brand, 1 La. Ann. 95; Union Bank *v.* Smith, 9 Rob. (La.) 75; McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785.

As to sufficiency of the averment of such facts in the various jurisdictions see Curry *v.* Mobile Bank, 8 Port. (Ala.) 360; Louisiana State Bank *v.* Dumartrait, 4 La. Ann. 483; Young *v.* Patterson, 11 Rob. (La.) 7; Manadue *v.* Kitchen, 3 Rob. (La.) 261, 38 Am. Dec. 237; Austin *v.* Latham, 19 La. 88; Commonwealth Bank *v.* Mudgett, 44 N. Y. 514 [*affirming* 45 Barb. (N. Y.) 663]; Townsend *v.* Auld, 10 Misc. (N. Y.) 343, 31 N. Y. Suppl. 29, 63 N. Y. St. 418, 24 N. Y. Civ. Proc. 181 [*reversing* 8 Misc. (N. Y.) 516, 28 N. Y. Suppl. 746, 59 N. Y. St. 274, and holding that a certificate of the giving of notice to an indorser whose residence was in the city of New York was sufficient where it gave his address as "New York"]; Colms *v.* State Bank, 4 Baxt. (Tenn.) 422; Golladay *v.* Union Bank, 2 Head (Tenn.) 57.

Certainty as to averments.— Inasmuch as notaries ought only to be held to reasonable certainty in the use of their language, the particulars of service, such as the hour of the day, or that the individual party with whom the notice was deposited, need not, it has been held, be specified, but will be presumed to be regular in the absence of proof to the contrary. Adams *v.* Wright, 14 Wis. 408.

As to facts essential to the giving of lawful notice see *infra*, XIII, G.

62. Halliday *v.* Martinet, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262.

As to sufficiency of averments of diligence see Peyroux *v.* Davis, 17 La. 479; Vigers *v.* Carlon, 14 La. 89, 33 Am. Dec. 575; Porter *v.* Boyle, 8 La. 170; Preston *v.* Daysson, 7 La. 7.

63. Curry *v.* Mobile Bank, 8 Port. (Ala.) 360.

64. Knox *v.* Buhler, 6 La. Ann. 104.

65. *Iowa.*—Wamsley *v.* Rivers, 34 Iowa 463.

Kentucky.— McClane *v.* Fitch, 4 B. Mon. (Ky.) 599.

Maine.— Pattee *v.* McCrillis, 53 Me. 410; Lewiston Falls Bank *v.* Leonard, 43 Me. 144, 69 Am. Dec. 49.

New York.— Barber *v.* Ketchum, 7 Hill (N. Y.) 444 [*affirming* 4 Hill (N. Y.) 224].

Virginia.— Slaughter *v.* Farland, 31 Gratt. (Va.) 134.

66. Barber *v.* Ketchum, 7 Hill (N. Y.) 444 [*affirming* 4 Hill (N. Y.) 224].

67. Allen *v.* Georgia Nat. Bank, 60 Ga. 347. See also Planters', etc., Bank *v.* King, 9 Ala. 279.

68. Brooks *v.* Day, 11 Iowa 46; Pier *v.* Henrichshoffen, 67 Mo. 163, 29 Am. Rep. 501; Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. 51.

69. Smith *v.* Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527.

held that the certificate must state that the place to which the notice was sent was the reputed residence or post-office of the indorser.[70]

c. Verification. In the absence of a statute requiring it[71] a seal is unnecessary to the validity of a certificate of protest,[72] the officer's official signature alone being sufficient.[73] Nor as a rule are witnesses required to authenticate the instrument or signature of the officer.[74]

d. By What Law Governed. The law of the place where the bill is payable governs as to the form and sufficiency of the protest.[75]

7. Acceptance Supra Protest — a. When Allowable. Acceptance *supra pro-*

70. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888. *Contra*, Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518.

In New York it was at one time held that the certificate must state that the notice was sent to the post-office nearest the indorser's residence (Rogers *v.* Jackson, 19 Wend. (N. Y.) 383), but under the act of 1835 the certificate need not state the reputed place of residence of the party notified or the post-office nearest thereto (Treadwell *v.* Hoffman, 5 Daly (N. Y.) 207; Barber *v.* Ketchum, 7 Hill (N. Y.) 444).

71. The law merchant has in many jurisdictions been changed and modified by statutory enactments in this respect. See Homes *v.* Smith, 16 Me. 181 (holding, however, that while the statute required the certificate to be under seal, yet the same requirements did not hold with regard to the record of protest on file in the clerk's office); Morris *v.* Foreman, 1 Dall. (Pa.) 193, 1 L. ed. 96, 11 Am. Dec. 235 (where it is held that the protest for non-acceptance must be sealed); Merchants' Bank *v.* Spinney, 13 Nova Scotia 87.

What constitutes sufficient seal.— Where the seal of a notary is necessary it has been held that the impression of the same on a paper is sufficient (Carter *v.* Burley, 9 N. H. 558; Manchester Bank *v.* Slason, 13 Vt. 334), the fact that it is partially defaced being immaterial so long as the impression of the seal remains discernible (Bradley *v.* Northern Bank, 60 Ala. 252). So too an official seal between two certificates, both of which were on one page, the one containing the statement of presentment and the other the fact of service of notice on the indorser, is a sufficient verification of the whole official recital of fact contained in the instrument. Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298 [*affirming* 40 Barb. (N. Y.) 179]. On the other hand a scroll would be insufficient as a seal for this purpose under the law merchant (2 Daniel Neg. Instr. § 947; 1 Edwards Bills & N. § 640) and a notarial seal imprinted in ink on a certificate of protest, no impression being made in the paper, is insufficient under the statutes of New York (Richard *v.* Boller, 6 Daly (N. Y.) 460, 51 How. Pr. (N. Y.) 371).

72. Huffaker *v.* Monticello Nat. Bank, 12 Bush (Ky.) 287; Commonwealth Bank *v.* Pursley, 3 T. B. Mon. (Ky.) 238; Lambeth *v.* Caldwell, 1 Rob. (La.) 61; Parkersburg Second Nat. Bank *v.* Chancellor, 9 W. Va. 69; Commercial Bank *v.* Brega, 17 U. C. C. P. 473; Russell *v.* Crofton, 1 U. C. C. P. 428; Ross *v.* McKindsay, 1 U. C. Q. B. 507; Goldie *v.* Maxwell, 1 U. C. Q. B. 424.

73. Huffaker *v.* Monticello Nat. Bank, 12 Bush (Ky.) 287; Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620 (holding that such signature may, however, be made by the officer's clerk, or even printed); Barnard *v.* Planters' Bank, 4 How. (Miss.) 98.

Under the civil law the signature alone was sufficient. Dom. B. 2, tit. 1, art. 29; Dom. B. 2, tit. 5, § 5, Postleth. Dist. Notary [*cited* in Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227].

74. Bradford *v.* Cooper, 1 La. Ann. 325; Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994; Anonymous, 12 Mod. 345.

In Louisiana no witnesses are required when the notary makes a demand or protests a bill or note, the statute requiring several persons only to attest the notice entered of protest in his record (Gale *v.* Kemper, 10 La. 205), and while after the completion and verification of the record the notary would have no right to change the same yet, inasmuch as he makes errors or omissions therein prior to its completion, any alterations or erasures must be proved to be made after such time to invalidate it (Marsoudet *v.* Jacobs, 6 Rob. (La.) 276).

75. *Illinois.*— Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867.

Iowa.— Chatham Bank *v.* Allison, 15 Iowa 357. *Compare* Thorp *v.* Craig, 10 Iowa 461.

Kentucky.— McClane *v.* Fitch, 4 B. Mon. (Ky.) 599.

Louisiana.— Tickner *v.* Roberts, 11 La. 14, 30 Am. Dec. 706, where the bill was payable in the state of Alabama, and as the form of the protest did not comply with the law of that state it was held to be inadmissible by the courts of Louisiana.

Maine.— Orono Bank *v.* Wood, 49 Me. 26.

New Hampshire.— Carter *v.* Burley, 9 N. H. 558.

New York.—Ross *v.* Bedell, 5 Duer (N. Y.) 462; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

Tennessee.—Thompson *v.* Commercial Bank, 3 Coldw. (Tenn.) 46; Carter *v.* Union Bank, 7 Humphr. (Tenn.) 548, 46 Am. Dec. 89.

United States.— See Neederer *v.* Barber, 17 Fed. Cas. No. 10,079.

Canada.— Bank of America *v.* Copland, 4 Montreal Leg. N. 154.

See 7 Cent. Dig. tit. "Bills and Notes," § 1054.

test is allowable only where acceptance by the drawee has been refused and the bill has been protested,[76] and the holder of a bill may elect to take or refuse such an acceptance.[77]

b. By Whom Made. Acceptance may be made by any person[78] and for the honor of any particular party, and while there cannot be a series of accepters for the honor of the same party,[79] there may be several accepters for the honor of different parties.[80]

c. How Made.[81] Where there is an acceptance for honor or *supra protest* the party so accepting should appear before a notary public and witness and declare that he accepts such protested bill for the honor of the drawer or indorser, as the case may be, and that he will pay it at the appointed time.[82] Where no person is designated as the party honored, the presumption is that the acceptance is for the honor of the drawer.[83] Acceptance may be expressed in full, as in the case where the accepter writes: "Accepted under protest, for honor of Messrs. A & B, and will be paid for their account if regularly protested, and refused when due."[84] The more usual form, however, consists simply of the words "Accepted *supra protest*," or "Accepted S. P. for the honor of" a person named signed by the accepter.[85]

d. Effect of — (I) *In General.* An acceptance *supra protest* is a promise by the accepter to pay the bill if the drawee refuses payment on its due presentment for that purpose, and if the accepter for honor is duly notified of such refusal.[86] It admits the genuineness of the drawer's signature and the accepter is bound by any estoppel binding on the party for whose honor he accepts;[87] and such acceptance inures to the benefit of all the parties subsequent to him for whose honor it is made.[88]

(II) *Rights of Accepter.* One who accepts a bill for the honor of the drawer or of an indorser, even without his request or knowledge, is entitled to have recourse to such party honored and to all parties liable on the bill to him.[89]

76. May *v.* Kelly, 27 Ala. 497; Baring *v.* Clark, 19 Pick. (Mass.) 220; Konig *v.* Bayard, 1 Pet. (U. S.) 250, 7 L. ed. 132; Hoare *v.* Cazenove, 16 East 391, 14 Rev. Rep. 370; Hussey *v.* Jacob, 1 Ld. Raym. 87; *Ex p.* Wackerbath, 5 Ves. Jr. 574.

77. Pillans *v.* Van Mierop, 3 Burr. 1663; Gregory *v.* Walcup, Comyns 75; Mitford *v.* Walcot, 12 Mod. 410.

78. The drawee himself may accept the bill for the honor of the drawer or indorser, where he does not choose to accept the bill drawn generally on account of the person in whose favor or on whose account he is advised it is drawn (Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567; Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264, 7 L. ed. 138), but if he is bound in good faith to accept he cannot change his relations to the parties and accept *supra protest* for the honor of an indorser, but must either accept or refuse (Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264, 7 L. ed. 138).

79. Jackson *v.* Hudson, 2 Camph. 447.

80. Jackson *v.* Hudson, 2 Camph. 447; Beawes Lex Mercatoria 33; Chitty Bills 375.

81. The Negotiable Instruments Law, section 281, provides that "an acceptance for honor *supra protest* must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor."

The Bills of Exchange Act, section 65, subsection 3, provides that "an acceptance for honor *supra protest* in order to be valid must (a) Be written on the bill, and indicate that it is an acceptance for honor: (b) Be signed by the acceptor for honor."

82. Gazzam *v.* Armstrong, 3 Dana (Ky.) 554.

83. Neg. Instr. L. § 282; Byles Bills 268; Chitty Bills 387.

84. Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381.

85. Byles Bills 402; Chitty Bills 387; Thompson Bills 323.

86. Schofield *v.* Bayard, 3 Wend. (N. Y.) 488; Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, M. & M. 381; Gregory *v.* Walcup, Comyns 75; Hoare *v.* Cazenove, 16 East 391, 14 Rev. Rep. 370; Vandewall *v.* Tyrrell, M. & M. 87, 22 E. C. L. 480.

87. Salt Springs Bank *v.* Syracuse Sav. Inst., 62 Barb. (N. Y.) 101; Phillips *v.* Im Thurn, L. R. 1 C. P. 463, 35 L. J. C. P. 220, 14 L. T. Rep. N. S. 406, 14 Wkly. Rep. 653. But see Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198.

88. Konig *v.* Bayard, 1 Pet. (U. S.) 250, 7 L. ed. 132; *In re* Overend, L. R. 6 Eq. 344, 18 L. T. Rep. N. S. 230, 16 Wkly. Rep. 560.

89. Freeman *v.* Perot, 2 Wash. (U. S.) 485, 9 Fed. Cas. No. 5,087; Goodall *v.* Polhill, 1 C. B. 233, 9 Jur. 554, 14 L. J. C. P.

It is his duty, however, upon acceptance of the bill, to notify the party for whose honor it was done,[90] and upon the payment of such bill under protest for honor, he should give reasonable notice to the person for whose honor he pays; otherwise the latter will not be bound to refund.[91] Where a party accepts for the honor of the drawer only, the general rule is that he will have no recourse against the indorsers, and in case of acceptance for the honor of an indorser he will have no recourse against subsequent indorsers.[92] The drawee who has accepted a bill of exchange is liable to one who has accepted it under protest for better security, although the original acceptance was given without funds of the drawer being in the accepter's hands to meet it.[93]

(III) *LIABILITIES OF ACCEPTER.* An acceptance for honor is in the nature of a conditional acceptance. It is an undertaking to pay if the original drawee, upon presentment to him for payment, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor.[94] Therefore demand of payment must be made of the accepter for honor after due presentment for payment to the drawee and protest for non-payment, in order to render him liable.[95]

8. PAYMENT SUPRA PROTEST — a. By Whom Made. A payment *supra protest*, which may be made on both foreign and inland bills,[96] may generally speaking be made by either a party to the bill or a stranger thereto, for the honor of another party,[97] but the payer should declare, usually in the presence of the notary, for whose honor the payment was made.[98]

b. When Made. As a general rule[99] a payment for the honor of a party must not be made before protest,[1] although it is not essential that the protest be formally completed,[2] and payment before such time raises the presumption that it

146, 50 E. C. L. 233; Smith *v.* Nissen, 1 T. R. 269.

90. Edwards Bills, § 441; Story Bills, § 259.

91. Wood *v.* Pugh, 7 Ohio, Pt. II, 156.

92. Gazzam *v.* Armstrong, 3 Dana (Ky.) 554, 557 (where the court said: "We are decidedly of the opinion, that he [the accepter for honor] acquired no demand, or right of action, against any party subsequent to the one for whom he made the payment, and that even against the preceding parties, he was only substituted to the rights of that party, in the same condition as if he had paid the bill himself"); Howland *v.* Carson, 15 Pa. St. 453; *Ex p.* Lambert, 13 Ves. Jr. 179. But see Mertens *v.* Winnington, 1 Esp. 113, where Lord Kenyon laid down the proposition that where a bill is so taken up the party who does so is to be considered as an indorsee paying full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill.

93. *Ex p.* Wackerbath, 5 Ves. Jr. 574, but in such case the accepter *supra protest* may be required in equity to resort first to the drawer.

94. Williams *v.* Germaine, 7 B. & C. 468, 6 L. J. K. B. O. S. 90, 1 M. & R. 394, 31 Rev. Rep. 248, 14 E. C. L. 212; Hoare *v.* Cazenove, 16 East 391, 14 Rev. Rep. 370. See also Mitchell *v.* Baring, 10 B. & C. 4, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381.

An acceptance to pay a bill of exchange according to the tenor, made after the time appointed for its payment, is a general acceptance to pay upon demand. Gregory *v.* Walcup, Comyns 75.

95. Walton *v.* Williams, 44 Ala. 347; Baring *v.* Clark, 19 Pick. (Mass.) 220; Williams *v.* Germaine, 7 B. & C. 468, 6 L. J. K. B. O. S. 90, 1 M. & R. 394, 31 Rev. Rep. 248, 14 E. C. L. 212; Hoare *v.* Cazenove, 16 East 391, 14 Rev. Rep. 370.

96. Smith *v.* Nissen, 1 T. R. 269.

97. Fairley *v.* Roch, Lutw. 891; Neg. Instr. L. § 300.

A drawee may make a payment for honor after he has refused to accept the bill for want of funds, but not after he has accepted it. Chitty Bills 575.

98. Byles Bills 272; Chitty Bills 576.

99. An exception to the rule is made in favor of an accepter for honor; in which case if the acceptance is approved by the party honored the accepter may pay the bill without waiting to have it protested for nonpayment. Chitty Bills 576.

1. Holland *v.* Pierce, 2 Mart. N. S. (La.) 499; Baring *v.* Clark, 19 Pick. (Mass.) 220; Deacon *v.* Stodhart, 9 C. & P. 685, 38 E. C. L. 398, 2 M. & G. 317, 40 E. C. L. 620, 2 Scott N. R. 557; Vandewall *v.* Tyrrell, M. & M. 87, 22 E. C. L. 480.

Dating the protest back will not make good a payment made for honor before the bill was dishonored. Vandewall *v.* Tyrrell, M. & M. 87, 22 E. C. L. 480.

2. Geralopulo *v.* Wieler, 10 C. B. 690, 15 Jur. 316, 20 L. J. C. P. 105, 3 Eng. L. & Eq. 515, 70 E. C. L. 690.

was made for the honor of the drawee.[3] It has been held also that payment should not be made until after notice of dishonor has been given the drawer.[4]

c. Effect of — (i) *In General.* A payment for honor releases an accommodation accepter of the bill regardless of the intent of the payer so to do.[5]

(ii) *Rights and Duties of Payer.* One who pays a bill for the honor of a drawer or indorser takes the title of the party from whom he received it[6] and may recover against such party or his personal representative,[7] or against prior parties to the bill,[8] although in some jurisdictions he cannot recover unless the payment is made at the request of a party who is liable.[9] He cannot recover against any party subsequent to the one for whose honor he paid.[10] It is the duty of one who pays for the honor of a party to the bill, if he would hold the latter liable to refund, to give him reasonable notice of such payment.[11]

XIII. NOTICE OF DISHONOR — EXCUSE AND WAIVER OF DEMAND AND NOTICE.

A. Necessity For Notice — 1. In General. The general rule is that when a negotiable instrument has been dishonored, either by non-acceptance or non-payment, it is the duty of the holder to give immediate notice of such dishonor to the drawer if it be a bill and to each indorser whether it be a bill or note;[12] and where the dishonor results from non-acceptance the holder should not wait to give notice until the maturity of the bill and its presentment for payment, but

3. Chitty Bills 575. In which case the payer would assume the position and acquire the rights of an indorsee. *Ex p.* Wyld, 2 De G. F. & J. 642, 7 Jur. N. S. 294, 30 L. J. Bankr. 10, 3 L. T. Rep. N. S. 934, 9 Wkly. Rep. 421, 63 Eng. Ch. 500.

4. Baring *v.* Clark, 19 Pick. (Mass.) 220.

5. McDowell *v.* Cook, 6 Sm. & M. (Miss.) 420, 45 Am. Dec. 289 [*citing Ex p.* Lambert, 13 Ves. Jr. 179]. See also Byles Bills 227.

6. *In re* Overend, L. R. 6 Eq. 344, 18 L. T. Rep. N. S. 230, 16 Wkly. Rep. 560.

7. Leake *v.* Burgess, 13 La. Ann. 156.

8. Goodall *v.* Polhill, 1 C. B. 233, 9 Jur. 554, 14 L. J. C. P. 146, 50 E. C. L. 233; Mertens *v.* Winnington, 1 Esp. 113; Lewin *v.* Brunetti, Lutw. 876; *Ex p.* Wackerbath, 5 Ves. Jr. 574.

In case of a forged signature of the party honored the payment may ordinarily be recovered back as made by mistake. Wilkinson *v.* Johnson, 3 B. & C. 428, 5 D. & R. 403, 3 L. J. K. B. O. S. 58, 10 E. C. L. 198.

9. Smith *v.* Sawyer, 55 Me. 139, 92 Am. Dec. 576; Willis *v.* Hobson, 37 Me. 403.

10. Gazzam *v.* Armstrong, 3 Dana (Ky.) 554.

11. Gazzam *v.* Armstrong, 3 Dana (Ky.) 554; Grosvenor *v.* Stone, 8 Pick. (Mass.) 79; Wood *v.* Pugh, 7 Ohio, Pt. II, 156.

The reason is that, if notice were not given that the payment was made by a stranger to the bill, the indorsers would have a right to believe their liability was at an end and would consequently take no steps for their own security or to reëstablish the credit of the drawer. Wood *v.* Pugh, 7 Ohio, Pt. II, 156.

12. *Alabama.*— Riggs *v.* McDonald, 1 Ala. 641.

Florida.— Joseph *v.* Salomon, 19 Fla. 623.

Illinois.— Kimmel *v.* Weil, 95 Ill. App. 15.

Kansas.— Liggett *v.* Weed, 7 Kan. 273.

Michigan.— Sweet *v.* Swift, 65 Mich. 90, 31 N. W. 767.

Missouri.— Tucker *v.* Gentry, 93 Mo. App. 655, 67 S. W. 723; Northern *v.* Hawkins, 61 Mo. App. 9.

New Jersey.— Ribble *v.* Jefferson, 10 N. J. L. 139.

New York.— Kelly *v.* Theiss, 65 N. Y. App. Div. 146, 72 N. Y. Suppl. 467.

North Carolina.— Asheville Nat. Bank *v.* Bradley, 117 N. C. 526, 23 S. E. 455; Long *v.* Stephenson, 72 N. C. 569.

Tennessee.— Cook *v.* Beech, 10 Humphr. (Tenn.) 412.

Utah.— Burnham *v.* McCormick, 18 Utah 42, 55 Pac. 77.

Virginia.— Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127; Thompson *v.* Cumming, 2 Leigh (Va.) 321.

United States.— French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576; Wallace *v.* Agry, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096.

England.— Blesard *v.* Hirst, 5 Burr. 2670; Gale *v.* Walsh, 5 T. R. 239, 2 Rev. Rep. 580; Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605; Goodall *v.* Dolley, 1 T. R. 712, 1 Rev. Rep. 372.

Canada.— Ontario Bank *v.* Burke, 10 Ont. Pr. 561; Sutherland *v.* Oliver, 2 Rev. Lég. 31; McQuarrie *v.* Fargo, 21 U. C. C. P. 478; Driggs *v.* Waite, 6 U. C. Q. B. O. S. 310.

Bill payable in instalments.— The rule is equally applicable to a bill payable in instalments, and notice must be given of the non-payment of each instalment. An omission, however, to give due notice as to one instalment will not discharge the drawer or indorser from liability for other instalments. Fitchburg Mut. F. Ins. Co. *v.* Davis, 121 Mass. 121. See also Jennings *v.* Brush Co., 19 Centr. L. J. 417.

should give notice of its non-acceptance immediately.[13] Failure to give, or laches in giving, notice of dishonor, without proper excuse therefor,[14] operates to discharge the indorser or drawer from his obligation absolutely,[15] and he cannot again be made liable except by his own voluntary act.[16] Hence he is not liable to an intermediate indorser who has taken the bill without knowledge of the holder's laches.[17]

2. As Affected by Character of Paper — a. Negotiable Paper — (i) *In General.* Notice of dishonor is necessary on bills payable at sight or after sight,[18]

13. *Kentucky.*— Tennessee Bank *v.* Smith, 9 B. Mon. (Ky.) 609; Smith *v.* Roach, 7 B. Mon. (Ky.) 17.

Massachusetts.— Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198.

Missouri.— Renshaw *v.* Triplett, 23 Mo. 213.

North Carolina.— Austin *v.* Rodman, 8 N. C. 194, 9 Am. Dec. 630.

Virginia.— Thompson *v.* Cumming, 2 Leigh (Va.) 321.

United States.— Lindenberger *v.* Wilson, 1 Cranch C. C. (U. S.) 340, 15 Fed. Cas. No. 8,361; Mitchell *v.* Degrand, 1 Mason (U. S.) 176, 17 Fed. Cas. No. 9,661; U. S. *v.* Barker, 4 Wash. (U. S.) 464, 24 Fed. Cas. No. 14,520.

England.— Goostrey *v.* Mead, Bull. N. P. 271; Roscow *v.* Hardy, 2 Camph. 458, 12 East 434; Goodall *v.* Dolley, 1 T. R. 712, 1 Rev. Rep. 372.

Contra, Read *v.* Adams, 6 Serg. & R. (Pa.) 356; Thatcher *v.* Mills, 14 Tex. 13, 65 Am. Dec. 95 (holding notice not necessary in case of an inland bill).

In Pennsylvania the statute dispenses with the necessity of notice of non-acceptance where the bill is afterward presented for payment and notice of non-payment is given to all parties liable. House *v.* Adams, 48 Pa. St. 261, 86 Am. Dec. 588; Read *v.* Adams, 6 Serg. & R. (Pa.) 356. See also Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289.

Conditional acceptance.—Where a draft for a specified sum was drawn "on account of claims in your hands belonging to me," and indorsed by the drawer: "Accepted when in funds," it was held that failure to notify the drawer of such conditional acceptance within a reasonable time would discharge him. Scattergood *v.* Findlay, 20 Ga. 423.

Although it may have been unnecessary to present the bill for acceptance, yet where it has been so presented and acceptance has been refused notice of its dishonor must be immediately given.

Kentucky.— Union Nat. Bank *v.* Marr, 6 Bush (Ky.) 614; Landrum *v.* Trowbridge, 2 Metc. (Ky.) 281; Smith *v.* Roach, 7 B. Mon. (Ky.) 17.

Mississippi.— Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408.

Missouri.— Glasgow *v.* Copeland, 8 Mo. 268.

New York.— Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; Tunno *v.* Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141.

Texas.— Carson *v.* Russell, 26 Tex. 452.

United States.— Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238; U. S. *v.* Barker, 4 Wash. (U. S.) 464, 24 Fed. Cas. No. 14,520.

England.— Blesard *v.* Hirst, 5 Burr. 2670; Rucker *v.* Hiller, 3 Camph. 217, 16 East 43, 14 Rev. Rep. 278; Bridges *v.* Berry, 3 Taunt. 130, 12 Rev. Rep. 618.

14. Excuses for omission of, or delay in, notice see *infra*, XIII, H.

15. *District of Columbia.*— Clark *v.* National Metropolitan Bank, 2 MacArthur (D. C.) 249.

Georgia.— Merchants' Bank *v.* Georgia Cent. Bank, 1 Ga. 418, 44 Am. Dec. 665.

Illinois.— Burritt *v.* Tidmarsh, 5 Ill. App. 341.

Iowa.— Manning First Nat. Bank *v.* Farneman, 93 Iowa 161, 61 N. W. 424.

Louisiana.— Union Ins. Co. *v.* Rodd, 26 La. Ann. 715.

Maine.— National Shoe, etc., Bank *v.* Gooding. 87 Me. 337, 32 Atl. 967.

Maryland.— Dixon *v.* Clayville, 44 Md. 573.

Massachusetts.— Boston Bank *v.* Hodges, 9 Pick. (Mass.) 420; Field *v.* Nickerson, 13 Mass. 131.

Missouri.— Allemania F. Ins. Co. *v.* McLeod, 4 Mo. App. 439.

New York.— Crim *v.* Starkweather, 88 N. Y. 339, 42 Am. Rep. 250; Eisenlord *v.* Dillenback, 15 Hun (N. Y.) 23.

North Carolina.— Brown *v.* Teague, 52 N. C. 573.

South Carolina.— Harwin *v.* Lowell, 2 Mill (S. C.) 193.

Wisconsin.— Merchants' State Bank *v.* Phillips State Bank, 94 Wis. 444, 69 N. W. 170.

United States.— Magruder *v.* Georgetown Union Bank, 3 Pet. (U. S.) 87, 7 L. ed. 612.

Canada.— Canadian Bank of Commerce *v.* Green, 45 U. C. Q. B. 81.

16. Smith *v.* Rowland, 18 Ala. 665.

17. *Mississippi.*— Wilcox *v.* Mitchell, 4 How. (Miss.) 272.

Pennsylvania.— Struthers *v.* Blake, 30 Pa. St. 139.

South Carolina.— Mathews *v.* Fogg, 1 Rich. (S. C.) 369, 44 Am. Dec. 257.

Wisconsin.— Westfall *v.* Farwell, 13 Wis. 504.

England.— Roscow *v.* Hardy, 2 Camph. 458, 12 East 434.

18. Higgins *v.* Morrison, 4 Dana (Ky.) 100; Griffin *v.* Phillips, 2 Rev. Leg. 30.

on demand notes,[19] and on inland bills,[20] the necessity for such notice applying as a general rule to all commercial paper.

(II) *Checks.* In some jurisdictions a distinction is drawn in the case of checks between the right of the indorser to notice and that of the drawer of the check, the cases holding that the former is always entitled to notice of dishonor, while the latter is not necessarily entitled to notice unless he is injured by lack of it, in which case he is discharged to the extent of his actual injury.[21]

b. Non-Negotiable Paper. Notice is not necessary to any party to a non-negotiable bill or note, the rules of the law merchant concerning notice applying to none but strictly commercial instruments.[22]

B. To Whom Notice Given — 1. In General. In general it is advisable that notice of dishonor of a bill or note should be given to all parties whom one may afterward desire to hold liable on such paper,[23] and where notice of dishonor is thus

19. Rice *v.* Wesson, 11 Metc. (Mass.) 400.

20. Lawrence *v.* Ralston, 3 Bibb (Ky.) 102. But see Willock *v.* Riddle, 5 Call (Va.) 358.

21. See Banks and Banking, 5 Cyc. 532.

An order in the nature of a check payable at some future day is held, in some jurisdictions, to be equivalent to an inland bill of exchange and notice of dishonor is necessary in order to hold the drawer. Minturn *v.* Fisher, 4 Cal. 35; Bradley *v.* Delaplaine, 5 Harr. (Del.) 305.

22. *Georgia.*— High *v.* Cox, 55 Ga. 662; Pannell *v.* Phillips, 55 Ga. 618; Gilbert *v.* Seymour, 44 Ga. 63; Smith *v.* Barnes, 24 Ga. 442.

Iowa.— Huse *v.* McDaniel, 33 Iowa 406; Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244; Billingham *v.* Bryan, 10 Iowa 317; Wilson *v.* Ralph, 3 Iowa 450; Long *v.* Smyser, 3 Iowa 266.

Kentucky.— Citizens' Sav. Bank *v.* Hays, 96 Ky. 365, 16 Ky. L. Rep. 505, 29 S. W. 20; Coyle *v.* Satterwhite, 4 T. B. Mon. (Ky.) 124.

Louisiana.—Soubercase *v.* Caldwell, 8 Mart. (La.) 714.

Michigan.— Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281; Briggs *v.* Parsons, 39 Mich. 400.

Mississippi.— Runnels *v.* Spencer, Walk. (Miss.) 362.

Missouri.— Stix *v.* Matthews, 75 Mo. 96.

New York.— Cromwell *v.* Hewitt, 40 N. Y. 491, 100 Am. Dec. 527; Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576; White *v.* Low, 7 Barb. (N. Y.) 204; Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403. See also Newman *v.* Frost, 52 N. Y. 422.

North Carolina.— Sutton *v.* Owen, 65 N. C. 123.

Pennsylvania.— Jordan *v.* Hurst, 12 Pa. St. 269. *Contra,* Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 264.

Virginia.—Pitman *v.* Breckenridge, 3 Gratt. (Va.) 127. But see Wood *v.* Duval, 9 Leigh (Va.) 6.

Wisconsin.— Ford *v.* Mitchell, 15 Wis. 304.

United States.— Stubbs *v.* Colt, 30 Fed. 417; Ish *v.* Mills, 1 Cranch C. C. (U. S.) 567, 13 Fed. Cas. No. 7,104.

England.— Cundy *v.* Marriott, 1 B. & Ad. 696, 9 L. J. K. B. O. S. 70, 20 E. C. L. 654; Plimley *v.* Westley, 2 Bing. N. Cas. 249, 1 Hodges 324, 5 L. J. C. P. 51, 2 Scott 423, 29 E. C. L. 523.

Contra, Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035 (as to immediate indorser); Sinclair *v.* Johnson, 85 Ind. 527 (where it was held that a non-negotiable order to pay money is analogous to a bank check in its implied requirement of notice to the drawer of the failure of the drawee to pay on presentation); Parker *v.* Riddle, 11 Ohio 102; Aldis *v.* Johnson, 1 Vt. 136.

Bank post-note.—It has been held in Maryland that notice of dishonor of a bank post-note is unnecessary. Key *v.* Knott, 9 Gill & J. (Md.) 342.

Bill not intended to be negotiated.— Under Ga. Code, § 2739, providing that protest and notice will not be necessary to charge indorsers of notes not made for the purpose of negotiation or intended to be negotiated at a chartered bank, it was held that notice is not necessary where a note, although negotiable at such bank, was not negotiated but remained in the payee's hands until after maturity, when he indorsed it, and the surety made a written waiver of demand and notice. Frank *v.* Longstreet, 44 Ga. 178.

County order.— It has been held that notice of dishonor of a county order drawn by one public officer upon another is not necessary. Lyell *v.* Lapeer County, 6 McLean (U. S.) 446, 15 Fed. Cas. No. 8,618.

23. Aldine Mfg. Co. *v.* Warner, 96 Ga. 370, 23 S. E. 404 (since notice to one indorser will not itself hold prior indorsers liable); Mead *v.* Engs, 5 Cow. (N. Y.) 303; Stafford *v.* Yates, 18 Johns. (N. Y.) 327; Haynes *v.* Birks, 3 B. & P. 599; Rowe *v.* Tipper, 13 C. B. 249, 17 Jur. 440, 22 L. J. C. P. 135, 1 Wkly. Rep. 152, 76 E. C. L. 249; Darbishire *v.* Parker, 6 East 3, 2 Smith K. B. 195. See also Stix *v.* Mathews, 63 Mo. 371, holding that notice given by the holder to the last indorser will not of itself charge prior indorsers.

Notice need not be given to parties who are not liable on account of the dishonor of the paper and can look to no person on the bill for indemnification or for payment of it. Hutz *v.* Karthause, 4 Wash. (U. S.) 1, 12 Fed. Cas. No. 6,963.

given in due time[24] it will inure to the benefit of all intermediate parties.[25] The holder, however, may give notice to a remote indorser whom he intends to hold liable, without giving notice to or through intermediate parties, since he is not obliged to give notice to any party to whom he does not look for payment,[26] notwithstanding the fact that by so doing he may discharge all intermediate parties for want of notice.[27] Therefore where a subsequent indorser who has received notice desires to hold a prior indorser, he should, for his own safety, give him prompt notice of the dishonor of the paper, since the holder may have omitted to notify him directly,[28] and such notice is sufficient, although it did not reach the prior indorser as soon as it would have done if it had been sent by the holder.[29]

24. Where notice of protest given by the holder to the second indorser is too late to fix the responsibility of such indorser to the holder, such notice will not avail a subsequent indorser, although it would have been in time if given by him. Keeler *v.* Bartine, 12 Wend. (N. Y.) 110; Simpson *v.* Turney, 5 Humphr. (Tenn.) 419, 42 Am. Dec. 443; Turner *v.* Leech, 4 B. & Ald. 451, 23 Rev. Rep. 344, 6 E. C. L. 556.

25. Grand Gulf R., etc., Co. *v.* Barnes, 12 Rob. (La.) 127; Barker *v.* Whitney, 18 La. 575; West River Bank *v.* Taylor, 34 N. Y. 128; Beale *v.* Parrish, 20 N. Y. 407, 75 Am. Dec. 414; Keeler *v.* Bartine, 12 Wend. (N. Y.) 110; Stafford *v.* Yates, 18 Johns. (N. Y.) 327 (where it was held that the first indorser of a note who has received notice of its nonpayment from the holder, but not from the second or subsequent indorser, is liable to such subsequent indorser in the same manner as if the notice had been received from him); Marr *v.* Johnson, 9 Yerg. (Tenn.) 1.

26. *District of Columbia.*— Boteler *v.* Dexter, 20 D. C. 26; Edmonston *v.* Gilbert, 3 Mackey (D. C.) 351.

Iowa.— Fahnestock *v.* Smith, 14 Iowa 561.

Kansas.— Seaton *v.* Scovill, 18 Kan. 433, 21 Am. Rep. 212 note, 26 Am. Rep. 779.

Louisiana.—Crane *v.* Trudeau, 19 La. Ann. 307; Grand Gulf R., etc., Co. *v.* Barnes, 12 Rob. (La.) 127; Union Bank *v.* Hyde, 7 Rob. (La.) 418, 41 Am. Dec. 290; Union Bank *v.* Lea, 7 Rob. (La.) 76, 41 Am. Dec. 275; Barker *v.* Whitney, 18 La. 575; McCullock *v.* Commercial Bank, 16 La. 566.

Maine.—Carter *v.* Bradley, 19 Me. 62, 36 Am. Dec. 735.

Michigan.— Wood *v.* Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597.

Mississippi.— Bowling *v.* Arthur, 34 Miss. 41; Wilcox *v.* Mitchell, 4 How. (Miss.) 272.

Missouri.— Griffith *v.* Assmann, 48 Mo. 66; Renshaw *v.* Triplett, 23 Mo. 213.

New York.— West River Bank *v.* Taylor, 34 N. Y. 128 [*affirming* 7 Bosw. (N. Y.) 466]; Spencer *v.* Ballou, 18 N. Y. 327; Lake *v.* Artisans' Bank, 17 Abb. Pr. (N. Y.) 232; Troy State Bank *v.* Capitol Bank, 27 How. Pr. (N. Y.) 57.

Ohio.— City Nat. Bank *v.* Clinton County Nat. Bank, 49 Ohio St. 351, 30 N. E. 958; Myers *v.* Standart, 11 Ohio St. 29; Lawson *v.* Farmers' Bank, 1 Ohio St. 206.

Pennsylvania.— Struthers *v.* Blake, 30 Pa. St. 139.

Virginia.— Cardwell *v.* Allan, 33 Gratt. (Va.) 160.

Wisconsin.— Linn *v.* Horton, 17 Wis. 151; Westfall *v.* Farwell, 13 Wis. 504.

England.— Heylym *v.* Adamson, 2 Burr. 669, 2 Ld. Ken. 379; Rickford *v.* Ridge, 2 Campb. 537; Marsh *v.* Maxwell, 2 Campb. 210 note, 11 Rev. Rep. 696 note; Pardo *v.* Fuller, Comyns 579; Dobree *v.* Eastwood, 3 C. & P. 250, 14 E. C. L. 552; Bromley *v.* Frazier, 1 Str. 441.

27. *Indiana.*— Henry *v.* State Bank, 3 Ind. 216.

Louisiana.— Peyroux *v.* Dubertrand, 11 La. 32.

Pennsylvania.— Struthers *v.* Blake, 30 Pa. St. 139.

South Carolina.— Valk *v.* State Bank, McMull. Eq. (S. C.) 414.

Virginia.— Cardwell *v.* Allan, 33 Gratt. (Va.) 160.

Where the usage of a bank was to notify all indorsers of paper on the date of maturity of the protest thereof, it was nevertheless held that an indorser who received due notice of protest of a note held by the bank would not be discharged because a prior indorser was not thus notified. Henry *v.* State Bank, 3 Ind. 216.

28. *Iowa.*— Fahnestock *v.* Smith, 14 Iowa 561.

Louisiana.— Watson *v.* Templeton, 11 La. Ann. 137, 66 Am. Dec. 194; McCullock *v.* Commercial Bank, 16 La. 566.

Missouri.— Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. 51.

New York.— Spencer *v.* Ballou, 18 N. Y. 327; Baker *v.* Morris, 25 Barb. (N. Y.) 138; Morgan *v.* Van Ingen, 2 Johns. (N. Y.) 204; Morgan *v.* Woodworth, 3 Johns. Cas. (N. Y.) 89.

Wisconsin.— Linn *v.* Horton, 17 Wis. 151.

29. *Kentucky.*— Smith *v.* Roach, 7 B. Mon. (Ky.) 17.

Louisiana.— Duncan *v.* Young, 1 Mart. (La.) 31.

Massachusetts.—Shelburne Falls Nat. Bank *v.* Townsley, 107 Mass. 444; Fitchburg Bank *v.* Perley, 2 Allen (Mass.) 433; Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212; Church *v.* Barlow, 9 Pick. (Mass.) 547; Colt *v.* Noble, 5 Mass. 167.

New York.— Metropolitan Bank *v.* Engel, 66 N. Y. App. Div. 273, 72 N. Y. Suppl. 691; Ogden *v.* Dobbin, 2 Hall (N. Y.) 112. See also West River Bank *v.* Taylor, 34 N. Y.

Notice may thus be transmitted from one indorser to another, and so back to the drawer of the bill, however circuitous the manner of giving notice may be.[30]

2. PARTIES TO PAPER — a. Drawer — (1) *IN GENERAL.* As a general rule notice of dishonor is necessary to charge the drawer of a bill, and in default of notice of non-acceptance or non-payment he is at once discharged, unless some excuse exists which exonerates the holder.[31] In like manner notice must be given to the drawer of a draft given in payment for goods,[32] in payment of an

128, 140, where Davies, J., said: "The text-writers and all the authorities I have examined concur in the doctrine, that the whole duty of the holder is discharged, by notice to his immediate preceding indorser, and that all prior indorsers are fixed, if they receive seasonable notice of the dishonor of the bill or note from their immediate indorsee."

Tennessee.— Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670.

30. *Alabama.*—Whitman *v.* Farmers' Bank, 8 Port. (Ala.) 258.

District of Columbia.— Edmonston *v.* Gilbert, 3 Mackey (D. C.) 351.

Iowa.— Van Brunt *v.* Vaughn, 47 Iowa 145, 29 Am. Rep. 468 [*following* Hartford Bank *v.* Stedman, 3 Conn. 489].

Kentucky.—Triplett *v.* Hunt, 3 Dana (Ky.) 126; Farmers', etc., Bank *v.* Turner, 2 Litt. (Ky.) 13.

Louisiana.— Watson *v.* Templeton, 11 La. Ann. 137, 66 Am. Dec. 194.

Maine.— Crocker *v.* Getchell, 23 Me. 392; Warren *v.* Gilman, 17 Me. 360.

Massachusetts.— True *v.* Collins, 3 Allen (Mass.) 438; Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212.

Missouri.— Griffith *v.* Assmann, 48 Mo. 66.

New Hampshire.—Manchester Bank *v.* Fellows, 28 N. H. 302.

New York.—West River Bank *v.* Taylor, 34 N. Y. 128 [*affirming* 7 Bosw. (N. Y.) 466]; Ogden *v.* Dobbin, 2 Hall (N. Y.) 112; Safford *v.* Wyckoff, 1 Hill (N. Y.) 11.

Pennsylvania.— Haly *v.* Brown, 5 Pa. St. 178.

Tennessee.— Hill *v.* Planters Bank, 3 Humphr. (Tenn.) 670; Butler *v.* Duval, 4 Yerg. (Tenn.) 265.

Wisconsin.— Linn *v.* Horton, 17 Wis. 151.

31. *Alabama.*— Smith *v.* Rowland, 18 Ala. 665.

Florida.— Pitts *v.* Jones, 9 Fla. 519; Holbrook *v.* Allen, 4 Fla. 87.

Georgia.— Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616; Hall *v.* Davis, 41 Ga. 614. But it is not necessary to give notice to the drawer of a domestic bill of failure of the accepter to pay, where the draft or bill was not intended to be negotiated at a chartered bank. High *v.* Cox, 55 Ga. 662.

Illinois.—Montelius *v.* Charles, 76 Ill. 303.

Kentucky.— Baxter *v.* Graves, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374.

Louisiana.— Blum *v.* Bidwell, 20 La. Ann. 43; Grieff *v.* Kirk, 15 La. Ann. 320; Kræutler *v.* U. S. Bank, 11 Rob. (La.) 213; Bloodgood *v.* Hawthorn, 9 La. 124.

Maine.— Auburn Nat. Shoe, etc., Bank *v.* Gooding, 87 Me. 337, 32 Atl. 967; Green *v.* Darling, 15 Me. 139.

Maryland.— Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703.

Michigan.— Sweet *v.* Swift, 65 Mich. 90, 31 N. W. 767.

Mississippi.— Holmes *v.* Preston, 70 Miss. 152, 12 So. 202.

New York.— Tunno *v.* Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141.

North Carolina.— Asheville Nat. Bank *v.* Bradley, 117 N. C. 526, 23 S. E. 455; Brown *v.* Teague, 52 N. C. 573.

Pennsylvania.— Mallory *v.* Kirwan, 2 Dall. (Pa.) 192, 1 L. ed. 344.

Wisconsin.—Merchants' State Bank *v.* Phillips State Bank, 94 Wis. 444, 69 N. W. 170.

United States.— Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. ed. 967; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Craig *v.* Brown, Pet. C. C. (U. S.) 171, 6 Fed. Cas. No. 3,327.

England.— Rothschild *v.* Currie, 1 Q. B. 43, 5 Jur. 865, 10 L. J. Q. B. 77, 4 P. & D. 737, 41 E. C. L. 428; Staples *v.* Okines, 1 Esp. 332; Dart *v.* King, 12 Mod. 310.

But in Texas, by statute (Hartley Dig. Tex. art. 2530), the drawer of any bill of exchange which is not accepted upon presentment becomes immediately liable for its payment, so that neither protest, notice, nor suit to the first term of the court is necessary to fix his liability. Carson *v.* Russell, 26 Tex. 452; Thatcher *v.* Mills, 14 Tex. 13, 65 Am. Dec. 95.

The reason that notice must be immediately given to the drawer when his bill has been dishonored by the drawee is because the former is presumed to have effects in the hands of the drawee, in consequence of which the latter ought to pay the bill, and because the drawer may sustain an injury by acting on the presumption that the bill is actually paid. French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576.

Where by authority of the debtor a creditor draws upon him the latter is entitled to notice of dishonor of his bill or draft. Walker *v.* Rogers, 40 Ill. 278, 89 Am. Dec. 348; Johnson *v.* Flanagan, 26 La. Ann. 689.

Where the drawer is the agent of the drawee and has deposited collateral with the holder to secure the payment of the bill he is nevertheless entitled to notice of its dishonor. Clegg *v.* Cotton, 3 B. & P. 239.

Bill drawn without authority.—It has been held that where a bill is drawn without authority the drawer is not entitled to notice of its dishonor. Lewis *v.* Parker, 33 Tex. 121.

32. Wallace *v.* Agry, 4 Mason (U. S.) 336.

antecedent debt or in settlement of a prior draft,[33] or in renewal of a former bill.[34]

(II) *Accommodation Drawer.* The drawer of a bill who signed for the accommodation of the accepter is as much entitled to notice of its dishonor as if the drawing was done for value.[35]

(III) *Where Accepted or Indorsed For Drawer's Accommodation.* Where a bill is accepted merely for the accommodation of the drawer the latter is not entitled to notice of its dishonor,[36] unless he can prove that he had funds in the drawee's hands and suffered loss for want of notice.[37] Upon the same principle the drawer is not entitled to notice from an indorser, who indorsed for his accommodation, to enable him to get his bill discounted, even where he draws upon funds, for while as against other parties he is entitled to require strict diligence in respect to notice, as to such accommodation indorser the debt is his own.[38]

(IV) *Where Accepted or Paid Supra Protest.* The drawer is entitled to the same notice from a party who accepts or pays the bill *supra protest* that he is entitled to receive from any other holder.[39]

29 Fed. Cas. No. 17,096; Allen *v.* King, 4 McLean (U. S.) 128, 1 Fed. Cas. No. 226.

33. Penn *v.* Poumeirat, 2 Mart. N. S. (La.) 541; Sweet *v.* Swift, 65 Mich. 90, 31 N. W. 767; Treadway *v.* Nicks, 3 McCord (S. C.) 195; Pendleton *v.* Knickerbocker L. Ins. Co., 7 Fed. 169.

A draft given in settlement of a prior draft is subject to the same rule. Mauney *v.* Coit, 80 N. C. 300, 30 Am. Rep. 80.

34. Bridges *v.* Berry, 3 Taunt. 130, 12 Rev. Rep. 618.

35. *Alabama.*— Sherrod *v.* Rhodes, 5 Ala. 683 (even where the drawer was indebted to the accepter, the bill not being drawn in payment of the debt); Shirley *v.* Fellows, 9 Port. (Ala.) 300.

California.— Los Angeles Nat. Bank *v.* Wallace, 101 Cal. 478, 36 Pac. 197.

Indiana.—Dickerson *v.* Turner, 12 Ind. 223.

Kansas.—Braley *v.* Buchanan, 21 Kan. 274.

Louisiana.— Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267; State Bank *v.* Morgan, 13 La. Ann. 598.

Missouri.— Merchants' Bank *v.* Easley, 44 Mo. 286, 100 Am. Dec. 287.

North Carolina.— Denny *v.* Palmer, 27 N. C. 610.

Ohio.— Miser *v.* Trovinger, 7 Ohio St. 281.

Virginia.— Hansbrough *v.* Gray, 3 Gratt. (Va.) 356.

England.— Turner *v.* Samson, 2 Q. B. D. 23, 46 L. J. Q. B. 167, 35 L. T. Rep. N. S. 537, 25 Wkly. Rep. 240; Cory *v.* Scott, 3 B. & Ald. 619, 5 E. C. L. 356; Sleigh *v.* Sleigh, 5 Exch. 514, 19 L. J. Exch. 345; *Ex p.* Heath, 2 Ves. & B. 240.

Contra, Marion Nat. Bank *v.* Phillips, 18 Ky. L. Rep. 159, 35 S. W. 910.

Where the drawer and accepter are both accommodation parties for the payee or a subsequent indorser, it has been held that the drawer is entitled to notice of dishonor. Norton *v.* Pickering, 8 B. & C. 610, 7 L. J. K. B. O. S. 85, 3 M. & R. 23, 15 E. C. L. 302.

36. *Alabama.*—Evans *v.* Norris, 1 Ala. 511.

Arkansas.— Harrison *v.* Trader, 29 Ark. 85.

Georgia.— McLaren *v.* Georgia Mar. Bank, 52 Ga. 131.

Kentucky.— Barbaroux *v.* Waters, 3 Metc. (Ky.) 304.

Louisiana.— Gillespie *v.* Cammack, 3 La. Ann. 248; New Orleans Sav. Bank *v.* Harper, 12 Rob. (La.) 231, 43 Am. Dec. 226.

Maryland.— Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620.

New York.— Ross *v.* Bedell, 5 Duer (N. Y.) 462; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94.

United States.— See French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 160, 2 L. ed. 576, where Marshall, C. J., said: "Where he [the drawer] draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or an equitable demand, in consequence of the non-payment of the bill."

England.— Terry *v.* Parker, 6 A. & E. 502, 6 L. J. K. B. 249, 1 N. & P. 752, W. W. & D. 303, 33 E. C. L. 273; Cory *v.* Scott, 3 B. & Ald. 619, 5 E. C. L. 356; Sharp *v.* Bailey, 9 B. & C. 44, 17 E. C. L. 29; Norton *v.* Pickering, 8 B. & C. 610, 7 L. J. K. B. O. S. 85, 3 M. & R. 23, 15 E. C. L. 302; Legge *v.* Thorpe, 2 Campb. 310, 12 East 171; Claridge *v.* Dalton, 4 M. & S. 226, 16 Rev. Rep. 440; Leach *v.* Hewitt, 4 Taunt. 731, 14 Rev. Rep. 652.

See 7 Cent. Dig. tit. "Bills and Notes," § 1014.

Presumption of accommodation.— It has been held that where a bill is made payable at the drawer's own house it will be presumed to be for his accommodation and he will not be entitled to notice. Sharp *v.* Bailey, 9 B. & C. 44, 17 E. C. L. 29.

37. Lacoste *v.* Harper, 3 La. Ann. 385, 48 Am. Dec. 449 (although insufficient to pay the whole amount of the bill); New Orleans Sav. Bank *v.* Harper, 12 Rob. (La.) 231, 43 Am. Dec. 226; Nicolet *v.* Gloyd, 18 La. 417; Reid *v.* Morrison, 2 Watts & S. (Pa.) 401; Fitzgerald *v.* Williams, 6 Bing. N. Cas. 68, 9 L. J. C. P. 41, 8 Scott 271, 37 E. C. L. 512.

38. *Ex p.* Heath, 2 Ves. & B. 240.

39. Baring *v.* Clark, 19 Pick. (Mass.) 220;

(v) *Where Drawer and Accepter Are Identical.* Where the drawer and accepter are in reality[40] or in effect[41] identical, or where one of several drawers is also an accepter[42] notice of dishonor to the drawer is not necessary.

b. Indorser — (i) *In General* — (a) *Rule Stated.* The indorser of a negotiable bill or note is entitled to due notice of its dishonor and failure to notify him thereof will release him from all liability,[43] notwithstanding the indorser's

Grosvenor *v.* Stone, 8 Pick. (Mass.) 79; Martin *v.* Ingersoll, 8 Pick. (Mass.) 1; Lenox *v.* Leverett, 10 Mass. 1, 6 Am. Dec. 97; Konig *v.* Bayard, 1 Pet. (U. S.) 250, 7 L. ed. 132.

40. Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681; James *v.* Ocoee Bank, 2 Coldw. (Tenn.) 57. See also Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165.

Different partnership names.— This rule is held to apply even where the drawer and drawee are carrying on business in two different partnership names and in two different places. Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670.

41. Minturn *v.* Fisher, 7 Cal. 573, where the drawer was paying teller in the bank on which the bill was drawn. See also Washington Bank *v.* Way, 2 Cranch C. C. (U. S.) 249, 2 Fed. Cas. No. 957.

Drawn by corporation officer on fellow officer or corporation.— If a bill is drawn by a corporation officer on another officer of the corporation (Dennis *v.* Table Mountain Water Co., 10 Cal. 369; Commercial Bank *v.* St. Croix Mfg. Co., 23 Me. 280; Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193), or on the corporation itself (Warrensburg Co-operative Bldg. Assoc. *v.* Zoll, 83 Mo. 94), it is in effect the paper of the corporation and notice of dishonor will not be necessary to hold the drawer, even though the corporation itself be insolvent and the paper be drawn by an officer who is actually indebted to it.

Partnership transactions.—No notice to the drawer is necessary where the drawer of a bill is a member of the firm drawn upon (Meeker *v.* Cummings, 22 La. Ann. 317; Fuller *v.* Hooper, 3 Gray (Mass.) 334; Gowan *v.* Jackson, 20 Johns. (N. Y.) 176), where the drawee is a member of the firm which draws the bill (New York, etc., Contracting Co. *v.* Meyer, 51 Ala. 325; Porthouse *v.* Parker, 1 Cambp. 82, 10 Rev. Rep. 637. *Compare* Dwight *v.* Scovil, 2 Conn. 654; *In re* Grant, 10 Fed. Cas. No. 5,691, 6 Law Rep. 158), where the bill is drawn by one firm upon another firm and both have a common partner (New York, etc., Contracting Co. *v.* Selma Sav. Bank, 51 Ala. 305, 23 Am. Rep. 552; Woodbury *v.* Sackrider, 2 Abb. Pr. (N. Y.) 402; Raymond *v.* Mann, 45 Tex. 301. See also West Branch Bank *v.* Fulmer, 3 Pa. St. 399, 45 Am. Dec. 651), or where the drawer and drawee are special partners in the transaction which forms the consideration of the bill (Rhett *v.* Poe, 2 How. (U. S.) 457, 11 L. ed. 338).

Where a bill is accepted by the drawer's agent, the drawer is not entitled to notice of its dishonor. Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432. See also Carson *v.* Alexander, 34 Miss. 528.

42. *Alabama.*— Smith *v.* Paul, 8 Port. (Ala.) 503.

Florida.— Bailey *v.* South Western Railroad Bank, 11 Fla. 266.

Illinois.— Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

Tennessee.— James *v.* Ocoee Bank, 2 Coldw. (Tenn.) 57.

Texas.— Raymond *v.* Mann, 45 Tex. 301.

England.— Alderson *v.* Pope, 1 Campb. 404 note; Porthouse *v.* Parker, 1 Campb. 82, 10 Rev. Rep. 637; Jacaud *v.* French, 12 East 317, 11 Rev. Rep. 390; Roach *v.* Ostler, 1 M. & R. 120, 17 E. C. L. 646; Bignold *v.* Waterhouse, 1 M. & S. 255.

But see McMean *v.* Little, 3 Baxt. (Tenn.) 330, where one of two drawers was the accepter for accommodation of the other, and it was held that the latter was discharged by failure in respect to demand and notice. See also Schumaker *v.* Quaritius, 5 Redf. Surr. (N. Y.) 351, holding that the fact that the holder is executor of an indorser does not render demand on the maker unnecessary, and that a failure to make such demand discharges the estate of the indorser.

43. *Alabama.*— Winter *v.* Coxe, 41 Ala. 207; Crenshaw *v.* McKiernan, Minor (Ala.) 295; Ward *v.* Gifford, Minor (Ala.) 5.

Arkansas.—Winston *v.* Richardson, 27 Ark. 34; White *v.* Cannada, 25 Ark. 41; Ruddell *v.* Walker, 7 Ark. 457.

California.— Goldman *v.* Davis, 23 Cal. 256.

Idaho.— Ankeny *v.* Henry, 1 Ida. 229.

Iowa.— Keater *v.* Hock, 11 Iowa 536.

Kansas.— Selover *v.* Snively, 24 Kan. 672; Couch *v.* Sherill, 17 Kan. 622.

Kentucky.—Todd *v.* Edwards, 7 Bush (Ky.) 89; McGowan *v.* Commonwealth Bank, 5 Litt. (Ky.) 271. But formerly an indorser was entitled to notice of dishonor only where the note was discounted at a bank. Farmers' etc., Bank *v.* Small, 2 T. B. Mon. (Ky.) 88.

Louisiana.— McNab *v.* Tally, 27 La. Ann. 640; Gayarre *v.* Sabatier, 24 La. Ann. 358; Marks *v.* Herman, 24 La. Ann. 335; Smith *v.* McWaters, 22 La. Ann. 431; Eichelberger *v.* Pike, 22 La. Ann. 142; Money *v.* Cosse, 20 La. Ann. 419; Abott *v.* Borge, 20 La. Ann. 372; Crane *v.* Benit, 20 La. Ann. 228; Cammack *v.* Gordon, 20 La. Ann. 213; Greves *v.* Tomlinson, 19 La. Ann. 90; McKee *v.* Dubois, 5 Rob. (La.) 421; New Orleans Sav. Bank *v.* Richards, 8 La. 550; Louisiana State Ins. Co. *v.* Shamburgh, 2 Mart. N. S. (La.) 511; McLanahan *v.* Brandon, 1 Mart. N. S. (La.) 321, 14 Am. Dec. 188; Johnson *v.* Duncan, 10 Mart. (La.) 706; Garnier *v.* Cauchoix,

subsequent knowledge of the dishonor of the bill[44] or the fact that the bill is made payable to bearer and might therefore have been transferred by delivery without indorsement.[45]

(B) *Where Indorsed After Maturity.* Where a party indorses a bill or note after maturity he is in effect a drawer of a new bill, and as such is entitled to

9 Mart. (La.) 584; Abat *v.* Rion, 7 Mart. (La.) 562.

Maine.— Rea *v.* Dorrance, 18 Me. 137; Thorn *v.* Rice, 15 Me. 263.

Maryland.— Howard Bank *v.* Carson, 50 Md. 18; Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78; Day *v.* Lyon, 6 Harr. & J. (Md.) 140; Philips *v.* McCurdy, 1 Harr. & J. (Md.) 187.

Massachusetts.— Webber *v.* Matthews, 101 Mass. 481; Creamer *v.* Perry, 17 Pick. (Mass.) 332, 28 Am. Dec. 297; New England Bank *v.* Lewis, 2 Pick. (Mass.) 125; Shaw *v.* Griffith, 7 Mass. 494.

Michigan.— Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281; Stewart *v.* Port Huron First Nat. Bank, 40 Mich. 348. See also Belford *v.* Bangs, 15 Ill. App. 76, construing Michigan statute.

Missouri.— Napper *v.* Blank, 54 Mo. 131; Glasgow *v.* Copeland, 8 Mo. 268.

Montana.— Grant *v.* Spencer, 1 Mont. 136.

New Hampshire.—Manchester Bank *v.* Fellows, 28 N. H. 302; Lawrence *v.* Langley, 14 N. H. 70.

New Jersey.— Barkalow *v.* Johnson, 16 N. J. L. 397; Shipman *v.* Cook, 16 N. J. Eq. 251.

New York.— Cayuga County Bank *v.* Warden, 1 N. Y. 413; Vergennes Bank *v.* Cameron, 7 Barb. (N. Y.) 143; Bradford *v.* Corey, 5 Barb. (N. Y.) 461; Pahquioque Bank *v.* Martin, 11 Abb. Pr. (N. S.) 291.

North Carolina.— Asheville Nat. Bank *v.* Bradley, 117 N. C. 526, 23 S. E. 455; Long *v.* Stephenson, 72 N. C. 569.

Pennsylvania.— Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 1 Atl. 190, 20 Atl. 718; McKinney *v.* Crawford, 8 Serg. & R. (Pa.) 351; Cassidy *v.* Kreamer, 22 Wkly. Notes Cas. (Pa.) 109, 13 Atl. 744; Arnold *v.* Niess, 1 Walk. (Pa.) 115.

South Carolina.— State Bank *v.* Croft, 3 McCord (S. C.) 522; Kilpatrick *v.* Heaton, 3 Brev. (S. C.) 92; Fotheringham *v.* Price, 1 Bay (S. C.) 291, 1 Am. Dec. 618; Scarborough *v.* Harris, 1 Bay (S. C.) 177, 1 Am. Dec. 609.

Vermont.— Nash *v.* Harrington, 1 Aik. (Vt.) 39, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

Virginia.— Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.— Young *v.* Bryan, 6 Wheat. (U. S.) 146, 5 L. ed. 228; Slacum *v.* Pomery, 6 Cranch (U. S.) 221, 3 L. ed. 205; Alexandria Bank *v.* Young, 2 Cranch C. C. (U. S.) 52, 2 Fed. Cas. No. 858; Allen *v.* King, 4 McLean (U. S.) 128, 1 Fed. Cas. No. 226.

England.— Bartlett *v.* Benson, 3 D. & L. 274, 15 L. J. Exch. 23, 14 M. & W. 733; Bridges *v.* Berry, 3 Taunt. 130, 12 Rev. Rep. 618.

In Georgia, by statute, the indorser of a bill or note is only entitled to notice of dishonor if it is payable or to be negotiated at a chartered bank (Williams *v.* Lewis, 69 Ga. 825; Continental Nat. Bank *v.* Folsom, 67 Ga. 624; Lynch *v.* Goldsmith, 64 Ga. 42; Falk *v.* Rothschild, 61 Ga. 595; Randolph *v.* Fleming, 59 Ga. 776; Pannell *v.* Phillips, 55 Ga. 618; McLaren *v.* Marine Bank, 52 Ga. 131; Frank *v.* Longstreet, 44 Ga. 178; Gilbert *v.* Seymour, 44 Ga. 63; Holmes *v.* Pratt, 34 Ga. 558; Butler *v.* Marine F. Ins. Bank, 18 Ga. 517; Beckwith *v.* Carleton, 14 Ga. 691; Hoadley *v.* Bliss, 9 Ga. 303) and a note payable at a private banker's does not come within the statute (Banks *v.* Besser, 56 Ga. 199). Moreover notice is rendered unnecessary under some special statutes, such as the charter of the Central Bank dispensing with notice in the case of paper held by the bank and payable there. Central Bank *v.* Whitfield, 1 Ga. 593; Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

In Illinois, by statute (Hurd Rev. Stat. § 7), the assignor or indorser of a note is not discharged by failure to give him notice of its dishonor. The statute substitutes due diligence in prosecuting the maker for such notice. Harding *v.* Dilley, 60 Ill. 528; Wilder *v.* De Wolf, 24 Ill. 190; Pierce *v.* Short, 14 Ill. 144; Bledsoe *v.* Graves, 5 Ill. 382; Hilborn *v.* Artus, 4 Ill. 344; State Bank *v.* Hawley, 2 Ill. 580.

In Texas, by statute (Hartley Dig. Tex. art. 2528), notice of dishonor is unnecessary as against indorsers if action is brought against the maker not later than at the first term of court, or within sixty days if in a justice's court. Williams *v.* Merchants' Bank, 67 Tex. 606, 4 S. W. 163; Green *v.* Elson, 31 Tex. 159; Sydnor *v.* Gascoigne, 11 Tex. 449; Frosh *v.* Holmes, 8 Tex. 29; Cartwright *v.* Roff, 1 Tex. 78.

Indorsement by agent without authority.— Although one who indorses a bill as agent without authority renders himself personally liable, due notice must be given either to the principal or the agent and without it the holder will fail. Clay *v.* Oakley, 5 Mart. N. S. (La.) 137.

Where an indorser became the administrator of the drawer of a promissory note, it was held that such fact did not relieve the holder from the obligation to give notice of its dishonor to the indorser. Magruder *v.* Georgetown Union Bank, 3 Pet. (U. S.) 87, 7 L. ed. 612.

44. Old Dominion Bank *v.* McVeigh, 29 Gratt. (Va.) 546.

45. Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

notice of dishonor upon subsequent presentment for payment,[46] even where the maker of the note was insolvent.[47] Where, however, a party indorses a note after its maturity, knowing that the maker is dead, he is really a maker, and as such is not entitled to notice of demand and dishonor;[48] and it will not be necessary to give notice to an indorser after maturity who had previously indorsed the paper before its maturity, and who intended afterward to become an indorser with a fixed liability.[49]

(c) *Where Indorser Interested With Maker or Drawer.* The fact that the indorser and maker are jointly interested in the consideration of a note, such as a partnership debt or purchase of goods for which the note was given, does not dis-

46. *Alabama.*— Montgomery State Branch Bank *v.* Gaffney, 9 Ala. 153; Adams *v.* Torbert, 6 Ala. 865; Kennon *v.* McRea, 7 Port. (Ala.) 175.

Arkansas.— Levy *v.* Drew, 14 Ark. 334; Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212. *Compare* Airy *v.* Nelson, 39 Ark. 43.

California.— Beer *v.* Clifton, 98 Cal. 323, 33 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 580; Beebe *v.* Brooks, 12 Cal. 308.

Connecticut.— Bishop *v.* Dexter, 2 Conn. 419.

Florida.— Bemis *v.* McKenzie, 13 Fla. 553; Guild *v.* Goldsmith, 9 Fla. 212.

Iowa.— Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250; McKewer *v.* Kirtland, 33 Iowa 348.

Kansas.— Lank *v.* Morrison, 44 Kan. 594, 24 Pac. 1106; Shelby *v.* Judd, 24 Kan. 161; Swartz *v.* Redfield, 13 Kan. 550.

Louisiana.— Roquest *v.* Pickett, 20 La. Ann. 546; McCall *v.* Witkouski, 16 La. Ann. 179; Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372.

Maine.— Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108.

Maryland.— Dixon *v.* Clayville, 44 Md. 573. But see McIlhenny *v.* Jones, 6 Harr. & J. (Md.) 256, where it was held that notice to the indorsers of the non-payment of a promissory note is not necessary where they had indorsed the note after the day of payment had elapsed, an action had been brought on it in their names for the use of the holder against the drawer, and such action, by the order of their attorney, was entered discontinued and the note taken out.

Massachusetts.— Colt *v.* Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584.

Missouri.— Armstrong *v.* Armstrong, 36 Mo. 225.

New Hampshire.— Dwight *v.* Emerson, 2 N. H. 159.

New York.— German-American Bank *v.* Atwater, 165 N. Y. 36, 58 N. E. 763; Eisenlord *v.* Dillenback, 79 N. Y. 617 [*affirming* 15 Hun (N. Y.) 23]; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75; Berry *v.* Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267; Strong *v.* Duke, 5 Alb. L. J. (N. Y.) 250.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75.

Oregon.— Smith *v.* Caro, 9 Oreg. 278.

Pennsylvania.— Tyler *v.* Young, 30 Pa. St. 143; Patterson *v.* Todd, 18 Pa. St. 426, 57 Am. Dec. 622; Leidy *v.* Tammany, 9 Watts (Pa.) 353; McKinney *v.* Crawford, 8 Serg. & R. (Pa.) 351 (holding that where a promissory note payable on demand is indorsed after it is overdue, in order to charge the indorser he must have notice of demand on the maker); Bank of North America *v.* Barriere, 1 Yeates (Pa.) 360; Campbell *v.* Carman, 1 Phila. (Pa.) 283, 9 Leg. Int. (Pa.) 2.

South Carolina.— Gray *v.* Bell, 2 Rich. (S. C.) 67, 44 Am. Dec. 277; Allwood *v.* Haseldon, 2 Bailey (S. C.) 457; Stockman *v.* Riley, 2 McCord (S. C.) 398; Poole *v.* Tolleson, 1 McCord (S. C.) 199, 10 Am. Dec. 663; Course *v.* Shackleford, 2 Nott & M. (S. C.) 283; Eefert *v.* Des Coudres, 1 Mill (S. C.) 69, 12 Am. Dec. 609.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158; Stothart *v.* Parker, 1 Overt. (Tenn.) 260.

Texas.— Winston *v.* Kelly, 33 Tex. 354.

Vermont.— Landon *v.* Bryant, 69 Vt. 203, 37 Atl. 297; Verder *v.* Verder, 63 Vt. 38, 21 Atl. 611. Even the indorser after maturity of a non-negotiable note has been held to be entitled to notice. Aldis *v.* Johnson, 1 Vt. 136.

Wisconsin.— Corwith *v.* Morrison, 1 Pinn. (Wis.) 489.

United States.— Cox *v.* Jones, 2 Cranch C. C. (U. S.) 370, 6 Fed. Cas. No. 3,303.

England.— Dehers *v.* Harriot, 1 Show. 163.

In Georgia a payee indorsing after maturity is by statute not entitled to notice of protest. Frank *v.* Longstreet, 44 Ga. 178.

In North Carolina a stranger who indorses a note at its maturity is held to be a comaker and as such is not entitled to notice. Baker *v.* Robinson, 63 N. C. 191.

47. Greely *v.* Hunt, 21 Me. 455; Pon *v.* Kelly, 3 N. C. 45; Stewart *v.* French, 2 Cranch C. C. (U. S.) 300, 22 Fed. Cas. No. 13,427.

48. Picklar *v.* Harlan, 75 Mo. 678.

49. Montgomery, etc., R. Co. *v.* Trebles, 44 Ala. 255; Williams *v.* Matthews, 3 Cow. (N. Y.) 252; Coleman *v.* Dunlap, 18 S. C. 591.

Second notice of non-payment is unnecessary where a note has been protested for non-payment and notice given the indorsers, and such indorsers then take up and sell the note without erasing their indorsement. St. John *v.* Roberts, 31 N. Y. 441, 88 Am. Dec. 287 [*reversing* 6 Bosw. (N. Y.) 593].

pense with the necessity of giving the former notice of dishonor,[50] although it has been held that the indorser of a note, made to be discounted for the joint benefit of the maker and indorser, is not entitled to notice of its dishonor.[51] It has likewise been held that such notice is not necessary if the indorser is a member of the firm which drew the bill,[52] or if an indorsement is made by a partnership and the bill is drawn by one of its members.[53]

(D) *Where Instrument Is Void.* The rule is well settled that the indorser is not entitled to notice of dishonor where he indorses with knowledge of an infirmity that renders the instrument void, such as forgery or personal incapacity of the drawer or maker;[54] and the better doctrine seems to be that he is not entitled to notice, even in case of his ignorance of the invalidity of the instrument so indorsed, since he by indorsement has warranted it to be a valid and genuine instrument.[55]

(E) *Where Paper Given For Indorser's Accommodation.* An indorser for whose accommodation the paper is given is under obligation to take up the bill or note and, in case of so doing, has no remedy against another party. Consequently, being without legal possibility of injury, he is not entitled to notice of dishonor.[56]

(II) *Accommodation Indorser.* By the law merchant an accommodation

50. Moore *v.* Brungard, 5 How. (Miss.) 557; Morris *v.* Husson, 4 Sandf. (N. Y.) 93; Foland *v.* Boyd, 23 Pa. St. 476.

The fact that the note was made for a corporation in which the indorser was interested as well as the maker dispenses with such necessity. Field *v.* New Orleans Delta Newspaper Co., 21 La. Ann. 24, 99 Am. Dec. 699; Maltass *v.* Siddle, 6 C. B. N. S. 494, 5 Jur. N. S. 1169, 28 L. J. C. P. 257, 7 Wkly. Rep. 449, 95 E. C. L. 494.

51. Washington Bank *v.* Way, 2 Cranch C. C. (U. S.) 249, 2 Fed. Cas. No. 957.

52. New York, etc., Contracting Co. *v.* Selma Sav. Bank, 51 Ala. 305, 23 Am. Rep. 552; West Branch Bank *v.* Fulmer, 3 Pa. St. 399, 45 Am. Dec. 651.

53. *Ex p.* Russell, 21 Fed. Cas. No. 12,148, 16 Nat. Bankr. Reg. 476. See, however, Taylor *v.* Young, 3 Watts (Pa.) 339, where the indorsee of a bill of exchange, drawn upon a partnership in favor of one of its members by a former partner who had recently withdrawn, and whose withdrawal was not known to the indorsee, was held not to be excused from giving notice to the drawer of the dishonor of the bill.

54. Rossi *v.* National Bank of Commerce, 71 Mo. App. 150; Farmers' Bank *v.* Vanmeter, 4 Rand. (Va.) 553; Benjamin Chalm. Dig. 197; Daniel Neg. Instr. § 669*b*.

55. *Maryland.*— Key *v.* Knott, 9 Gill & J. (Md.) 342.

Massachusetts.— Burrill *v.* Smith, 7 Pick. (Mass.) 291.

Missouri.— See Maddox *v.* Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, 41 L. R. A. 581.

New York.— Turnbull *v.* Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Goddard *v.* Merchants' Bank, 4 N. Y. 147.

Ohio.— Perkins *v.* White, 36 Ohio St. 530.

Utah.— Hamer *v.* Brainerd, 7 Utah 245, 26 Pac. 299, 12 L. R. A. 434.

England.— Cundy *v.* Marriott, 1 B. & Ad. 696, 9 L. J. K. B. O. S. 70, 20 E. C. L. 654.

Implied warranty.— An indorser impliedly warrants that the maker has capacity to contract and therefore is not entitled to notice in case the maker is not liable by reason of coverture or other incapacity. Butler *v.* Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265. See, however, Collier *v.* Budd, 7 Mo. 485; Carter *v.* Flower, 4 D. & L. 529, 11 Jur. 313, 16 L. J. Exch. 199, 16 M. & W. 743.

Accommodation indorser.— But it has been held in several jurisdictions that a mere accommodation indorser, receiving no part of the consideration, is not responsible for any alteration which may have avoided the instrument, unless upon due demand and notice. Susquehanna Valley Bank *v.* Loomis, 85 N. Y. 207, 39 Am. Rep. 652; Leach *v.* Hewitt, 4 Taunt. 731, 14 Rev. Rep. 652.

56. *Alabama.*—Morris *v.* Birmingham Nat. Bank, 93 Ala. 511, 9 So. 606.

Iowa.— Iowa City First Nat. Bank *v.* Ryerson, 23 Iowa 508.

Kentucky.— Risk *v.* Bridgeford, 15 Ky. L. Rep. 206.

Maryland.— Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620; Clopper *v.* Union Bank, 7 Harr. & J. (Md.) 92, 16 Am. Dec. 294.

Missouri.— Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165.

New Jersey.— Blenderman *v.* Price, 50 N. J. L. 296, 12 Atl. 775.

New York.— Witherow *v.* Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94.

Pennsylvania.— Shriner *v.* Keller, 25 Pa. St. 61; Reid *v.* Morrison, 2 Watts & S. (Pa.) 401.

Tennessee.— American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492; Black *v.* Fizer, 10 Heisk. (Tenn.) 48.

Virginia.—McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785.

United States.— Webster *v.* Mitchell, 22 Fed. 869.

indorser is placed upon the same footing as if he were an indorser for value and is equally entitled to notice of dishonor of the bill,[57] even though he was aware that the drawee had no funds with the drawer,[58] although the drawer of the bill is insolvent,[59] and although the accepter of the bill is himself an accommodation party.[60]

(III) *AGENT FOR COLLECTION.* A party who indorses a bill or note for collection only is entitled to due notice of its dishonor as a distinct indorser.[61]

(IV) *ANOMALOUS OR IRREGULAR INDORSER.* In those jurisdictions where one who, not being a party to a negotiable[62] bill or note, indorses it in blank prior to delivery is regarded as an indorser[63] he is entitled to due notice of the dishonor of the paper in order to fix his liability;[64] but where such an indorser is held

57. *Connecticut.*— Buck *v.* Cotton, 2 Conn. 126, 7 Am. Dec. 251.

Georgia.— Apple *v.* Lesser, 93 Ga. 749, 21 S. E. 171; Randolph *v.* Fleming, 59 Ga. 776. But in some cases an accommodation indorser who does not indorse for the purpose of transferring the title for value, but merely for the purpose of strengthening the credit of the maker, is placed upon the footing of a surety and is held not to be entitled to notice of non-payment and protest in order to make him liable. Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761; Eppens *v.* Forbes, 82 Ga. 748, 9 S. E. 723; Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54; Camp *v.* Simmons, 62 Ga. 73; Collins *v.* Everett, 4 Ga. 266. See also Carlton *v.* White, 99 Ga. 384, 27 S. E. 704.

Louisiana.— Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267; Ball *v.* Greaud, 14 La. Ann. 305, 74 Am. Dec. 431; Braux *v.* Le Blanc, 10 La. Ann. 97.

Maine.—Rea *v.* Dorrance, 18 Me. 137.

Massachusetts.— Warder *v.* Tucker, 7 Mass. 449, 5 Am. Dec. 62.

Michigan.— Smith *v.* Long, 40 Mich. 555, 29 Am. Rep. 558.

Missouri.— Bogy *v.* Keil, 1 Mo. 743.

Ohio.— Miser *v.* Trovinger, 7 Ohio St. 281.

Rhode Island.— Sawyer *v.* Brownell, 13 R. I. 141, 43 Am. Rep. 19.

United States.— French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576 [*reversing* 1 Cranch C. C. (U. S.) 221, 2 Fed. Cas. No. 867, where it was held to be unnecessary unless the indorser was damaged by want of notice]; Phipps *v.* Harding, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203, 30 L. R. A. 513.

England.— Turner *v.* Samson, 2 Q. B. D. 23, 46 L. J. Q. B. 167, 35 L. T. Rep. N. S. 537, 25 Wkly. Rep. 240; Carter *v.* Flower, 4 D. & L. 529, 11 Jur. 313, 16 L. J. Exch. 199, 16 M. & W. 743.

Canada.— Ontario Bank *v.* Burke, 10 Ont. Pr. 561; Merchants' Bank *v.* Cunningham, 1 Quebec Q. B. 33; Gore Bank *v.* Craig, 7 U. C. C. P. 344.

Taking a renewal from the maker without giving notice of non-payment discharges an accommodation indorser. Hall *v.* Newcomb, 7 Hill (N. Y.) 416, 42 Am. Dec. 82 [*overruling* Nelson *v.* Dubois, 13 Johns. (N. Y.) 175]; Smith *v.* Becket, 13 East 187.

58. Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576. But see Farmers' Bank *v.* Vanmeter, 4 Rand. (Va.) 553, where it was held that an indorser is chargeable without notice if he indorsed for the drawer for accommodation only and had no expectation that the drawee would pay.

59. Keeler *v.* Bartine, 12 Wend. (N. Y.) 110; Jackson *v.* Richards, 2 Cai. (N. Y.) 343.

60. Norton *v.* Pickering, 8 B. & C. 610, 7 L. J. K. B. O. S. 85, 3 M. & R. 23, 15 E. C. L. 302; Foster *v.* Parker, 2 C. P. D. 18, 46 L. J. C. P. 77, 25 Wkly. Rep. 321.

In such a case the accommodation indorser has the right of recourse to prior accommodation parties. Todd *v.* Edwards, 7 Bush (Ky.) 89; Cory *v.* Scott, 3 B. & Ald. 619, 5 E. C. L. 356.

61. Lynn First Nat. Bank *v.* Smith, 132 Mass. 227; Elizabeth State Bank *v.* Ayers, 7 N. J. L. 130, 11 Am. Dec. 535; Ogden *v.* Dobbin, 2 Hall (N. Y.) 112; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451.

Where agency has ceased.— In Coffman *v.* Kentucky Bank, 41 Miss. 212, 90 Am. Dec. 371, it was held that where a bill was indorsed for a bank by its cashier, and at the time of its maturity such cashier had ceased to be an officer of the bank, notice to the bank was sufficient without notice to the indorsing cashier.

62. **Non-negotiable note.**—It has been held that one who writes his name upon the back of a non-negotiable promissory note to give it credit is a guarantor, and is liable *prima facie* for the payment of the note upon the default of the principal without previous demand or notice. San Diego First Nat. Bank *v.* Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; Cromwell *v.* Hewitt, 40 N. Y. 491, 100 Am. Dec. 527 [*following* Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576].

63. See *supra*, II, B, 6, a, (II), (A).

64. *Alabama.*— Hooks *v.* Anderson, 58 Ala. 238, 29 Am. Rep. 745; Price *v.* Lavender, 38 Ala. 389; Milton *v.* De Yampert, 3 Ala. 648; Jordan *v.* Garnett, 3 Ala. 610.

California.— Fessenden *v.* Summers, 62 Cal. 484; Jones *v.* Goodwin, 39 Cal. 493, 2 Am. Rep. 473; Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356.

Indiana.— Bronson *v.* Alexander, 48 Ind. 244; Roberts *v.* Masters, 40 Ind. 461; Snyder *v.* Oatman, 16 Ind. 265; Sill *v.* Leslie, 16 Ind. 236; Vore *v.* Hurst, 13 Ind. 551, 74 Am. Dec. 268.

Kansas.— Bradford *v.* Pauly, 18 Kan. 216.

liable as a guarantor or maker[65] he is not entitled to notice of dishonor as an indorser,[66] and where he is deemed a surety[67] the same is true.[68]

(v) *Joint Indorsers*—(a) *In General.* As a general rule where several parties indorse a bill or note jointly all are entitled to receive notice of its dishonor,[69] and it has been held that failure to give notice to one of two joint indorsers who are not partners will release the other indorser who had notice.[70]

(b) *Partners.* Where, however, such indorsers are partners, notice of dishonor given to one is sufficient to bind all, on the ground of their common interest rather than common knowledge,[71] and such notice binds both the firm and its

Massachusetts.— An indorser in blank before delivery is now entitled to notice of dishonor (Mass. Pub. Stat. (1882), p. 427) but was not so entitled prior to 1874 (National Bank *v.* Law, 127 Mass. 72; Cook *v.* Googins, 126 Mass. 410).

Michigan.— Smith *v.* Long, 40 Mich. 555, 29 Am. Rep. 558.

New York.— Moore *v.* Cross, 19 N. Y. 227, 75 Am. Dec. 326; Spies *v.* Gilmore, 1 N. Y. 321; Hall *v.* Newcomb, 3 Hill (N. Y.) 233; Seabury *v.* Hungerford, 2 Hill (N. Y.) 80; Dean *v.* Hall, 17 Wend. (N. Y.) 214.

Ohio.— Farr *v.* Ricker, 46 Ohio St. 265, 21 N. E. 354.

Pennsylvania.— Taylor *v.* McCune, 11 Pa. St. 460.

Tennessee.— Clouston *v.* Barbiere, 4 Sneed (Tenn.) 336; Comparree *v.* Brockway, 11 Humphr. (Tenn.) 355. But it has been held that while this is true in the absence of proof of a different contract, the indorser may by his agreement enlarge his liability, and that it is competent to show by parol evidence the nature and extent of his undertaking. Iser *v.* Cohen, 1 Baxt. (Tenn.) 421.

65. See *supra*, II, B, 6, a, (II).

66. *Georgia.*— Hardy *v.* White, 60 Ga. 454.

Iowa.— Rodabaugh *v.* Pitkin, 46 Iowa 544; Sibley *v.* Van Horn, 13 Iowa 209. See also Sabin *v.* Harris, 12 Iowa 87.

Minnesota.— Peckham *v.* Gilman, 7 Minn. 446.

Rhode Island.— Manufacturers', etc., Bank *v.* Follett, 11 R. I. 92, 23 Am. Rep. 418; Perkins *v.* Barstow, 6 R. I. 505; Mathewson *v.* Sprague, 1 R. I. 8.

West Virginia.— Miller *v.* Clendenin, 42 W. Va. 416, 26 S. E. 512, in the absence of an agreement made at the time of such indorsement that the party so putting his name upon the note or bill should be treated as an indorser.

67. See *supra*, II, B, 6, a, (II), (c).

68. *Georgia.*— Eppens *v.* Forbes, 82 Ga. 748, 9 S. E. 723.

Indiana.— Fitch *v.* Citizens' Nat. Bank, 97 Ind. 211.

Louisiana.— Athens Mfg. Co. *v.* Hunt, 28 La. Ann. 2; Adams *v.* Gordon, 22 La. Ann. 41; Wall *v.* Bry, 1 La. Ann. 312; Variol *v.* Doherty, McGloin (La.) 118.

North Carolina.— Dismukes *v.* Wright, 20 N. C. 74; Williams *v.* Irwin, 20 N. C. 70; Hatcher *v.* McMorine, 15 N. C. 122.

Rhode Island.— Mathewson *v.* Sprague, 1 R. I. 8.

Tennessee.— Iser *v.* Cohen, 1 Baxt. (Tenn.) 421.

Vermont.— Marsh *v.* Badcock, 2 D. Chipm. (Vt.) 124.

United States.— Thornton *v.* Stoddert, 1 Cranch C. C. (U. S.) 534, 23 Fed. Cas. No. 14,000.

Contra, Bradford *v.* Corey, 5 Barb. (N. Y.) 461.

69. *Connecticut.*— Shepard *v.* Hawley, 1 Conn. 367, 6 Am. Dec. 244, where it was held that an acknowledgment of due notice by one would lay no foundation for an action against the others.

Indiana.— State Bank *v.* Slaughter, 7 Blackf. (Ind.) 133.

Maryland.— People's Bank *v.* Keech, 26 Md. 521, 90 Am. Dec. 118.

New York.— Willis *v.* Green, 5 Hill (N. Y.) 232, 40 Am. Dec. 351. See also Chenango Bank *v.* Root, 4 Cow. (N. Y.) 126. But the notice need not be addressed to them jointly or refer to their joint indorsement. Cayuga County Bank *v.* Warden, 6 N. Y. 19.

Ohio.— Miser *v.* Trovinger, 7 Ohio St. 281.

Pennsylvania.— Struthers *v.* Blake, 30 Pa. St. 139; Sayre *v.* Frick, 7 Watts & S. (Pa.) 383, 62 Am. Dec. 249.

Wisconsin.— See Boyd *v.* Orton, 16 Wis. 495.

United States.— Gantt *v.* Jones, 1 Cranch (U. S.) 210, 9 Fed. Cas. No. 5,213.

England.— See Carvick *v.* Vickery, Dougl. 653 note.

Contra, Higgins *v.* Morrison, 4 Dana (Ky.) 100; Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. (Ky.) 610; Jarnagin *v.* Stratton, 95 Tenn. 619, 32 S. W. 625, 30 L. R. A. 495 (where the indorsers were joint and several).

70. People's Bank *v.* Keech, 26 Md. 521, 90 Am. Dec. 118; Willis *v.* Green, 5 Hill (N. Y.) 232, 40 Am. Dec. 351.

71. *Alabama.*— New York, etc., Contracting Co. *v.* Selma Sav. Bank, 51 Ala. 305, 23 Am. Rep. 552.

Kentucky.—Citizens' Sav. Bank *v.* Hays, 90 Ky. 365, 16 Ky. L. Rep. 505, 29 S. W. 20, where the firm-name used was the individual name of the other partner.

Louisiana.— Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Magee *v.* Dunbar, 10 La. 546.

Massachusetts.— Bank of America *v.* Shaw, 142 Mass. 290, 7 N. E. 779.

Missouri.— Bouldin *v.* Page, 24 Mo. 594.

Pennsylvania.— Collins *v.* Titusville Bank, 31 Leg. Int. (Pa.) 388.

England.— Porthouse *v.* Parker, 1 Campb.

individual members.[72] Upon the dissolution of a partnership after indorsement and before maturity notice to one partner is sufficient to bind the others;[73] and where one of the firm dies after indorsement and before maturity it is sufficient if notice is given to the surviving partner.[74]

c. Assignor Without Indorsement. A party who assigns a bill or note without indorsement is not entitled to notice of its dishonor, unless he can show that he is injured by the holder's negligence.[75]

d. Maker. The maker of a note is not entitled to notice of its dishonor,[76] and this rule applies even where the note is made payable on its face at a bank[77] and although the maker is an accommodation party and is known as such to the holder.[78]

e. Accepter. It may be stated as the universally accepted doctrine that the accepter of a bill of exchange, being the principal and not the collateral debtor, is not entitled to notice of its dishonor.[79]

82, 10 Rev. Rep. 637; Bignold *v.* Waterhouse, 1 M. & S. 255.

72. Hume *v.* Watt, 5 Kan. 34 (where the partner served with notice resided in the place in which the bill was protested and the partner not notified was a non-resident); Wheeler *v.* Maillot, 20 La. Ann. 75; St. Louis Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; Bouldin *v.* Page, 24 Mo. 594.

73. *Alabama.*— Coster *v.* Thomason, 19 Ala. 717.

Maryland.— See Howard Bank *v.* Carson, 50 Md. 18.

Missouri.— St. Louis Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; St. Louis Fourth Nat. Bank *v.* Heuschen, 52 Mo. 207.

New York.—Hubbard *v.* Matthews, 54 N. Y. 43, 13 Am. Rep. 562.

Ohio.— Riddle *v.* McBeth, 2 Ohio Dec. (Reprint) 606, 4 West. L. Month. 153, where this rule was applied, although the holder knew that the firm was then dissolved.

Pennsylvania.— Burnet *v.* Howell, 8 Phila. (Pa.) 531.

In Louisiana such notice to one partner after a dissolution of the firm is held to be sufficient before the holder has received notice of the dissolution. Nott *v.* Douming, 6 La. 684.

74. Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Dabney *v.* Stidger, 4 Sm. & M. (Miss.) 749. But see Cocke *v.* State Bank, 6 Humphr. (Tenn.) 51, where it was held that after the death of one of the firm of indorsers notice of dishonor addressed by mail to the firm was sufficient to bind the partnership effects in the hands of the surviving partner, but not sufficient to bind the estate of the deceased partner in the hands of the personal representative, for want of due notice to such representative.

75. Hunter *v.* Moul, 98 Pa. St. 13, 42 Am. Rep. 610; Hutz *v.* Karthause, 4 Wash. (U. S.) 1, 11 Fed. Cas. No. 6,963; Van Wart *v.* Woolley, 3 B. & C. 439, 10 E. C. L. 204, 5 D. & R. 374, 3 L. J. K. B. O. S. 51, R. & M. 4, 21 E. C. L. 690; Swinyard *v.* Bowes, 5 M. & S. 62, 17 Rev. Rep. 274. See also Smith *v.* Mercer, L. R. 3 Exch. 51, 37 L. J. Exch. 24, 17 L. T. Rep. N. S. 317; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; Turner *v.* Stones, 1 D. & L. 122, 7 Jur. 745, 12 L. J. Q. B. 303.

The purchaser of a bill who transfers it on account of antecedent indebtedness without indorsing the same is not entitled to notice of its dishonor. Van Wart *v.* Smith, 1 Wend. (N. Y.) 219. But see Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108, where it was held that the transfer by the indorser of a previously indorsed and protested draft by delivery is equivalent to the drawing of a new draft on the accepter, and that in case of dishonor notice thereof should be given to such indorser.

76. Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Thornton *v.* Stoddert, 1 Cranch C. C. (U. S.) 534, 23 Fed. Cas. No. 14,000.

If one is an apparent indorser, but in fact a maker, he is not entitled to notice of dishonor. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653; Jamaica Bank *v.* Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; Furth *v.* Baxter, 24 Wash. 608, 64 Pac. 798.

77. Pritchard *v.* Smith, 77 Ga. 463; Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127; Watkins *v.* Crouch, 5 Leigh (Va.) 522; Pearse *v.* Pemberthy, 3 Campb. 261.

78. Marion Nat. Bank *v.* Phillips, 18 Ky. L. Rep. 159, 35 S. W. 910; Hansbrough *v.* Gray, 3 Gratt. (Va.) 356.

79. *Georgia.*—Cox *v.* Mechanics' Sav. Bank, 28 Ga. 529, where the acceptance was for the drawer's accommodation.

Louisiana.— Fuller *v.* Leonard, 27 La. Ann. 635.

New York.—Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

Pennsylvania.— Garden City Nat. Bank *v.* Fitler, 155 Pa. St. 210, 26 Atl. 372, 35 Am. St. Rep. 874.

Tennessee.— James *v.* Ocoee Bank, 2 Coldw (Tenn.) 57; Blair *v.* State Bank, 11 Humphr. (Tenn.) 84.

England.— Rhodes *v.* Gent, 5 B. & Ald. 244, 7 E. C. L. 140; Treacher *v.* Hinton, 4 B. & Ald. 413, 23 Rev. Rep. 325, 6 E. C. L. 413; Edwards *v.* Dick, 4 B. & Ald. 212, 23 Rev. Rep. 255, 6 E. C. L. 455; Smith *v.* Thatcher, 4 B. & Ald. 200, 6 E. C. L. 450; Turner *v.* Hayden, 4 B. & C. 1, 10 E. C. L. 455, 6 D. & R. 5, R. & M. 215, 21 E. C. L. 736; Sebag *v.*

3. Persons in Representative Capacity — a. Agents. Notice of dishonor may be given to the agent of a party entitled thereto, when the agent is charged with the general conduct of his principal's business;[80] but it must be shown that it was within the scope of the agent's authority to receive such notice,[81] and notice to a mere attorney or solicitor,[82] to an outdoor servant, not known to have been an inmate in the family,[83] or to an attorney in fact[84] is insufficient, unless it is shown that he is specially authorized to receive such notice. Where, however, the principal has given the agent authority to receive notice for him, such authority ceases with the death of the principal, and a notice given to the agent after the death of the principal will not bind the latter's estate.[85]

b. Assignees. Where a party to a bill or note has become bankrupt or insolvent, notice of dishonor of the paper should be given to his assignee, if one has been appointed and such appointment is known;[86] but if no assignee has been appointed, or if the holder of the paper is not aware of the appointment and

Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39.

80. *Alabama.* — Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335.

California.— Kellogg *v.* Pacific Box Factory, 57 Cal. 327.

Louisiana. — Aurianne *v.* Eschbacher, 28 La. Ann. 48; Hestres *v.* Petrovic, 1 Rob. (La.) 119; Jones *v.* Mansker, 15 La. 51; Edson *v.* Jacobs, 14 La. 494.

Maine.— Lord *v.* Appleton, 15 Me. 270.

Marylana.— Crowley *v.* Barry, 4 Gill (Md.) 194, where notice to an agent who was authorized to receive and read the indorser's mail was held to be sufficient, although the indorser also received mail from a post-office near his residence.

Massachusetts.— Chouteau *v.* Webster, 6 Metc. (Mass.) 1, 39 Am. Dec. 705; Powers *v.* Lynch, 3 Mass. 77.

Minnesota.— King *v.* Griggs, 82 Minn. 387, 85 N. W. 162.

Mississippi. — Coffman *v.* Commonwealth Bank, 41 Miss. 212, 90 Am. Dec. 371; Wilcox *v.* Routh, 9 Sm. & M. (Miss.) 476; Wilkins *v.* Commercial Bank, 6 How. (Miss.) 217.

Missouri.— Mercantile Bank *v.* McCarthy, 7 Mo. App. 318.

New York.— Kruger *v.* Persons, 52 N. Y. App. Div. 635, 66 N. Y. Suppl. 1135 [*affirming* 45 N. Y. App. Div. 184, 60 N. Y. Suppl. 1078]; Mechanics' Banking Assoc. *v.* Place, 4 Duer (N. Y.) 212.

Wisconsin.— Wilson *v.* Senier, 14 Wis. 380, where the principal was absent in a foreign country.

England.— Smith *v.* Thatcher, 4 B. & Ald. 200, 6 E. C. L. 450; Crosse *v.* Smith, 1 M. & S. 545, 14 Rev. Rep. 652.

Notice of protest to charge a corporation, in whose name paper is indorsed, is properly served upon the general agent of the corporation. Auburn Bank *v.* Putnam, 1 Abb. Dec. (N. Y.) 80.

81. Robinson *v.* Aird, (Fla. 1901) 29 So. 633.

Insufficient showing.—An indorsement "In need at Messrs. Smith, Payne, & Smith," was held to constitute the bank referred to the indorser's agent only for the purpose of payment, and that it did not authorize it to receive a notice of dishonor for him. *In re* Leeds Banking Co., L. R. 1 Eq. 1, 11 Jur. N. S. 920, 35 L. J. Ch. 311, 13 L. T. Rep. N. S. 314, 14 Wkly. Rep. 43.

82. Louisiana State Bank *v.* Ellery, 4 Mart. N. S. (La.) 87; Crosse *v.* Smith, 1 M. & S. 545, 14 Rev. Rep. 652.

83. Commercial Bank *v.* Weller, 5 U. C. Q. B. 543.

84. New York, etc., Contracting Co. *v.* Selma Sav. Bank, 51 Ala. 305, 23 Am. Rep. 552; Planters', etc., Bank *v.* King, 9 Ala. 279; Bird *v.* Doyal, 20 La. Ann. 541; De Lizardi *v.* Pouverin, 4 Rob. (La.) 393; Louisiana State Bank *v.* Ellery, 4 Mart. N. S. (La.) 87; Hockaday *v.* Skeggs, 2 Phila. (Pa.) 268, 14 Leg. Int. (Pa.) 124; Valk *v.* Gaillard, 4 Strobh. (S. C.) 99. See, however, Wilcox *v.* Routh, 9 Sm. & M. (Miss.) 476; Firth *v.* Thrush, 8 B. & C. 387, 6 L. J. K. B. O. S. 355, 2 M. & R. 359, 15 E. C. L. 193.

85. Bird *v.* Doyal, 20 La. Ann. 541; Washington Bank *v.* Peirson, 2 Cranch C. C. (U. S.) 685, 2 Fed. Cas. No. 953; Brent *v.* Washington Bank, 2 Cranch C. C. (U. S.) 517, 4 Fed. Cas. No. 1,834.

86. Callahan *v.* Commonwealth Bank, 82 Ky. 231; Camidge *v.* Allenby, 6 B. & C. 373, 9 D. & R. 391, 5 L. J. K. B. O. S. 95, 30 Rev. Rep. 358, 13 E. C. L. 175; Rhode *v.* Proctor, 4 B. & C. 517, 6 D. & R. 510, 3 L. J. K. B. O. S. 188, 28 Rev. Rep. 369, 10 E. C. L. 684; *Ex p.* Chapple, 3 Deac. 218, 7 L. J. Bankr. 43, 3 Mont. & A. 490. See also Fassin *v.* Hubbard, 55 N. Y. 465, where a bill was indorsed "Brander & Hubbard, old firm in liquidation," and notice given to the liquidating agent at the office of the firm was held to be sufficient. *Contra,* House *v.* Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813, where it was held that the insolvent indorser will not be bound by a notice given only to his assignee, even so far as to render the claim provable against his estate in that proceeding. And see *Ex p.* Baker, 4 Ch. D. 795, 46 L. J. Bankr. 60, 36 L. T. Rep. N. S. 339, 25 Wkly. Rep. 454, where it was held that notice to the bankrupt was sufficient, even where an assignee had been appointed.

could not ascertain it by reasonable diligence, it is proper to serve the notice upon the bankrupt or insolvent himself.[87]

c. Executors or Administrators. If a party entitled to notice is dead at the time the paper becomes payable and this is known to the holder or subsequent indorser, notice should be sent to his executor or administrator, if there be any and it can be ascertained by reasonable inquiry who or where he is, in order to render his estate liable on such paper.[88] Where, however, no administrator has been appointed, or the identity of such administrator cannot be ascertained after due diligence, a notice addressed to the party sought to be charged at his late residence or to his "legal representative" is sufficient.[89] Where there are several executors or administrators notice to one of them is sufficient.[90]

C. By Whom Notice Given — 1. Parties to or in Possession of Paper — a. In General. Notice of dishonor may be given by, or at the instance of, any person who is a party to, or lawfully in possession of, the dishonored bill or note, and who would be a competent witness to prove such demand and notice.[91]

87. Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; *Ex p.* Tremont Nat. Bank, 2 Lowell (U. S.) 409, 24 Fed. Cas. No. 14,169, 16 Nat. Bankr. Reg. 397, 25 Pittsb. Leg. J. 84; *Ex p.* Johnson, 3 Deac & C. 433, 1 Mont. & A. 622; *Ex p.* Chapple, 3 Deac. 218, 7 L. J. Bankr. 43, 3 Mont. & A. 490; *Ex p.* Moline, 19 Ves. Jr. 216.

Notice to an insolvent corporation may be served at its former office on its assignee. American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492.

88. *Alabama.*— Hallett *v.* Mobile Branch Bank, 12 Ala. 193.

California.— Drexler *v.* McGlynn, 99 Cal. 143, 33 Pac. 773.

Louisiana.— Maspero *v.* Pedesclaux, 22 La. Ann. 227, 2 Am. Rep. 727; Bird *v.* Doyal, 20 La. Ann. 541; Louisiana State Bank *v.* Dumartrait, 4 La. Ann. 483; New Orleans, etc., R. Co. *v.* Kerr, 9 Rob. (La.) 122, 41 Am. Dec. 323; Christmas *v.* Fluker, 7 Rob. (La.) 13 (where notice directed "to the legal representative" of an indorser who had died before maturity of the note was held sufficient to support a subsequent action on the indorsement); State Bank *v.* Smith, 4 Rob. (La.) 276; McLanahan *v.* Brandon, 1 Mart. N. S. (La.) 321, 14 Am. Dec. 188.

Massachusetts.— Goodnow *v.* Warren, 122 Mass. 79, 23 Am. Rep. 289; Massachusetts Bank *v.* Oliver, 10 Cush. (Mass.) 557; Oriental Bank *v.* Blake, 22 Pick. (Mass.) 206.

Mississippi.— Barnes *v.* Reynolds, 4 How. (Miss.) 114.

New Hampshire.— Mathewson *v.* Strafford Bank, 45 N. H. 104.

New Jersey.— Dodson *v.* Taylor, 56 N. J. L. 11, 28 Atl. 316; Smalley *v.* Wright, 40 N. J. L. 471.

New York.— Deininger *v.* Miller, 7 N. Y. App. Div. 409, 40 N. Y. Suppl. 195, 74 N. Y. St. 758; Port Jefferson Bank *v.* Darling, 91 Hun (N. Y.) 236, 36 N. Y. Suppl. 153; Beals *v.* Peck, 12 Barb. (N. Y.) 245; Cayuga County Bank *v.* Bennett, 5 Hill (N. Y.) 236; Merchants' Bank *v.* Birch, 17 Johns. (N. Y.) 25, 8 Am. Dec. 367.

Pennsylvania.— Linderman *v.* Guldin, 34 Pa. St. 54. See also Shoenberger *v.* Lancaster Sav. Inst., 28 Pa. St. 459, where a note indorsed by a testator was protested for nonpayment and notice was given the executor named in the will, who had not joined in the probate, qualified, or, at the time of the notice, renounced the trust, and who did not refuse the notice, and it was held that such notice was sufficient to bind the estate.

Tennessee.— Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419; Cocke *v.* State Bank, 6 Humphr. (Tenn.) 51; Pillow *v.* Hardeman, 3 Humphr. (Tenn.) 538, 39 Am. Dec. 195; Alton *v.* Robinson, 2 Humphr. (Tenn.) 341 (where the executor was held to be entitled to notice in order to bind the estate, although he was the maker of the note).

Virginia.— Boyd *v.* City Sav. Bank, 15 Gratt. (Va.) 501.

Wisconsin.— Boyd *v.* Orton, 16 Wis. 495.

Canada.— Merchants' Bank *v.* Bell, 29 Grant Ch. (U. C.) 413; McKenzie *v.* Northrop, 22 U. C. C. P. 383; Cosgrave *v.* Boyle, 45 U. C. Q. B. 32.

89. *Louisiana.*— Weaver *v.* Penn, 27 La. Ann. 129, where notice was addressed to the deceased indorser and delivered to his son-in-law at his late residence.

Mississippi.— Barnes *v.* Reynolds, 4 How. (Miss.) 114.

New Hampshire.— Mathewson *v.* Strafford Bank, 45 N. H. 104.

New York.—Stewart *v.* Eden, 2 Cai. N. Y.) 121, 2 Am. Dec. 222.

Tennessee.— Planters' Bank *v.* White, 2 Humphr. (Tenn.) 112, 36 Am. Dec. 305.

Virginia.— Boyd *v.* City Sav. Bank, 15 Gratt. (Va.) 501.

90. Lewis *v.* Bakewell, 6 La. Ann. 359, 54 Am. Dec. 561; Beals *v.* Peck, 12 Barb. (N. Y.) 245; Carolina Nat. Bank *v.* Wallace, 13 S. C. 347, 36 Am. Rep. 694 (in which case the executor was the maker of the note).

91. *Massachusetts.*— Cabot Bank *v.* Warner, 10 Allen (Mass.) 522.

Mississippi.— Offit *v.* Vick, Walk. (Miss.) 99.

New York.— West River Bank *v.* Taylor, 34 N. Y. 128; Chanoine *v.* Fowler, 3 Wend. (N. Y.) 173.

b. Agents — (1) *In General.* Notice of dishonor may be given for the holder of the paper by an agent specially authorized or by a general agent,[92] in

South Carolina.— Poultney *v.* Haslett, 1 Nott & M. (S. C.) 466.

Texas.— Beal *v.* Alexander, 6 Tex. 531.

Accepter.— Union Bank *v.* Grimshaw, 15 La. 321; Brailsford *v.* Williams, 15 Md. 150, 74 Am. Dec. 559; Rosher *v.* Kieran, 4 Campb. 87. But see Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198, where it was held that notice by the drawee who had refused acceptance was insufficient, the court holding that such a person was not a party to, or chargeable in virtue of, the bill, and that notice from him was in no degree better than from any other stranger.

Indorser.—*Massachusetts.*—Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198.

Missouri.— Glasscock *v.* State Bank, 8 Mo. 443; Glasgow *v.* Pratte, 8 Mo. 336, 40 Am. Dec. 142.

New York.— Mead *v.* Engs, 5 Cow. (N. Y.) 303; Stafford *v.* Yates, 18 Johns. (N. Y.) 327.

Wisconsin.— Linn *v.* Horton, 17 Wis. 151.

England.— Jennings *v.* Roberts, 4 E. & B. 615, 1 Jur. N. S. 401, 24 L. J. Q. B. 102, 82 E. C. L. 615; Wilson *v.* Swabey, 1 Stark. 34, 2 E. C. L. 23. See also Rogerson *v.* Hare, 1 Jur. 71, where it was held that notice may be given by a party to a bill or note in the name of another party who is liable as indorser, even without the latter's authority.

Maker.—Johnson *v.* Harth, 1 Bailey (S. C.) 482, where it was held that in case the indorser has notice from the maker that the note has been presented and not paid he is liable, although the holder may have neglected to give notice in due season.

Notary.— *Alabama.*— Greene *v.* Farley, 20 Ala. 322; Crawford *v.* Mobile Branch Bank, 7 Ala. 205.

California.— It is the duty of the notary to give notice of dishonor and he may be held liable for negligence on his official bond. Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547.

Iowa.—Smith *v.* Ralston, Morr. (Iowa) 87.

Kansas.—A notary public cannot, as a public officer, give notice of the non-payment of a note, but in giving notice he acts merely as the agent of the person employing him for such purpose. Lindsborg Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324; Couch *v.* Sherrill, 17 Kan. 622.

Kentucky.— Stivers *v.* Prentice, 3 B. Mon. (Ky.) 461; Shrieve *v.* Duckham, 1 Litt. (Ky.) 194.

Louisiana.— Follain *v.* Dupré, 11 Rob. (La.) 454; Harrison *v.* Bowen, 16 La. 282; Waldron *v.* Turpin, 15 La. 552, 35 Am. Dec. 210. See also Union Bank *v.* Morgan, 2 La. Ann. 418, holding that although the notary is the maker of the instrument he may act as the holder's agent in giving notice of its dishonor.

Missouri.— Renick *v.* Robbins, 28 Mo. 339.

New York.— Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

Ohio.— Powell *v.* State Bank, 1 Disn. (Ohio) 269, 12 Ohio Dec. (Reprint) 615; Lafayette Bank *v.* McLaughlin, 1 Ohio Dec. (Reprint) 202, 4 West. L. J. 70.

Tennessee.—Barr *v.* Marsh, 9 Yerg. (Tenn.) 253. See also Wheeler *v.* State, 9 Heisk. (Tenn.) 393, holding that it is the official duty of a notary to give notice of protest, that the act is that of a public officer under his official oath and not that of a private agent, and that failure to discharge his duty is a breach of his bond.

United States.— Harris *v.* Robinson, 4 How. (U. S.) 336, 11 L. ed. 1000; Burke *v.* McKay, 2 How. (U. S.) 66, 11 L. ed. 181; Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 5 L. ed. 628.

Actual holder.— In England it has been held that notice of dishonor must come from the actual holder or his agent in order to be effectual. Tindal *v.* Brown, 1 T. R. 167, 2 T. R. 186, 1 Rev. Rep. 171; *Ex p.* Barclay, 7 Ves. Jr. 597.

Where a bill was taken as collateral security it was held that it was the right and duty of the holder to present it at maturity and give due notice of its dishonor if not paid. Peacock *v.* Pursell, 14 C. B. N. S. 728, 10 Jur. N. S. 178, 32 L. J. C. P. 266, 8 L. T. Rep. N. S. 636, 11 Wkly. Rep. 834, 108 E. C. L. 728.

92. *Alabama.*— Todd *v.* Neal, 49 Ala. 266.

Arkansas.— Jordan *v.* Ford, 7 Ark. 416.

California.— Drexler *v.* McGlynn, 99 Cal. 143, 33 Pac. 773.

Iowa.— Mt. Pleasant Branch State Bank *v.* McLeran, 26 Iowa 306.

Louisiana.— Jex *v.* Tureaud, 19 La. Ann. 64; Lathrop *v.* Lawson, 5 La. Ann. 238, 52 Am. Dec. 585; Marsoudet *v.* Jacobs, 6 Rob. (La.) 276.

Michigan.— Cromer *v.* Platt, 37 Mich. 132, 26 Am. Rep. 503.

Missouri.— State Bank *v.* Vaughan, 36 Mo. 90; Walker *v.* State Bank, 8 Mo. 704.

New York.— Cowperthwaite *v.* Sheffield, 1 Sandf. (N. Y.) 416; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451; Williams *v.* Matthews, 3 Cow. (N. Y.) 252; Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230; Tunno *v.* Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141.

North Carolina.— Cape-Fear Bank *v.* Seawell, 9 N. C. 560.

North Dakota.—Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188.

Pennsylvania.— Falk *v.* Lee, 8 Wkly. Notes Cas. (Pa.) 345.

Texas.— Payne *v.* Patrick, 21 Tex. 680.

United States.—Harris *v.* Robinson, 4 How. (U. S.) 336, 11 L. ed. 1000; U. S. Bank *v.* Goddard, 5 Mason (U. S.) 366, 2 Fed. Cas. No. 917.

England.— Stewart *v.* Kennett, 2 Campb. 177; Woodthorpe *v.* Lawes, 2 Gale 193, 6 L. J. Exch. 69, 2 M. & W. 109.

Foreman or servant.—It was held in Firth *v.* Thrush, 8 B. & C. 387, 6 L. J. K. B. O. S. 355, 2 M. & R. 359, 15 E. C. L. 193, that the

the absence of statute no public officer or notary being necessary.[93] Where notice of dishonor is given by an agent on behalf of the holder such notice may be given either in the agent's own name[94] or in the name of his principal.[95]

(II) *For Collection.* A bank or other agent having possession of a bill or note for collection is entitled to give notice of its dishonor, being deemed for that purpose the holder thereof.[96] In the absence of uniform and established custom, however, an agent for collection is only required to give notice to his principal[97]

foreman or servant of a tradesman is not necessarily an agent authorized to give notice of the dishonor of a bill.

93. *Iowa.*—Smith *v.* Ralston, Morr. (Iowa) 87.

Louisiana.— Lathrop *v.* Lawson, 5 La. Ann. 238, 52 Am. Dec. 585; Waldron *v.* Turpin, 15 La. 552, 35 Am. Dec. 210.

Michigan.— Burkam *v.* Trowbridge, 9 Mich. 209.

New Jersey.— Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

Pennsylvania.— Cake *v.* Stidfole, 1 Walk. (Pa.) 95.

United States.— Burke *v.* McKay, 2 How. (U. S.) 66, 11 L. ed. 181.

94. Drexler *v.* McGlynn, 99 Cal. 143, 33 Pac. 773; Woodthorpe *v.* Lawes, 2 Gale 193, 6 L. J. Exch. 69, 2 M. & W. 109.

95. Harrison *v.* Ruscoe, 10 Jur. 142, 15 L. J. Exch. 110, 15 M. & W. 231; Rogerson *v.* Hare, 1 Jur. 71.

96. *Alabama.*— Greene *v.* Farley, 20 Ala. 322; Mobile Bank *v.* Huggins, 3 Ala. 206.

Connecticut.— Bartlett *v.* Isbell, 31 Conn. 296, 83 Am. Dec. 146; East Haddam Bank *v.* Scovil, 12 Conn. 303.

Maine.—Bradley *v.* Davis, 26 Me. 45; Burnham *v.* Webster, 19 Me. 232; Freeman's Bank *v.* Perkins, 18 Me. 292; Warren *v.* Gilman, 17 Me. 360.

Massachusetts.— Phipps *v.* Millbury Bank, 8 Metc. (Mass.) 79; Hartford Bank *v.* Barry, 17 Mass. 94.

Mississippi.— Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83.

Missouri.— State Bank *v.* Vaughan, 36 Mo. 90; Renick *v.* Robbins, 28 Mo. 339.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

New York.— Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Cole *v.* Jessup, 10 N. Y. 96; Troy State Bank *v.* Capitol Bank, 41 Barb. (N. Y.) 343; Burbank *v.* Beach, 15 Barb. (N. Y.) 426; Walker *v.* State Bank, 13 Barb. (N. Y.) 636; Ogden *v.* Dobbin, 2 Hall (N. Y.) 112; Orleans Bank *v.* Smith, 3 Hill (N. Y.) 560; Mead *v.* Engs, 5 Cow. (N. Y.) 303.

Ohio.— Ohio L. Ins., etc., Co. *v.* McCague, 18 Ohio 54; Powell *v.* State Bank, 1 Disn. (Ohio) 269, 12 Ohio Dec. (Reprint) 615.

Pennsylvania.— Myers *v.* Courtney, 11 Phila. (Pa.) 343, 33 Leg. Int. (Pa.) 140.

Tennessee.— Butler *v.* Duval, 4 Yerg. (Tenn.) 265.

Vermont.— Worden *v.* Nourse, 36 Vt. 756.

Wisconsin.— Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105.

United States.— Codrington *v.* Adams, Brunn. Col. Cas. (U. S.) 650, 5 Fed. Cas. No. 2,937, 21 Law Rep. 586.

England.— Chapman *v.* Keane, 3 A. & E. 193, 4 L. J. K. B. 185, 4 N. & M. 607, 30 E. C. L. 106; Haynes *v.* Birks, 3 B. & P. 599; Scott *v.* Lifford, 1 Campb. 246, 9 East 347; Rowe *v.* Tipper, 13 C. B. 249, 17 Jur. 440, 22 L. J. C. P. 135, 1 Wkly. Rep. 152, 76 E. C. L. 249; Langdale *v.* Trimmer, 15 East 291; Clode *v.* Bayley, 7 Jur. 1092, 13 L. J. Exch. 17, 12 M. & W. 51; Emmerson *v.* Heelis, 2 Taunt. 38, 11 Rev. Rep. 520.

Canada.—Reg. *v.* Montreal Bank, 1 Can. Exch. 154 [*citing* Brown *v.* London, etc., R. Co., 4 B. & S. 326, 10 Jur. N. S. 234, 32 L. J. Q. B. 318, 11 Wkly. Rep. 884, 116 E. C. L. 326]; Howard *v.* Godard, 9 N. Brunsw. 452; Girvan *v.* Price, 8 N. Brunsw. 409; Wilson *v.* Pringle, 14 U. C. Q. B. 230.

See also Banks and Banking, 5 Cyc. 504, note 69.

Notice may be given by a notary employed by a bank to which the bill has been indorsed "for collection only." Warren *v.* Gilman, 17 Me. 360.

97. *Alabama.*— Foster *v.* McDonald, 3 Ala. 34.

Indiana.— Pate *v.* State Bank, 3 Ind. 176.

Kansas.— Seaton *v.* Scovill, 18 Kan. 433, 21 Am. Rep. 212 note, 26 Am. Rep. 779, where it was held that so far as notice is concerned the agent is to be considered as though he were the real holder and his principal a prior indorser.

Louisiana.— Moore *v.* Corning, 12 La. Ann. 256; Grand Gulf R., etc., Co. *v.* Barnes, 12 Rob. (La.) 127.

Maine.— Fish *v.* Jackman, 19 Me. 467, 36 Am. Dec. 769. But it has been held that if the holder of the note shall employ agents whose residences or places of business are so distant from those of the parties to the paper that the transmission of notices through them would inevitably occasion great and unnecessary delay, it might be evidence of a want of due diligence, or even of the fraudulent or vexatious attempt to injure a party under the pretense of using due diligence. Crocker *v.* Getchell, 23 Me. 392.

Massachusetts.— Lynn First Nat. Bank *v.* Smith, 132 Mass. 227; True *v.* Collins, 3 Allen (Mass.) 438; Phipps *v.* Millbury Bank, 8 Metc. (Mass.) 79; Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212; Church *v.* Barlow, 9 Pick. (Mass.) 547; Colt *v.* Noble, 5 Mass. 167.

Mississippi.— Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63.

Missouri.— Griffith *v.* Assmann, 48 Mo. 66.

or to another collecting agent from whom the agent received it as a separate indorser.[98]

c. Personal Representatives. In case of the death of the holder notice may be given by his personal representative.[99]

2. STRANGERS. Notice of dishonor cannot be given by one who is a stranger to the instrument, and such notice will be of no avail to any party.[1]

D. Time of Giving Notice — 1. IN GENERAL — a. Rule Stated — (I) *IN GENERAL.* Notice of dishonor of a bill or note must in all cases be sent within a reasonable time;[2] and in order to charge the drawer of a bill or any indorser,

New York.— Farmers' Bank *v.* Vail, 21 N. Y. 485; Troy State Bank *v.* Capitol Bank, 27 How. Pr. (N. Y.) 57; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451; Howard *v.* Ives, 1 Hill (N. Y.) 263; Mead *v.* Engs, 5 Cow. (N. Y.) 303. *Compare* Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372 [*affirmed* in 3 Cow. (N. Y.) 662], where it was proved that it was the uniform and established custom of banks to give notice to all the indorsers.

Ohio.— Ohio L. Ins., etc., Co. *v.* McCague, 18 Ohio 54.

Tennessee.— Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670.

United States.— U. S. Bank *v.* Goddard, 5 Mason (U. S.) 366, 2 Fed. Cas. No. 917.

England.— Haynes *v.* Birks, 3 B. & P. 599.

98. *Connecticut.*— Hartford Bank *v.* Stedman, 3 Conn. 489. See also Holland *v.* Turner, 10 Conn. 308.

Massachusetts.—Wamesit Bank *v.* Buttrick, 11 Gray (Mass.) 387; Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212.

Michigan.— Wood *v.* Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597.

Missouri.—Renshaw *v.* Triplett, 23 Mo. 213.

Ohio.— Lawson *v.* Farmers' Bank, 1 Ohio St. 206.

Pennsylvania.—Myers *v.* Courtney, 11 Phila. (Pa.) 343, 33 Leg. Int. (Pa.) 140.

West Virginia.— Big Sandy Nat. Bank *v.* Chilton, 40 W. Va. 491, 21 S. E. 774.

99. White *v.* Stoddard, 11 Gray (Mass.) 258, 71 Am. Dec. 711; Rand *v.* Hubbard, 4 Metc. (Mass.) 252.

1. *Maryland.*— Brailsford *v.* Williams, 15 Md. 150, 74 Am. Dec. 559.

Massachusetts.— Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198.

Minnesota.— Jagger *v.* National German-American Bank, 53 Minn. 386, 55 N. W. 545.

New York.— Lawrence *v.* Miller, 16 N. Y. 235; Chanoine *v.* Fowler, 3 Wend. (N. Y.) 173.

North Carolina.— Brower *v.* Wooten, 4 N. C. 507, 7 Am. Dec. 692.

Pennsylvania.— Juniata Bank *v.* Hale, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558.

Texas.— Payne *v.* Patrick, 21 Tex. 680.

England.— Stewart *v.* Kennett, 2 Camph. 177; *Ex p.* Barclay, 7 Ves. Jr. 597.

The law requires notice by a party to the instrument who is at least contingently liable on it, although he may not be the holder of the paper at the time of giving notice (Poultney *v.* Haslett, 1 Nott & M. (S. C.) 466; Chapman *v.* Keane, 3 A. & E. 193, 4 L. J. K. B. 185, 4 N. & M. 607, 30 E. C. L. 106; Jameson *v.* Swinton, 2 Campb. 373, 2 Taunt. 224; Lysaght *v.* Bryant, 9 C. B. 46, 19 L. J. C. P. 160, 67 E. C. L. 46; Newen *v.* Gill, 8 C. & P. 367, 34 E. C. L. 784; Harrison *v.* Ruscoe, 10 Jur. 142, 15 L. J. Exch. 110, 15 M. & W. 231; Wilson *v.* Swabey, 1 Stark. 34, 2 E. C. L. 23), and notice by a party who has been discharged by the laches of the holder or of a subsequent indorser is of no avail, since he is no longer liable on, and has no interest in, the paper (Turner *v.* Leech, 4 B. & Ald. 451, 23 Rev. Rep. 344, 6 E. C. L. 556; Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694; Rowe *v.* Tipper, 13 C. B. 249, 17 Jur. 440, 22 L. J. C. P. 135, 1 Wkly. Rep. 152, 76 E. C. L. 249; Harrison *v.* Ruscoe, 10 Jur. 142, 15 L. J. Exch. 110, 15 M. & W. 231; *Ex p.* Barclay, 7 Ves. Jr. 597).

2. *Alabama.*— Eldridge *v.* Rogers, Minor (Ala.) 392.

Connecticut.— Phelps *v.* Blood, 2 Root (Conn.) 518.

Kentucky.— Noble *v.* Commonwealth Bank, 3 A. K. Marsh. (Ky.) 262.

Louisiana.— Spencer *v.* Stirling, 10 Mart. (La.) 88; Pinder *v.* Nathan, 4 Mart. (La.) 346.

Maryland.— Philips *v.* McCurdy, 1 Harr. & J. (Md.) 187.

Missouri.— Linville *v.* Welch, 29 Mo. 203.

New Hampshire.— Hadduck *v.* Murray, 1 N. H. 140, 8 Am. Dec. 43, where it was held that notice should be given as soon after the dishonor of the paper as conveniently could be done, considering the situation of the parties and frequency of communication between their places of residence.

New York.— Bryden *v.* Bryden, 11 Johns. (N. Y.) 187.

North Carolina.— Brittain *v.* Johnson, 12 N. C. 293, where it was held that the same strictness is not required in the matter of giving notice of dishonored paper between farmers resident in the country as between merchants resident in towns.

Pennsylvania.— Bank of North America *v.* McKnight, 2 Dall. (Pa.) 158, 1 L. ed. 330; Bank of North America *v.* Vardon, 2 Dall. (Pa.) 78, 1 L. ed. 297.

South Carolina.— Allwood *v.* Haseldon, 2 Bailey (S. C.) 457 (where the expression of the court was "with all convenient diligence"); Price *v.* Young, 1 McCord (S. C.) 339; Scarborough *v.* Harris, 1 Bay (S. C.) 177, 1 Am. Dec. 609 (where reasonable notice to the indorser was defined as "by first post or convenient opportunity").

United States.— Bull *v.* Kasson First Nat.

there must be due diligence used, not only by the holder, but by every party through whom the notice is transmitted, from the holder up to the party charged.[3]

(II) *Where Paper Indorsed After Maturity.* The rule requiring notice of dishonor to be given within a reasonable time applies equally to paper indorsed after maturity, the same diligence being required as in the case of an ordinary indorsement.[4]

b. What Is Reasonable Time — (I) *Rule Stated.* Until comparatively recently the term "reasonable time," as used in the rule above stated,[5] had received no uniform construction by the courts, its interpretation varying in the different jurisdictions, according to the condition of the country and the circumstances of each particular case.[6] Now, however, its meaning has been narrowed

Bank, 14 Fed. 612; Lindenberger *v.* Wilson, 1 Cranch C. C. (U. S.) 340, 15 Fed. Cas. No. 8,361 (where the court said that notice of protest should be given as soon as possible, under all the circumstances, according to the usual course of communication).

England.— Hirschfeld *v.* Smith, L. R. 1 C. P. 340, 1 H. & R. 284, 12 Jur. N. S. 523, 35 L. J. C. P. 177, 14 L. T. Rep. N. S. 886, 14 Wkly. Rep. 455; Gladwell *v.* Turner, L. R. 5 Exch. 59, 39 L. J. Exch. 31, 21 L. T. Rep. N. S. 674, 18 Wkly. Rep. 317; Baldwin *v.* Richardson, 1 B. & C. 245, 2 D. & R. 285, 25 Rev. Rep. 383, 8 E. C. L. 105; Haynes *v.* Birks, 2 B. & P. 599; Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; Darbishire *v.* Parker, 6 East 3, 2 Smith K. B. 195; Hart *v.* King, 12 Mod. 310.

3. Triplett *v.* Hunt, 3 Dana (Ky.) 126; Farmers', etc., Bank *v.* Turner, 2 Litt. (Ky.) 13; American L. Ins., etc., Co. *v.* Emerson, 4 Sm. & M. (Miss.) 177 (where notice given by an indorser three days after the receipt of notice from a subsequent party was held to be insufficient); Marsh *v.* Maxwell, 2 Campb. 210 note, 11 Rev. Rep. 696 note; Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694.

4. *Alabama.*— Montgomery State Branch Bank *v.* Gaffney, 9 Ala. 153; Adams *v.* Torbert, 6 Ala. 865.

Arkansas.— Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California.— Beebe *v.* Brooks, 12 Cal. 308.

Iowa.— McKewer *v.* Kirtland, 33 Iowa 348; Campbell *v.* Varney, 12 Iowa 43.

Kentucky.— Lawrence *v.* Ralston, 3 Bibb (Ky.) 102.

Louisiana.— Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372.

Maine.—Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478.

New York.—German-American Bank *v.* Atwater, 165 N. Y. 36, 58 N. E. 763 [*affirming* 33 N. Y. App. Div. 627, 53 N. Y. Suppl. 1104]; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727.

Vermont.— Nash *v.* Harrington, 1 Aik. (Vt.) 39, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

5. See *supra*, XII, D, 1, a, (I).

6. **Sufficient notice.**— In the following cases notice of dishonor was held to have been given within a reasonable time:

Indiana.—Sharpe *v.* Drew, 9 Ind. 281, where there was a delay of seven days.

Iowa.— Knight *v.* Dunsmore, 12 Iowa 35, where there was a delay of five days, the maker being insolvent at the maturity of the note and dying four days after and the guarantor not being injured by the delay.

Kentucky.— Mitcherson *v.* Grays, 4 B. Mon. (Ky.) 399, where there was a delay of six days in mailing notice of protest.

Louisiana.— Pinder *v.* Nathan, 4 Mart. (La.) 346, where notice of the non-acceptance of a bill in Boston was served on an indorser in New Orleans twenty-seven days thereafter.

New York.— Syracuse, etc., R. Co. *v.* Collins, 3 Lans. (N. Y.) 29 (where notice to the drawer of a check was given two weeks after delivery, the bank having failed on the day after the check was given); Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75 (where notice was given within ten days after dishonor of the non-negotiable order).

Pennsylvania.— Ashton *v.* Sproule, 35 Pa. St. 492 (where under an old Pennsylvania act, repealed in 1851, the holder of a bill or note was allowed to give notice of its dishonor at any time before suit brought); Jordan *v.* Hurst, 12 Pa. St. 269 (where, in case of a note indorsed after maturity, there was a delay in giving notice of three months after demand and refusal); Bank of North America *v.* McKnight, 1 Yeates (Pa.) 145 (where notice was given two days after dishonor).

Virginia.— Stott *v.* Alexander, 1 Wash. (Va.) 331, where there was a lapse of fifteen months between presentment in Philadelphia and notice to an indorser in Virginia.

Insufficient notice.— In the following cases notice of dishonor was held not to have been given within a reasonable time:

Alabama.— Brown *v.* Turner, 11 Ala. 752, where there was a delay of fifteen days.

Arkansas.— Levy *v.* Drew, 14 Ark. 334 (where there was a delay of twenty-five days); Ellis *v.* Dunham, 14 Ark. 127 (where notice was delayed six months).

California.— Keyes *v.* Fenstermaker, 24 Cal. 329, where there was a delay of three months.

Georgia.— Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616, where there was a delay of four and a half months.

Kentucky.— Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61, where there was a delay of

down so as to require each party to a bill or note, when notified of its dishonor, to give notice to those parties whom he desires to hold liable on the next day after the reception of such notice at the very latest.[7] At the option of the holder,

nearly four years without reasonable excuse.

Louisiana.— Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267 (where there was a delay of four years); Union Bank *v.* Fonteneau, 12 Rob. (La.) 120 (where notice was given two days after protest, both parties residing in the same place); Reynolds *v.* Buford, 3 Mart. N. S. (La.) 35 (where there was a delay of four days, the indorser residing but six miles from the holder).

Maine.— Littlehale *v.* Maberry, 43 Me. 264 (where there was a delay of four days); Green *v.* Darling, 15 Me. 141 (where there was a delay of nineteen days, the parties residing in the same town).

Massachusetts.— Thayer *v.* Brackett, 12 Mass. 450 (where there was a delay of three months); Hussey *v.* Freeman, 10 Mass. 84 (where there was a delay of eight days).

New York.—Clarke *v.* Ward, 4 Duer (N. Y.) 206 (where the notice was not given until three months after dishonor); Sice *v.* Cunningham, 1 Cow. (N. Y.) 397 (where there was a delay of five months, the parties residing near each other); Bryden *v.* Bryden, 11 Johns. (N. Y.) 187 (where there was a delay of three days, the holder and indorser residing in the same city); Crain *v.* Colwell, 8 Johns. (N. Y.) 384 (where there was a delay of two months).

North Carolina.— Hubbard *v.* Troy, 24 N. C. 134 (where there was a delay of fourteen days); Johnston *v.* McGinn, 15 N. C. 277 (where there was a delay of forty-seven days in the giving of notice); Yancey *v.* Littlejohn, 9 N. C. 525 (where there was a delay of four months in giving notice, all the parties residing in the same village); State Bank *v.* Smith, 7 N. C. 70 (where there was a delay of six days); London *v.* Howard, 3 N. C. 332 (where there was a delay of over two months, the parties living in the same town).

Ohio.— Davis *v.* Herrick, 6 Ohio 55, where there was a delay of nine days.

Pennsylvania.— Mallory *v.* Kirwan, 2 Dall. (Pa.) 192, 1 L. ed. 344, where there was a delay of nine months.

Rhode Island.—Westminster Bank *v.* Wheaton, 4 R. I. 30, where there was a delay of three days in giving notice to the indorser of a check.

Vermont.— Aldis *v.* Johnson, 1 Vt. 136, where there was a delay of four months in the case of a non-negotiable note.

United States.— Warder *v.* Carson, 2 Dall. (Pa.) 233, 1 L. ed. 361 (where a delay of six days in giving notice to the indorser in the city was held to be unreasonable, although it was intimated that it might have been sufficient in the country); Steinmetz *v.* Currey, 1 Dall. (Pa.) 234, 1 L. ed. 115 (where there was a delay of over two years); Morris *v.* Gardner, 1 Cranch C. C. (U. S.) 213, 17 Fed. Cas. No. 9,830 (where there was a delay of nine days, the parties living within two miles of each other); Lewis *v.* Brewster, 2 McLean (U. S.) 21, 15 Fed. Cas. No. 8,318 (where notice was given seven months after maturity of the note); U. S. *v.* Barker, 24 Fed. Cas. No. 14,519, 1 U. S. L. J. 1 (where there was a delay of nine days).

7. *Alabama.*— Knott *v.* Venable, 42 Ala. 186.

Connecticut.— Hartford Bank *v.* Stedman, 3 Conn. 489.

Florida.— Marks *v.* Boone, 24 Fla. 177, 4 So. 532; Sanderson *v.* Sanderson, 20 Fla. 292.

Iowa.— Barker *v.* Webster, 10 Iowa 593.

Kansas.— Seaton *v.* Scovill, 18 Kan. 433, 21 Am. Rep. 212 note, 26 Am. Rep. 779.

Kentucky.— Smith *v.* Roach, 7 B. Mon. (Ky.) 17; Triplett *v.* Hunt, 3 Dana (Ky.) 126; Hickman *v.* Ryan, 5 Litt. (Ky.) 24; Pearson *v.* Duckham, 3 Litt. (Ky.) 385; Shrieve *v.* Duckham, 1 Litt. (Ky.) 194; Frankfort Bank *v.* Markley, 3 A. K. Marsh. (Ky.) 505; Noble *v.* Commonwealth Bank, 3 A. K. Marsh. (Ky.) 262.

Louisiana.— Blackman *v.* Leonard, 15 La. Ann. 59; Townsley *v.* Springer, 1 La. 122, 515; Miller *v.* Hennen, 3 Mart. N. S. (La.) 587.

Maine.— Chick *v.* Pillsbury, 24 Me. 458, 41 Am. Dec. 394; Northern Bank *v.* Williams, 21 Me. 217.

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216; Flack *v.* Green, 3 Gill & J. (Md.) 474.

Massachusetts.— Housatonic Bank *v.* Laflin, 5 Cush. (Mass.) 546; Grand Bank *v.* Blanchard, 23 Pick. (Mass.) 305; Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180; Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165; Woodbridge *v.* Brigham, 12 Mass. 403, 7 Am. Dec. 85.

Mississippi.— American L. Ins., etc., Co. *v.* Emerson, 4 Sm. & M. (Miss.) 177.

Nebraska.— Phelps *v.* Stocking, 21 Nebr. 443, 32 N. W. 217.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402 [*affirming* 23 Hun (N. Y.) 628]; Borst *v.* Winckel, 14 Hun (N. Y.) 138; Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391; Howard *v.* Ives, 1 Hill (N. Y.) 263. But where a note was marked "paid" by mistake on the day it matured, but on the following day the error was discovered and corrected and notice of dishonor given to the indorser, such notice was held to be sufficient. Troy City Bank *v.* Grant, Lalor (N. Y.) 119.

Ohio.— Remington *v.* Harrington, 8 Ohio 507.

Pennsylvania.— Brenzer *v.* Wightman, 7

however, notice may be given on the very day of the dishonor of the paper, after due demand of acceptance or payment and refusal thereof,[8] and such immediate transmission will not enlarge the time allowed to prior parties to give notice.[9]

(II) *Application of Rule*—(A) *In General*—(1) To Indorsers. Each indorser has the same time in which to give notice to prior parties that the holder

Watts & S. (Pa.) 264; Jones *v.* Wardell, 6 Watts & S. (Pa.) 399.

Tennessee.— Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670.

Vermont.— North Bennington First Nat. Bank *v.* Wood, 51 Vt. 471, 31 Am. Rep. 692; Whittlesey *v.* Dean, 2 Aik. (Vt.) 263.

Virginia.— Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707.

United States.— Read *v.* Carbery, 2 Cranch C. C. (U. S.) 417, 20 Fed. Cas. No. 11,604; Metropolis Bank *v.* Walker, 2 Cranch C. C. (U. S.) 294, 2 Fed. Cas. No. 903; U. S. Bank *v.* Goddard, 5 Mason (U. S.) 366, 2 Fed. Cas. No. 917; Seventh Ward Bank *v.* Hanrick, 2 Story (U. S.) 416, 21 Fed. Cas. No. 12,687; Bonner *v.* New Orleans, 2 Woods (U. S.) 135, 3 Fed. Cas. No. 1,631.

England.— Boyd *v.* Emmerson, 2 A. & E. 184, 4 L. J. K. B. 43, 4 N. & M. 99, 29 E. C. L. 102; Williams *v.* Smith, 2 B. & Ald. 496, 21 Rev. Rep. 373; Jameson *v.* Swinton, 2 Campb. 373, 2 Taunt. 224; Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694; Scott *v.* Lifford, 1 Campb. 246, 9 East 347; Langdale *v.* Trimmer, 15 East 291; Darbishire *v.* Parker, 6 East 3, 2 Smith K. B. 195; Muilman *v.* D'Eguino, 2 H. Bl. 565.

In Illinois, by statute, a notice of dishonor is sufficient if mailed to or served upon the party sought to be charged within forty-eight hours after the dishonor of the paper. Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

In case of a demand note, where the demand was made unnecessarily soon, it was held that notice should have been given on the next day after dishonor, and that the fact that a second demand was made and notice thereof duly given would not avail the holder. Rice *v.* Wesson, 11 Metc. (Mass.) 400.

8. *Alabama.*— Curry *v.* Mobile Bank, 8 Port. (Ala.) 360; Crenshaw *v.* McKiernan, Minor (Ala.) 295.

California.— McFarland *v.* Pico, 8 Cal. 626; Toothaker *v.* Cornwall, 3 Cal. 144 (where it was held that notice might be given on the day of dishonor after banking hours if the paper was payable at a bank, and at the close of the usual hours of commercial business if not payable at a bank, and in places where there are no regular hours of business after sunset).

Connecticut.— Lockwood *v.* Crawford, 18 Conn. 361.

Illinois.— Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186.

Kentucky.— Pearson *v.* Duckham, 3 Litt. (Ky.) 385; Commonwealth Bank *v.* Eades, 1 Litt. (Ky.) 277; Frankfort Bank *v.* Markley, 3 A. K. Marsh. (Ky.) 505.

Louisiana.— Deblieux *v.* Bullard, 1 Rob. (La.) 66, 36 Am. Dec. 684; Austin *v.* Latham, 19 La. 88; Union Bank *v.* Grimshaw, 15 La. 321.

Maine.— King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560; Greeley *v.* Thurston, 4 Me. 479, 16 Am. Dec. 285.

Massachusetts.— Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Widgery *v.* Munroe, 6 Mass. 449.

Mississippi.— Harrel *v.* Bixler, Walk. (Miss.) 176.

Missouri.— Draper *v.* Clemens, 4 Mo. 52.

New Hampshire.— Simpson *v.* White, 40 N. H. 540; Manchester Bank *v.* Fellows, 28 N. H. 302; Smith *v.* Little, 10 N. H. 526.

New York.— Etheridge *v.* Ladd, 44 Barb. (N. Y.) 69 (the court remarking that although the maker has the whole day in which to pay the note, he must seek the holder after a demand and refusal); Oothout *v.* Ballard, 41 Barb. (N. Y.) 33; Osborn *v.* Moncure, 3 Wend. (N. Y.) 170; Corp *v.* McComb, 1 Johns. Cas. (N. Y.) 328.

Ohio.— Remington *v.* Harrington, 8 Ohio 507.

Pennsylvania.— Hallowell *v.* Curry, 41 Pa. St. 322; Coleman *v.* Carpenter, 9 Pa. St. 178, 49 Am. Dec. 552; Thomas *v.* Shoemaker, 6 Watts & S. (Pa.) 179.

Tennessee.— Garland *v.* West, 9 Baxt. (Tenn.) 315; Coleman *v.* Ewing, 4 Humphr. (Tenn.) 241.

Vermont.— Thorpe *v.* Peck, 28 Vt. 127.

Virginia.— Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707.

United States.— Lindenberger *v.* Beall, 6 Wheat. (U. S.) 104, 5 L. ed. 216; Bussard *v.* Levering, 6 Wheat. (U. S.) 102, 5 L. ed. 215; Mandeville *v.* Rumney, 3 Cranch C. C. (U. S.) 424, 16 Fed. Cas. No. 9,016; Smith *v.* Glover, 2 Cranch C. C. (U. S.) 334, 22 Fed. Cas. No. 13,051; Munroe *v.* Mandeville, 2 Cranch C. C. (U. S.) 187, 17 Fed. Cas. No. 9,929; Austen *v.* Miller, 5 McLean (U. S.) 153, 2 Fed. Cas. No. 661.

England.— Hine *v.* Allely, 4 B. & Ad. 624, 2 L. J. K. B. 105, 1 M. & M. 433, 24 E. C. L. 275; Burbridge *v.* Manners, 3 Campb. 193, 13 Rev. Rep. 786; Jameson *v.* Swinton, 2 Campb. 373, 2 Taunt. 224; Hume *v.* Peploe, 8 East 168, 9 Rev. Rep. 399; *Ex p.* Moline, 19 Ves. Jr. 216.

It was formerly doubted whether this could be done. Auld *v.* Mandeville, 2 Cranch C. C. (U. S.) 167, 2 Fed. Cas. No. 653; Hartley *v.* Case, 4 B. & C. 339, 10 E. C. L. 606, 1 C. & P. 555, 12 E. C. L. 318, 6 D. & R. 505, 3 L. J. K. B. O. S. 262; Haynes *v.* Birks, 3 B. & P. 599; Leftley *v.* Mills, 4 T. R. 170; Colkett *v.* Freeman, 2 T. R. 59.

9. Farmer *v.* Rand, 16 Me. 453; Manchester Bank *v.* Fellows, 28 N. H. 302; Carter *v.* Burley, 9 N. H. 558; Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707.

originally had; that is to say one day, reckoned from his own receipt of the notice,[10] whether he gives notice to his immediate indorser or to more remote parties.[11]

(2) To Agents. Where notices of dishonor are transmitted by the principal through agents, the time for giving notice cannot be extended by giving an additional day to each agent, but notice must be transmitted within the time allowed to the principal.[12] Where notices are inclosed to an indorser to be remailed to prior parties to the paper, this should be done on the day that the notices are received, such indorser receiving and remailing the notices in the capacity of agent of the holder.[13]

(3) Where Indorsed For Collection. After an agent for collection has given notice to his principal of the dishonor of the paper the principal is allowed the same time for giving notice to the indorser that he would have been entitled to had he himself been an indorser receiving notice from the holder.[14] The agent,

10. *Alabama.*—Whitman *v.* Farmers' Bank, 8 Port. (Ala.) 258.

Arkansas.— Davis *v.* Hanly, 12 Ark. 645.

Kansas.— Seaton *v.* Scovill, 18 Kan. 433, 21 Am. Rep. 212 note, 26 Am. Rep. 779.

Kentucky.— Smith *v.* Roach, 7 B. Mon. (Ky.) 17.

Louisiana.— Grand Gulf R., etc., Co. *v.* Barnes, 12 Rob. (La.) 127; Barker *v.* Whitney, 18 La. 575.

Maine.— Allen *v.* Avery, 47 Me. 287; Fish *v.* Jackman, 19 Me. 467, 36 Am. Dec. 769.

Massachusetts.— Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445, 107 Mass. 444. Fitchburg Bank *v.* Perley, 2 Allen (Mass.) 433; Palen *v.* Shurtleff, 9 Metc. (Mass.) 581.

Michigan.— Wood *v.* Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597, where the earlier indorser resided in the town where the note was payable and the last indorser at a distance.

Missouri.— Renshaw *v.* Triplett, 23 Mo. 213.

New Hampshire.—Manchester Bank *v.* Fellows, 28 N. H. 302; Carter *v.* Burley, 9 N. H. 558.

New Jersey.— Elizabeth State Bank *v.* Ayers, 7 N. J. L. 130, 11 Am. Dec. 535.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402 [*affirming* 23 Hun (N. Y.) 628]; Farmers' Bank *v.* Vail, 21 N. Y. 485; Higgins *v.* Barrowcliffe, 46 N. Y. Super. Ct. 540; Mead *v.* Engs, 5 Cow. (N. Y.) 303.

Ohio.— Lawson *v.* Farmers' Bank, 1 Ohio St. 206.

Pennsylvania.— Etting *v.* Schuylkill Bank, 2 Pa. St. 355, 44 Am. Dec. 205; Myers *v.* Courtney, 11 Phila. (Pa.) 342, 33 Leg. Int. (Pa.) 140.

Rhode Island.— Mitchell *v.* Cross, 2 R. I. 437.

Wisconsin.— Linn *v.* Horton, 17 Wis. 151.

England.— Jameson *v.* Swinton, 2 Campb. 373, 2 Taunt. 224; Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694; Goodall *v.* Polhill, 1 C. B. 233, 9 Jur. 554, 14 L. J. C. P. 146, 50 E. C. L. 233; Hilton *v.* Shepherd, 6 East 14 note; Geill *v.* Jeremy, M. & M. 61, 22 E. C. L. 472.

11. City Nat. Bank *v.* Clinton County Nat. Bank, 49 Ohio St. 351, 30 N. E. 958; Turner *v.* Leech, 4 B. & Ald. 451, 23 Rev. Rep. 344, 6 E. C. L. 556.

Notice to second indorser.— Where, however, the holder sends notice in due time to the second indorser, he cannot bind the first indorser by sending notice to him the next day, although such notice would have been good if sent by the second indorser. Rowe *v.* Tipper, 13 C. B. 249, 17 Jur. 440, 22 L. J. C. P. 135, 1 Wkly. Rep. 152, 76 E. C. L. 249.

12. Barker *v.* Whitney, 18 La. 575; Flack *v.* Green, 3 Gill & J. (Md.) 474; Sewall *v.* Russell, 3 Wend. (N. Y.) 276; U. S. *v.* Barker, 24 Fed. Cas. No. 14,519, 1 U. S. L. J. 1.

13. *Indiana.*— Pate *v.* State Bank, 3 Ind. 176.

Maine.— Freeman's Bank *v.* Perkins, 18 Me. 292 (where the notice was delayed two hours and thereby missed the only mail of the day, and it was held to be insufficient); Warren *v.* Gilman, 17 Me. 360.

Massachusetts.—Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445, 107 Mass. 444; Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212. See also True *v.* Collins, 3 Allen (Mass.) 438; Church *v.* Barlow, 9 Pick. (Mass.) 547.

Missouri.— State Bank *v.* Vaughan, 36 Mo. 90. See also Stix *v.* Mathews, 63 Mo. 371.

New Jersey.— Elizabeth State Bank *v.* Ayers, 7 N. J. L. 130, 11 Am. Dec. 535.

New York.— Howard *v.* Ives, 1 Hill (N. Y.) 263; Safford *v.* Wyckoff, 1 Hill (N. Y.) 11. See also Borst *v.* Winckel, 14 Hun (N. Y.) 138; Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

Ohio.— Ohio L. Ins., etc., Co. *v.* McCague, 18 Ohio 54.

Pennsylvania.— Stephenson *v.* Dickson, 24 Pa. St. 148, 62 Am. Dec. 369.

Wisconsin.— Linn *v.* Horton, 17 Wis. 151.

United States.— See Vowell *v.* Patton, 2 Cranch C. C. (U. S.) 312, 28 Fed. Cas. No. 17,022, holding that where notice is inclosed to a bank in the same town with the indorser it is not sufficient for the bank to remail it to such indorser, unless it can be shown that the indorser received it the same day that the bank did.

14. *Massachusetts.*— Church *v.* Barlow, 9 Pick. (Mass.) 547; Colt *v.* Noble, 5 Mass. 167.

being regarded as standing in the shoes of the principal for the purpose of collection and giving notice of dishonor, is allowed the same time to give notice to prior parties as his principal would have.[15]

(B) *Where Given at Place of Business.* If notice of dishonor is served on a party to commercial paper at his place of business, or by leaving it at his place of business, it must as a general rule be served during business hours.[16]

(C) *Where Given at Place of Residence.* Where notice is given at the residence of the party sought to be charged it may be served at any time within reasonable hours before the house is closed for the night.[17]

(D) *Where Parties Reside in Same Place.* Where the party sought to be charged lives in the same town or city as the holder or subsequent indorser notice must be sent in time to be received by such party on the day after the dishonor of the paper.[18]

(E) *Where Receipt of Notice Unavoidably Delayed.* Unavoidable delay in the receipt of notice of dishonor of commercial paper will not affect the party's rights against prior parties, and in such case he still has one entire day in which to give notice to the parties whom he desires to hold liable.[19]

(F) *Where Sent By Mail* — (1) IN GENERAL. The general rule is that where the notice is sent by mail it should be sent by the first mail of the day succeeding

New York.— West River Bank *v.* Taylor, 34 N. Y. 128 [*affirming* 7 Bosw. (N. Y.) 466]; Mead *v.* Engs, 5 Cow. (N. Y.) 303.

Ohio.— Lawson *v.* Farmers' Bank, 1 Ohio St. 206.

Pennsylvania.— Cassidy *v.* Kreamer, (Pa. 1888) 13 Atl. 744.

Tennessee.— Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670; McNeil *v.* Wyatt, 3 Humphr. (Tenn.) 125.

England.— Haynes *v.* Birks, 3 B. & P. 599; Scott *v.* Lifford, 1 Campb. 246, 9 East 347; Langdale *v.* Trimmer, 15 East 291. *Contra, In re* Leeds Banking Co., L. R. 1 Eq. 1, 11 Jur. N. S. 920, 35 L. J. Ch. 311, 13 L. T. Rep. N. S. 314, 14 Wkly. Rep. 43.

But see Carmena *v.* Doherty, 7 Rob. (La.) 57 (holding that where the mail is resorted to as the earliest ordinary conveyance, such conveyance must be uninterrupted, and hence, where the notice was sent to the holder by his agent through the mail, he could not claim the additional day in which to serve notice upon a prior indorser); Johnson *v.* Harth, 1 Bailey (S. C.) 482 (holding that where it is the usage of the bank having paper for collection to give notice to all parties the bank cannot be regarded otherwise than as the mere agent of the holder throughout, and that the latter cannot claim an additional day to give notice to prior parties to the paper, but is bound to give notice at the farthest on the last day of grace).

Where the holder establishes intermediate agents for the sole purpose of forwarding to some other agent who is to make the demand, he cannot claim a day's delay at each place where he has a forwarding agent, in order to give that agent opportunity to notify the next agent that the bill has been protested. Slack *v.* Longshaw, 8 Ky. L. Rep. 166. See also Talbot *v.* Clark, 8 Pick. (Mass.) 51.

15. Carmena *v.* State Bank, 1 La. Ann. 369; McNeil *v.* Wyatt, 3 Humphr. (Tenn.) 125; Heywood *v.* Pickering, L. R. 9 Q. B. 428, 43 L. J. Q. B. 145; Prideaux *v.* Criddle, L. R. 4 Q. B. 455, 10 B. & S. 515, 38 L. J. Q. B. 232, 20 L. T. Rep. N. S. 695; Firth *v.* Thrush, 8 B. & C. 387, 6 L. J. K. B. O. S. 355, 2 M. & R. 359, 15 E. C. L. 193; Woodland *v.* Fear, 7 E. & B. 519, 3 Jur. N. S. 587, 26 L. J. Q. B. 202, 5 Wkly. Rep. 624, 90 E. C. L. 519; Clode *v.* Bayley, 7 Jur. 1092, 13 L. J. Exch. 17, 12 M. & W. 51; Robson *v.* Bennett, 2 Taunt. 388, 11 Rev. Rep. 614. *Contra,* Fish *v.* Jackman, 19 Me. 467, 36 Am. Dec. 769; Sewall *v.* Russell, 3 Wend. (N. Y.) 276; Johnson *v.* Harth, 1 Bailey (S. C.) 482; Prince *v.* Bank, 3 App. Cas. 325.

16. John *v.* City Nat. Bank, 57 Ala. 96; Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281; Pierson *v.* Boyd, 2 Duer (N. Y.) 33; Adams *v.* Wright, 14 Wis. 408. See, however, Bonner *v.* New Orleans, 2 Woods (U. S.) 135, 3 Fed. Cas. No. 1,631, where it was held that notice of dishonor need not be served within business hours, but in which case notice was actually received by the party to be charged.

17. Hallowell *v.* Curry, 41 Pa. St. 322 (where notice was served at ten o'clock in the evening); Adams *v.* Wright, 14 Wis. 408; Jameson *v.* Swinton, 2 Campb. 373, 2 Taunt. 224 (where notice was served at nine o'clock in the evening).

18. Walters *v.* Brown, 15 Md. 285, 74 Am. Dec. 566; Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216; Shoemaker *v.* Mechanics' Bank, 59 Pa. St. 79, 98 Am. Dec. 315; Moore *v.* Somerset, 6 Watts & S. (Pa.) 262; Smith *v.* Mullett, 2 Camph. 208, 11 Rev. Rep. 694; Fowler *v.* Hendon, 4 Tyrw. 1002.

19. Linn *v.* Horton, 17 Wis. 151 (where the notice of dishonor was delayed by reason of a storm); Horne *v.* Rouquette, 3 Q. B. D. 514, 39 L. T. Rep. N. S. 219, 26 Wkly. Rep. 894.

the day of protest.[20] Where, however, the first mail of the day succeeding the day of protest is closed the night of the day of protest, or at an unreasonably early hour the next day, notice need not be sent by that mail;[21] and where there

20. *Arkansas.*— Moore *v.* Burr, 14 Ark. 230.

Connecticut.— Hartford Bank *v.* Stedman, 3 Conn. 489.

Florida.— Marks *v.* Boone, 24 Fla. 177, 4 So. 532.

Kansas.— Seaton *v.* Scovill, 18 Kan. 433, 21 Am. Rep. 212 note, 26 Am. Rep. 779.

Kentucky.— Hickman *v.* Ryan, 5 Litt. (Ky.) 24; Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. (Ky.) 610.

Louisiana.— Carmena *v.* State Bank, 1 La. Ann. 369; U. S. Bank *v.* Merle, 2 Rob. (La.) 117, 38 Am. Dec. 201.

Maine.— Beckwith *v.* Smith, 22 Me. 125, 38 Am. Dec. 290; Goodman *v.* Norton, 17 Me. 381.

Massachusetts.— Haskell *v.* Boardman, 8 Allen (Mass.) 38; Chouteau *v.* Webster, 6 Metc. (Mass.) 1, 39 Am. Dec. 705; Talbot *v.* Clark, 8 Pick. (Mass.) 51; Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180.

New Hampshire.— Manchester Bank *v.* White, 30 N. H. 456; Manchester Bank *v.* Fellows, 28 N. H. 302; Carter *v.* Burley, 9 N. H. 558.

New Jersey.— Burgess *v.* Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408; Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

New York.— Burkhalter *v.* Erie Second Nat. Bank, 42 N. Y. 538; Sewall *v.* Russell, 3 Wend. (N. Y.) 276; Mead *v.* Engs, 5 Cow. (N. Y.) 303; Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

North Carolina.— Asheville Nat. Bank *v.* Bradley, 117 N. C. 526, 23 S. E. 455; Denny *v.* Palmer, 27 N. C. 610; Hubbard *v.* Troy, 24 N. C. 134.

Rhode Island.— Mitchell *v.* Cross, 2 R. I. 437. See also Mt. Vernon Bank *v.* Holden, 2 R. I. 467.

Vermont.— North Bennington First Nat. Bank *v.* Wood, 51 Vt. 471, 31 Am. Rep. 692.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.— Alexandria Bank *v.* Swann, 9 Pet. (U. S.) 33, 9 L. ed. 40; U. S. *v.* Barker, 12 Wheat. (U. S.) 559, 6 L. ed. 728 [*affirming* 4 Wash. (U. S.) 464, 24 Fed. Cas. No. 14,520]; Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264; Seventh Ward Bank *v.* Hanrick, 2 Story (U. S.) 416, 2 Fed. Cas. No. 12,678.

England.— Williams *v.* Smith, 2 B. & Ald. 496, 21 Rev. Rep. 373; Hawkes *v.* Salter, 4 Bing. 715, 6 L. J. C. P. O. S. 180, 1 M. & P. 750, 29 Rev. Rep. 708, 13 E. C. L. 706; Burbridge *v.* Manners, 3 Campb. 193, 13 Rev. Rep. 786; Dobree *v.* Eastwood, 3 C. & P. 250, 14 E. C. L. 552; Russel *v.* Langstaffe, Dougl. 514; Darbishire *v.* Parker, 6 East 3, 2 Smith K. B. 195; Geill *v.* Jeremy, M. & M. 61, 22 E. C. L. 472; Bray *v.* Hadwen, 5 M. & S. 68, 17 Rev. Rep. 277.

Canada.— Taylor *v.* Grier, 17 U. C. Q. B. 222. See also Wilson *v.* Pringle, 14 U. C. Q. B. 230, where a notice mailed between eight and nine o'clock in the evening of the day after the protest was held sufficient.

See 7 Cent. Dig. tit. "Bills and Notes," § 1173.

The rule as formerly laid down in some jurisdictions was that where the post was employed notice must go by the first mail (Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. (Ky.) 610; Sasscer *v.* Farmers' Bank, 4 Md. 409; Denny *v.* Palmer, 27 N. C. 610; Whittlesey *v.* Dean, 2 Aik. (Vt.) 263) or as held in some cases by the next or earliest practicable post (King *v.* Foyles, 2 Cranch C. C. (U. S.) 303, 14 Fed. Cas. No. 7,792; Williams *v.* Smith, 2 B. & Ald. 496, 21 Rev. Rep. 373; Muilman *v.* D'Eguino, 2 H. Bl. 565; Coleman *v.* Sayer, 2 Str. 829; Leftley *v.* Mills, 4 T. R. 170; Tindal *v.* Brown, 1 T. R. 167, 2 T. R. 186, 1 Rev. Rep. 171).

21. *Arkansas.*— Davis *v.* Hanly, 12 Ark. 645.

Florida.— Marks *v.* Boone, 24 Fla. 177, 4 So. 532; Sanderson *v.* Sanderson, 20 Fla. 292.

Louisiana.— Commercial Bank *v.* King, 3 Rob. (La.) 243.

Maine.— Chick *v.* Pillsbury, 24 Me. 458, 41 Am. Dec. 394. *Contra*, Beckwith *v.* Smith, 22 Me. 125, 38 Am. Dec. 290; Goodman *v.* Norton, 17 Me. 381.

Maryland.— Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78.

Massachusetts.— Haskell *v.* Boardman, 8 Allen (Mass.) 38; Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165.

Mississippi.— Wemple *v.* Dangerfield, 2 Sm. & M. (Miss.) 445; Hoopes *v.* Newman, 2 Sm. & M. (Miss.) 71; Deminds *v.* Kirkman, 1 Sm. & M. (Miss.) 644; Downs *v.* Planters' Bank, 1 Sm. & M. (Miss.) 261, 40 Am. Dec. 92.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

New Jersey.— Burgess *v.* Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408; Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402 [*affirming* 23 Hun (N. Y.) 628]; Howard *v.* Ives, 1 Hill (N. Y.) 263 (where the first mail on the succeeding day closed at eight A. M. and notice mailed at nine A. M. was held to be sufficient).

Ohio.— West *v.* Brown, 6 Ohio St. 542 [*affirming* 1 Disn. (Ohio) 48, 12 Ohio Dec. (Reprint) 479]. But where the only mail departing for the place of residence of the indorser closed at nine-ten A. M., it was held that notice deposited in the office after that hour was insufficient; that due diligence required that the holder should have availed himself of that mail. Lawson *v.* Farmers' Bank, 1 Ohio St. 206.

Pennsylvania.— Stephenson *v.* Dickson, 24 Pa. St. 148, 62 Am. Dec. 369.

is no post on the day after dishonor of the paper the notice should be sent by the very next post that occurs after that day.[22]

(2) Foreign Mail. Where notice is to be sent to another country the rule has been laid down that it is sufficient to send it by the first direct and regular mode of conveyance, and that the holder is not bound to send such notice by an accidental, although earlier conveyance.[23]

(G) *Where Sent by Special Messenger.* Where a special messenger is used instead of the mail it is sufficient to send the notice by such messenger on the day after the paper is dishonored or notice of dishonor is received;[24] but where a messenger is used as the medium and there is a regular mail communication which could be employed delay beyond the time at which the notice if sent by mail should have reached its destination is at the sender's own risk.[25]

(H) *Where Sunday or Legal Holiday Follows Day of Protest.* Where commercial paper is protested on Saturday, or on a day succeeded by a legal holiday, notice may properly be given on the next succeeding secular or business day.[26]

Rhode Island.— Mitchell *v.* Cross, 2 R. I. 437.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.—Alexandria Bank *v.* Swann, 9 Pet. (U. S.) 33, 9 L. ed. 40; Seventh Ward Bank *v.* Hanrick, 2 Story (U. S.) 416, 21 Fed. Cas. No. 12,678.

See 7 Cent. Dig. tit. "Bills and Notes," § 1173.

22. Knott *v.* Venable, 42 Ala. 186; Townsley *v.* Stranger, 1 La. 122 (where two days elapsed after dishonor before the next regular mail); U. S. *v.* Barker, 4 Wash. (U. S.) 464, 24 Fed. Cas. No. 14,520; Geill *v.* Jeremy, M. & M. 61, 22 E. C. L. 472.

23. Stainback *v.* Commonwealth Bank, 11 Gratt. (Va.) 260 (where notice held two weeks for the next mail steamer was deemed sufficient, although a packet sailed earlier with mail to the same port); Muilman *v.* D'Equino, 2 H. Bl. 565. But see Lenox *v.* Leverett, 10 Mass. 1, 6 Am. Dec. 97; Fleming *v.* McClure, 1 Brev. (S. C.) 428, 2 Am. Dec. 671 (where it was held that where a bill drawn in this country on a European port has been dishonored, notice must be sent by the first ship bound to any port of the United States, and that it is not sufficient to send it by the first ship bound for the port of residence of the drawer and indorser); Tarratt *v.* Wilmot, 6 N. Brunsw. 353.

24. Jarvis *v.* St. Croix Mfg. Co., 23 Me. 287; Fish *v.* Jackman, 19 Me. 467, 36 Am. Dec. 769.

25. Darbishire *v.* Parker, 6 East 3, 2 Smith K. B. 195 (where the delay of two hours in communication of the notice in this manner beyond the time of delivery of the mail was held to be fatal); Bancroft *v.* Hall, Holt 476, 3 E. C. L. 189 (where it was held, however, that delivery by a messenger at any time during the day on which such notice would have been received through due course of the mail was sufficient).

26. *Alabama.*— Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893; Curry *v.* Mobile Bank, 8 Port. (Ala.) 360.

Arkansas.— Moore *v.* Burr, 14 Ark. 230.

California.— McFarland *v.* Pico, 8 Cal. 626.

Connecticut.— Hartford Bank *v.* Stedman, 3 Conn. 489; Shepard *v.* Hall, 1 Conn. 329.

Louisiana.— Deblieux *v.* Bullard, 1 Rob. (La.) 66, 36 Am. Dec. 684; Canonge *v.* Cauchoix, 11 Mart. (La.) 452.

Maryland.—Burckmyer *v.* Whiteford, 6 Gill (Md.) 1. See also Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

Massachusetts.— Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180.

Mississippi.— Fleming *v.* Fulton, 6 How. (Miss.) 473.

Missouri.— Commercial Bank *v.* Barksdale, 36 Mo. 563.

New Hampshire.—Carter *v.* Burley, 9 N. H. 558.

New York.— Sylvester *v.* Crohan, 138 N. Y. 494, 34 N. E. 273, 53 N. Y. St. 113 [*affirming* 63 Hun (N. Y.) 509, 18 N. Y. Suppl. 546, 45 N. Y. St. 320]; Farmers' Bank of Bridgeport *v.* Vail, 21 N. Y. 485; Betts *v.* Cox, 2 N. Y. City Ct. 31 (where the note fell due on Saturday, the national holiday was celebrated on Monday, July 5th, and notice deposited in the mail on the sixth was held to be seasonable); Howard *v.* Ives, 1 Hill (N. Y.) 263; Cuyler *v.* Stevens, 4 Wend. (N. Y.) 566; Williams *v.* Matthews, 3 Cow. (N. Y.) 252; Jackson *v.* Richards, 2 Cai. (N. Y.) 343.

Ohio.— West *v.* Brown, 6 Ohio St. 542.

Pennsylvania.— Hallowell *v.* Curry, 41 Pa. St. 322; Hantsch *v.* Legan, 1 Woodw. (Pa.) 456.

Virginia.— Early *v.* Preston, 1 Patt. & H. (Va.) 228.

United States.— Crawford *v.* Milligan, 2 Cranch C. C. (U. S.) 226, 7 Fed. Cas. No. 3,370; Seventh Ward Bank *v.* Hanrick, 2 Story (U. S.) 416, 21 Fed. Cas. No. 12,678.

England.—Wright *v.* Shawcross, 2 B. & Ald. 501 note; Hawkes *v.* Salter, 4 Bing. 715, 6 L. J. C. P. O. S. 180, 1 M. & P. 750, 29 Rev. Rep. 708, 13 E. C. L. 706; Haynes *v.* Birks, 3 B. & P. 599; Scott *v.* Lifford, 1 Camph. 246, 9 East 347; Poole *v.* Dicas, 1 Hodges 162, 4 L. J. C. P. 196, 1 Scott 600; Tassell *v.* Lewis, 1 Ld. Raym. 743; Bray *v.* Hadwen, 5 M. & S. 68, 17 Rev. Rep. 277.

See 7 Cent. Dig. tit. "Bills and Notes," § 1169.

2. Premature Notice. By analogy to the rule that a demand made before the paper becomes due is invalid,[27] notice given before the paper becomes due is necessarily so, as every notice to be available must be based upon a legal demand,[28] and the fact that notice is given prematurely by a mistake in reckoning the date of the maturity of the paper creates no exception to the rule.[29]

3. What Law Governs. According to the better doctrine the law of the place where commercial paper is payable determines the time within which notice of its dishonor should be given.[30]

E. Place of Giving Notice — 1. In General — a. Rule Stated. Generally speaking the place at which notice of dishonor is served is immaterial so long as it is received in due time by the party entitled to the same.[31] Thus it may be sent to either his residence or his place of business,[32] although with regard to

Jewish holiday.— Where a bill of exchange was dishonored on Saturday and the following Monday was a Jewish holiday it was held that the holder of the bill, who was a Jew, and strictly forbidden by his religion to attend to any secular business on that day, was excused from mailing notice of dishonor until the following day. Lindo *v.* Unsworth, 2 Camph. 602, 12 Rev. Rep. 750.

27. See *supra*, X, B, 1.

28. *California.*— Toothaker *v.* Cornwall, 3 Cal. 144, holding that where a sight bill which is entitled to grace is presented for payment and notice given without a previous presentment for acceptance such notice is invalid and the drawer will not be charged.

Massachusetts.— Pierce *v.* Cate, 12 Cush. (Mass.) 190, 59 Am. Dec. 176.

New Hampshire.— Lawrence *v.* Langley, 14 N. H. 70; Dennie *v.* Walker, 7 N. H. 199.

New Jersey.— Hagerty *v.* Engle, 43 N. J. L. 299.

New York.— Jackson *v.* Richards, 2 Cai. (N. Y.) 343.

South Carolina.— Aubin *v.* Lazarus, 2 McCord (S. C.) 134.

West Virginia.— Thornburg *v.* Emmons, 23 W. Va. 325.

United States.— Bell *v.* Chicago First Nat. Bank, 115 U. S. 373, 6 S. Ct. 105, 29 L. ed. 409, holding that if paper is presented and notice given without allowing for days of grace, where days of grace are allowed, such notice is invalid.

England.— Leftley *v.* Mills, 4 T. R. 170.

See 7 Cent. Dig. tit. "Bills and Notes," § 1170.

29. Kohler *v.* Montgomery, 17 Ind. 220; Craft *v.* State Bank, 7 Ind. 219.

30. *Illinois.*— Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867.

Indiana.— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Turner *v.* Rogers, 8 Ind. 139; Shanklin *v.* Cooper, 8 Blackf. (Ind.) 41.

Massachusetts.— Murphy *v.* Collins, 121 Mass. 6.

Michigan.— See Snow *v.* Perkins, 2 Mich. 238.

Vermont.— Bryant *v.* Edson, 8 Vt. 325, 30 Am. Dec. 472.

United States.— Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61.

England.— Rothschild *v.* Currie, 1 Q. B. 43, 5 Jur. 865, 10 L. J. Q. B. 77, 4 P. & D. 737, 41 E. C. L. 428; Horne *v.* Rouquette, 3 Q. B. D. 514, 39 L. T. Rep. N. S. 219, 26 Wkly. Rep. 894; Hirschfeld *v.* Smith, L. R. 1 C. P. 340, 1 H. & R. 284, 12 Jur. N. S. 523, 35 L. J. C. P. 177, 14 L. T. Rep. N. S. 886, 14 Wkly. Rep. 455.

Canada.— Mathewson *v.* Carman, 1 U. C. Q. B. 259.

Contra, Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

31. *Kansas.*— Cornett *v.* Hafer, 43 Kan. 60, 22 Pac. 1015.

Kentucky.— Moreland *v.* Citizens' Sav. Bank, 97 Ky. 211, 17 Ky. L. Rep. 88, 30 S. W. 637.

Louisiana.— Thomas *v.* Marsh, 2 La. Ann. 353.

Maine.— Bradley *v.* Davis, 26 Me. 45.

Maryland.— Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Mississippi.— Miles *v.* Hall, 12 Sm. & M. (Miss.) 332.

Nebraska.— Hendershot *v.* Nebraska Nat. Bank, 25 Nebr. 127, 41 N. W. 133.

New Hampshire.— Mathewson *v.* Strafford Bank, 45 N. H. 104.

Pennsylvania.— Dicken *v.* Hall, 87 Pa. St. 379.

Vermont.— North Bennington First Nat. Bank *v.* Wood, 51 Vt. 471, 31 Am. Rep. 692.

United States.— U. S. Bank *v.* Corcoran, 2 Pet. (U. S.) 121, 7 L. ed. 368 [*affirming* 3 Cranch C. C. (U. S.) 46, 2 Fed. Cas. No. 912]; Spalding *v.* Krutz, 1 Dill. (U. S.) 414, 22 Fed. Cas. No. 13,201; Hyslop *v.* Jones, 3 McLean (U. S.) 96, 12 Fed. Cas. No. 6,990.

Although left at an improper place, if the notice be in fact received seasonably by the party sought to be charged it is sufficient.

Louisiana.— Greves *v.* Tomlinson, 19 La. Ann. 90.

Maine.— Bradley *v.* Davis, 26 Me. 45.

Massachusetts.— Cahot Bank *v.* Warner, 10 Allen (Mass.) 522.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

United States.— U. S. Bank *v.* Corcoran, 2 Pet. (U. S.) 121, 7 L. ed. 368; Hyslop *v.* Jones, 3 McLean (U. S.) 96, 12 Fed. Cas. No. 6,990.

32. *Iowa.*— Grinman *v.* Walker, 9 Iowa 426.

business men the office or place of business is preferable;[33] but in any event it should be sent where it is most likely to be promptly and timely received[34] and to a place from which the party entitled to it could reasonably be expected to receive it.[35]

b. Application of Rule — (1) *In General* — (A) *Office or Place of Business* — (1) In General. It is usually proper and sufficient to leave notice at the office or usual place of business of the party to be charged.[36] If he has several places of business in the same town notice may be served at either of them;[37] and if his office and place of business are in different towns it may be served at either place.[38]

(2) What Constitutes. A place of business, to constitute a proper place for the leaving of notice, cannot be determined by any fixed definition or rule, the conditions or circumstances justifying the inference that such notice will be timely received being of course the material issue.[39] The place where the party to be

Massachusetts.— See Peirce *v.* Pendar, 5 Metc. (Mass.) 352.

Ohio.— Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362.

Tennessee.—Phillips *v.* Alderson, 5 Humphr. (Tenn.) 403.

Wisconsin.— Simms *v.* Larkin, 19 Wis. 390.

United States.— Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 7 L. ed. 269.

See also *infra*, XIII, E, 1, b, (I), (A); XIII, E, 1, b, (I), (B).

33. 1 Parsons Notes & B. 487.

34. *Kentucky.*—McClain *v.* Waters, 9 Dana (Ky.) 55.

Louisiana.— Follain *v.* Dupré, 11 Rob. (La.) 454.

Missouri.— Bank of Commerce *v.* Chambers, 14 Mo. App. 152.

New York.— Van Vechten *v.* Pruyn, 13 N. Y. 549.

Tennessee.— Nashville Bank *v.* Bennett, 1 Yerg. (Tenn.) 166.

35. Gilroy *v.* Brinkley, 12 Heisk. (Tenn.) 392; Robison *v.* Barber, 3 Am. L. J. N. S. 59.

36. *Alabama.*— Stanley *v.* Mobile Bank, 23 Ala. 652.

Illinois.— Cook *v.* Renick, 19 Ill. 598, holding that notice for a postmaster might be left at the post-office.

Louisiana. — Aurianne *v.* Eschbacher, 28 La. Ann. 48; Merz *v.* Kaiser, 20 La. Ann. 377; Sullivan *v.* Godwin, 20 La. Ann. 33; Kock *v.* Bringier, 19 La. Ann. 183; U. S. Bank *v.* Merle, 2 Rob. (La.) 117, 38 Am. Dec. 201; State Bank *v.* Mansker, 15 La. 115; Commercial Bank *v.* Gove, 15 La. 113; Jones *v.* Mansker, 15 La. 51; Edson *v.* Jacobs, 14 La. 494.

Maine.— Lord *v.* Appleton, 15 Me. 270.

Massachusetts.— Hobbs *v.* Straine, 149 Mass. 212, 21 N. E. 365.

New Jersey.—Smalley *v.* Wright, 40 N. J. L. 471.

Wisconsin.— Simms *v.* Larkin, 19 Wis. 390; Westfall *v.* Farwell, 13 Wis. 504.

United States.— Bowling *v.* Harrison, 6 How. (U. S.) 248, 12 L. ed. 425; Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 7 L. ed. 269 [*reversing* 2 Cranch C. C. (U. S.) 510, 2 Fed. Cas. No. 872]; U. S. Bank *v.* MacDonald, 4 Cranch C. C. (U. S.) 624, 2 Fed. Cas. No. 925; U. S. Bank *v.* Hatch, 1 McLean (U. S.) 90, 2 Fed. Cas. No. 918.

England.— Bancroft *v.* Hall, Holt 476, 3 E. C. L. 189; Crosse *v.* Smith, 1 M. & S. 545, 14 Rev. Rep. 529.

See 7 Cent. Dig. tit. "Bills and Notes," § 1159.

The fact that he is temporarily absent from the city will not affect the sufficiency of notice left at such place. State Bank *v.* Hennen, 4 Mart. N. S. (La.) 226.

37. Phillips *v.* Alderson, 5 Humphr. (Tenn.) 403.

38. Merz *v.* Kaiser, 20 La. Ann. 377; Montgomery County Bank *v.* Marsh, 7 N. Y. 481.

39. Thus if the indorser is an officer of the United States customs, notice may be left on his desk at the custom-house (State Bank *v.* Mudgett, 44 N. Y. 514 [*affirming* 45 Barb. (N. Y.) 663]); where the indorser was a judge, whose library was in the upper rooms of the building where he lodged and who transacted judicial business there, it was held to be a question for the jury whether or not notice left at such a place was left at his office (Caruthers *v.* Harbert, 5 Coldw. (Tenn.) 362, 98 Am. Dec. 421); where the indorser has become bankrupt and his store is in the same building with his residence notice may be left at the store with the person in charge thereof (*Ex p.* Johnson, 3 Deac. & C. 433, 1 Mont. & A. 622); and where the indorser was director of a corporation, had no other place of business, and his indorsement was made at the company's office and on the business paper of the company, notice may be left at such office (Berridge *v.* Fitzgerald, L. R. 4 Q. B. 639, 10 B. & S. 668, 38 L. J. Q. B. 335, 17 Wkly. Rep. 917). On the other hand notice left where the indorser was merely a clerk in the house of another is not sufficient unless he actually receives the same (West Tennessee Bank *v.* Davis, 5 Heisk. (Tenn.) 436), and notice sent to the office of a railroad whose president had indorsed in his private capacity is insufficient (Commercial Bank *v.* Strong, 28 Vt. 316, 67 Am. Dec. 714).

The fact that little time is spent at such place may be immaterial if these conditions exist. Lamkin *v.* Edgerly, 151 Mass. 348, 24 N. E. 49.

charged has his mail delivered and opened or his name printed upon the door of an office or room is a strong circumstance in determining his place of business;[40] but a room to which a man is accustomed to resort or where he may be frequently found as a visitor is not a proper place,[41] and it is not sufficient merely to leave the notice in a building where the indorser's office is.[42]

(B) *Residence*—(1) IN GENERAL. It is generally proper and sufficient to leave or send notice to the usual residence or dwelling of an indorser,[43] and where he resides in a place other than the place of payment, but does not designate in his indorsement the place at which he should be notified, and notice is sent by mail, the general rule is that it should be sent to the town of his residence[44] or to the post-office nearest to such residence.[45] If, however, the holder knows, or by

The fact that he does not have a separate office of his own, but has his business desk in the counting-room of another, is immaterial and does not change the character of such office as his place of business. Williams *v.* Brailsford, 25 Md. 126.

40. *Maine.*— Howe *v.* Bradley, 19 Me. 31.

Maryland.— Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390.

Massachusetts.— Lamkin *v.* Edgerly, 151 Mass. 348, 24 N. E. 49.

New York.— People *v.* North River Bank, 62 Hun (N. Y.) 484, 17 N. Y. Suppl. 200, 43 N. Y. St. 43.

Tennessee.—American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492.

Where there was a sign with the same name as that of the indorser and the notary who demanded payment was informed that the indorser's place of business was at such address, it was held that notice left at such place was sufficient to bind him, although such was not his place of business and the notice was never received by him. Libby *v.* Adams, 32 Barb. (N. Y.) 542. But see Lawrence *v.* Miller, 16 N. Y. 235.

41. Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281. See also Kerr *v.* Roberts, 5 Wkly. Notes Cas. (Pa.) 25.

42. Kleinmann *v.* Boernstein, 32 Mo. 311, where the business office of an indorser was in the third story and the notice was left on a desk in the second story of that building. See also Davenport *v.* Gilbert, 4 Bosw. (N. Y.) 532.

43. *Kentucky.*—McClain *v.* Waters, 9 Dana (Ky.) 55; Menzies *v.* Farmers Bank, 3 Ky. L. Rep. 822.

Louisiana.— Coulon *v.* Champlin, 15 La. 544; Franklin *v.* Verbois, 6 La. 727.

Pennsylvania.— Fisher *v.* Evans, 5 Binn. (Pa.) 541.

Vermont.— Commercial Bank *v.* Strong, 28 Vt. 316, 67 Am. Dec. 714; Sanford *v.* Norton, 17 Vt. 285.

United States.— U. S. Bank *v.* Hatch, 6 Pet. (U. S.) 250, 8 L. ed. 387 (holding that the notice might be left at the indorser's boarding-house if that was his residence); Greatrake *v.* Brown, 2 Cranch C. C. (U. S.) 541, 10 Fed. Cas. No. 5,743.

See 7 Cent. Dig. tit. "Bills and Notes," § 1158.

44. *Louisiana.*— Lafitte *v.* Perkins, 21 La. Ann. 171.

New Hampshire.— Manchester Bank *v.* White, 30 N. H. 456.

New York.— Seneca County Bank *v.* Neass, 3 N. Y. 442 [*affirming* 5 Den. (N. Y.) 329]; Webber *v.* Gotthold, 8 Misc. (N. Y.) 503, 28 N. Y. Suppl. 763, 59 N. Y. St. 416; Remer *v.* Downer, 23 Wend. (N. Y.) 620 (holding that notice thus sent was sufficient, although there were several offices in the same town, unless the holder knew that it should be differently directed).

North Carolina.—Denny *v.* Palmer, 27 N. C. 610.

Ohio.— Clymer *v.* Stubbs, 1 Ohio Dec. (Reprint) 438, 10 West. L. J. 51.

Pennsylvania.— Browning *v.* Armstrong, 9 Phila. (Pa.) 59, 29 Leg. Int. (Pa.) 228.

Vermont.— Manchester Bank *v.* Slason, 13 Vt. 334, holding that notice thus sent will be sufficient, notwithstanding there might be another post-office in the same town at which the indorser did his principal business.

United States.— Fowler *v.* Warfield, 4 Cranch C. C. (U. S.) 71, 9 Fed. Cas. No. 5,004.

45. *Alabama.*— Worsham *v.* Goar, 4 Port. (Ala.) 441. By the later statutes of Alabama the notice was to be addressed to the post-office nearest the residence of the party entitled to such notice at the time he became a party to the instrument, without regard to his post-office at the time of dishonor. John *v.* City Nat. Bank, 57 Ala. 96.

Indiana.— Bell *v.* State Bank, 7 Blackf. (Ind.) 456; Timms *v.* Delisle, 5 Blackf. (Ind.) 447.

Kentucky.— Bondurant *v.* Everett, 1 Metc. (Ky.) 658.

Louisiana.— Citizens' Bank *v.* Pugh, 19 La. Ann. 43; Lallande *v.* Hope, 18 La. Ann. 188; Lathrop *v.* Delee, 8 La. Ann. 170; Union Bank *v.* Morgan, 2 La. Ann. 418; New Orleans Canal, etc., Co. *v.* Barrow, 2 La. Ann. 326; Union Bank *v.* Stoker, 1 La. Ann. 269; New Orleans Sav. Bank *v.* Harper, 12 Rob. (La.) 231, 43 Am. Dec. 226; Bell *v.* Lawson, 12 Rob. (La.) 152; Follain *v.* Dupré, 11 Rob. (La.) 454; Becnel *v.* Tournillon, 6 Rob. (La.) 500; Pollard *v.* Cook, 4 Rob. (La.) 199; Nott *v.* Beard, 16 La. 308; Harrison *v.* Bowen, 16 La. 282; Gale *v.* Kemper, 10 La. 205.

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216; Columbia Bank *v.* Magruder, 6 Harr. & J. (Md.) 172, 14 Am. Dec. 271.

Michigan.— Nevius *v.* Lansingburgh Bank, 10 Mich. 547.

the exercise of reasonable diligence could know, the office from which the party is in the habit of receiving his mail, or from which he would likely receive it the more quickly, notice should, in the absence of statute,[46] be sent to such office, although it is not the one nearest his residence.[47]

(2) Where Mail Is Received at Several Offices. Where the indorser is in the habit of receiving his mail through two or more offices notice may as a rule be directed to either,[48] although it has been held that it should be directed to the office nearest his residence,[49] unless the difference in the distance be very slight.[50] If one of the two places is his residence notice should be sent to such place.[51]

Mississippi.— Stamps *v.* Brown, Walk. (Miss.) 526.

Missouri.— Sanderson *v.* Reinstadler, 31 Mo. 483; Barret *v.* Evans, 28 Mo. 331.

Nebraska.— Forbes *v.* Omaha Nat. Bank, 10 Nebr. 338, 6 N. W. 393, 35 Am. Rep. 480.

New York.— J. H. Mohlman Co. *v.* McKane, 60 N. Y. App. Div. 546, 69 N. Y. Suppl. 1046; Hunt *v.* Fish, 4 Barb. (N. Y.) 324 (holding that this is especially true where he has been in the habit of receiving his mail at such office, although he has lately changed his residence to another town); Rogers *v.* Jackson, 19 Wend. (N. Y.) 383; Cuyler *v.* Nellis, 4 Wend. (N. Y.) 398.

Pennsylvania.— Woods *v.* Neeld, 44 Pa. St. 86 (where the indorser was discharged by reason of the fact that notice was not sent to the post-office nearest his residence); Jones *v.* Lewis, 8 Watts & S. (Pa.) 14.

South Carolina.— Foster *v.* Sineath, 2 Rich. (S. C.) 338.

Tennessee.— Davis *v.* Williams, Peck (Tenn.) 191.

United States.— Whitney *v.* Huntt, 5 Cranch C. C. (U. S.) 120, 29 Fed. Cas. No. 17,589.

See 7 Cent. Dig. tit. "Bills and Notes," § 1181.

46. Marshall *v.* Baker, 3 Minn. 320, where by virtue of the statute it was held that notice must be sent to the nearest post-office regardless of the indorser's habit of receiving mail at another.

47. *Alabama.*— McGrew *v.* Toulmin, 2 Stew. & P. (Ala.) 428.

Georgia.— Walker *v.* Augusta Bank, 3 Ga. 486.

Illinois.— Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867, although he may have a residence elsewhere and receive some of his mail at such residence.

Kentucky.— Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576.

Louisiana.—Grieff *v.* McDaniel, 14 La. Ann. 160; State Bank *v.* Tournillon, 9 La. Ann. 132; Citizens' Bank *v.* Walker, 2 La. Ann. 791; Grand Gulf R., etc., Co. *v.* Barnes, 12 Rob. (La.) 127; Follain *v.* Dupré, 11 Rob. (La.) 454; New Orleans, etc., R. Co. *v.* Robert, 9 Rob. (La.) 130; New Orleans, etc., Co. *v.* Kerr, 9 Rob. (La.) 122, 41 Am. Dec. 323; Mead *v.* Carnal, 6 Rob. (La.) 73, 39 Am. Dec. 552; Mechanics', etc., Bank *v.* Jemison, 6 Rob. (La.) 90; Nicholson *v.* Marders, 3 Rob. (La.) 242; Mechanics', etc., Bank *v.* Compton, 3 Rob. (La.) 4. But see Foreman *v.* Wikoff, 16 La. 20, 35 Am. Dec. 212.

Massachusetts.— Roberts *v.* Taft, 120 Mass. 169; Shaylor *v.* Mix, 4 Allen (Mass.) 351.

Missouri.— Glasscock *v.* State Bank, 8 Mo. 443.

New Jersey.—Hazelton Coal Co. *v.* Ryerson, 20 N. J. L. 129, 40 Am. Dec. 217. *Compare* Ferris *v.* Saxton, 4 N. J. L. 1, holding that to justify the sending of notice to such place the holder must have reasonable ground for believing that the indorser would be more likely to receive it than at the one nearer his residence.

New York.— Montgomery County Bank *v.* Marsh, 7 N. Y. 481 [*affirming* 11 Barb. (N. Y.) 645]; Morris *v.* Husson, 4 Sandf. (N. Y.) 93; Cuyler *v.* Nellis, 4 Wend. (N. Y.) 398; Geneva Bank *v.* Howlett, 4 Wend. (N. Y.) 328; Reid *v.* Payne, 16 Johns. (N. Y.) 218, 8 Am. Dec. 311.

North Carolina.— U. S. Bank *v.* Lane, 10 N. C. 453, 14 Am. Dec. 595.

Ohio.— Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Gist *v.* Llbrand, 3 Ohio 307, 17 Am. Dec. 595.

Pennsylvania.— Mercer *v.* Lancaster, 5 Pa. St. 160. See also Jones *v.* Lewis, 8 Watts & S. (Pa.) 14.

Tennessee.— Farmers', etc., Bank *v.* Battle, 4 Humphr. (Tenn.) 86.

United States.— U. S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 7 L. ed. 513; Sherman *v.* Clark, 3 McLean (U. S.) 91, 21 Fed. Cas. No. 12,763.

Canada.— Bank of New Brunswick *v.* Millican, 9 N. Brunsw. 254; Bank of Upper Canada *v.* Smith, 3 U. C. Q. B. 358.

See 7 Cent. Dig. tit. "Bills and Notes," § 1180.

48. Menzies *v.* Farmers Bank, 3 Ky. L. Rep. 822; Hazelton Coal Co. *v.* Ryerson, 20 N. J. L. 129, 40 Am. Dec. 217; U. S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 7 L. ed 513.

This is true in Louisiana, where the indorser so receives his mail and has not declared according to law his intention of fixing his domicile in any certain place. Crawford *v.* Read, 9 Rob. (La.) 243; New Orleans Exch., etc., Co. *v.* Boyce, 3 Rob. (La.) 307.

49. Nicholson *v.* Marders, 3 Rob. (La.) 242; Mechanics', etc., Bank *v.* Compton, 3 Rob. (La.) 4.

50. New Orleans Canal, etc., Co. *v.* Briggs, 12 Rob. (La.) 175, 43 Am. Dec. 224; Follain *v.* Dupré, 11 Rob. (La.) 454.

51. Shelburne Falls Nat. Bank *v.* Townsley, 107 Mass. 444 [*overruling* 102 Mass. 177, 3 Am. Rep. 445].

(3) Where Only County or Parish of Residence Known. If the party to be notified is known to reside in a certain county or parish but his actual address is not definitely known and the exercise of due diligence fails to disclose the same, notice should be sent to the county-seat or to the principal town of the county or parish, and when thus directed will as a rule be sufficient.[52] But it is incumbent upon the holder or notary to act on any information he may have or could, by the exercise of diligence, have received, concerning the actual address of the indorser.[53]

(4) Where Party Is Attending Congress. If the indorser is attending to his duties as a member of congress at the time notice should be given, the courts are not agreed as to the place it should be sent. It has not only been held that notice sent to his home residence would be sufficient,[54] but that, if he has a fixed and known residence in the state which he represents, notice sent to Washington would be insufficient.[55] On the other hand it has been held sufficient and proper to send notice to his temporary residence at Washington,[56] although he has left an agent in charge of his affairs at home;[57] but after adjournment and after his return to his residence in his own state notice sent to Washington would be insufficient.[58]

(5) What Constitutes. The word "residence," with regard to the place of giving notice, does not necessarily mean a permanent, exclusive, or actual abode in a place, but may be satisfied by a partial or temporary residence.[59] Hence notice may be sent to a party's residence, although he or his family be temporarily absent[60] or abroad.[61] If, however, the holder knows that the indorser has changed his place of residence or will be absent therefrom for some time, or could by diligence ascertain such fact, notice sent to such former residence is insufficient;[62] and it is not proper to send notice to a place known to be intended as a

52. *Louisiana.*— Under the early statutes of Louisiana it would seem that this is only true when a letter addressed to the principal town would be the place nearest the indorser's residence or be the office at which he receives his mail. Becnel *v.* Tournillon, 6 Rob. (La.) 500 [*distinguishing* Gale *v.* Kemper, 10 La. 205]. See also Gallagher *v.* Tyson, 19 La. Ann. 35; Knox *v.* Buhler, 7 La. Ann. 42.

Maryland.— Whitridge *v.* Rider, 22 Md. 548.

Massachusetts.— Burlingame *v.* Foster, 128 Mass. 25; Cabot Bank *v.* Russell, 4 Gray (Mass.) 167; Morton *v.* Westcott, 8 Cush. (Mass.) 425.

New York.— Remer *v.* Downer, 23 Wend. (N. Y.) 620.

Pennsylvania.— Weakly *v.* Bell, 9 Watts (Pa.) 273, 36 Am. Dec. 116.

Vermont.— Manchester Bank *v.* Slason, 13 Vt. 334.

Virginia.— Rand *v.* Reynolds, 2 Gratt. (Va.) 171.

Canada.— Upper Canada Bank *v.* Bloor, 5 U. C. Q. B. 619.

53. Heiss *v.* Corcoran, 15 La. Ann. 694; Moore *v.* Hardcastle, 11 Md. 486; Roberts *v.* Taft, 120 Mass. 169; Morton *v.* Westcott, 8 Cush. (Mass.) 425; Randall *v.* Smith, 34 Barb. (N. Y.) 452; Libby *v.* Adams, 32 Barb. (N. Y.) 542.

54. Marr *v.* Johnson, 9 Yerg. (Tenn.) 1.

55. Walker *v.* Tunstall, 3 How. (Miss.) 259.

If he has no fixed place of residence in his state and is known to be in Washington notice sent to that place would be sufficient. Tunstall *v.* Walker, 2 Sm. & M. (Miss.) 638; Walker *v.* Tunstall, 3 How. (Miss.) 259.

56. Graham *v.* Sangston, 1 Md. 59; Bank of Commerce *v.* Chambers, 14 Mo. App. 152.

57. Chouteau *v.* Webster, 6 Metc. (Mass.) 1, 39 Am. Dec. 705, this fact not being known to the holder.

58. Bayly *v.* Chubb, 16 Gratt. (Va.) 284.

59. Wachusett Nat. Bank *v.* Fairbrother, 148 Mass. 181, 19 N. E. 345, 12 Am. St. Rep. 530; Young *v.* Durgin, 15 Gray (Mass.) 264.

60. *Alabama.*— Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335; Goodwin *v.* McCoy, 13 Ala. 271.

Indiana.— Curtis *v.* State Bank, 6 Blackf. (Ind.) 312, 38 Am. Dec. 143.

Kentucky.— Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61.

Louisiana.— Manadue *v.* Kitchen, 3 Rob. (La.) 261, 38 Am. Dec. 237.

New York.— Merchants' Bank *v.* Birch, 17 Johns. (N. Y.) 25, 8 Am. Dec. 367.

Tennessee.— Marr *v.* Johnson, 9 Yerg. (Tenn.) 1; Chattanooga First Nat. Bank *v.* Reid, (Tenn. Ch. 1900) 58 S. W. 1124.

Canada.— Ryan *v.* Malo, 12 L. C. Rep. 8.

61. Cromwell *v.* Hynson, 2 Esp. 511.

62. Wilcox *v.* Mitchell, 4 How. (Miss.) 272; Planters' Bank *v.* Bradford, 4 Humphr. (Tenn.) 39; Alexandria Sav. Inst. *v.* McVeigh, 84 Va. 41, 3 S. E. 885; McVeigh *v.* Allen, 29 Gratt. (Va.) 588.

temporary residence only,[63] to a residence generally occupied by him at a much later period of the year,[64] to a former one which has been abandoned [65] or which by reason of war has been vacated or deserted for several months,[66] or to a store underneath a party's residence.[67] If an indorser holds himself out as residing at a certain place notice at that place is sufficient, although he in fact resides at another.[68]

(c) *With Whom Left.* Notice of dishonor of a bill or note when given at the residence of the party to be served may be left with a member of his family [69] or with a servant or other person in charge,[70] the temporary absence of the drawer or indorser being immaterial,[71] or it may be served by putting it in a letter-box at his office,[72] but where the indorser has a place of business and could be easily found, notice should not be left with the maker, with whom the indorser boarded.[73]

(II) *Where Given to Insolvent Firm.* As a rule notice to an insolvent firm may be sent or left at the place of business of the firm with the party in charge,[74] or it may be left at the residence of one of the partners,[75] especially where their place of business is closed and no one is in charge.[76]

2. Where Place Expressly Designated. If in his indorsement or in any other manner a party designates the place where notice shall be sent, it

The fact that his purpose in going away was unlawful is immaterial. McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785.

63. Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362.

If actually received by him within a day after the time he would have received it if he had been at home, however, it will be sufficient, in the absence of proof of damage by reason of its having been sent to him at such place and delayed thereby. Dicken *v.* Hall, 87 Pa. St. 379.

64. Runyon *v.* Montfort, 44 N. C. 371.

65. McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785.

66. Gilroy *v.* Brinkley, 12 Heisk. (Tenn.) 392; Alexandria Sav. Inst. *v.* McVeigh, 84 Va. 41, 3 S. E. 885.

67. There being a private entrance to the residence apart from the store, and no evidence that the party had been in the habit of receiving notice at the store. U. S. Bank *v.* Corcoran, 2 Pet. (U. S.) 121, 7 L. ed. 368.

68. Commercial Bank *v.* King, 3 Rob. (La.) 243; Lewiston Falls Bank *v.* Leonard, 43 Me. 144, 69 Am. Dec. 49.

69. *District of Columbia.*—Murray *v.* Ormes, 3 MacArthur (D. C.) 60.

Kentucky.— Commonwealth Bank *v.* Duncan, 4 Bush (Ky.) 294.

Louisiana.— Aurianne *v.* Eschbacher, 28 La. Ann. 48.

South Carolina.— Moodie *v.* Morrall, 1 Mill (S. C.) 367.

Tennessee.— Colms *v.* State Bank, 4 Baxt. (Tenn.) 422.

Wisconsin.— Westfall *v.* Farwell, 13 Wis. 504.

United States.— Cana *v.* Friend, 2 Cranch C. C. (U. S.) 370, 5 Fed. Cas. No. 2,375.

England.—Cromwell *v.* Hynson, 2 Esp. 511; Housego *v.* Cowne, 6 L. J. Exch. 110, M. & H. 54, 2 M. & W. 348.

70. *California.*— Fisk *v.* Miller, 63 Cal. 367.

Louisiana.— U. S. Bank *v.* Merle, 2 Rob. (La.) 117, 38 Am. Dec. 201 (where the notice was left with a slave in the indorser's absence from home); Coulon *v.* Champlin, 15 La. 544.

Wisconsin.— Adams *v.* Wright, 14 Wis. 408.

United States.— U. S. Bank *v.* Hatch, 1 McLean (U. S.) 90, 2 Fed. Cas. No. 918.

England.— Stedman *v.* Gooch, 1 Esp. 3.

In Virginia it seems that notice served at the residence of the drawer or indorser of dishonored paper can only be left, in his absence, with a white servant over the age of sixteen. McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785.

Notice left with the mate on board a brig commanded by the indorser is sufficient. Austin *v.* Latham, 19 La. 88.

71. Aurianne *v.* Eschbacher, 28 La. Ann. 48; Sullivan *v.* Godwin, 20 La. Ann. 33; Mechanics' Banking Assoc. *v.* Place, 4 Duer (N. Y.) 212; U. S. Bank *v.* MacDonald, 4 Cranch C. C. (U. S.) 624, 2 Fed. Cas. No. 925.

72. Curlewis *v.* Corfield, 1 Q. B. 814, 1 G. & D. 489, 6 Jur. 259, 41 E. C. L. 790.

73. Bailey *v.* State Bank, 7 Mo. 467, the court observing that the maker is probably the last person to whom notice like this should be given.

74. Casco Nat. Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; Importers', etc., Nat. Bank *v.* Shaw, 144 Mass. 421, 11 N. E. 666; Bank of America *v.* Shaw, 142 Mass. 290, 7 N. E. 779; Bliss *v.* Nichols, 12 Allen (Mass.) 443; St. Louis Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492. See also Coster *v.* Thomason, 19 Ala. 717.

75. St. Louis Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858.

76. Miltenberger *v.* Spaulding, 33 Mo. 421.

should be sent to that place, although it is not in closest proximity to his residence or although he usually receives his mail at another place,[77] and any deviation from such directions will be at the risk of the holder.[78] A direction to leave notice at a certain place will remain good until countermanded [79] and will not be restricted to apply only to paper on which the indorser was primarily liable, unless it be clearly shown that the direction was understood in a restricted sense.[80]

3. Where Residence Unknown — a. In General. If the residence of a party entitled to notice is not known, it is incumbent upon the holder or the party acting for him, in the absence of a statute providing otherwise,[81] to use reasonable and prompt diligence to ascertain such residence [82] and to inform himself if there is a post-office at the place to which he desires to direct notice.[83] If, however, the holder or notary makes diligent inquiry for the indorser from parties likely to know of his whereabouts and duly acts on the information obtained, the indorser will be held, although the notice was delayed or sent to the wrong place or in fact failed to reach him altogether;[84] and subsequent knowledge of the

77. *Alabama.*— Robinson *v.* Hamilton, 4 Stew. & P. (Ala.) 91.

Louisiana.— McKenzie *v.* Ward, 4 La. Ann. 572; Carmena *v.* State Bank, 1 La. Ann. 369.

Maryland.—Crowley *v.* Barry, 4 Gill (Md.) 194.

New York.— Bartlett *v.* Robinson, 39 N. Y. 187 [*affirming* 9 Bosw. (N. Y.) 305]; Morris *v.* Husson, 4 Sandf. (N. Y.) 93; Utica Bank *v.* Bendel, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281; Catskill Bank *v.* Stall, 15 Wend. (N. Y.) 364. *Compare* Ireland *v.* Kip, Anth. N. P. (N. Y.) 195.

Ohio.— Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362.

England.— Skelton *v.* Braithwaite, 1 Dowl. N. S. 354, 11 L. J. Exch. 54, 8 M. & W. 252.

Canada.— Cosgrave *v.* Boyle, 6 Can. Supreme Ct. 165; Vaughan *v.* Ross, 8 U. C. Q. B. 506.

See 7 Cent. Dig. tit. "Bills and Notes," § 1182.

What constitutes direction.— As a rule, if the indorser writes under his name an address when he indorses the instrument, it will be regarded as a direction as to the place where notice should be sent in case of dishonor of the note. Baker *v.* Morris, 25 Barb. (N. Y.) 138; Morris *v.* Husson, 4 Sandf. (N. Y.) 93; Tomeny *v.* German Nat. Bank, 9 Heisk. (Tenn.) 493; Carter *v.* Union Bank, 7 Humphr. (Tenn.) 548, 46 Am. Dec. 89; Farmers', etc., Bank *v.* Battle, 4 Humphr. (Tenn.) 86; Burmester *v.* Barron, 17 Q. B. 828, 16 Jur. 314, 21 L. J. Q. B. 135, 79 E. C. L. 828. See also Bartlett *v.* Robinson, 39 N. Y. 187. But where several parties add to their signature an agreement that notices left at the place set against their names shall be considered legal and binding on them and no place is indicated opposite the name of one indorser, the agreement is not binding on him, but he has a right to insist upon notice under the ordinary rules of the law merchant. Smith *v.* Trickey, 24 Me. 539. A direction to send notice to a certain place when the letter containing it is sent by steamboat will not authorize a sending of the notice to that place when transmitted by mail. Priestley *v.* Bisland, 9 Rob. (La.) 425.

78. Paterson Bank *v.* Butler, 12 N. J. L. 268.

79. Eastern Bank *v.* Brown, 17 Me. 356.

80. Menzies *v.* Farmers Bank, 3 Ky. L. Rep. 822.

81. In Kentucky the statute dispenses with the exercise of due diligence on the notary's part in ascertaining the indorser's address. Mulholland *v.* Samuels, 8 Bush (Ky.) 63.

82. *Louisiana.*—Bird *v.* Doyal, 20 La. Ann. 541; New Orleans Canal, etc., Co. *v.* Bry, 2 La. Ann. 303; McLanahan *v.* Brandon, 1 Mart. N. S. (La.) 321, 14 Am. Dec. 188.

Maine.— Barker *v.* Clark, 20 Me. 156.

Massachusetts.— Hodges *v.* Galt, 8 Pick. (Mass.) 251.

New Jersey.— Woodruff *v.* Daggett, 20 N. J. L. 526; Winans *v.* Davis, 18 N. J. L. 276.

New York.— Lawrence *v.* Miller, 16 N. Y. 235; Greenwich Bank *v.* De Groot, 7 Hun (N. Y.) 210; Randall *v.* Smith, 34 Barb. (N. Y.) 452; Utica Bank *v.* De Mott, 13 Johns. (N. Y.) 432.

North Carolina.— Denny *v.* Palmer, 27 N. C. 610.

Pennsylvania.— Smith *v.* Fisher, 24 Pa. St. 222.

Texas.— Earnest *v.* Taylor, 25 Tex. Suppl. 37.

England.— Bateman *v.* Joseph, 2 Campb. 461, 12 East 433, 11 Rev. Rep. 443; Chapcott *v.* Curlews, 2 M. & Rob. 484.

83. Tyson *v.* Oliver, 43 Ala. 455.

84. *Alabama.*— Robinson *v.* Hamilton, 4 Stew. & P. (Ala.) 91.

California.— Garver *v.* Downie, 33 Cal. 176.

Connecticut.— Bartlett *v.* Isbell, 31 Conn. 296, 83 Am. Dec. 146.

Louisiana.— New Orleans Canal, etc., Co. *v.* Morgan, 3 La. Ann. 356.

Massachusetts.— Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180.

Missouri.— Sanderson *v.* Reinstadler, 31 Mo. 483.

New York.— Carroll *v.* Upton, 3 N. Y. 272; Libby *v.* Adams, 32 Barb. (N. Y.) 542; Beale *v.* Parish, 24 Barb. (N. Y.) 243; Harger *v.* Bemis, 1 Thomps. & C. (N. Y.) 460; Rawdon *v.* Redfield, 2 Sandf. (N. Y.) 178; Ransom *v.*

true residence of the indorser does not necessitate the sending of another notice.[85] Hence whether or not subsequent inquiries were made would be immaterial.[86]

b. What Constitutes Due Diligence — (1) *In General.* There is scarcely any uniformity among the various courts as to what constitutes due diligence,[87] and the cases depend so much upon particular circumstances that it is difficult to find precise precedents.[88] If the indorser has moved it involves among other things an inquiry at his former residence;[89] and it may be said in general that it must be such diligence as men of business usually exercise when their interest depends upon obtaining correct information.[90] Due diligence also requires the holder, if

Mack, 2 Hill (N. Y.) 587, 38 Am. Dec. 602; Utica Bank *v.* Phillips, 3 Wend. (N. Y.) 408; Chapman *v.* Lipscombe, 1 Johns. (N. Y.) 294.

Ohio.— Burckhardt *v.* Fourth Nat. Bank, 6 Ohio Dec. (Reprint) 1036, 9 Am. L. Rec. 691.

Pennsylvania.— Weakly *v.* Bell, 9 Watts (Pa.) 273, 36 Am. Dec. 116; Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355.

South Carolina.— Central Nat. Bank *v.* Adams, 11 S. C. 452, 32 Am. Rep. 495.

Tennessee.— Farmers', etc., Bank *v.* Eddings, 4 Humphr. (Tenn.) 521 note; Marsh *v.* Barr, Meigs (Tenn.) 68; Barr *v.* Marsh, 9 Yerg. (Tenn.) 253; Nichol *v.* Bate, 7 Yerg. (Tenn.) 305, 27 Am. Dec. 505; Dunlap *v.* Thompson, 5 Yerg. (Tenn.) 67.

Vermont.—Walworth *v.* Seaver, 30 Vt. 728, 73 Am. Dec. 332.

Wisconsin.— Linn *v.* Horton, 17 Wis. 151; Adams *v.* Wright, 14 Wis. 408.

United States.— Harris *v.* Robinson, 4 How. (U. S.) 336, 11 L. ed. 1000.

Canada.—Patterson *v.* Tapley, 9 N. Brunsw. 529; Upper Canada Bank *v.* Smith, 3 U. C. Q. B. 358.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1186, 1187.

85. Rowland *v.* Rowe, 48 Conn. 432; Lambert *v.* Ghiselin, 9 How. (U. S.) 552, 13 L. ed. 254. Although it would seem that if after obtaining such information the notary promptly sent notice to the proper place, this fact might be considered in determining that the notary was duly diligent. Eager *v.* Brown, 11 La. Ann. 625. *Compare* Canonge *v.* Louisiana State Bank, 7 Mart. N. S. (La.) 583.

86. Brighton Market Bank *v.* Philbrick, 40 N. H. 506; Firth *v.* Thrush, 8 B. & C. 387, 6 L. J. K. B. O. S. 355, 2 M. & R. 359, 15 E. C. L. 193.

87. Wolf *v.* Burgess, 59 Mo. 583, 584, where the court said: "While the authorities are uniform that suitable exertions must be used in this respect, yet different courts have arrived at variant conclusions as to the *quantum* of effort necessary to be put forth in order to fill the measure of what the law denominates 'due diligence.'"

It would seem to require such effort as a prudent man interested in giving notice of a fact would make to find the address of a party in order to accomplish that object (Riggs *v.* Hatch, 21 Blatchf. (U. S.) 318, 16 Fed. 838), and less diligence is required in ascertaining the residence for the purpose of giving notice than for the purpose of making demand of payment (Wachusett Nat. Bank *v.* Fairbrother, 148 Mass. 181, 19 N. E. 345, 12 Am. St. Rep. 530; Young *v.* Durgin, 15 Gray (Mass.) 264).

An examination of old notes which were formerly indorsed by an indorser and which were in the possession of a bank which holds the paper does not constitute due diligence in ascertaining the indorser's address where he had a well-known address that could have been otherwise easily ascertained. Utica Bank *v.* De Mott, 13 Johns. (N. Y.) 432.

Search in the city directory.— It is not due diligence to look for the indorser's or drawer's name in the city directory (Cuming *v.* Roderick, 167 N. Y. 571, 60 N. E. 1109 [*affirming* 42 N. Y. App. Div. 620, 58 N. Y. Suppl. 1093]; Bacon *v.* Hanna, 137 N. Y. 379, 33 N. E. 303, 50 N. Y. St. 660, 20 L. R. A. 495 [*affirming* 63 Hun (N. Y.) 625, 17 N. Y. Suppl. 430, 43 N. Y. St. 906]; Baer *v.* Leppert, 12 Hun (N. Y.) 516; Greenwich Bank *v.* De Groot, 7 Hun (N. Y.) 210), although an examination, not only of the directory, but also an inquiry of the maker has been held due diligence (Gawtry *v.* Doane, 51 N. Y. 84). So too an examination of the city directory and an inquiry of both the holder and maker is sufficient (Sanderson *v.* Reinstadler, 31 Mo. 483. See also Staylor *v.* Ball, 24 Md. 183), although it has been held that merely to examine the directory and to inquire at the bank would not be due diligence where other inquiries are also available (Gilchrist *v.* Donnell, 53 Mo. 591). See also Haly *v.* Brown, 5 Pa. St. 178.

88. Porter *v.* Judson, 1 Gray (Mass.) 175. See also U. S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 551, 7 L. ed. 513, where the court said: "It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided on their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule."

Notice left at the bank where the note is payable, no other effort being shown to find the indorser, is not due diligence. Greves *v.* Tomlinson, 19 La. Ann. 90.

89. Barker *v.* Clark, 20 Me. 156. See also *In re* Billings, (Minn. 1901) 85 N. W. 162.

90. Palmer *v.* Whitney, 21 Ind. 58; *In re* Billings, (Minn. 1901) 85 N. W. 162; Brighton Market Bank *v.* Philbrick, 40 N. H. 506, 509 (where it is said: "They were bound to act in good faith, and not give

he knows where the indorser resides, to inform the notary of such fact[91] and to inform him of whom he should make inquiry.[92]

(II) *Inquiry of Interested or Informed Parties* — (A) *In General.* Inquiries to be sufficient should be made of persons likely to know of the indorser's whereabouts and who have no interest in misleading.[93] The holder should make inquiries of the available parties to the instrument,[94] of the indorser's agent,[95] and, in some jurisdictions it would seem, of every party to the paper accessible.[96] In some jurisdictions, however, it would seem that an inquiry at

credit to doubtful intelligence when better could have been obtained"); Utica Bank *v.* Bender, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281.

Notice to discontinued post-office.— It is not due diligence to send notice to a post-office which has been discontinued for a period of twelve months. Davis *v.* Beckham, 4 Humphr. (Tenn.) 53.

Illustrations.—Thus where a notary called at the house of an indorser and finding it closed inquired of a neighbor and was informed that the indorser and his family were out of town on a visit, the extent of which was not known, and the notary left a notice for the indorser at the next door with the request that they should hand it to him on his return (Williams *v.* U. S. Bank, 2 Pet. (U. S.) 96, 7 L. ed. 360), where notice was handed to the indorser's wife the day after it was made, and by her given to the indorser on the day following, the indorser residing twenty miles from the place of protest (Foreman *v.* Wikoff, 16 La. 20, 35 Am. Dec. 212), and where demand is made in compliance with an agreement between the indorser, maker, and payee, and notice seasonably sent to the payee upon the refusal of the maker to pay upon the last demand as per agreement (Brock *v.* Thompson, 1 Bailey (S. C.) 322), it was held that due diligence had been used. On the other hand, where an attorney makes no inquiries as to the residence of the indorser until a day near the time at which the notice should be given and resorts to the maker of the note for such information only near the close of such day, from whom he immediately gets the information sought (Howland *v.* Adrain, 30 N. J. L. 41), or where notice is merely left at a hotel, it not appearing that it was left with any one authorized to receive it, that the indorser was in the hotel at that time, or that any inquiry was made for him (Ashley *v.* Gunton, 15 Ark. 415), it was held that due diligence had not been used.

91. Paterson Bank *v.* Butler, 12 N. J. L. 268; Lawrence *v.* Miller, 16 N. Y. 235; Smith *v.* Fisher, 24 Pa. St. 222; Fitler *v.* Morris, 6 Whart. (Pa.) 406; Bellemire *v.* U. S. Bank 4 Whart. (Pa.) 105, 33 Am. Dec. 46; Steinhoff *v.* Merchants' Bank, 46 U. C. Q. B. 25.

92. Wheeler *v.* Field, 6 Metc. (Mass.) 290.

93. *Alabama.*— Decatur Branch Bank *v.* Peirce, 3 Ala. 321.

Maine.— Saco Nat. Bank *v.* Sanborn, 63 Me. 340, 18 Am. Rep. 224.

New Hampshire.— Brighton Market Bank *v.* Philbrick, 40 N. H. 506.

New Jersey.— Winans *v.* Davis, 18 N. J. L. 276.

New York.— Carroll *v.* Upton, 2 Sandf. (N. Y.) 171.

United States.— Lambert *v.* Ghiselin, 9 How. (U. S.) 552, 13 L. ed. 254.

England.— Bateman *v.* Joseph, 2 Campb. 461, 12 East 433, 11 Rev. Rep. 443.

It has been held sufficient to make inquiry of the indorser's partner and clerk (Garver *v.* Downie, 33 Cal. 176), of his factor (Ledoux *v.* Morgan, 3 La. Ann. 344), or of a relative who was likely to know if the indorser has removed, and if so the place to which he had gone (Requa *v.* Collins, 51 N. Y. 144); but it is not sufficient to make inquiry of one temporarily in charge of a post-office in the town where the indorser lived (Phipps *v.* Chase, 6 Metc. (Mass.) 491), to inquire of persons in the bar-room of a hotel and others encountered in the street and at the post-office, and neglect to inquire of the post-master (Spencer *v.* Salina Bank, 3 Hill (N. Y.) 520), or to inquire of an employee in the office of the last indorser (State *v.* Craig, 80 Me. 85, 13 Atl. 129).

94. *Louisiana.*— Vance *v.* Depass, 2 La. Ann. 16.

Maine.— Hill *v.* Varrell, 3 Me. 233.

Massachusetts.— Porter *v.* Judson, 1 Gray (Mass.) 175; Peirce *v.* Pendar, 5 Metc. (Mass.) 352.

Tennessee.—Barr *v.* Marsh, 9 Yerg. (Tenn.) 253.

Wisconsin.— Wilson *v.* Senier, 14 Wis. 380.

95. Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150; Herbert *v.* Servin, 41 N. J. L. 225; Marsh *v.* Barr, Meigs (Tenn.) 68; Barker *v.* Hall, Mart. & Y. (Tenn.) 183; Beveridge *v.* Burgis, 3 Camph. 262, 13 Rev. Rep. 798. But see Sweet *v.* Woodin, 72 Mich. 393, 40 N. W. 471.

96. Wolf *v.* Burgess, 59 Mo. 583; Gilchrist *v.* Donnell, 53 Mo. 591; Cuming *v.* Roderick, 28 N. Y. App. Div. 253, 50 N. Y. Suppl. 1053.

It has been held not to be sufficient diligence to inquire for the indorser only of the holder and officers of the bank where the maker also lived near the bank at which the note was payable (Whitridge *v.* Rider, 22 Md. 548), although where the holder inquired for the residence of an indorser from two prior holders the question of the exercise of diligence was held to be for the jury (Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355. See also Palmer *v.* Whitney, 21 Ind. 58).

the bank or place at which the note was made payable constitutes sufficient diligence.[97]

(B) *Extent of Inquiry Required.* If the holder or notary is distinctly informed as to the residence of an indorser by a credible person who, from his connection with the transaction or acquaintance with the indorser, is likely to know his residence and who is not interested to mislead him, it is due diligence to act upon such information.[98] But if the residence of the indorser is not distinctly stated it is incumbent upon the notary to follow up any clew thereto which may have been obtained by his inquiries.[99]

(III) *Sending Notice to Place of Indorsement.* Although, if the actual whereabouts of the drawer or indorser are not definitely known to the holder and due and diligent inquiry fails to reveal the same, notice sent to the place of making the indorsement is sufficient;[1] the holder cannot rely on the mere place of date or signature to dispense with diligence.[2] If, however, the indorser has had a known and continuous residence at the place of the date of his indorsement for some time and the holder has no knowledge of a change in his residence, or there are no circumstances from which he might assume that the residence has been changed, it has been held that he has a right to presume that such residence continues, and the exercise of due diligence would not require a further inquiry on the part of the holder,[3] although it has been said that a change of residence

97. Harris *v.* Robinson, 4 How. (U. S.) 336, 11 L. ed. 1000.

98. *Connecticut.*— Bartlett *v.* Isbell, 31 Conn. 296, 83 Am. Dec. 146; Belden *v.* Lamb, 17 Conn. 441.

Indiana.— Palmer *v.* Whitney, 21 Ind. 58.

Massachusetts.— Wood *v.* Corl, 4 Metc. (Mass.) 203.

Mississippi.— Hunt *v.* Nugent, 10 Sm. & M. (Miss.) 541.

New Hampshire.— Brighton Market Bank *v.* Philbrick, 40 N. H. 506.

New York.— Rawdon *v.* Redfield, 2 Sandf. (N. Y.) 178; Carroll *v.* Upton, 2 Sandf. (N. Y.) 171; Spencer *v.* Salina Bank, 3 Hill (N. Y.) 520; Ransom *v.* Mack, 2 Hill (N. Y.) 587, 38 Am. Dec. 602; Utica Bank *v.* Bender, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281. See also Libby *v.* Adams, 32 Barb. (N. Y.) 542; Harger *v.* Bemis, 1 Thomps. & C. (N. Y.) 460.

Tennessee.— Farmers', etc., Bank *v.* Eddings, 4 Humphr. (Tenn.) 521 note; Marsh *v.* Barr, Meigs (Tenn.) 68.

United States.— Lambert *v.* Ghiselin, 9 How. (U. S.) 552, 13 L. ed. 254.

99. Wolf *v.* Burgess, 59 Mo. 583.

1. *Kansas.*— See Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793.

Kentucky.— Page *v.* Prentice, 5 B. Mon. (Ky.) 7.

Louisiana.— Jamison *v.* Pothaus, 26 La. Ann. 63; Page *v.* Valery, McGloin (La.) 208.

Maryland.— Sasscer *v.* Whitely, 10 Md. 98, 69 Am. Dec. 126.

Mississippi.— Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150; Dodley *v.* Goodloe, 6 Sm. & M. (Miss.) 255, 45 Am. Dec. 287.

New York.— Carroll *v.* Upton, 2 Sandf. (N. Y.) 171; Utica Bank *v.* Davidson, 5 Wend. (N. Y.) 587.

Pennsylvania.— Pierce *v.* Struthers, 27 Pa. St. 249; Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480.

England.— Clarke *v.* Sharpe, 1 H. & H. 35, 3 M. & W. 166; Mann *v.* Moors, R. & M. 249, 21 E. C. L. 743.

See 7 Cent. Dig. tit. "Bills and Notes," § 1157.

2. *Alabama.*— Sprague *v.* Tyson, 44 Ala. 338; Tyson *v.* Oliver, 43 Ala. 455; Decatur Branch Bank *v.* Peirce, 3 Ala. 321; Foard *v.* Johnson, 2 Ala. 565, 36 Am. Dec. 421.

Connecticut.— Barnwell *v.* Mitchell, 3 Conn. 101.

Louisiana.— Curry *v.* Herlong, 11 La. Ann. 634.

Maine.— Hill *v.* Varrell, 3 Me. 233.

Missouri.— Gilchrist *v.* Donnell, 53 Mo. 591.

New York.— Carroll *v.* Upton, 3 N. Y. 272; Spencer *v.* Salina Bank, 3 Hill (N. Y.) 520; Lowery *v.* Scott, 24 Wend. (N. Y.) 358, 35 Am. Dec. 627.

North Carolina.— Runyon *v.* Montfort, 44 N. C. 371.

Pennsylvania.— Fitler *v.* Morris, 6 Whart. (Pa.) 406; Fisher *v.* Evans, 5 Binn. (Pa.) 541.

Canada.— See Balloch *v.* Binney, 5 N. Brunsw. 440.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1157, 1186, 1187.

Effect of statute on exercise of diligence.— The Louisiana act of March 3, 1827, No. 56, providing that if the indorser's residence be unknown or not found by the use of due diligence notice shall be directed to him at the place where the bill or note is drawn is held not to change the law merchant governing the sufficiency of the diligence to be used in serving notice of protest. Follain *v.* Dupré, 11 Rob. (La.) 454; Becnel *v.* Tournillon, 6 Rob. (La.) 500; Duncan *v.* Sparrow, 3 Rob. (La.) 164; Preston *v.* Daysson, 7 La. 7.

3. *Connecticut.*— Rowland *v.* Rowe, 48 Conn. 432.

Kentucky.— Menzies *v.* Farmers Bank, 3 Ky. L. Rep. 822.

under circumstances of peculiar publicity and notoriety would necessitate further inquiry.[4]

F. Manner of Giving Notice — 1. In General. Personal service of notice of dishonor is never essential,[5] and the proper mode or manner of giving notice will vary according to the circumstances of each particular case.[6] If the party sought to be charged actually receives the notice in due season the mere manner in which it is sent is wholly immaterial.[7]

2. Where Parties Reside in Different Places — a. By Mail — (i) *In General.* Where the parties to a bill or note reside in different places, between which there is a regularly established postal route, it is generally sufficient to send notice of dishonor by the mail, such being the ordinary or usual mode of conveyance,[8] and

Maryland.— Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390.

Mississippi.— Hunt *v.* Nugent, 10 Sm. & M. (Miss.) 541; Union Bank *v.* Govan, 10 Sm. & M. (Miss.) 333.

New York.— Ward *v.* Perrin, 54 Barb. (N. Y.) 89; Utica Bank *v.* Phillips, 3 Wend. (N. Y.) 408.

Tennessee.— Harris *v.* Memphis Bank, 4 Humphr. (Tenn.) 519; Farmers', etc., Bank *v.* Harris, 2 Humphr. (Tenn.) 311.

United States.— McMurtrie *v.* Jones, 3 Wash. (U. S.) 206, 16 Fed. Cas. No. 8,905.

4. Planters' Bank *v.* Bradford, 4 Humphr. (Tenn.) 39.

5. *Alabama.*— Rives *v.* Parmley, 18 Ala. 256.

California.— Fisk *v.* Miller, 63 Cal. 367.

Kentucky.— Lawrence *v.* Ralston, 3 Bibb (Ky.) 102; Monarch *v.* Farmers', etc., Bank, 20 Ky. L. Rep. 1275, 49 S. W. 319.

Louisiana.— Sullivan *v.* Godwin, 20 La. Ann. 33; Manadue *v.* Kitchen, 3 Rob. (La.) 261, 38 Am. Dec. 237; State Bank *v.* Mansker, 15 La. 115; Commercial Bank *v.* Gove, 15 La. 113; Franklin *v.* Verbois, 6 La. 727.

Massachusetts.— Hobbs *v.* Straine, 149 Mass. 212, 21 N. E. 365.

New York.—Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222.

Wisconsin.— Adams *v.* Wright, 14 Wis. 408; Westfall *v.* Farwell, 13 Wis. 504.

United States.— Williams *v.* U. S. Bank, 2 Pet. (U. S.) 96, 7 L. ed. 360.

England.— Paul *v.* Joel, 4 H. & N. 355, 5 Jur. N. S. 603, 28 L. J. Exch. 143, 7 Wkly. Rep. 287; Housego *v.* Cowne, 6 L. J. Exch. 110, M. & H. 54, 2 M. & W. 348.

6. Hobbs *v.* Straine, 149 Mass. 212, 21 N. E. 365; Bank of America *v.* Shaw, 142 Mass. 290, 7 N. E. 779; Hill *v.* Norvell, 3 McLean (U. S.) 583, 12 Fed. Cas. No. 6,497 (where notice for a member of congress was left for him in the congressional post-office and received in due time).

7. *Alabama.*— Foster *v.* McDonald, 5 Ala. 376.

California.— Drexler *v.* McGlynn, 99 Cal. 143, 33 Pac. 773; Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545 (where the notice was properly mailed and afterward illegally taken from the mail-bag, but was subsequently received by the indorser).

Iowa.— Grinman *v.* Walker, 9 Iowa 426.

Kentucky.— M. V. Monarch Co. *v.* Farmers', etc., Bank, 105 Ky. 430, 20 Ky. L. Rep. 1351, 49 S. W. 317, 88 Am. St. Rep. 310; Monarch *v.* Farmers', etc., Bank, 20 Ky. L. Rep. 1275, 49 S. W. 319.

Louisiana.— Maspero *v.* Pedesclaux, 22 La. Ann. 227, 2 Am. Rep. 727; Citizens Bank *v.* Walker, 2 La. Ann. 791; Thomas *v.* Marsh, 2 La. Ann. 353; Huie *v.* Brazeale, 19 La. 457.

Maine.— Bradley *v.* Davis, 26 Me. 45; Carter *v.* Bradley, 19 Me. 62, 36 Am. Dec. 735 (where the notice was directed by mistake to the wrong party but afterward delivered to the right one).

Maryland.— Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Massachusetts.—Shelburne Falls Nat. Bank *v.* Townsley, 107 Mass. 444; Cabot Bank *v.* Warner, 10 Allen (Mass.) 522; Shaylor *v.* Mix, 4 Allen (Mass.) 351.

Missouri.— Gilchrist *v.* Donnell, 53 Mo. 591; Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. 51.

Nebraska.— Hendershot *v.* Nebraska Nat. Bank, 25 Nebr. 127, 41 N. W. 133; Phelps *v.* Stocking, 21 Nebr. 443, 33 N. W. 217.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

New York.— Cayuga County Bank *v.* Bennett, 5 Hill (N. Y.) 236.

Pennsylvania.— Dicken *v.* Hall, 87 Pa. St. 379; Gordon *v.* Pedrick, 6 Phila. (Pa.) 254, 24 Leg. Int. (Pa.) 332.

South Carolina.— Carolina Nat. Bank *v.* Wallace, 13 S. C. 347, 36 Am. Rep. 694; Foster *v.* Sineath, 2 Rich. (S. C.) 338.

Wisconsin.— Terbell *v.* Jones, 15 Wis. 253.

United States.— U. S. Bank *v.* Corcoran, 2 Pet. (U. S.) 121, 7 L. ed. 368; Spalding *v.* Krutz, 1 Dill. (U. S.) 414, 22 Fed. Cas. No. 13,201; Hyslop *v.* Jones, 3 McLean (U. S.) 96, 12 Fed. Cas. No. 6,990.

England.— Hilton *v.* Fairclough, 2 Campb. 633, 12 Rev. Rep. 766; Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694; Scott *v.* Lifford, 1 Campb. 246, 9 East 347.

Canada.— Chapman *v.* Bishop, 1 U. C. C. P. 432; Nassau *v.* O'Reilly, (Hil. T.) 2 Vict.

8. *Alabama.*— Carrington *v.* Odom, 124 Ala. 529, 27 So. 510.

Connecticut.— Hartford Bank *v.* Stedman, 3 Conn. 489; Shepard *v.* Hall, 1 Conn. 329.

Kansas.— Seaton *v.* Scovill, 18 Kan. 433, 21 Am. Rep. 212 note, 26 Am. Rep. 779.

Kentucky.— Stivers *v.* Prentice, 3 B. Mon.

where due diligence has been used this rule is not affected by the fact that through the miscarriage of the mail such notice may never have been received,[8]

(Ky.) 461; Farmers', etc., Bank *v.* Butler, 3 Litt. (Ky.) 498; Farmers', etc., Bank *v.* Turner, 2 Litt. (Ky.) 13.

Maine.— Loud *v.* Merrill, 45 Me. 516; Fish *v.* Jackman, 19 Me. 467, 36 Am. Dec. 769; Lord *v.* Appleton, 15 Me. 270.

Maryland.— Citizens' Bank *v.* Grafflin, 31 Md. 507, 1 Am. Rep. 66; Sasscer *v.* Farmers' Bank, 4 Md. 409; Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216; Flack *v.* Green, 3 Gill & J. (Md.) 474.

Massachusetts.— Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445; Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198; Lincoln, etc., Bank *v.* Hammatt, 9 Mass. 159; Munn *v.* Baldwin, 6 Mass. 316.

Mississippi.— Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63; Wilcox *v.* McNutt, 2 How. (Miss.) 776, 32 Am. Dec. 304.

Missouri.— State Bank *v.* Vaughan, 36 Mo. 90.

Nebraska.— Phelps *v.* Stocking, 21 Nebr. 443, 32 N. W. 217.

New Hampshire.— Manchester Bank *v.* White, 30 N. H. 456.

New Jersey.— Hazelton Coal Co. *v.* Ryerson, 20 N. J. L. 129, 40 Am. Dec. 217; Washington Banking Co. *v.* King, 14 N. J. L. 45; Elizabeth State Bank *v.* Ayers, 7 N. J. L. 130, 11 Am. Dec. 535.

New York.— Townsend *v.* Auld, 8 Misc. (N. Y.) 516, 28 N. Y. Suppl. 746, 59 N. Y. St. 274; Ireland *v.* Kip, 11 Johns. (N. Y.) 231.

Ohio.— Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Liggitt *v.* Wing, 31 Cinc. L. Bul. 85.

Pennsylvania.— Woods *v.* Neeld, 44 Pa. St. 86; Jones *v.* Lewis, 8 Watts & S. (Pa.) 14; Stimple *v.* Herman, 34 Leg. Int. (Pa.) 313.

Virginia.— Slaughter *v.* Farland, 31 Gratt. (Va.) 134, where the mail communication was by a circuitous route.

United States.— Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538; Lindenberger *v.* Beall, 6 Wheat. (U. S.) 104, 5 L. ed. 216; Bussard *v.* Levering, 6 Wheat. (U. S.) 102, 5 L. ed. 215; Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 7 L. ed. 269 [*reversing* 2 Cranch C. C. (U. S.) 510, 2 Fed. Cas. No. 872].

England.— Scott *v.* Lifford, 1 Camph. 246, 9 East 347; Esdaile *v.* Sowerby, 11 East 114, 10 Rev. Rep. 440; Kufh *v.* Weston, 3 Esp. 54; Saunderson *v.* Judge, 2 H. Bl. 509, 3 Rev. Rep. 492.

In Wisconsin, under Wis. Rev. Stat. § 176, requiring that notice shall be served by delivering a copy to the person entitled to such notice, or "by depositing such copy in the postoffice, . . . directed to him at the postoffice at or nearest to his known or reputed place of residence," depositing a copy in the post-office is sufficient service on either a resident or non-resident indorser. Glicksman *v.* Early, 78 Wis. 223, 47 N. W. 272.

Where the mail service between two points is suspended or broken up the notice of protest deposited in the post-office at the place of presentment and addressed to an indorser who resides at another is insufficient. Todd *v.* Neal, 49 Ala. 266; Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275 (where it was held that the statutory provision for sending notice of dishonor by mail did not apply to Confederate States' mails, unless the actual receipt of the notice was proven); James *v.* Wade, 21 La. Ann. 548; Lapeyre *v.* Robertson, 20 La. Ann. 399; Shaw *v.* Neal, 19 La. Ann. 156; Citizens' Bank *v.* Pugh, 19 La. Ann. 43; Harden *v.* Boyce, 59 Barb. (N. Y.) 425; Farmers' Bank *v.* Gunnell, 26 Gratt. (Va.) 131; Billgerry *v.* Branch, 19 Gratt. (Va.) 393, 100 Am. Dec. 679.

9. *Alabama.*— Carrington *v.* Odom, 124 Ala. 529, 27 So. 510; Knott *v.* Venable, 42 Ala. 186.

Connecticut.— Bartlett *v.* Isbel, 31 Conn. 296, 83 Am. Dec. 146; Hartford Bank *v.* Hart, 3 Day (Conn.) 491, 3 Am. Dec. 274.

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

Massachusetts.— Morse *v.* Chamberlin, 144 Mass. 406, 11 N. E. 560; Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445; Cabot Bank *v.* Warner, 10 Allen (Mass.) 522; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Munn *v.* Baldwin, 6 Mass. 316.

Minnesota.— Wilson *v.* Richards, 28 Minn. 337, 9 N. W. 872.

Missouri.— Renshaw *v.* Triplett, 23 Mo. 213.

New Jersey.— Washington Banking Co. *v.* King, 14 N. J. L. 45.

New York.— Gawtry *v.* Doane, 51 N. Y. 84; Ogden *v.* Cowley, 2 Johns. (N. Y.) 274; Chapman *v.* Lipscombe, 1 Johns. (N. Y.) 294.

Ohio.— Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362.

Pennsylvania.— Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355; Jones *v.* Lewis, 8 Watts & S. (Pa.) 14; Hitner *v.* Finney, 1 Wkly. Notes Cas. (Pa.) 50.

Vermont.— U. S. Nat. Bank *v.* Burton, 58 Vt. 426, 3 Atl. 756.

Washington.— Benedict *v.* Schmieg, 13 Wash. 476, 43 Pac. 374, 52 Am. St. Rep. 61, 36 L. R. A. 703.

United States.— Lambert *v.* Ghiselin, 9 How. (U. S.) 552, 13 L. ed. 254; Bussard *v.* Levering, 6 Wheat. (U. S.) 102, 5 L. ed. 215; Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264.

England.—Stocken *v.* Collins, 9 C. & P. 653, 7 M. & W. 515, 38 E. C. L. 380; Dobree *v.* Eastwood, 3 C. & P. 250, 14 E. C. L. 552; Parker *v.* Gordon, 7 East 385, 6 Esp. 41, 3 Smith K. B. 358, 8 Rev. Rep. 646; Kufh *v.*

or that by reason of a defect in the plan for the transmission of the mail the letter is greatly delayed before it reaches the party sought to be notified.[10] In some jurisdictions, however, where the holder and indorser reside in different places and the home of the indorser is the place of presentment, the agent for collection is regarded as the holder for the purpose of giving notice, and notice to the indorser sent by mail is insufficient.[11] Where this view obtains, if the holder and indorser reside in the same place, and the place of presentment is different, upon the agent for collection forwarding the notice to his principal, the latter may give notice to the indorser through the mail, the agent in such case being regarded as the holder from whom the notice emanates, and the real holder *quoad hoc* simply the conduit of conveyance.[12] In other jurisdictions it is held that such collection agent is merely the agent of the holder, and as the real holder and the party sought to be charged reside in different places service by mail is sufficient.[13]

(II) *Mode of Posting* — (A) *Delivery to Postman.* Since the postal regulations of the United States require that carriers while on their rounds shall receive all prepaid letters that may be handed to them for mailing, it follows that the delivery of a notice properly directed and duly stamped to a United States letter-carrier while on such rounds is a sufficient mailing thereof.[14]

(B) *Depositing in Letter-Box.* So where the government provides boxes for the deposit of letters, as in the case of lamp-post boxes, it is sufficient to deposit the notice in such boxes in cases where service by mail is authorized.[15]

Weston, 3 Esp. 54; Mackay *v.* Judkins, 1 F. & F. 208; Saunderson *v.* Judge, 2 H. Bl. 509, 3 Rev. Rep. 492; Woodcock *v.* Houldsworth, 16 L. J. Exch. 49, 16 M. & W. 124. See, however, Dale *v.* Lubbock, 1 Barn. 199, where the contrary seems to have been held.

10. *Maine.*— Lord *v.* Appleton, 15 Me. 270.

Pennsylvania.— Jones *v.* Lewis, 8 Watts & S. (Pa.) 14; Jones *v.* Wardell, 6 Watts & S. (Pa.) 399 (where notice, although correctly addressed, was delivered to the wrong party).

Rhode Island.—Mt. Vernon Bank *v.* Holden, 2 R. I. 467.

United States.— Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538.

England.— Woodcock *v.* Houldsworth, 16 L. J. Exch. 49, 16 M. & W. 124.

11. Miller *v.* Whitfield, 16 La. Ann. 10; Bowling *v.* Harrison, 6 How. (U. S.) 248, 12 L. ed. 425.

12. *Connecticut.*— Hartford Bank *v.* Stedman, 3 Conn. 489.

Iowa.—Van Brunt *v.* Vaughn, 47 Iowa 145, 29 Am. Rep. 468.

Maine.— Warren *v.* Gilman, 17 Me. 360.

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

Massachusetts.— Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

New York.— Wynen *v.* Schappert, 6 Daly (N. Y.) 558, 55 How. Pr. (N. Y.) 156; Price *v.* McGoldrick, 2 Abb. N. Cas. (N. Y.) 69.

13. Shelton *v.* Carpenter, 60 Ala. 201; Philipe *v.* Haberlee, 45 Ala. 597; Tyson *v.* Oliver, 43 Ala. 455; Bibb *v.* McQueen, 42 Ala. 408; Gindrat *v.* Mechanics' Bank, 7 Ala. 324; Carson *v.* State Bank, 4 Ala. 148; West River Bank *v.* Taylor, 34 N. Y. 128 [*affirming* 7 Bosw. (N. Y.) 466].

Notice mailed in another place.— Under a statute providing that where the party sought to be charged resides in the place where the paper is protested notice should be given him there by mail, it has been held that notice mailed to him by the notary at such address from another post-office is insufficient. Fahnestock *v.* Smith, 14 Iowa 561.

14. Wynen *v.* Schappert, 6 Daly (N. Y.) 558, 55 How. Pr. (N. Y.) 156; Pearce *v.* Langfit, 101 Pa. St. 507, 47 Am. Rep. 737. See also Skilbeck *v.* Garbett, 7 Q. B. 846, 849, 9 Jur. 939, 14 L. J. Q. B. 338, 53 E. C. L. 846, where Denman, C. J., said: "If a public servant, belonging to the post-office, takes charge of the letter in the exercise of his public duty, it is the same as if it were carried to the office." See, however, Hawkins *v.* Rutt, Peake 186, where the contrary was held.

15. *District of Columbia.*— Morton *v.* Cammack, MacArthur & M. (D. C.) 22.

Maine.— Casco Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319.

Massachusetts.— Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994.

Michigan.— Wood *v.* Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597.

New York.— Greenwich *v.* De Groot, 7 Hun (N. Y.) 210; Mechanics', etc., Bank *v.* Crow, 5 Daly (N. Y.) 191 [*affirmed* in 60 N. Y. 85].

Private letter-boxes.— The deposit, however, of a notice of dishonor of negotiable paper in a private letter-box of a private office is not a deposit in the post-office, and notice so mailed would not be sufficient. Townsend *v.* Auld, 10 Misc. (N. Y.) 343, 31 N. Y. Suppl. 29, 63 N. Y. St. 418, 24 N. Y. Civ. Proc. 181.

b. By Special Messenger. Where the party sought to be charged does not live on or near an established postal route notice must be sent by special messenger, or if any other method is adopted it must appear that the notice was received as promptly as it would have been by messenger.[16]

3. Where Parties Reside in Same Place — a. Rule Stated — (I) *In General.* By the general rule of the law merchant where parties reside in the same place notice of dishonor of the bill or note must be given to the party entitled thereto personally or left at his domicile or place of business;[17] and this rule obtains unless by statute[18] or by the usage of a particular place[19] a different mode of notice is resorted to.

16. Farmers', etc., Bank *v.* Butler, 3 Litt. (Ky.) 498; Citizens' Bank *v.* Pugh, 19 La. Ann. 43; Fish *v.* Jackman, 19 Me. 467, 36 Am. Dec. 769 (where the indorser lived in the wilderness twenty miles from a post-office); Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 7 L. ed. 269 [*reversing* 2 Cranch C. C. (U. S.) 510, 2 Fed. Cas. No. 872].

17. *Alabama.*—Ishell *v.* Lewis, 98 Ala. 550, 13 So. 335; John *v.* Selma City Nat. Bank, 57 Ala. 96; Philipe *v.* Harberlee, 45 Ala. 597; Tyson *v.* Oliver, 43 Ala. 455.

California.— Vance *v.* Collins, 6 Cal. 435.

Connecticut.— Hartford Bank *v.* Stedman, 3 Conn. 489; Shepard *v.* Hall, 1 Conn. 329.

Delaware.— Brindley *v.* Barr, 3 Harr. (Del.) 419.

District of Columbia.— Morton *v.* Cammack, MacArthur & M. (D. C.) 22.

Indiana.— Curtis *v.* State Bank, 6 Blackf. (Ind.) 312, 38 Am. Dec. 143.

Iowa.— Grinman *v.* Walker, 9 Iowa 426.

Kansas.— Swayze *v.* Britton, 17 Kan. 625.

Kentucky.— Todd *v.* Edwards, 7 Bush (Ky.) 89.

Louisiana.— Miller *v.* Whitfield, 16 La. Ann. 10; Heiss *v.* Corcoran, 15 La. Ann. 694; Carmena *v.* Doherty, 7 Rob. (La.) 57; Louisiana State Bank *v.* Rowel, 6 Mart. N. S. (La.) 506; Laporte *v.* Landry, 5 Mart. N. S. (La.) 359; McCrummen *v.* McCrummen, 5 Mart. N. S. (La.) 158; Clay *v.* Oakley, 5 Mart. N. S. (La.) 137.

Maine.— Davis *v.* Gowen, 19 Me. 447; Green *v.* Darling, 15 Me. 141.

Maryland.— Walters *v.* Brown, 15 Md. 285, 74 Am. Dec. 566; Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

Massachusetts.—Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445; Cabot Bank *v.* Warner, 10 Allen (Mass.) 522; Phipps *v.* Chase, 6 Metc. (Mass.) 491; Peirce *v.* Pendar, 5 Metc. (Mass.) 352.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263; Nevius *v.* Lansingburgh Bank, 10 Mich. 547.

Minnesota.— Levering *v.* Washington, 3 Minn. 323. But under Minn. Laws (1856), c. 5, § 4, notice of protest might be sent by mail, as well to a resident of the town where the same was mailed as to a party residing elsewhere. Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105.

Mississippi.— Bowling *v.* Arthur, 34 Miss. 41; Hogatt *v.* Bingaman, 7 How. (Miss.) 565; Wilcox *v.* McNutt, 2 How. (Miss.) 776, 32 Am. Dec. 304. See also Miles *v.* Hall, 12 Sm. & M. (Miss.) 332, holding that where the indorser resided in a different city from that in which the note was payable, and on the day that the note was protested he happened, with the knowledge of the holder, to be in the place where the note was payable and protested, the holder must give him personal notice and that notice through the post-office addressed to his place of residence would not be sufficient.

Missouri.— Gilchrist *v.* Donnell, 53 Mo. 591; State Bank *v.* Vaughan, 36 Mo. 90; Barret *v.* Evans, 28 Mo. 331; Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. 51; Bank of Commerce *v.* Chambers, 14 Mo. App. 152.

New York.— Van Vechten *v.* Pruyn, 13 N. Y. 549; Cayuga County Bank *v.* Bennett, 5 Hill (N. Y.) 236; Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; Ransom *v.* Mack, 2 Hill (N. Y.) 587, 38 Am. Dec. 602 (where the court said that the post-office was not a legal place of deposit for notices to indorsers, except where the notice is to be transmitted by mail to another office); Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372; Ireland *v.* Kip, 10 Johns. (N. Y.) 490, 11 Johns. (N. Y.) 231.

North Carolina.— Costin *v.* Rankin, 48 N. C. 387.

Tennessee.— Farmers', etc., Bank *v.* Battle, 4 Humphr. (Tenn.) 86; Barker *v.* Hall, Mart. & Y. (Tenn.) 183.

United States.— Williams *v.* U. S. Bank, 2 Pet. (U. S.) 96, 7 L. ed. 360; Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 7 L. ed. 269.

England.— Crosse *v.* Smith, 1 M. & S. 545, 14 Rev. Rep. 529.

18. McNatt *v.* Jones, 52 Ga. 473 (where it was held that whatever may have been the rule previous to the act of congress requiring all "drop letters" to bear a postage stamp, since the passage of that act notice to an indorser of a notarial protest deposited in the post-office of the city where the indorser resides is sufficient notice under Ga. Code, § 2781. It does not appear from the report of this case whether the city of Augusta had a free carrier delivery system at the time of this decision or not); Grinman *v.* Walker, 9 Iowa 426. See also Merchants Bank *v.* McNutt, 11 Can. Supreme Ct. 126; Commercial Bank *v.* Eccles, 4 U. C. Q. B. 336.

19. *Alabama.*— John *v.* Selma City Nat. Bank, 62 Ala. 529, 34 Am. Rep. 35; John *v.* Selma City Nat. Bank, 57 Ala. 96; Ray *v.*

(II) *By Mail.* Where a penny post or carrier delivery has been established in a city or town notice may be given through such medium, the postage being prepaid, even where the parties reside in the same place, provided it is mailed in time to be delivered on the day after dishonor or on the day after such notice has been received;[20] and notice by mail is allowable if there be two or more post-offices in the same place, a regular mail between them, and the parties are in the habit of resorting to different offices for their mail.[21] In some jurisdictions, moreover, it has been held that where an indorser subscribes his post-office address under his signature he thereby waives his right to personal service of notice, even though residing in the same place with the holder or subsequent indorser, and assents to receive notice through the post-office.[22]

b. What Constitutes Same Place. In some cases the rule stated[23] has been

Porter, 42 Ala. 327; Gindrat *v.* Mechanics' Bank, 7 Ala. 324; Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281.

California.— Vance *v.* Collins, 6 Cal. 435.

Connecticut.— See also Hartford Bank *v.* Stedman, 3 Conn. 489.

Delaware.—Brindley *v.* Barr, 3 Harr. (Del.) 419.

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216; U. S. Bank *v.* Norwood, 1 Harr. & J. (Md.) 423.

Iowa.— Grinman *v.* Walker, 9 Iowa 426.

Maine.— Lime Rock Bank *v.* Hewett, 52 Me. 51.

Massachusetts.— Chicopee Bank *v.* Eager, 9 Metc. (Mass.) 583; Lincoln, etc., Bank *v.* Hammatt, 9 Mass. 159.

South Carolina.—Benedict *v.* Rose, 16 S. C. 629; Carolina Nat. Bank *v.* Wallace, 13 S. C. 347, 36 Am. Rep. 694.

United States.— Mills *v.* U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. ed. 512.

Indorser not bound by usage.— Where the usage of a bank in relation to giving notice to an indorser is so loose and variable and so different from what the law requires as to leave it uncertain whether any notice was given to the indorser at any time or place or put into the post-office for him, such indorser is not bound by such usage by doing business with the bank. Thorn *v.* Rice, 15 Me. 263.

Note not payable at bank.— It was held in Lime Rock Bank *v.* Hewett, 52 Me. 51, that even where a bank had established the usage of notifying parties residing in the town where the bank was situated of the dishonor of the paper through the post-office, such notice would not be sufficient to charge the indorser of a note not payable at the bank, even though the indorser had knowledge of the usage.

20. *Alabama.*— Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893; Philipe *v.* Harberlee, 45 Ala. 597.

District of Columbia.— Morton *v.* Cammack, MacArthur & M. (D. C.) 22, where it was held that in order for notice to be given through the mail under such circumstances it must be shown that the party so to be charged resided or had his place of business within the carrier limits, and that he was in the habit of receiving his mail in that way.

Maryland.— Walters *v.* Brown, 15 Md. 285, 74 Am. Dec. 566; Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

Massachusetts.—Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445; Eagle Bank *v.* Hathaway, 5 Metc. (Mass.) 212.

New York.— Price *v.* McGoldrick, 2 Abb. N. Cas. (N. Y.) 69, where the notary and indorser lived in Brooklyn and the notary had an office in New York where the note was payable and notice posted in Brooklyn to such indorser was held sufficient.

Pennsylvania.— Shoemaker *v.* Mechanics' Bank, 59 Pa. St. 79, 98 Am. Dec. 315.

England.— Hilton *v.* Fairclough, 2 Campb. 633, 12 Rev. Rep. 766; Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694; Scott *v.* Lifford, 1 Camp. 246, 9 East 347; Dobree *v.* Eastwood, 3 C. & P. 250, 14 E. C. L. 552; Fowler *v.* Hendon, 4 Tyrw. 1002.

21. Shaylor *v.* Mix, 4 Allen (Mass.) 351; Cabot Bank *v.* Russell, 4 Gray (Mass.) 167; Chicopee Bank *v.* Eager, 9 Metc. (Mass.) 583 (where the notice was held sufficient on the ground of an established usage of the bank); Seneca County Bank *v.* Neass, 3 N. Y. 442 [*affirming* 5 Den. (N. Y.) 329]; Eddy *v.* Jump, 6 Duer (N. Y.) 492; Paton *v.* Lent, 4 Duer (N. Y.) 231; Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; Foster *v.* Sineath, 2 Rich. (S. C.) 338; Farmers', etc., Bank *v.* Battle, 4 Humphr. (Tenn.) 86.

Actual transmission by mail from one place to another is not essential in all cases to a good service of notice through the post-office. Westfall *v.* Farwell, 13 Wis. 504.

22. Baker *v.* Morris, 25 Barb. (N. Y.) 138; Tomeny *v.* German Nat. Bank, 9 Heisk. (Tenn.) 493 (where the word "Memphis," written by an indorser under his name, was held to be an implied direction to give notice through the post-office at Memphis); Davis *v.* State Bank, 4 Sneed (Tenn.) 390. See, however, Bowling *v.* Harrison, 6 How. (U. S.) 248, 12 L. ed. 425 (where a note was made payable at a bank of Vicksburg, and it was held that a memorandum thereon that the indorser "lives at Vicksburg" was not sufficient evidence of an agreement by the indorser to receive notice of its dishonor through the post-office at Vicksburg); Skelton *v.* Braithwaite, 1 Dowl. N. S. 354, 11 L. J. Exch. 54, 8 M. & W. 252.

23. See *supra*, XIII, F, 3, a, (I).

held to apply to the case of a party residing outside of the limits of a city or town where presentment was made or the holder resided, and yet doing business and receiving his mail there.[24] In others, however, it is held that the term "the same place" refers to the corporate limits of the town or city where the presentment is made or the holder resides, and that consequently where the party sought to be charged resides outside of these limits he is not entitled to personal service, and if he gets his mail at the post-office within them it is sufficient to deposit the notice there.[25]

G. Form and Requisites of Notice — 1. In General — a. Whether Written or Oral. While, from the standpoint of convenience and completeness of proof, it is preferable that the notice should be in writing,[26] this is not essential, and the fact that a notice otherwise sufficient is given verbally is immaterial;[27] but mere knowledge of non-payment or dishonor is not as a rule sufficient to constitute notice,[28] although under certain circumstances, as where the drawer is executor

24. *Louisiana.*— Louisiana State Bank *v.* Rowel, 6 Mart. N. S. (La.) 506; Laporte *v.* Landry, 5 Mart. N. S. (La.) 359.

Michigan.— Newberry *v.* Trowbridge, 4 Mich. 391.

Mississippi.— Hogatt *v.* Bingaman, 7 How. (Miss.) 565; Patrick *v.* Beazley, 6 How. (Miss.) 609, 38 Am. Dec. 456.

Nebraska.— Forbes *v.* Omaha Nat. Bank, 10 Nebr. 338, 6 N. W. 393, 35 Am. Rep. 480.

New York.— Ireland *v.* Kip, 10 Johns. (N. Y.) 490, 11 Johns. (N. Y.) 231.

Tennessee.— Davis *v.* State Bank, 4 Sneed (Tenn.) 390; Farmers', etc., Bank *v.* Battle, 4 Humphr. (Tenn.) 86; Barker *v.* Hall, Mart. & Y. (Tenn.) 183.

Virginia.— Brown *v.* Abingdon Bank, 85 Va. 95, 7 S. E. 357.

United States.— Vowell *v.* Patton, 2 Cranch C. C. (U. S.) 312, 28 Fed. Cas. No. 17,022.

25. *Alabama.*— Carson *v.* State Bank, 4 Ala. 148.

Georgia.— Walker *v.* Augusta Bank, 3 Ga. 486.

Indiana.— Sharpe *v.* Drew, 9 Ind. 281; Fisher *v.* State Bank, 7 Blackf. (Ind.) 610; Bell *v.* State Bank, 7 Blackf. (Ind.) 456; Timms *v.* Delisle, 5 Blackf. (Ind.) 447.

Kentucky.— Bondurant *v.* Everett, 1 Metc. (Ky.) 658.

Louisiana.— Lathrop *v.* Delee, 8 La. Ann. 170; Bird *v.* McCalop, 2 La. Ann. 351; New Orleans Canal, etc., Co. *v.* Barrow, 2 La. Ann. 326; Whittemore *v.* Leake, 14 La. 392; Lanusse *v.* Massicot, 3 Mart. (La.) 261.

Missouri.— Sanderson *v.* Reinstadler, 31 Mo. 483; Barret *v.* Evans, 28 Mo. 331.

Pennsylvania.— Jones *v.* Lewis, 8 Watts & S. (Pa.) 14; Kerr *v.* Roberts, 5 Wkly. Notes Cas. (Pa.) 25.

South Carolina.— Foster *v.* Sineath, 2 Rich. (S. C.) 338.

United States.— Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 7 L. ed. 269; Spalding *v.* Krutz, 1 Dill. (U. S.) 414, 22 Fed. Cas. No. 13,201.

In Wisconsin it was formerly provided by statute (Wis. Rev. Stat. (1858), c. 12, § 5) that the notary should personally serve the notice upon the indorser if he resided within two miles of the residence of the notary, but if he resided beyond these limits it might be sent by mail. Westfall *v.* Farwell, 13 Wis. 504; Power *v.* Mitchell, 7 Wis. 161.

26. Martin *v.* Brown, 75 Ala. 442.

27. *Alabama.*— Martin *v.* Brown, 75 Ala. 442; Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281.

California.— Pierce *v.* Schaden, 55 Cal. 406; Thompson *v.* Williams, 14 Cal. 160.

Iowa.— McKewer *v.* Kirtland, 33 Iowa 348; Iowa City First Nat. Bank *v.* Ryerson, 23 Iowa 508; Merritt *v.* Woodbury, 14 Iowa 299.

Kentucky.— Higgins *v.* Morrison, 4 Dana (Ky.) 100; Commonwealth Bank *v.* Brooking, 2 Litt. (Ky.) 41.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Coons, 36 La. Ann. 271.

Maine.— Ticonic Bank *v.* Stackpole, 41 Me. 321, 66 Am. Dec. 246.

Missouri.— Burlington First Nat. Bank *v.* Hatch, 78 Mo. 13; Linville *v.* Welch, 29 Mo. 203; Glasgow *v.* Pratte, 8 Mo. 336, 40 Am. Dec. 142.

New York.— Woodin *v.* Foster, 16 Barb. (N. Y.) 146; Butt *v.* Hoge, 2 Hilt. (N. Y.) 81; Cuyler *v.* Stevens, 4 Wend. (N. Y.) 566.

Pennsylvania.—Rahm *v.* Philadelphia Bank, 1 Rawle (Pa.) 335.

South Carolina.— Payne *v.* Winn, 2 Bay (S. C.) 374.

England.— Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694; Scott *v.* Lifford, 1 Campb. 246, 9 East 347; Metcalfe *v.* Richardson, 11 C. B. 1011, 73 E. C. L. 1011; Phillips *v.* Gould, 8 C. & P. 355, 34 E. C. L. 776; Housego *v.* Cowne, 6 L. J. Exch. 110, M. & H. 54, 2 M. & W. 348.

See 7 Cent. Dig. tit. "Bills and Notes," § 1129.

28. *Minnesota.*—Jagger *v.* National German-American Bank, 53 Minn. 386, 388, 55 N. W. 545, where the court said: "Mere knowledge of the dishonor of paper is not notice. Notice signifies more. It must come from one who is entitled to look to the party for payment, and must inform him (1) that the note has been duly presented for payment; (2) that it has been dishonored; (3) that the holder looks to him for payment. Although, probably, if the notice comes from the proper party, and contains the first two

of the accepter, it has been held that knowledge obtained from the holder would in effect amount to notice.[29]

b. Address. While, when sent by mail, the notice should of course be addressed to the party entitled to receive the same,[30] the name which a party has selected for himself as indorser may be used in such notification[31] and it is unnecessary that the notice itself be addressed if the envelope containing it was properly directed.[32] The sufficiency of the address, when questioned for irregularity, is determined by the probability of the notice, when thus directed, reaching the indorser in due time.[33] Notice directed merely to the county is insufficient,[34] and if there are places of the same name in different states the address should contain the state as well as the city;[35] but it is not necessary that it be actually addressed to the indorser's post-office if in the ordinary course of mail it would go to and be retained at such office.[36] Notice sent to an office which had recently been discontinued is sufficient, where in the course of mail it is transferred to his subsequent address;[37] and if it is otherwise properly directed it is unnecessary to state the parish or county in which the office is situated.[38] So too it is held that an address containing the name of the indorser, with the town and state thereon, is sufficiently directed without giving the name of the street or number of his house;[39] but this is not true if the indorser has added to his indorsement his number and the name of his street,[40] nor, it would seem, if the holder and indorser lived in the same place.[41]

of these requisites, the third would be implied."

Montana.— Grant *v.* Spencer, 1 Mont. 136.

New York.—Agan *v.* McManus, 11 Johns. (N. Y.) 180.

Pennsylvania.— Lancaster First Nat. Bank *v.* Zahm, 110 Pa. St. 188, 1 Atl. 190; Juniata Bank *v.* Hale, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558.

Tennessee.— Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419.

United States.— Columbia Bank *v.* Mackall, 2 Cranch C. C. (U. S.) 631, 2 Fed. Cas. No. 873.

England.— Bird *v.* Legge, 7 Dowl. P. C. 814, 8 L. J. Exch. 258, 5 M. & W. 418; Commercial Bank *v.* St. Croix Mfg. Co., 23 Me. 280.

29. Caunt *v.* Thompson, 7 C. B. 400, 6 D. & L. 621, 13 Jur. 495, 18 L. J. C. P. 125, 62 E. C. L. 400.

30. Notice intended for a bank may be addressed to the president thereof. Aiken *v.* Marine Bank, 16 Wis. 679.

31. People's Bank *v.* Scalzo, 127 Mo. 164, 29 S. W. 1032. But see Lake Shore Nat. Bank *v.* Butler Colliery Co., 51 Hun (N. Y.) 63, 3 N. Y. Suppl. 771, 20 N. Y. St. 688.

The addition of immaterial words to an address does not affect its validity. Mechanics', etc., Bank *v.* Jemison, 6 Rob. (La.) 90, where the words "At the post office at" were prefixed to the name of the office at which the indorser usually received his mail.

A request to return in ten days when placed on an envelope containing the notice is immaterial and does not affect the validity thereof, especially in those localities where mail is delivered expeditiously. Manchester *v.* Van Brunt, 2 Misc. (N. Y.) 228, 22 N. Y. Suppl. 362, 50 N. Y. St. 588 [*affirming* 19 N. Y. Suppl. 685, 46 N. Y. St. 566].

32. Denegre *v.* Hiriart, 6 La. Ann. 100; Glicksman *v.* Earley, 78 Wis. 223, 47 N. W. 272.

It is unnecessary that it be inclosed in what is properly called an "envelope" if the notice is properly folded and directed. Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105.

33. A mistake in the name of the office to which a notice is sent is immaterial so long as the office is as well-known by one name as by the other. Geneva Bank *v.* Howlett, 4 Wend. (N. Y.) 328, where the notice directed to "Geddesburg" was held sufficient, although the real name of the office was "Geddes," it appearing that the two names were used interchangeably.

34. Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576.

35. Beckwith *v.* Smith, 22 Me. 125, 38 Am. Dec. 290.

36. Ledoux *v.* Morgan, 3 La. Ann. 344; Citizens Bank *v.* Walker, 2 La. Ann. 791; Follain *v.* Dupré, 11 Rob. (La.) 454. See also Luckett *v.* Goodrich, 9 Ohio Dec. (Reprint) 328, 12 Cinc. L. Bul. 174.

37. Marshalltown First Nat. Bank *v.* Owen, 23 Iowa 185.

38. Hepburn *v.* Ratliff, 2 La. Ann. 331; Union Bank *v.* Stoker, 1 La. Ann. 269; Crawford *v.* Read, 9 Rob. (La.) 243; Mainer *v.* Spurlock, 9 Rob. (La.) 161; Nott *v.* Beard, 16 La. 308.

39. Morse *v.* Chamberlin, 144 Mass. 406, 11 N. E. 560; True *v.* Collins, 3 Allen (Mass.) 438.

40. Bartlett *v.* Robinson, 39 N. Y. 187 [*affirming* 9 Bosw. (N. Y.) 305].

41. Cottle *v.* Thomas, 5 Ohio Dec. (Reprint) 18, 1 Am. L. Rec. 372; Benedict *v.* Schmieg, 13 Wash. 476, 43 Pac. 374, 52 Am. St. Rep. 61, 36 L. R. A. 703.

c. Language Employed — (i) *In General.* No particular words are necessary to constitute a good and sufficient notice of dishonor,[42] and, as the object of notice is to inform the party notified that the paper has been dishonored and that he is looked to for payment,[43] it follows that a notice which informs an indorser of these two facts, either expressly or by necessary or reasonable implication and intendment, is sufficient.[44] The notice must be such, however, that the intent to fix his liability is not a matter of mere conjecture.[45]

42. *Alabama.*— Saltmarsh *v.* Tuthill, 13 Ala. 390.

California.— McFarland *v.* Pico, 8 Cal. 626.

Connecticut.— Kilgore *v.* Bulkley, 14 Conn. 362.

Kentucky.— Young *v.* Bennett, 7 Bush (Ky.) 474.

Massachusetts.—Housatonic Bank *v.* Laflin, 5 Cush. (Mass.) 546.

Michigan.—Burkam *v.* Trowbridge, 9 Mich. 209.

Mississippi.— Chewning *v.* Gatewood, 5 How. (Miss.) 552.

North Carolina.— Cape-Fear Bank *v.* Seawell, 9 N. C. 560.

Tennessee.— Myers *v.* State Bank, 3 Head (Tenn.) 330.

A copy of the notary's certificate of protest generally contains all the information necessary to charge an indorser and is therefore of itself a sufficient notice of dishonor. Northern Bank *v.* Williams, 21 Me. 217; Gates *v.* Beecher, 3 Thomps. & C. (N. Y.) 404 [*affirmed* in 60 N. Y. 518, 19 Am. Rep. 207]. See also Southam *v.* Ranton, 9 Ont. App. 530; Wood *v.* Hutt, 9 U. C. Q. B. 344.

43. Staples *v.* Okines, 1 Esp. 332; Tindal *v.* Brown, 1 T. R. 167, 2 T. R. 186, 1 Rev. Rep. 171; *Ex p.* Barclay, 7 Ves. Jr. 597.

44. *Alabama.*— Hallett *v.* Mobile Branch Bank, 12 Ala 193.

California.—Thompson *v.* Williams, 14 Cal. 160; Stoughton *v.* Swan, 4 Cal. 213, 60 Am. Dec. 605.

Kentucky.— Young *v.* Bennett, 7 Bush (Ky.) 474; Crisson *v.* Williamson, 1 A. K. Marsh. (Ky.) 454.

Louisiana.— Union Bank *v.* Grimshaw, 15 La. 321.

Maryland.— U. S. Bank *v.* Norwood, 1 Harr. & J. (Md.) 423.

Massachusetts.— Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518; Wheaton *v.* Wilmarth, 13 Metc. (Mass.) 422.

Michigan.— Cromer *v.* Platt, 37 Mich. 132, 26 Am. Rep. 503; Burkam *v.* Trowbridge, 9 Mich. 209; Snow *v.* Perkins, 2 Mich. 238.

Missouri.— Renick *v.* Robbins, 28 Mo. 339.

New Hampshire.— Manchester Bank *v.* White, 30 N. H. 456; Smith *v.* Little, 10 N. H. 526.

New Jersey.— Salomon *v.* Pfeister, etc., Leather Co., (N. J. 1895) 31 Atl. 602.

New York.— Beals *v.* Peck, 12 Barb. (N. Y.) 245; Groton First Nat. Bank *v.* Crittenden, 2 Thomps. & C. (N. Y.) 118; Davenport *v.* Gilbert, 6 Bosw. (N. Y.) 179 [*affirming* 4 Bosw. (N. Y.) 532]; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330; James *v.* Badger, 1 Johns. Cas. (N. Y.) 131.

North Carolina.— Cape-Fear Bank *v.* Seawell, 9 N. C. 560; Pon *v.* Kelly, 3 N. C. 45.

Wisconsin.— Glicksman *v.* Earley, 78 Wis. 223, 47 N. W. 272; Aiken *v.* Milwaukee Mar. Bank, 16 Wis. 679.

United States.— Nelson *v.* Killingsley First Nat. Bank, 69 Fed. 798, 32 U. S. App. 554, 16 C. C. A. 425.

England.— King *v.* Bickley, 2 Q. B. 419, 6 Jur. 582, 11 L. J. Q. B. 224, 42 E. C. L. 740; Grugeon *v.* Smith, 6 A. & E. 499, 2 N. & P. 303, W. W. & D. 516, 33 E. C. L. 271; Stockman *v.* Parr, 1 C. & K. 41, 7 Jur. 886, 12 L. J. Exch. 415, 11 M. & W. 809, 47 E. C. L. 41; Stocken *v.* Collins, 9 C. & P. 653, 7 M. & W. 515, 38 E. C. L. 380; Woodthorpe *v.* Lawes, 2 Gale 193, 6 L. J. Exch. 69, 2 M. & W. 109; Paul *v.* Joel, 4 H. & N. 355, 5 Jur. N. S. 603, 28 L. J. Exch. 143, 7 Wkly. Rep. 287; Edmonds *v.* Cates, 2 Jur. 183; Hedger *v.* Steavenson, 1 Jur. 987, 6 L. J. Exch. 189, M. & H. 176, 2 M. & W. 799; Bailey *v.* Porter, 14 L. J. Exch. 244, 14 M. & W. 44; Lewis *v.* Gompertz, 6 M. & W. 399.

Canada.— Reg. *v.* Montreal Bank, 1 Can. Exch. 154; Counsell *v.* Livingston, 2 Ont. L. Rep. 582; Blinn *v.* Dixon, 5 U. C. Q. B. 580; Upper Canada Bank *v.* Street, 3 U. C. Q. B. 29; Harris *v.* Perry, 8 U. C. C. P. 407.

See 7 Cent. Dig. tit. "Bills and Notes," § 1136.

Intended or threatened legal proceedings.— It has been held that a statement that the note was due and a request of the indorser for payment coupled with a threat of, or statement of, the intended institution of legal proceedings is sufficient (Robson *v.* Curlewis, 2 Q. B. 421, 42 E. C. L. 741, C. & M. 378, 41 E. C. L. 209, 3 G. & D. 69; Armstrong *v.* Christiani, 5 C. B. 687, 17 L. J. C. P. 181, 57 E. C. L. 687; Wathen *v.* Blackwell, 6 Jur. 738. But see Hartley *v.* Case, 4 B. & C. 339, 10 E. C. L. 606, 1 C. & P. 555, 12 E. C. L. 318, 6 D. & R. 505, 3 L. J. K. B. O. S. 262; Solarte *v.* Palmer, 7 Bing. 530, 1 Cr. & J. 417, 9 L. J. Exch. O. S. 121, 5 M. & P. 475, 1 Tyrw. 371, 20 E. C. L. 238 [*affirmed* in 1 Bing. N. Cas. 194, 1 Scott 1, 27 E. C. L. 602]); and this would be especially true where the notice contained the statement that the instrument had been dishonored, coupled with a statement of intended proceedings (Shelton *v.* Bradley, 5 Jur. 28, 10 L. J. Exch. 218, 7 M. & W. 436). On the other hand it has been held insufficient to notify the indorser that the note is already put in suit against him by a petition on file in a certain court. Davis *v.* Burt, 7 Iowa 56.

45. Klockenbaum *v.* Pierson, 16 Cal. 375; Townsend *v.* Lorain Bank, 2 Ohio St. 345;

(II) *Particular Statements*—(A) *Due Presentment.* A notice of dishonor must show a presentment and demand [46] at the proper time,[47] although the facts or circumstances incidental to, or constituting, a legal demand need not necessarily be set out.[48]

(B) *Dishonor*—(1) In General. It is essential to the sufficiency of a notice of dishonor that it contain a statement showing directly that the instrument to which it refers has not only been duly presented but also that it has been dishonored.[49] It will be insufficient if it appears from the notice that the bill or note was presented or protested either before [50] the proper date of its matu-

Nelson *v.* Killingsley First Nat. Bank, 69 Fed. 798, 32 U. S. App. 554, 16 C. C. A. 425; Furze *v.* Sharwood, 2 Q. B. 388, 2 G. & D. 116, 6 Jur. 554, 11 L. J. Q. B. 119, 42 E. C. L. 726; Messenger *v.* Southey, 8 Dowl. P. C. 594, 9 L. J. C. P. 278, 1 M. & G. 76, 1 Scott N. R. 180, 39 E. C. L. 652.

46. Page *v.* Gilbert, 60 Me. 485; Porter *v.* Thom, 167 N. Y. 584, 60 N. E. 1119; Arnold *v.* Kinloch, 50 Barb. (N. Y.) 44; Pahquioque Bank *v.* Martin, 11 Abb. Pr. (N. Y.) 291; Boulton *v.* Welch, 3 Bing. N. Cas. 688, 3 Hodges 77, 1 Jur. 263, 6 L. J. C. P. 243, 4 Scott 425, 32 E. C. L. 318.

47. Tevis *v.* Wood, 5 Cal. 393 (where the notice stated the demand to have been made on the day subsequent to maturity and was held insufficient, although demand was in fact seasonably made); Wynn *v.* Alden, 4 Den. (N. Y.) 163 (holding that an undated notice which stated that the note had been "this day presented for payment" was defective). See also *infra*, XIII, G, 1, c, (II), (B), (1).

Successive demands.— If the notice shows only a demand made on July 4 it will be insufficient, although a good demand was made on the previous day, the legal demand being in nowise mentioned or referred to. Ransom *v.* Mack, 2 Hill (N. Y.) 587, 38 Am. Dec. 602. So where an instrument has been dishonored when first presented, a notice of a subsequent demand and dishonor must also show the first presentment, although such subsequent demand would have been made in due time had the bill not been previously dishonored. Rice *v.* Wesson, 11 Metc. (Mass.) 400.

Where the indorsement is made on an instrument overdue the rule requiring a specific statement of the time of presentment has no application. Thompson *v.* Williams, 14 Cal. 160.

48. *Indiana.*— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Massachusetts.— Sanger *v.* Stimpson, 8 Mass. 260.

New York.— Young *v.* Catlett, 6 Duer (N. Y.) 437.

Tennessee.— Apperson *v.* Bynum, 5 Coldw. (Tenn.) 341.

Wisconsin.— Wallace *v.* Crilley, 46 Wis. 577, 1 N. W. 301.

England.— *Ex p.* Lowenthal, L. R. 9 Ch. 591, 43 L. J. Bankr. 83, 30 L. T. Rep. N. S. 668.

49. *Maine.*— Littlehale *v.* Maberry, 43 Me. 264.

Maryland.— Armstrong *v.* Thruston, 11 Md. 148; Nailor *v.* Bowie, 3 Md. 251; Boehme *v.* Carr, 3 Md. 202; Graham *v.* Sangston, 1 Md. 59.

Michigan.— Newberry *v.* Trowbridge, 4 Mich. 391; Platt *v.* Drake, 1 Dougl. (Mich.) 296.

New Hampshire.— Fisk *v.* Morse, 16 N. H. 271.

New York.— Dole *v.* Gold, 5 Barb. (N. Y.) 490; Barnes *v.* Barrus, 2 Thomps. & C. (N. Y.) 390.

Ohio.— Townsend *v.* Lorain Bank, 2 Ohio St. 345, 360 (where the court said: "Information of the dishonor is as explicit a condition of his contract, as presentment to the maker or acceptor, and often quite as important to him; and it can no more become absolute, and he made liable, by neglecting the one than the other. He has contracted to know, and has a right to know, that the paper has been presented to the party primarily liable, for payment, and been refused; and a right to demand that the information shall be so definitely given as to enable him to fix the liability, and upon taking it up, to coerce payment from those back of him on it; which can only be done when he is advised that the demand was made at a time when the maker or acceptor was bound to pay, and when a failure to do so would dishonor the paper"); Lafayette Bank *v.* McLaughlin, 1 Ohio Dec. (Reprint) 202, 4 West. L. J. 70.

South Carolina.— Sinclair *v.* Lynah, 1 Speers (S. C.) 244.

Tennessee.— See Ratcliff *v.* Planters' Bank, 2 Sneed (Tenn.) 425.

England.— Hartley *v.* Case, 4 B. & C. 339, 10 E. C. L. 606, 1 C. & P. 555, 12 E. C. L. 318, 6 D. & R. 505, 3 L. J. K. B. O. S. 262; Solarte *v.* Palmer, 7 Bing. 530, 1 Cr. & J. 417, 9 L. J. Exch. O. S. 121, 5 M. & P. 475, 1 Tyrw. 371, 20 E. C. L. 238; Boulton *v.* Welch, 3 Bing. N. Cas. 688, 3 Hodges 77, 1 Jur. 263, 6 L. J. C. P. 243, 4 Scott 425, 32 E. C. L. 318; Jennings *v.* Roberts, 4 E. & B. 615, 1 Jur. N. S. 401, 24 L. J. Q. B. 102, 82 E. C. L. 615.

Canada.— Delaney *v.* Hall, 3 Nova Scotia 401; Upper Canada Bank *v.* Street, (Mich. T.) 5 Vict.

See 7 Cent. Dig. tit. "Bills and Notes," § 1134.

50. Union Bank *v.* Fonteneau, 12 Rob. (La.) 120; Routh *v.* Robertson, 11 Sm. & M. (Miss.) 382; De la Hunt *v.* Higgins, 9 Abb. Pr. (N. Y.) 422; Etting *v.* Schuylkill Bank, 2 Pa. St. 355, 44 Am. Dec. 205; Ashland Banking Co. *v.* Wolf, 6 Wkly. Notes Cas.

rity or after[51] such date, but an error as to the time of demand is not fatal where the circumstances are such that the party to be charged is not misled.[52] Inasmuch as the term "protest" has come to mean the steps necessary to charge an indorser,[53] and its application has been extended to notes and to inland as well as foreign bills, it is held that a statement in a notice that the note has been "protested" expresses by necessary implication proper demand and refusal and is therefore sufficient.[54]

(2) STATEMENT OF NON-PAYMENT. While it is recognized by all courts that notice of dishonor may be inferred from certain statements, it is generally agreed that a mere notice that the paper remains unpaid, together with a request of payment or a statement that the indorser is looked to for payment, is insufficient,[55]

(Pa.) 555 [*affirming* 3 Wkly. Notes Cas. (Pa.) 93]. See also U. S. Bank *v.* Barry, 2 Cranch C. C. (U. S.) 307, 2 Fed. Cas. No. 907. But see Journey *v.* Pierce, 2 Houst. (Del.) 176 (where the notice was dated the day preceding the maturity of the note, but the facts and circumstances clearly showed that the demand was made upon the day of maturity and also that the indorser was in no way misled by such variance); Ontario Bank *v.* Petrie, 3 Wend. (N. Y.) 456 (where it was held that where a notice was dated on the day the note became due, stating that such had been protested the day previous, the question should be left to the jury as to whether the indorser had been misled by mistake); Low *v.* Owen, 12 U. C. C. P. 101.

51. Tevis *v.* Wood, 5 Cal. 393; Walmsley *v.* Acton, 44 Barb. (N. Y.) 312; Spang *v.* McGarry, 2 Ohio Dec. (Reprint) 116, 1 West. L. Month. 406.

A statement that the note was presented "in the bank" imports, however, that it was presented within banking hours. Henry *v.* State Bank, 3 Ind. 216.

52. Tradesmen's Bank *v.* Tillyer, 12 Pa. Co. Ct. 452.

Where the day of the date of the notice had not yet arrived when it was handed to the indorser, as where a notice served on an indorser on the twenty-fifth of a certain month stated that a note indorsed by him was due on that day, which was actually true, but the notice itself was dated the twenty-sixth of the same month, it was held that the indorser was not discharged, as he could have been misled only by his own supineness in neglecting to ask for an explanation, if he was in fact in any way misled. Tobey *v.* Lennig, 14 Pa. St. 483 [*distinguishing* Etting *v.* Schuylkill Bank, 2 Pa. St. 355, 44 Am. Dec. 205].

53. See *supra*, XII, B, 1.

54. *California.*— Kellogg *v.* Pacific Box Factory, 57 Cal. 327.

Maryland.— Reynolds *v.* Appleman, 41 Md. 615; Selden *v.* Washington, 17 Md. 379, 79 Am. Dec. 659.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263; Burkam *v.* Trowbridge, 9 Mich. 209; Snow *v.* Perkins, 2 Mich. 238; Spies *v.* Newberry, 2 Dougl. (Mich.) 425. *Compare* Platt *v.* Drake, 1 Dougl. (Mich.) 296 [*recognized* as *res adjudicata* in Newberry *v.* Trowbridge, 4 Mich. 391], which case was unquestionably based entirely upon the technical use of the term "protest," the court overlooking the fact that the term had become applicable to notes as well as foreign bills and that its general import and meaning had been by usage extended.

Missouri.— Burlington First Nat. Bank *v.* Hatch, 78 Mo. 13.

New Jersey.— Burgess *v.* Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408.

New York.— Artisans' Bank *v.* Backus, 36 N. Y. 100; Youngs *v.* Lee, 12 N. Y. 551 [*affirming* 18 Barb. (N. Y.) 187]; Cook *v.* Litchfield, 9 N. Y. 279 [*affirming* 5 Sandf. (N. Y.) 330]; Beals *v.* Peck, 12 Barb. (N. Y.) 245; Baldwin *v.* Doying, 5 N. Y. Civ. Proc. 300.

Ohio.— Fox *v.* Newell, 1 Ohio Dec. (Reprint) 378, 8 West. L. J. 421; Lafayette Bank *v.* McLaughlin, 1 Ohio Dec. (Reprint) 202, 4 West. L. J. 70.

Pennsylvania.— Stephenson *v.* Dickson, 24 Pa. St. 148, 62 Am. Dec. 369.

Wisconsin.— Brewster *v.* Arnold, 1 Wis. 264.

Canada.— Handyside *v.* Courtney, 1 L. C. Jur. 250; Blain *v.* Oliphant, 9 U. C. Q. B. 473.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1134, 1136.

55. *Maine.*— Page *v.* Gilbert, 60 Me. 485.

Maryland.— Farmers' Bank *v.* Bowie, 4 Md. 290.

Massachusetts.— Pinkham *v.* Macy, 9 Metc. (Mass.) 174; Gilbert *v.* Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329.

New York.— Arnold *v.* Kinloch, 50 Barb. (N. Y.) 44; Dole *v.* Gold, 5 Barb. (N. Y.) 490; Pahquioque Bank *v.* Martin, 11 Abb. Pr. (N. Y.) 291.

Ohio.— Townsend *v.* Lorain Bank, 2 Ohio St. 345.

South Carolina.— Sinclair *v.* Lynah, 1 Speers (S. C.) 244.

United States.— See U. S. *v.* Barker, 24 Fed. Cas. No. 14,519, 1 U. S. L. J. 1. *Compare* Mills *v.* U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. ed. 512.

England.— Strange *v.* Price, 10 A. & E. 125, 3 Jur. 361, 8 L. J. Q. B. 197, 2 P. & D. 278, 37 E. C. L. 88; Hartley *v.* Case, 4 B. & C. 339, 10 E. C. L. 606, 1 C. & P. 555, 12 E. C. L. 318, 6 D. & R. 505, 3 L. J. K. B. O. S. 262.

Compare Wolf *v.* Lauman, 34 Mo. 575.

See 7 Cent. Dig. tit. "Bills and Notes," § 1134.

unless the paper be made payable at a particular bank, where it is held at maturity.[56]

(c) *Intent to Look to Indorser.* While it is altogether proper that the notice should contain a statement that the indorser is looked to for payment, yet if due notice of presentment and dishonor is given an explicit statement of such intention is unnecessary.[57] It is sufficient if under all the circumstances the language imports such intention;[58] and it would seem not unfair to imply such intention from the very fact of sending notice of dishonor.[59]

(d) *Description of Instrument* — (1) In General. While an indorser is entitled to notice of dishonor, both because it is material to his interest and his contract provides for it, he cannot shut his eyes to facts within his own knowledge or rely for a defense upon mistakes or omissions which could not have resulted to his prejudice.[60] Hence with regard to the designation of the instrument any form of description which is sufficiently accurate not to mislead him as to the instrument intended is sufficient.[61] The absence of evidence of the exist-

56. Sasscer *v.* Farmers' Bank, 4 Md. 409; Hunter *v.* Van Bomhorst, 1 Md. 504; Clark *v.* Eldridge, 13 Metc. (Mass.) 96; Hallowell *v.* Curry, 41 Pa. St. 322; Blinn *v.* Dixon, 5 U. C. Q. B. 580. See also Fullerton *v.* U. S. Bank, 1 Pet. (U. S.) 604, 7 L. ed. 280.

57. *Connecticut.*—Cowles *v.* Harts, 3 Conn. 516.

Kentucky.— Shrieve *v.* Duckham, 1 Litt. (Ky.) 194.

Louisiana.— Barstow *v.* Hiriart, 6 La. Ann. 98.

Maine.— Warren *v.* Gilman, 17 Me. 360.

Maryland.— Graham *v.* Sangston, 1 Md. 59; U. S. Bank *v.* Norwood, 1 Harr. & J. (Md.) 423.

Massachusetts.— Fitchburg Mut. F. Ins. Co. *v.* Davis, 121 Mass. 121.

North Carolina.— See Brower *v.* Wooten, 4 N. C. 507, 7 Am. Dec. 692; Pon *v.* Kelly, 3 N. C. 204, 2 Am. Dec. 617.

Ohio.— Townsend *v.* Lorain Bank, 2 Ohio St. 345; Lafayette Bank *v.* McLaughlin, 1 Ohio Dec. (Reprint) 202, 4 West. L. J. 70.

United States.— U. S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 7 L. ed. 513.

England.— King *v.* Bickley, 2 Q. B. 419, 6 Jur. 582, 11 L. J. Q. B. 224, 42 E. C. L. 740; Cook *v.* French, 10 A. & E. 131 note, 37 E. C. L. 91; Jameson *v.* Swinton, 2 Campb. 373, 2 Taunt. 224; Mackay *v.* Judkins, 1 F. & F. 208; Miers *v.* Brown, 12 L. J. Exch. 290, 11 M. & W. 372. See also East *v.* Smith, 4 D. & L. 744, 11 Jur. 412, 16 L. J. Q. B. 292, 2 Saund. & C. 23.

See 7 Cent. Dig. tit. "Bills and Notes," § 1135

58. U. S. Bank *v.* Norwood, 1 Harr. & J. (Md.) 423; Burgess *v.* Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408.

59. Gilbert *v.* Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; U S. Bank *v.* Carneal, 2 Pet. (U. S.) 543, 7 L. ed. 513; Chard *v.* Fox, 14 Q. B. 200, 13 Jur. 960, 68 E. C. L. 200; Furze *v.* Sharwood, 2 Q. B. 388, 2 G. & D. 116, 6 Jur. 554, 11 L. J. Q. B. 119, 42 E. C. L. 726.

60. Thompson *v.* Williams, 14 Cal. 160; Spann *v.* Baltzell, 1 Fla. 301, 46 Am. Dec. 346; Snow *v.* Perkins, 2 Mich. 238; Townsend *v.* Lorain Bank, 2 Ohio St. 345.

61. *Alabama.*— Saltmarsh *v.* Tuthill, 13 Ala. 390; Crawford *v.* Mobile Branch Bank, 7 Ala. 205; Moorman *v.* State Bank, 3 Port. (Ala.) 353.

Connecticut.— Kilgore *v.* Bulkley, 14 Conn. 362.

Indiana.— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Louisiana.— Farmers' Bank *v.* Stevens, 11 La. Ann. 189; Mainer *v.* Spurlock, 9 Rob. (La.) 161; Barker *v.* Whitney, 18 La. 575; Duncan *v.* Young, 1 Mart. (La.) 31.

Maine.— Wood *v.* Watson, 53 Me. 300; Williams *v.* Smith, 48 Me. 135; Waterman *v.* Vose, 43 Me. 504; Crocker *v.* Getchell, 23 Me. 392.

Maryland.— Sasscer *v.* Farmers' Bank, 4 Md. 409; Graham *v.* Sangston, 1 Md. 59.

Missouri.— Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503; Renick *v.* Robbins, 28 Mo. 339.

New Jersey.— Dodson *v.* Taylor, 56 N. J. L. 11, 28 Atl. 316; Haines *v.* Dubois, 30 N. J. L. 259; Howland *v.* Adrain, 30 N. J. L. 41.

New York.— Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207 [*affirming* 3 Thomps. & C. (N. Y.) 404]; Hodges *v.* Shuler, 22 N. Y. 114 [*affirming* 24 Barb. (N. Y.) 68]; Cook *v.* Litchfield, 9 N. Y. 279 [*reversing* 5 Sandf. (N. Y.) 330]; Beals *v.* Peck, 12 Barb. (N. Y.) 245; Davenport *v.* Gilbert, 4 Bosw. (N. Y.) 532, 6 Bosw. (N. Y.) 179; Butt *v.* Hoge, 2 Hilt. (N. Y.) 81; Rochester Bank *v.* Gould, 9 Wend. (N. Y.) 279; Reedy *v.* Seixas, 2 Johns. Cas. (N. Y.) 337; Knopfel *v.* Seufert, 11 N. Y. Leg. Obs. 184.

Ohio.— Powell *v.* State Bank, 1 Disn. (Ohio) 269, 12 Ohio Dec. (Reprint) 615.

Tennessee.— Ross *v.* Planters' Bank, 5 Humphr. (Tenn.) 335.

United States.— Alexandria Bank *v.* Swann, 9 Pet. (U. S.) 33, 9 L. ed. 40; Mills *v.* U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. ed. 512; Cooper *v.* Gibbs, 4 McLean (U. S.) 396, 6 Fed. Cas. No. 3,194.

England.— Bromage *v.* Vaughan, 9 Q. B. 608, 10 Jur. 982, 16 L. J. Q. B. 10, 58 E. C. L. 608; Mellersh *v.* Rippen, 7 Exch. 578, 16 Jur. 366, 21 L. J. Exch. 222; Harpham *v.* Child, 1 F. & F. 652.

ence of other similar obligations is material in determining such sufficiency,[62] and circumstances may be shown to rebut any presumption of uncertainty.[63] It has been held that if the instrument referred to is sufficiently described and it is stated that it is dishonored, an inaccuracy in stating the place where it is lying will not be fatal.[64]

(2) Misstatement of Amount. A misstatement of the amount due on a note is immaterial if the party notified is not thereby mislead as to the instrument intended,[65] but where there is not only a material mistake in the amount of the note but also in the person notified the notice will as a matter of law be declared insufficient.[66]

(3) Omission or Misstatement of Date. Unless it is shown that a party is misled by the omission or misstatement of the date of the instrument in a notice such irregularity will not invalidate it;[67] and under like circumstances the omission or misstatement of the date of maturity will not be fatal.[68]

(4) Omission or Misnomer of Parties. A notice otherwise sufficiently accurate in the description of the paper will not, unless it is clear that the indorser is misled thereby, be invalidated by omitting the name of the holder, owner,[69]

See 7 Cent. Dig. tit. "Bills and Notes," § 1133.

Misnomer of instrument.— Describing a protested note as a bill (Messenger *v.* Southey, 8 Dowl. P. C. 594, 9 L. J. C. P. 278, 1 M. & G. 76, 1 Scott N. R. 180, 39 E. C. L. 652) or calling a bill a note (Stockman *v.* Parr, 1 C. & K. 41, 7 Jur. 886, 12 L. J. Exch. 415, 11 M. & W. 809, 47 E. C. L. 41) will not invalidate the notice.

62. Gill *v.* Palmer, 29 Conn. 54; Howland *v.* Adrian, 30 N. J. L. 41; Cooperstown Bank *v.* Woods, 28 N. Y. 545; Youngs *v.* Lee, 12 N. Y. 551 [*affirming* 18 Barb. (N. Y.) 187]; Cayuga County Bank *v.* Warden, 1 N. Y. 413; Cook *v.* Litchfield, 2 Bosw. (N. Y.) 137; Robinson *v.* Taylor, 4 N. Brunsw. 198. See also Cook *v.* Litchfield, 9 N. Y. 279 [*reversing* 5 Sandf. N. Y.) 330].

63. Thus where there is an outstanding and unpaid note in all respects like the one protested, except that it was payable three instead of six months after its date, it may be shown that a suit was pending on the note first due when the second note was protested and that defendant had answered in such suit before the maturity of the note in question. Davenport *v.* Gilbert, 6 Bosw. (N. Y.) 179.

64. Rowlands *v.* Springett, 9 Jur. 356, 14 L. J. Exch. 227, 14 M. & W. 7.

65. *Maine.*— King *v.* Hurley, 85 Me. 525, 27 Atl. 463.

Michigan.— Snow *v.* Perkins, 2 Mich. 238.

Mississippi.— Rowan *v.* Odenheimer, 5 Sm. & M. (Miss.) 44.

New York.— Rochester Bank *v.* Gould, 9 Wend. (N. Y.) 279; Reedy *v.* Seixas, 2 Johns. Cas. (N. Y.) 337.

United States.—Alexandria Bank *v.* Swann, 9 Pet. (U. S.) 33, 9 L. ed. 40 [*reversing* 4 Cranch C. C. (U. S.) 136, 2 Fed. Cas. No. 853].

Canada.— Thompson *v.* Cotterell, 11 U. C. Q. B. 185.

See 7 Cent. Dig. tit. "Bills and Notes," § 1133.

Where the misstatement is a considerable variance from the amount actually due on the note it has been left to the jury to determine whether the indorser was or was not misled. McKnight *v.* Lewis, 5 Barh. (N. Y.) 681.

66. Remer *v.* Downer, 23 Wend. (N. Y.) 620.

67. *Massachusetts.*— Housatonic Bank *v.* Laflin, 5 Cush. (Mass.) 546.

New York.— Cooperstown Bank *v.* Woods, 28 N. Y. 561; Cayuga County Bank *v.* Warden, 1 N. Y. 413; Northrup *v.* Cheney, 27 N. Y. App. Div. 418, 50 N. Y. Suppl. 389; Rochester Bank *v.* Gould, 9 Wend. (N. Y.) 279.

Tennessee.— Ross *v.* Planters' Bank, 5 Humphr. (Tenn.) 335.

United States.— Mills *v.* U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. ed. 512; U. S. Bank *v.* Watterston, 4 Cranch C. C. (U. S.) 445, 2 Fed. Cas. No. 941.

Canada.—Robinson *v.* Taylor, 4 N. Brunsw. 198.

See 7 Cent. Dig. tit. "Bills and Notes," § 1131.

Form of stating date.— The date of the note may be stated in the notice in figures, as "3-15-1884." Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

68. Saltmarsh *v.* Tuthill, 13 Ala. 390; Smith *v.* Whiting, 12 Mass. 6, 7 Am. Dec. 25; Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207 [*affirming* 3 Thomps. & C. (N. Y.) 404]; Cooperstown Bank *v.* Woods, 28 N. Y. 561; Knopfel *v.* Senfert, 11 N. Y. Leg. Obs. 184; Thorn *v.* Sandford, 6 U. C. C. P. 462.

69. *Indiana.*— Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Kentucky.— Stivers *v.* Prentice, 3 B. Mon. (Ky.) 461; Shrieve *v.* Duckham, 1 Litt. (Ky.) 194.

Maine.— Bradley *v.* Davis, 26 Me. 45; Howe *v.* Bradley, 19 Me. 31.

Massachusetts.— Housatonic Bank *v.* Laflin, 5 Cush. (Mass.) 546; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209.

United States.— Mills *v.* U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. ed. 512.

drawee,[70] or indorser,[71] or by a misdescription of such parties;[72] but a notice failing to state the maker's name has been held defective.[73] Describing the bill as "drawn" by the indorser has been held to be not fatal.[74]

d. Copy of Protest. It was at one time thought necessary, where the drawer or indorser was abroad, that the notice should be accompanied by a copy of the protest,[75] although this was unnecessary where he resided in the same country;[76] but it is now well established both in England and in this country that such copy need not in any case accompany the notice.[77]

e. Signature. It is essential that the notice of dishonor be signed by the party or notary[78] giving the same,[79] but it is not necessary to attach thereto an official seal.[80]

2. What Law Governs. The law of the place of contract,[81] *i. e.*, where the

See 7 Cent. Dig. tit. "Bills and Notes," § 1133.

70. Mainer *v.* Spurlock, 9 Rob. (La.) 161.

71. King *v.* Hurley, 85 Me. 525, 27 Atl. 463; Sasscer *v.* Farmers' Bank, 4 Md. 409.

72. *Alabama.*— Moorman *v.* State Bank, 3 Port. (Ala.) 353.

Maine.— Carter *v.* Bradley, 19 Me. 62, 36 Am. Dec. 735.

Tennessee.— Myers *v.* State Bank, 3 Head (Tenn.) 330.

Texas.— Reid *v.* Reid, 11 Tex. 585.

United States.— Dennistoun *v.* Stewart, 17 How. (U. S.) 606, 15 L. ed. 228. But see Underwood *v.* Huddlestone, 2 Cranch C. C. (U. S.) 93, 24 Fed. Cas. No. 14,340.

England.— Mellersh *v.* Rippen, 7 Exch. 578, 16 Jur. 366, 21 L. J. Exch. 222; Harrison *v.* Ruscoe, 10 Jur. 142, 15 L. J. Exch. 110, 15 M. & W. 231.

73. Home Ins. Co. *v.* Green, 19 N. Y. 518, 75 Am. Dec. 361, which case was decided upon the theory that one indorsing frequently for the accommodation of different persons and keeping no bill-book would not by means of such notice ordinarily be liable to identify the paper on which he was sought to be charged. Nor would one who indorsed and negotiated his own business paper, if his transactions of that kind were extensive, be likely to know to what particular paper the notice referred.

74. Gill *v.* Palmer, 29 Conn. 54; Haines *v.* Dubois, 30 N. J. L. 259. *Compare* Beauchamp *v.* Cash, D. & R. N. P. 3, 16 E. C. L. 410.

75. Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; Chitty Bills 374.

76. Robins *v.* Gibson, 3 Campb. 334, 1 M. & S. 288; Chaters *v.* Bell, 4 Esp. 48; Cromwell *v.* Hynson, 2 Esp. 511.

77. *Michigan.*— Atwater *v.* Streets, 1 Dougl. (Mich.) 455.

Missouri.— Linville *v.* Welch, 29 Mo. 203.

New York.— Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. (N. Y.) 416].

United States.— Dennistoun *v.* Stewart, 17 How. (U. S.) 606, 15 L. ed. 228; Wallace *v.* Agry, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096.

England.— Goodman *v.* Harvey, 4 A. & E. 870, 6 L. J. K. B. 260, 6 N. & M. 372, 31 E. C. L. 381.

Canada.— O'Neil *v.* Perrin, (Mich. T.) 3 Vict.

78. Signature of both parties.—Where the notice is duly signed by the notary the signature of the party on whose behalf he gives the notice is not necessary. Coffman *v.* Kentucky Bank, 41 Miss. 212, 90 Am. Dec. 371.

79. Walker *v.* State Bank, 8 Mo. 704; Walmsley *v.* Acton, 44 Barb. (N. Y.) 312; People's Nat. Bank *v.* Dibrell, 91 Tenn. 301, 18 S. W. 626. See also Klockenbaum *v.* Pierson, 16 Cal. 375. *Compare* Maxwell *v.* Brain, 10 Jur. N. S. 777, 10 L. T. Rep. N. S. 301, 12 Wkly. Rep. 688.

A printed signature has been held to be a sufficient signature.

Alabama.— Crawford *v.* Mobile Branch Bank, 7 Ala. 205.

Maryland.— Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620.

New Jersey.— Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

New York.— Cooperstown Bank *v.* Woods, 28 N. Y. 545.

United States.— Spalding *v.* Krutz, 1 Dill. (U. S.) 414, 22 Fed. Cas. No. 13,201.

See 7 Cent. Dig. tit. "Bills and Notes," § 1132.

The fact that the body of the notice is in the writing of another will not raise the presumption that the instrument was signed in blank. Browning *v.* Andrews, 3 McLean (U. S.) 576, 4 Fed. Cas. No. 2,040.

80. Crawford *v.* Mobile Branch Bank, 7 Ala. 205; Curry *v.* Mobile Bank, 8 Port. (Ala.) 360; Palmer *v.* Whitney, 21 Ind. 58.

81. *Kentucky.*— Nickell *v.* Citizens' Bank, 22 Ky. L. Rep. 1552, 60 S. W. 925.

Massachusetts.— Williams *v.* Wade, 1 Metc. (Mass.) 82.

Michigan.— Snow *v.* Perkins, 2 Mich. 238.

New Hampshire.— Simpson *v.* White, 40 N. H. 540; Williams *v.* Putnam, 14 N. H. 540, 40 Am. Dec. 204 (holding that if the place of indorsement does not appear it will be presumed to be the domicile of the indorser).

New York.— Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137. See also Leavenworth *v.* Brockway, 2 Hill (N. Y.) 201.

North Carolina.— Commercial Nat. Bank *v.* Gastonia First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, 32 L. R. A. 712; Hatcher *v.* McMorine, 15 N. C. 122.

bill was drawn or the indorsement of the paper was made which was in force at the time the notice was given,[82] governs the sufficiency of the notice of dishonor.

H. Excuses For Omission of, or Delay in, Demand or Notice — 1. In General. Both upon reason and authority, the same facts which would dispense with or excuse delay in giving notice will constitute a like excuse as to protest,[83] although where demand need not for proper reasons be made notice should be sent to the indorsers, if reasons do not exist excusing that also.[84] Just what circumstances will excuse a failure or delay must be determined largely by the facts and circumstances of the particular case and are seldom governed by any fixed rule.[85] Whenever the conditions presented are such that demand or notice would be useless[86] and ineffectual[87] they will be excused; and an exercise of due and reasonable diligence on the part of the holder to make demand or notice constitutes sufficient excuse.[88] Hence any inevitable or unavoidable accident or unfore-

Texas.— Raymond *v.* Holmes, 11 Tex. 54.

Canada.— City Bank *v.* Ley, 1 U. C. Q. B. 192.

Contra, Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867 [*overruling* by implication Belford *v.* Bangs, 15 Ill. App. 76]; Rothschild *v.* Currie, 1 Q. B. 43, 5 Jur. 865, 10 L. J. Q. B. 77, 4 P. & D. 737, 41 E. C. L. 428; Hirschfeld *v.* Smith, L. R. 1 C. P. 340, 1 H. & R. 284, 12 Jur. N. S. 523, 35 L. J. C. P. 177, 14 L. T. Rep. N. S. 886, 14 Wkly. Rep. 455 (holding that on a bill indorsed in England and payable in France the sufficiency and reasonableness of the notice was determined by the law of France).

See 7 Cent. Dig. tit. "Bills and Notes," § 1052.

The reason for this rule when applicable to the indorser is that the indorsement is equivalent to a new bill drawn upon the same drawee; and hence the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract is made. Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

82. Pritchard *v.* Scott, 7 Mart. N. S. (La.) 491; State Bank *v.* Rowel, 6 Mart. N. S. (La.) 506; Levering *v.* Washington, 3 Minn. 323.

83. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653.

84. Price *v.* Young, 1 McCord (S. C.) 339; Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419.

85. Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397. See also State Bank *v.* Croft, 3 McCord (S. C.) 522; Bailey *v.* Bodenham, 16 C. B. N. S. 288, 10 Jur. N. S. 821, 33 L. J. C. P. 252, 10 L. T. Rep. N. S. 422, 12 Wkly. Rep. 865, 111 E. C. L. 288.

An accident, mistake, or unwarranted interference by mail authorities, to a notice passing through their hands in due course of mail is a good excuse for delay (Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397; Pier *v.* Heinrichshoffen, 67 Mo. 163, 29 Am. Rep. 501; Newbold *v.* Boraef, 155 Pa. St. 227, 26 Atl. 305; Jones *v.* Wardell, 6 Watts & S. (Pa.) 399. *Compare* Grant *v.* Long, 12 La. 402, holding that no irregularities of the mail which prevent a bill from arriving in season will excuse its non-presentment for payment on the day it is due), although if the delay is caused in part by the holder's mistake in addressing the drawee presentment in proper time will not be excused (Schofield *v.* Bayard, 3 Wend. (N. Y.) 488).

An injunction restraining the collection of the note is a good excuse both for demand and notice. Williams *v.* Bartlett, 4 Lea (Tenn.) 620. See also Lovett *v.* Cornwell, 6 Wend. (N. Y.) 369.

Holiday.— Where according to the custom of a particular country vessels are not allowed to clear during the Christmas holidays, this circumstance will excuse delay in giving notice when the cause of the delay is attributable to such custom. Martin *v.* Ingersoll, 8 Pick. (Mass.) 1.

Where the steps necessary to fix liability are prevented by the indorser, which puts the holder of the note off his guard, the latter is excused and liability attaches to the former; but such act must precede the time of the doing of the things which would fix the indorser's liability, for if the indorser is once released from liability on account of the negligence of the holder the subsequent acts of the indorser will not revive his liability. Bruce *v.* Lytle, 13 Barb. (N. Y.) 163.

86. As where the indorser has discharged the maker from liability by a release and settlement (Burke *v.* McKay, 2 How. (U. S.) 66, 11 L. ed. 181) or where a draft is in the possession of the drawer until after maturity (Lomax *v.* Smyth, 50 Iowa 223).

87. Salisbury *v.* Bartleson, 39 Minn. 365, 40 N. W. 265.

The special circumstances should be such as to render it impossible to act earlier without damage or inconvenience beyond such as would be incidental to the ordinary course of business. Phœnix Ins. Co. *v.* Gray, 13 Mich. 191.

88. *California.*— Garver *v.* Downie, 33 Cal. 176.

Connecticut.— Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397.

Indiana.— Hoffman *v.* Hollingsworth, 10 Ind. App. 353, 37 N. E. 960.

seen occurrence not attributable to the fault of the holder is an excuse, provided the holder makes presentment or gives notice as soon afterward as he is able.[89]

2. Absconding, Removal, or Absence — a. Of Maker or Accepter. The absconding of the maker or accepter before the maturity of a note or bill[90] or his removal[91] from the state[92] without providing a place where demand may be made is generally speaking an excuse for not making demand,[93] although diligence should be exercised in making inquiry for him;[94] but the bare fact of absence from home is not of itself sufficient to excuse demand or a delay until the obligor shall have returned.[95] The absconding or removal of the maker or

Pennsylvania.— Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355.

Vermont.— Blodgett *v.* Durgin, 32 Vt. 361.

United States.— Gallagher *v.* Roberts, 2 Wash. (U. S.) 191, 9 Fed. Cas. No. 5,195.

89. Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397; Labadiole *v.* Landry, 20 La. Ann. 149; Jex *v.* Tureaud, 19 La. Ann. 64; Harp *v.* Kenner, 19 La. Ann. 63.

The class of accidents, casualties, or circumstances which will excuse is said to include those which render it morally or physically impossible to make such presentment. Windham Bank *v.* Norton, etc., Co., 22 Conn. 213, 56 Am. Dec. 397. See also Moody *v.* Mack, 43 Mo. 210.

A heavy rain and the ordinary inconvenience incidental to it will not excuse a failure to demand payment of a note when due. Barker *v.* Parker, 6 Pick. (Mass.) 80.

90. *Louisiana.*— Wolfe *v.* Jewett, 10 La. 383.

Massachusetts.— Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206.

Missouri.— Plahto *v.* Patchin, 26 Mo. 389.

New York.— Bruce *v.* Lytle, 13 Barb. (N. Y.) 163; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457.

Ohio.— McClelland *v.* Bishop, 42 Ohio St. 113.

Pennsylvania.— Lehman *v.* Jones, 1 Watts & S. (Pa.) 126, 37 Am. Dec. 455; Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480; Becker *v.* Levy, 5 Pa. L. J. Rep. 298.

South Carolina.— Gillespie *v.* Hannahan, 4 McCord (S. C.) 503; McClellan *v.* Clarke, 2 Brev. (S. C.) 106.

Tennessee.— Ratcliff *v.* Planters' Bank, 2 Sneed (Tenn.) 425.

See 7 Cent. Dig. tit. "Bills and Notes," § 1036.

91. If the maker resides in another state or country at the time of making as well as at the maturity of a note and his residence is known to the holder, it has been held that the indorser is entitled to have the note presented for payment at such foreign residence. Bradley *v.* Patton, 51 Ala. 108; Orleans Bank *v.* Whittemore, 12 Gray (Mass.) 469, 64 Am. Dec. 605; Spies *v.* Gilmore, 1 N. Y. 321 [*affirming* Gilmore *v.* Spies, 1 Barb. (N. Y.) 158]; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Gist *v.* Lybrand, 3 Ohio 307, 17 Am. Dec. 595. But it is not necessary to demand payment at the maker's foreign residence, although unchanged since the making of the note, if the paper bears date at a place within the state (Selden *v.* Washington, 17 Md. 379, 79 Am. Dec. 659; Ricketts *v.* Pendleton, 14 Md. 320; Smith *v.* Philbrick, 10 Gray (Mass.) 252, 69 Am. Dec. 315), and inquiry for the maker at the place of date is in such case sufficient (Hepburn *v.* Toledano, 10 Mart. (La.) 643, 13 Am. Dec. 345; Smith *v.* Philbrick, 10 Gray (Mass.) 252, 69 Am. Dec. 315).

92. Removal to another portion of the same state or jurisdiction is not sufficient to excuse demand, provided his place of residence could be ascertained with reasonable diligence. Oakey *v.* Beauvais, 11 La. 487; Anderson *v.* Drake, 14 Johns. (N. Y.) 114, 7 Am. Dec. 442; Reid *v.* Morrison, 2 Watts & S. (Pa.) 401.

93. *Iowa.*— Whitely *v.* Allen, 56 Iowa 224, 9 N. W. 190, 41 Am. Rep. 99.

Kentucky.— Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576.

Massachusetts.— Widgery *v.* Munroe, 6 Mass. 449.

New Hampshire.— Caldwell *v.* Porter, 17 N. H. 27.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Adams *v.* Leland, 30 N. Y. 309; Foster *v.* Julien, 24 N. Y. 28, 80 Am. Dec. 320; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Cummings *v.* Fisher, Anth. N. P. (N. Y.) 1.

North Carolina.— Moore *v.* Coffield, 12 N. C. 247.

Ohio.— Gist *v.* Lybrand, 3 Ohio 307, 17 Am. Dec. 595.

Pennsylvania.— Reid *v.* Morrison, 2 Watts & S. (Pa.) 401.

South Carolina.— Gillespie *v.* Hannahan, 4 McCord (S. C.) 503.

United States.— McGruder *v.* Washington Bank, 9 Wheat. (U. S.) 598, 6 L. ed. 170.

See 7 Cent. Dig. tit. "Bills and Notes," § 1036.

94. Pierce *v.* Cate, 12 Cush. (Mass.) 190, 59 Am. Dec. 176 [*overruling* Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206]; Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480; Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640; Starke *v.* Cheeseman, 1 Ld. Raym. 538. See also Browne *v.* Boulton, 9 U. C. Q. B. 64.

95. *Arkansas.*— Levy *v.* Drew, 14 Ark. 334.

Kentucky.— Lawrence *v.* Ralston, 3 Bibb (Ky.) 102.

Louisiana.— Puig *v.* Carter, 20 La. Ann. 414; McCrummen *v.* McCrummen, 5 Mart. N. S. (La.) 158.

Massachusetts.— Shaw *v.* Reed, 12 Pick.

accepter is, however, excuse for the timely observance of the usual precedent conditions as to him only, and does not excuse the giving of notice of non-payment to the indorser.[96]

b. Of Indorser. The removal or absconding of the indorser is a good excuse for failure to give him due notice of dishonor where his whereabouts cannot be ascertained by ordinary diligence.[97]

3. Absence of Funds With Drawee and No Reasonable Expectation of Acceptance — a. Rule Stated — (I) *In General.* Where the drawer has no funds in the hands of the drawee, no reasonable expectation of afterward having such funds, or no reasonable belief or right to assume that the bill will be honored, formal presentment or notice are unnecessary to charge him,[98] although notice is

(Mass.) 132; Sanger *v.* Stimpson, 8 Mass. 260.

Minnesota.— Michaud *v.* Legarde, 4 Minn. 43.

New Hampshire.— Dennie *v.* Walker, 7 N. H. 199.

England.— Sands *v.* Clarke, 8 C. B. 751, 14 Jur. 352, 19 L. J. C. P. 84, 65 E. C. L. 751.

If the accepter resides at a hotel, but leaves it for several days, an inquiry for him at the hotel is sufficient and will excuse a failure to make further efforts for presentment. Belmont Bank *v.* Patterson, 17 Ohio 78.

96. Hilborn *v.* Artus, 4 Ill. 344; Grafton Bank *v.* Cox, 13 Gray (Mass.) 503; Shaw *v.* Reed, 12 Pick. (Mass.) 132; May *v.* Coffin, 4 Mass. 341; Michaud *v.* Lagarde, 4 Minn. 43; Williams *v.* Matthews, 3 Cow. (N. Y.) 252.

97. Nailor *v.* Bowie, 3 Md. 251; Becker *v.* Levy, 5 Pa. L. J. Rep. 298; Williams *v.* U. S. Bank, 2 Pet. (U. S.) 96, 7 L. ed. 360; Walwyn *v.* St. Quintin, 1 B. & P. 652, 2 Esp. 515; Crosse *v.* Smith, 1 M. & S. 545, 14 Rev. Rep. 529; Bowes *v.* Howe, 5 Taunt. 30, 14 Rev. Rep. 700, 1 E. C. L. 29; Sturges *v.* Derrick, Wightw. 76.

98. *Alabama.*— Tarver *v.* Nance, 5 Ala. 712; Foard *v.* Womack, 2 Ala. 368; Armstrong *v.* Gay, 1 Stew. (Ala.) 175.

Arkansas.— Sullivan *v.* Deadman, 23 Ark. 14; McRae *v.* Rhodes, 22 Ark. 315.

California.— Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283.

Illinois.— Kupfer *v.* Galena Bank, 34 Ill. 328, 85 Am. Dec. 309; Brower *v.* Rupert, 24 Ill. 182.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489.

Iowa.— Kimball *v.* Bryan, 56 Iowa 632, 10 N. W. 218.

Kentucky.— Clarke *v.* Castleman, 1 J. J. Marsh. (Ky.) 69.

Louisiana.— Blum *v.* Bidwell, 20 La. Ann. 43; Anderson *v.* Folger, 11 La. Ann. 269; Bradford *v.* Cooper, 1 La. Ann. 325; Crain *v.* Robert, 3 Mart. N. S. (La.) 145.

Maine.— Burnham *v.* Spring, 22 Me. 495.

Maryland.— Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703; Cathell *v.* Goodwin, 1 Harr. & G. (Md.) 468; Eichelberger *v.* Finley, 7 Harr. & J. (Md.) 381, 16 Am. Dec. 312.

Massachusetts.— Beauregard *v.* Knowlton, 156 Mass. 395, 31 N. E. 389; Shaw *v.* Stone, 1 Cush. (Mass.) 228; Kinsley *v.* Robinson, 21 Pick. (Mass.) 327.

Mississippi.—Avent *v.* Maroney, (Miss. 1892) 12 So. 209; Wood *v.* Gibbs, 35 Miss. 559; Cook *v.* Martin, 5 Sm. & M. (Miss.) 379.

Missouri.— Taylor *v.* Newman, 77 Mo. 257; Harness *v.* Davies County Sav. Assoc., 46 Mo. 357; Merchants' Bank *v.* Easley, 44 Mo. 286, 100 Am. Dec. 287; Commercial Bank *v.* Barksdale, 36 Mo. 563.

New York.— Mobley *v.* Clark, 28 Barb. (N. Y.) 390; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367; Hoffman *v.* Smith, 1 Cai. (N. Y.) 157.

North Carolina.— Spear *v.* Atkinson, 23 N. C. 262; ——— *v.* Stanton, 2 N. C. 271.

Ohio.— Miser *v.* Trovinger, 7 Ohio St. 281.

Pennsylvania.—Wollenweber *v.* Ketterlinus, 17 Pa. St. 389.

Rhode Island.— Aborn *v.* Bosworth, 1 R. I. 401.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775; Yongue *v.* Ruff, 3 Strobh. (S. C.) 311; Printems *v.* Helfried, 1 Nott & M. (S. C.) 187.

Tennessee.— Golladay *v.* Union Bank, 2 Head (Tenn.) 57; Oliver *v.* State Bank, 11 Humphr. (Tenn.) 74.

Texas.— Armendiaz *v.* Serna, 40 Tex. 291; Kottwitz *v.* Alexander, 34 Tex. 689; Lewis *v.* Parker, 33 Tex. 121; Wood *v.* McMeans, 23 Tex. 481; Durrum *v.* Hendrick, 4 Tex. 495.

Wisconsin.— Mehlberg *v.* Tisher, 24 Wis. 607.

United States.— Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538; Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697; Cox *v.* Simms, 1 Cranch C. C. (U. S.) 238, 6 Fed. Cas. No. 3,306; Valk *v.* Simmons, 4 Mason (U. S.) 113, 28 Fed. Cas. No. 16,815; Allen *v.* King, 4 McLean (U. S.) 128, 1 Fed. Cas. No. 226; Read *v.* Wilkinson, 2 Wash. (U. S.) 514, 20 Fed. Cas. No. 11,611; Baker *v.* Gallagher, 1 Wash. (U. S.) 461, 2 Fed. Cas. No. 768.

England.— Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; Chaters *v.* Bell, 4 Esp. 48; Dennis *v.* Morrice, 3 Esp. 158; Terry *v.* Parker, 6 A. & E. 502, 6 L. J. K. B. 249, 1 N. & P. 752, W. W. & D. 303, 33 E. C. L. 273; Cory *v.* Scott, 3 B. & Ald. 619, 5 E. C. L. 356; Norton *v.* Pickering, 8 B. & C. 610, 7 L. J. K. B. O. S. 85, 3 M. & R. 23, 15 E. C. L. 302; Van Wart *v.* Woolley, 3 B. & C. 439, 10 E. C. L. 204, 5 D. & R. 374, 3 L. J. K. B.

still necessary to charge an indorser.[99] When the above rule was first established the courts, acting apparently either upon the theory that the drawing of a bill, when the drawer knew that he had no effects in the hands of the drawee, was a fraud, or that a knowledge that it would probably be dishonored was tantamount to notice, held that mere lack of funds in the hands of the drawee was of itself sufficient to excuse notice;[1] but it may now be said to be well established that the drawer is entitled to notice if he had reasonable ground to expect that his bill would be honored, although he had no effects in the drawee's hands.[2]

O. S. 51, R. & M. 4, 21 E. C. L. 690; Lafitte *v.* Slatter, 6 Bing. 623, 8 L. J. C. P. O. S. 273, 4 M. & P. 457, 31 Rev. Rep. 510, 19 E. C. L. 282; Legge *v.* Thorpe, 2 Camph. 310, 12 East 171; Hill *v.* Heap, D. & R. N. P. 57, 25 Rev. Rep. 791, 16 E. C. L. 435; Wirth *v.* Austin, L. R. 10 C. P. 689, 32 L. T. Rep. N. S. 669; Carew *v.* Duckworth, L. R. 4 Exch. 313, 38 L. J. Exch. 149, 20 L. T. Rep. N. S. 882, 17 Wkly. Rep. 927; Gale *v.* Walsh, 5 T. R. 239, 2 Rev. Rep. 580; Bickerdike *v.* Bollman, 1 T. R. 405, 1 Rev. Rep. 242.

See 7 Cent. Dig. tit. "Bills and Notes," § 1042.

Delays in presentation are immaterial therefore in such case. Hoyt *v.* Seeley, 18 Conn. 353; Emery *v.* Hobson, 63 Me. 32; Eichelberger *v.* Finley, 7 Harr. & J. (Md.) 381, 16 Am. Dec. 312.

This rule applies to foreign and inland bills (Legge *v.* Thorpe, 2 Camph. 310, 12 East 171; Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605; Bickerdike *v.* Bollman, 1 T. R. 405, 1 Rev. Rep. 242), checks (Lawrence *v.* Schmidt, 35 Ill. 440, 85 Am. Dec. 371; Howes *v.* Austin, 35 Ill. 396; Warrensburg Co-operative Bldg. Assoc. *v.* Zoll, 83 Mo. 94; Healy *v.* Gilman, 1 Bosw. (N. Y.) 235; Fitch *v.* Redding, 4 Sandf. (N. Y.) 130; Coyle *v.* Smith, 1 E. D. Smith (N. Y.) 400; Sterrett *v.* Rosencrantz, 3 Phila. (Pa.) 54, 15 Leg. Int. 53. And see BANKS AND BANKING, 5 Cyc. 533, note 75), and drafts (Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139).

99. *California.*— Applegarth *v.* Abbott, 64 Cal. 459, 2 Pac. 43.

Kentucky.— Slack *v.* Longshaw, 8 Ky. L. Rep. 166.

Nebraska.— Steele *v.* Russell, 5 Nebr. 211.

New York.— Mohawk *v.* Broderick, 10 Wend. (N. Y.) 304.

North Carolina.— Denny *v.* Palmer, 27 N. C. 610.

Tennessee.— Harwood *v.* Jarvis, 5 Sneed (Tenn.) 375.

United States.— Ramdulollday *v.* Darieux, 4 Wash. (U. S.) 61, 20 Fed. Cas. No. 11,543.

England.—Walwyn *v.* St. Quintin, 1 B. & P. 652, 2 Esp. 515; Foster *v.* Parker, 2 C. P. D. 18, 46 L. J. C. P. 77, 25 Wkly. Rep. 321; Brown *v.* Maffey, 15 East 216; Saul *v.* Jones, 1 E. & E. 59, 5 Jur. N. S. 220, 28 L. J. Q. B. 37, 7 Wkly. Rep. 47, 102 E. C. L. 59; Wilkes *v.* Jacks, Peake 202; Goodall *v.* Dolley, 1 T. R. 712, 1 Rev. Rep. 372.

See 7 Cent. Dig. tit. "Bills and Notes," § 1042.

1. *Alabama.*— Foard *v.* Womack, 2 Ala. 368.

Illinois.— Brower *v.* Rupert, 24 Ill. 182.

Kentucky.— See Baxter *v.* Graves, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374.

New York.— See Franklin *v.* Vanderpool, 1 Hall (N. Y.) 78.

Pennsylvania.— See Case *v.* Morris, 31 Pa. St. 100, where the origin of the exception is commented upon.

England.— Cory *v.* Scott, 3 B. & Ald. 619, 5 E. C. L. 356; Fitzgerald *v.* Williams, 6 Bing. N. Cas. 68, 9 L. J. C. P. 41, 8 Scott 271, 37 E. C. L. 512; Clegg *v.* Cotton, 3 B. & P. 239; *Ex p.* Heath, 2 Rose 141, 2 Ves. & B. 240; Bickerdike *v.* Bollman, 1 T. R. 405, 1 Rev. Rep. 242 (which case is generally cited as the first to establish the exception).

See 7 Cent. Dig. tit. "Bills and Notes," § 1042.

2. *Alabama.*— Hill *v.* Norris, 2 Stew. & P. (Ala.) 114.

Florida.— Joseph *v.* Salomon, 19 Fla. 623; Pitts *v.* Jones, 9 Fla. 519.

Illinois.— Welch *v.* B. C. Taylor Mfg. Co., 82 Ill. 579; Walker *v.* Rogers, 40 Ill. 278, 89 Am. Dec. 348; Kupfer *v.* Galena Bank, 34 Ill. 328, 85 Am. Dec. 309.

Louisiana.— Johnson *v.* Flanagan, 26 La. Ann. 689; Gardner *v.* McDaniel, 26 La. Ann. 472; Eastin *v.* Osborn, 26 La. Ann. 153; Louisiana State Bank *v.* Buhler, 22 La. Ann. 83; Scott *v.* McCulloch, 16 La. Ann. 242; Williams *v.* Brashear, 19 La. 370; Bloodgood *v.* Hawthorn, 9 La. 124.

Maine.— Campbell *v.* Pettengill, 7 Me. 126, 20 Am. Dec. 349.

Massachusetts.— Grosvenor *v.* Stone, 8 Pick. (Mass.) 79; Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198; Blakely *v.* Grant, 6 Mass. 386.

Mississippi.— Dunbar *v.* Tyler, 44 Miss. 1; Richie *v.* McCoy, 13 Sm. & M. (Miss.) 541.

Missouri.— Merchants' Bank *v.* Easley, 44 Mo. 286, 100 Am. Dec. 287; Commercial Bank *v.* Barksdale, 36 Mo. 563.

New York.— Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259.

North Carolina.— Austin *v.* Rodman, 8 N. C. 194, 9 Am. Dec. 630.

Texas.— Cole *v.* Wintercost, 12 Tex. 118; Durrum *v.* Hendrick, 4 Tex. 495.

United States.— Knickerbocker L. Ins. Co. *v.* Pendleton, 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866; French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576; Olshausen *v.* Lewis, 1 Biss. (U. S.) 419, 18 Fed. Cas. No. 10,507; Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697; Mackall *v.* Goszler, 2 Cranch C. C. (U. S.) 240, 16 Fed. Cas. No. 8,835; *In re* Brown, 2 Story (U. S.) 502,

(II) *What Constitutes Reasonable Expectation.* What justifies a "reasonable expectation" that a bill will be honored, or in other words insures to the drawer the right to demand and notice, depends upon the attendant circumstances of the particular case;[3] but they should be such as would induce a merchant of common prudence and ordinary regard for his commercial credit to draw a like bill.[4] Where there is a running account between the drawer and drawee,[5] where the drawee is indebted to the holder,[6] or where the drawee, who was a factor of the drawer, was accustomed to accept the drafts of the drawer,[7] the drawer is justified in the expectation that the bill will be honored. In some jurisdictions

4 Fed. Cas. No. 1,985, 6 Law Rep. 508, 10 Hunt. Mer. Mag. 377.

England.— Rucker *v.* Hiller, 3 Campb. 217, 16 East 43, 14 Rev. Rep. 278; Legge *v.* Thorpe, 2 Campb. 310, 12 East 171; Staples *v.* Okines, 1 Esp. 332.

See 7 Cent. Dig. tit. "Bills and Notes," § 1042.

3. He will be justified in expecting an acceptance of his bill where, on making a consignment to the drawee, he draws before such consignment comes to hand, where he omits to send the bill of lading to the consignee, where goods were lost, where there is a fluctuating balance between him and the drawee, or where the drawee has been in the habit of accepting bills of the drawer without regard to the state of their accounts (Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538); where the drawer has on deposit collaterals and securities exceeding his indebtedness to the drawee or where there is a fluctuating balance remaining unsettled between the parties (Commercial Bank *v.* Barksdale, 36 Mo. 563); where the drawer has provided funds to meet the bill which by accident failed to reach the drawee in time (Edwards *v.* Moses, 2 Nott & M. (S. C.) 433, 10 Am. Dec. 615); or where, although having effects in the hands of the drawee, he is indebted to him in a larger amount and the drawee has appropriated such effects to the payment of the antecedent debt (Blackhan *v.* Doren, 2 Campb. 503, 11 Rev. Rep. 779). See also Walwyn *v.* St. Quintin, 1 B. & P. 652, 2 Esp. 515; Spooner *v.* Gardiner, R. & M. 84, 21 E. C. L. 707.

Authority from the drawee to draw constitutes a reasonable expectation of payment, although no funds are in the drawee's hands. Bloodgood *v.* Hawthorn, 9 La. 124; Austin *v.* Rodman, 8 N. C. 194, 9 Am. Dec. 630.

Where a bill of exchange is drawn against the consignment before the arrival of the goods, a reasonable expectation at once arises that the bill will be accepted, and the drawer is therefore entitled to notice (Joseph *v.* Salomon, 19 Fla. 623; Robins *v.* Gibson, 3 Campb. 334, 1 M. & S. 288. See also Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703), although the acceptance is refused because of the damaged condition of the goods upon their arrival (Rucker *v.* Hiller, 3 Campb. 217, 16 East 43, 14 Rev. Rep. 278); but if the bill of lading against which the bill of exchange is drawn is pledged as security for the payment of the bill, and acceptance is refused because the bill of lading is not delivered to the drawee the drawer would not be entitled to notice (Schuchardt *v.* Hall, 36 Md. 590, 11 Am. Rep. 514).

Attachment of the funds in the hands of the drawee after the bill has been drawn will not dispense with the giving of notice to the drawer. Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198.

4. Cathell *v.* Goodwin, 1 Harr. & G. (Md.) 468, 471, where it is said: "The reasonable grounds required by law are not such as would excite an idle hope, a wild expectation or a remote probability, that the bill might be honored, but such as create a full expectation, a strong probability of its payment."

Absence of legal tender on deposit.— If the drawer draws bills payable in dollars, but has on deposit only depreciated bank-notes, he will not be entitled to demand and notice (Lawrence *v.* Schmidt, 35 Ill. 440, 85 Am. Dec. 371; Pack *v.* Thomas, 13 Sm. & M. (Miss.) 11, 51 Am. Dec. 135), although it would seem that it must appear that the bank-bills were depreciated in value at the time the deposit was made (Willetts *v.* Paine, 43 Ill. 432). See also Kimball *v.* Bryan, 56 Iowa 632, 10 N. W. 218.

If acceptance was understood to be conditioned upon the performance of certain acts by the drawer, he must upon his part perform such conditions to be entitled to notice. Rhett *v.* Poe, 2 How. (U. S.) 457, 11 L. ed. 338. See also English *v.* Wall, 12 Rob. (La.) 132.

5. Hill *v.* Norris, 2 Stew. & P. (Ala.) 114; Gardner *v.* McDaniel, 26 La. Ann. 472; Urquhart *v.* Thomas, 24 La. Ann. 95; Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697.

A shifting of the balance between the two will not dispense with necessity of notice (Case *v.* Morris, 31 Pa. St. 100; Orr *v.* Maginnis, 7 East 361, 3 Smith K. B. 328), but where the drawer and drawee have had a settlement of accounts between them after the draft was drawn, no mention being made of such outstanding draft, and it appeared that the drawee was not indebted to the drawer, it was held that there could be no reasonable expectation that the draft would be paid (Stewart *v.* Millard, 7 Lans. (N. Y.) 373).

6. Minehart *v.* Handlin, 37 Ark. 276; Walker *v.* Rogers, 40 Ill. 278, 89 Am. Dec. 348; Claridge *v.* Dalton, 4 M. & S. 226, 16 Rev. Rep. 440 (holding that this was true, although the indebtedness was upon a credit which would not expire until after the bill became due).

7. Dunbar *v.* Tyler, 44 Miss. 1.

the mere fact that the drawer had no funds in the hands of the drawee at the maturity of the bill will not dispense with notice if he had funds in the hands of the drawee at the time of its execution or any time before its maturity.[8]

b. Application to Accommodation Drawers or Indorsers. The mere fact that a bill is drawn for the accommodation of other parties does not dispense with the necessity of notice if the drawer has reasonable grounds to assume that it will be honored, notwithstanding he has no funds in the hands of the drawee;[9] but if the drawer or indorser is himself the party accommodated, inasmuch as he would then have the sole interest in the payment and be ultimately liable, notice to him is unnecessary.[10] If an indorser adds his name to a bill for the accommodation of the maker, knowing that the maker is insolvent or does not expect the bill to be honored, he is not entitled to notice.[11]

4. Absence of Knowledge of Party's Residence or Address. If the residence or address of the maker or indorser is not known and cannot be ascertained by the exercise of reasonable diligence demand and notice will be excused;[12] but in

8. Richie *v.* McCoy, 13 Sm. & M. (Miss.) 541; Edwards *v.* Moses, 2 Nott & M. (S. C.) 433, 10 Am. Dec. 615; Smith *v.* Thatcher, 4 B. & Ald. 200, 6 E. C. L. 450; Walwyn *v.* St. Quintin, 1 B. & P. 652, 2 Esp. 515; Thackray *v.* Blackett, 3 Campb. 164, 13 Rev. Rep. 783; Hammond *v.* Dufrene, 3 Campb. 145; Legge *v.* Thorpe, 2 Campb. 310, 12 East 171; Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; *Ex p.* Heath, 2 Rose 141, 2 Ves. & B. 240; *Ex p.* Wilson, 11 Ves. Jr. 410, 8 Rev. Rep. 194.

Funds payable to executor.— Where the funds which are in the drawee's hands are payable to the drawer as an executor he would have no reasonable expectation that a bill drawn by him in his individual capacity would be honored. Yongue *v.* Ruff, 3 Strobh. (S. C.) 311.

9. Sherrod *v.* Rhodes, 5 Ala. 683; Shirley *v.* Fellows, 9 Port. (Ala.) 300; Curry *v.* Herlong, 11 La. Ann. 634; Mackall *v.* Goszler, 2 Cranch C. C. (U. S.) 240, 16 Fed. Cas. No. 8,835; Cory *v.* Scott, 3 B. & Ald. 619, 5 E. C. L. 356; Norton *v.* Pickering, 8 B. & C. 610, 7 L. J. K. B. O. S. 85, 3 M. & R. 23, 15 E. C. L. 302; Brown *v.* Maffey, 15 East 216.

10. *Alabama.*— Holman *v.* Whiting, 19 Ala. 703.

Arkansas.— Harrison *v.* Trader, 29 Ark. 85.

Kentucky.— Barbaroux *v.* Waters, 3 Metc. (Ky.) 304.

Louisiana.— Gillespie *v.* Cammack, 3 La. Ann. 248, holding that this was especially true where an unfulfilled agreement had been made to provide for the bill.

Maine.— Torrey *v.* Foss, 40 Me. 74, holding that this was especially true where the indorser for whose accommodation the note was drawn had expressly agreed to take care of the same, although the maker was indebted to him both at the time the note was made and at its maturity.

Michigan.— See Compton *v.* Blair, 46 Mich. 1, 8 N. W. 533.

Missouri.— Beveridge *v.* Richmond, 14 Mo. App. 405.

New Jersey.— Blenderman *v.* Price, 50 N. J. L. 296, 12 Atl. 775; Letson *v.* Dunham, 14 N. J. L. 307.

New York.— See Ross *v.* Bedell, 5 Duer (N. Y. 462.

Pennsylvania.— Shriner *v.* Keller, 25 Pa. St. 61; Reid *v.* Morrison, 2 Watts & S. (Pa.) 401.

Tennessee.— American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492; Black *v.* Fizer, 10 Heisk. (Tenn.) 48.

Texas.— Durrum *v.* Hendrick, 4 Tex. 495.

England.— Thomas *v.* Fenton, 5 D. & L. 28, 11 Jur. 633, 16 L. J. Q. B. 362, 2 Saund. & C. 68.

Prior indorsers must be notified, however. Turner *v.* Sampson, 2 Q. B. D. 23, 46 L. J. Q. B. 167, 35 L. T. Rep. N. S. 537, 25 Wkly. Rep. 240.

11. Groton *v.* Dallheim, 6 Me. 476; Farmers' Bank *v.* Vanmeter, 4 Rand. (Va.) 553; French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576; De Berdt *v.* Atkinson, 2 H. Bl. 336. *Aliter* if he did not know of the insolvency at the time he made the indorsement. Holland *v.* Turner, 10 Conn. 308.

12. *Alabama.*— Robinson *v.* Hamilton, 4 Stew. & P. (Ala.) 91.

Kansas.— Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793.

Louisiana.— Cooley *v.* Shannon, 20 La. Ann. 548.

Maine.— Clark *v.* Bigelow, 16 Me. 246; Whitter *v.* Graffam, 3 Me. 82.

Maryland.— Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390; Staylor *v.* Ball, 24 Md. 183.

Mississippi.— Tunstall *v.* Walker, 2 Sm. & M. (Miss.) 638.

Missouri.— Shepard *v.* Citizens' Ins. Co., 8 Mo. 272.

New Hampshire.— New York Belting, etc., Co. *v.* Ela, 61 N. H. 352.

New York.— Hunt *v.* Maybee, 7 N. Y. 266; Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222. See also Adams *v.* Leland, 30 N. Y. 309.

Ohio.— Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362.

Pennsylvania.— Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480.

South Carolina.— Galpin *v.* Hard, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

Tennessee.— Ratcliff *v.* Planters' Bank, 2

all such cases the party whose duty it is to make demand or give notice must, in the absence of statute,[13] exercise reasonable diligence to ascertain the whereabouts of the desired party,[14] and this must be shown affirmatively by the holder.[15]

5. Bankruptcy or Insolvency — a. Of Maker or Accepter — (1) *In General.* By the decided weight of authority the insolvency or bankruptcy of the maker of a note or the accepter of a bill does not excuse an omission to make demand or give notice to the indorsers,[16] although in some cases the courts have held

Sneed (Tenn.) 425; Nichol *v.* Bate, 7 Yerg. (Tenn.) 305, 27 Am. Dec. 505 (holding that in such case if due diligence was used to ascertain the proper address notice sent to the wrong address would be sufficient).

Vermont.— Blodgett *v.* Durgin, 32 Vt. 361.

England.—Baldwin *v.* Richardson, 1 B. & C. 245, 2 D. & R. 285, 25 Rev. Rep. 383, 8 E. C. L. 105; Bateman *v.* Joseph, 2 Campb. 461, 12 East 433, 11 Rev. Rep. 443; Harrison *v.* Fitzhenry, 3 Esp. 238; Browning *v.* Kinnear, Gow. 81, 5 E. C. L. 879.

See 7 Cent. Dig. tit. "Bills and Notes," § 1030.

The excuse is available only to the party who is ignorant of such residence and not to an earlier indorser who knew of it. Beale *v.* Parrish, 20 N. Y. 407, 75 Am. Dec. 414.

Where the signature on the paper is illegible due presentment or notice becomes sometimes impossible and that fact is then a sufficient excuse (Manufacturers', etc., Bank *v.* Hazard, 30 N. Y. 226; Hewitt *v.* Thomson, 1 M. & Rob. 543), but the notary in such case must make reasonable effort to ascertain the name, and if he misdescribes the party by his own negligence and so fails to give proper notice the indorser will be discharged (McGeorge *v.* Chapman, 45 N. J. L. 395; Davey *v.* Jones, 42 N. J. L. 28, 36 Am. Rep. 505. See also Baillie *v.* Dickson, 7 Ont. App. 759).

13. Mulholland *v.* Samuels, 8 Bush (Ky.) 63, holding that under the statutes of that state it need only appear that the notary did not know the place of residence, and not that it was not within his power to ascertain such fact by the use of reasonable diligence.

14. *Louisiana.*— Porter *v.* Boyle, 8 La. 170; Miranda *v.* New Orleans City Bank, 6 La. 740, 26 Am. Dec. 493; McLanahan *v.* Brandon, 1 Mart. N. S. (La.) 321, 14 Am. Dec. 188.

Maine.— Hill *v.* Varrell, 3 Me. 233.

Missouri.— Linville *v.* Welch, 29 Mo. 203.

New Hampshire.— Otis *v.* Hussey, 3 N. H. 346.

New Jersey.— Woodruff *v.* Daggett, 20 N. J. L. 526.

New York.— Cuyler *v.* Nellis, 4 Wend. (N. Y.) 398.

Pennsylvania.— Smith *v.* Fisher, 24 Pa. St. 222.

Texas.— Earnest *v.* Taylor, 25 Tex. Suppl. 37.

Knowledge of bank president.— If the note is held by a bank and the indorser's address is known to its president his knowledge binds the bank and due notice of dishonor must be given. Central Nat. Bank *v.* Levin, 6 Mo. App. 543.

15. Hartford Bank *v.* Green, 11 Iowa 476; Stiles *v.* Inman, 55 Miss. 469; Haly *v.* Brown, 5 Pa. St. 178.

If the indorser has no residence in fact the reason for requiring diligence for ascertaining the residence then fails, and in such case notice sent to the place where the party is known to be is the best and only evidence which can be given. Tunstall *v.* Walker, 2 Sm. & M. (Miss.) 638.

16. *Alabama.*— Stocking *v.* Conway, 1 Port. (Ala.) 260.

Connecticut.— Dwight *v.* Scovil, 2 Conn. 654.

Delaware.— Seaford First Nat. Bank *v.* Connoway, 4 Houst. (Del.) 206.

Maine.— Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108; Greely *v.* Hunt, 21 Me. 455.

Massachusetts.— Lee Bank *v.* Spencer, 6 Metc. (Mass.) 308, 39 Am. Dec. 734 (holding this to be true, although the maker declared to the holder that it would be of no use to present the note); Granite Bank *v.* Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253; Shaw *v.* Reed, 12 Pick. (Mass.) 132; Farnum *v.* Fowle, 12 Mass. 89, 7 Am. Dec. 35; Crossen *v.* Hutchinson, 9 Mass. 205, 6 Am. Dec. 55; May *v.* Coffin, 4 Mass. 341.

Michigan.—Whitten *v.* Wright, 34 Mich. 92.

Minnesota.— Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; Hart *v.* Eastman, 7 Minn. 74.

Missouri.— Jamison *v.* Copher, 35 Mo. 483.

New Hampshire.— Lawrence *v.* Langley, 14 N. H. 70.

New York.— Carroll *v.* Sweet, 128 N. Y. 19, 27 N. E. 763, 37 N. Y. St. 868, 13 L. R. A. 43 [*reversing* 57 N. Y. Super. Ct. 100, 5 N. Y. Suppl. 572, 25 N. Y. St. 356]; Smith *v.* Miller, 52 N. Y. 545; Manning *v.* Lyon, 70 Hun (N. Y.) 345, 24 N. Y. Suppl. 265, 54 N. Y. St. 6; Benedict *v.* Caffe, 5 Duer (N. Y.) 226; Moore *v.* Alexander, 33 Misc. (N. Y.) 613, 68 N. Y. Suppl. 888 [*affirmed* in 63 N. Y. App. Div. 100, 71 N. Y. Suppl. 420]; O'Neill *v.* Meighan, 32 Misc. (N. Y.) 516, 66 N. Y. Suppl. 313; Myers *v.* Coleman, Anth. N. P. (N. Y.) 205; Ireland *v.* Kip, Anth. N. P. (N. Y.) 195.

North Carolina.— Pons *v.* Kelly, 3 N. C. 204, 2 Am. Dec. 617.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75 [*reversing* 9 Ohio Dec. (Reprint) 407, 13 Cinc. L. Bul. 13].

Oregon.— Hawley *v.* Jette, 10 Oreg. 31, 45 Am. Rep. 129.

Pennsylvania.— Gibbs *v.* Cannon, 9 Serg. & R. (Pa.) 198, 11 Am. Dec. 699; Barton *v.*

otherwise,[17] provided such insolvency be notorious and not merely reputed or intended.[18] With regard, however, to a guarantor, his obligation not being conditional like that of an indorser, the rule is different, and the insolvency of the parties primarily liable is as to him an excuse for a failure to give notice.[19]

(II) *Effect of Knowledge on Part of Indorser.* Generally speaking the fact that the indorser knew of the maker's insolvency at the time he made the indorsement does not dispense with the necessity of notice to him,[20] even though the note be indorsed overdue.[21]

Baker, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620.

South Carolina.— Allwood *v.* Haseldon, 2 Bailey (S. C.) 457; Johnson *v.* Harth, 1 Bailey (S. C.) 482; Jervey *v.* Wilbur, 1 Bailey (S. C.) 453; Page *v.* Loud, Harp. (S. C.) 269, 18 Am. Dec. 650; Course *v.* Shackleford, 2 Nott & M. (S. C.) 283; Price *v.* Young, 1 Nott & M. (S. C.) 438; Edwards *v.* Thayer, 2 Bay (S. C.) 217.

Vermont.— Nash *v.* Harrington, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

Wisconsin.— Reinke *v.* Wright, 93 Wis. 368, 67 N. W. 737.

United States.— Rhett *v.* Poe, 2 How. (U. S.) 457, 11 L. ed. 338; French *v.* Columbia Bank, 4 Cranch (U. S.) 141, 2 L. ed. 576; Neale *v.* Peyton, 2 Cranch C. C. (U. S.) 313, 17 Fed. Cas. No. 10,071.

England.—Rhode *v.* Proctor, 4 B. & C. 517, 6 D. & R. 510, 10 E. C. L. 684 (holding that notice must be given, although both the drawer and accepter are bankrupt); *Ex p.* Johnson, 3 Deac. & C. 433, 1 Mont. & A. 622; Esdaile *v.* Sowerby, 11 East 114, 10 Rev. Rep. 440; Nicholson *v.* Gouthit, 2 H. Bl. 609; De Berdt *v.* Atkinson, 2 H. Bl. 336 (holding that this is especially true where the indorser had provided funds to take up the note).

Canada.— See La Banque Nationale *v.* Martel, 17 Quebec Super. Ct. 97.

See 7 Cent. Dig. tit. "Bills and Notes," § 1041.

Insolvency of both drawer and drawee, where such facts were known to the holder at the time the bill was drawn, are sufficient to excuse notice. Mobley *v.* Clark, 28 Barb. (N. Y.) 390.

17. *Illinois.*— Hawkinson *v.* Olson, 48 Ill. 277.

Indiana.— Couch *v.* Thorntown First Nat. Bank, 64 Ind. 92.

Louisiana.— Scott *v.* McCulloch, 16 La. Ann. 242, although the accepter became bankrupt between the drawing of the bill and its maturity, after disposing of the funds which had been provided by the drawer for the payment of the same.

South Carolina.— Clark *v.* Minton, 2 Brev. (S. C.) 185.

Texas.— Texarkana First Nat. Bank *v.* De Morse, (Tex. Civ. App. 1894) 26 S. W. 417.

United States.— Riddle *v.* Mott, 2 Cranch C. C. (U. S.) 73, 20 Fed. Cas. No. 11,810; Offutt *v.* Hall, 1 Cranch C. C. (U. S.) 572, 18 Fed. Cas. No. 10,450; Patton *v.* Violett, 1 Cranch C. C. (U. S.) 463, 18 Fed. Cas. No. 10,839.

18. Couch *v.* Thorntown First Nat. Bank, 64 Ind. 92; Kiddell *v.* Ford, 3 Brev. (S. C.) 178, 6 Am. Dec. 569; Clark *v.* Minton, 2 Brev. (S. C.) 185. See also Walton *v.* Watson, 1 Mart. N. S. (La.) 347; Oliver *v.* Munday, 3 N. J. L. 982.

19. *Connecticut.*— Forbes *v.* Rowe, 48 Conn. 413.

Delaware.— Erwin *v.* Lamborn, 1 Harr. (Del.) 125.

Iowa.— Knight *v.* Dunsmore, 12 Iowa 35.

Ohio.— Bashford *v.* Shaw, 4 Ohio St. 263.

Pennsylvania.— Fegenbush *v.* Lang, 28 Pa. St. 193; Leech *v.* Hill, 4 Watts (Pa.) 448; Gibbs *v.* Cannon, 9 Serg. & R. (Pa.) 198, 11 Am. Rep. 699.

United States.— See Reynolds *v.* Douglass, 12 Pet. (U. S.) 497, 9 L. ed. 1171.

20. *Alabama.*— Adams *v.* Torbert, 6 Ala. 865; Hightower *v.* Ivy, 2 Port. (Ala.) 308.

Connecticut.— Buck *v.* Cotton, 2 Conn. 126, 7 Am. Dec. 251.

Maine.— Gower *v.* Moore, 25 Me. 16, 43 Am. Dec. 247; Groton *v.* Dallheim, 6 Me. 476.

Massachusetts.— Farnum *v.* Fowle, 12 Mass. 89, 7 Am. Dec. 35; Sandford *v.* Dillaway, 10 Mass. 52, 6 Am. Dec. 99.

Michigan.— Whitten *v.* Wright, 34 Mich. 92.

New Jersey.— Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

New York.— Bruce *v.* Lytle, 13 Barb. (N. Y.) 163; Jackson *v.* Richards, 2 Cai. (N. Y.) 343.

Pennsylvania.— Barton *v.* Baker, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620.

South Carolina.— Jervey *v.* Wilbur, 1 Bailey (S. C.) 453. *Contra,* McClellan *v.* Clarke, 2 Brev. (S. C.) 106; Clark *v.* Minton [*cited* in Kiddell *v.* Ford, 2 Treadw. (S. C.) 678, 682].

Wisconsin.— Wilson *v.* Senier, 14 Wis. 380.

United States.—Phipps *v.* Harding, 70 Fed. 468, 34 U. S. App. 148, 17 C. C. A. 203. *Contra,* Morris *v.* Gardner, 1 Cranch C. C. (U. S.) 213, 17 Fed. Cas. No. 9,830.

Contra, Stothart *v.* Parker, 1 Overt. (Tenn.) 260; De Berdt *v.* Atkinson, 2 H. Bl. 336 [*explained* and *doubted* in Holland *v.* Turner, 10 Conn. 308].

See 7 Cent. Dig. tit. "Bills and Notes," § 1041.

By the law merchant the fact that the makers were insolvent all the time and the indorser knew it does not waive presentment for payment and notice of dishonor. Kimmel *v.* Weil, 95 Ill. App. 15.

21. *Alabama.*— Adams *v.* Torbert, 6 Ala. 865.

b. Of Drawee. Inasmuch as it cannot be definitely known without presentment that a drawee will not be able, through friends or resources unknown to the holder, to pay a bill,[22] his known or reputed insolvency is not of itself sufficient excuse for failing to make presentment for payment or give notice of dishonor,[23] provided of course the drawer had a reasonable right to expect the bill to be paid,[24] and this is true although the bill was accepted *supra protest*.[25]

6. Closing or Abandonment of Residence or Place of Payment. The fact that the maker or accepter's residence or the place of payment designated in the instrument is closed, with no one present to answer a demand, or has been removed or abandoned, is sufficient excuse for failure to make demand.[26] So too notice will be excused if the indorser's place of business was closed and no one was there to answer for him.[27]

7. Countermand of Payment. A countermand of payment by the drawer of a bill of exchange or draft,[28] a withdrawal of the funds upon which the bill is

Maine.— Greely *v.* Hunt, 21 Me. 455.

Massachusetts.— Colt *v.* Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584.

South Carolina.— Allwood *v.* Haseldon, 2 Bailey (S. C.) 457.

United States.— Stewart *v.* French, 2 Cranch C. C. (U. S.) 300, 23 Fed. Cas. No. 13,427.

See 7 Cent. Dig. tit. "Bills and Notes," § 1041.

22. Hawley *v.* Jette, 10 Oreg. 31, 45 Am. Rep. 129.

23. *Connecticut.*— Dwight *v.* Scovil, 2 Conn. 654.

Louisiana.— Walton *v.* Watson, 1 Mart. N. S. (La.) 347.

Maine.— Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108.

Maryland.— Grafton First Nat. Bank *v.* Buckhannon Bank, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332; Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703.

New York.— Grant *v.* MacNutt, 12 Misc. (N. Y.) 20, 33 N. Y. Suppl. 62, 66 N. Y. St. 719; Jackson *v.* Richards, 2 Cai. (N. Y.) 343.

North Carolina.— Asheville Nat. Bank *v.* Bradley, 117 N. C. 526, 23 S. E. 455; Cedar Falls Co. *v.* Wallace, 83 N. C. 225.

Oregon.— Hawley *v.* Jette, 10 Oreg. 31, 45 Am. Rep. 129.

England.— Haynes *v.* Birks, 3 B. & P. 599; Whitfield *v.* Savage, 2 B. & P. 277; Thackray *v.* Blackett, 3 Campb. 164, 13 Rev. Rep. 783; Esdaile *v.* Sowerby, 11 East 114, 10 Rev. Rep. 440; Nicholson *v.* Gouthit, 2 H. Bl. 609; Boultbee *v.* Stubbs, 18 Ves. Jr. 20, 11 Rev. Rep. 141; *Ex p.* Wilson, 11 Ves. Jr. 410, 8 Rev. Rep. 194.

Contra, as to checks in Tennessee. Jackson Ins. Co. *v.* Sturges, 12 Heisk. (Tenn.) 339; Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

See 7 Cent. Dig. tit. "Bills and Notes," § 1041.

24. Cedar Falls Co. *v.* Wallace, 83 N. C. 225.

25. Schofield *v.* Bayard, 3 Wend. (N. Y.) 488.

26. *Alabama.*— Roberts *v.* Mason, 1 Ala. 373; Goading *v.* Britain, 1 Stew. & P. (Ala.) 282.

Florida.— Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346.

Louisiana.— Erwin *v.* Adams, 2 La. 318.

Maine.— Central Bank *v.* Allen, 16 Me. 41.

Massachusetts.— Shed *v.* Brett, 1 Pick. (Mass.) 413.

New York.— Paton *v.* Lent, 4 Duer (N. Y.) 231; Ogden *v.* Cowley, 2 Johns. (N. Y.) 274.

Pennsylvania.— Berg *v.* Abbott, 83 Pa. St. 177, 24 Am. Rep. 158; Rahm *v.* Philadelphia Bank, 1 Rawle (Pa.) 335.

Tennessee.—Sulzbacher *v.* Charleston Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828; Apperson *v.* Bynum, 5 Coldw. (Tenn.) 341; Union Bank *v.* Fowlkes, 2 Sneed (Tenn.) 555.

England.— Hine *v.* Allely, 4 B. & Ad. 624, 2 L. J. K. B. 105, 1 N. & M. 433, 24 E. C. L. 275; Rogers *v.* Langford, 1 Cr. & M. 637, 3 Tyrw. 654; Turner *v.* Stones, 1 D. & L. 122, 7 Jur. 745, 12 L. J. Q. B. 303; Howe *v.* Bowes, 16 East 112, 14 Rev. Rep. 319 [*reversed* on other grounds in 5 Taunt. 30, 14 Rev. Rep. 700, 1 E. C. L. 29]; Crosse *v.* Smith, 1 M. & S. 545, 14 Rev. Rep. 529.

27. Howe *v.* Bradley, 19 Me. 31; Lord *v.* Appleton, 15 Me. 270; Bowie *v.* Blacklock, 2 Cranch C. C. (U. S.) 265, 3 Fed. Cas. No. 1,729. See also Granite Bank *v.* Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253, holding that where the place of business of a firm which was the maker of a note was closed when the note became due and the notary was informed that the firm had failed and left town, there was a sufficient excuse for demand, although a partner in the firm on whom demand might have been made resided in the city and his address appeared in the directory.

28. *Alabama.*— Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67.

Illinois.— Industrial Bank *v.* Bowes, 165 Ill. 70, 46 N. E. 10, 56 Am. St. Rep. 228.

New Hampshire.— Child *v.* Moore, 6 N. H. 33.

New York.— Woodin *v.* Frazee, 38 N. Y. Super. Ct. 190; Purchase *v.* Mattison, 6 Duer

drawn,[29] or a statement to the payee that such funds are withdrawn [30] will dispense with demand or notice as to himself; but it would seem that the mere withdrawal of funds before maturity of the bill is not of itself a waiver,[31] unless it be done without further reasonable expectation of providing for the bill.[32]

8. **Death of Maker.** The death of the maker of a note does not excuse a demand of payment and the giving of notice to the indorser,[33] unless the indorsement is made after the death of the maker with full knowledge of that fact.[34] It has been held, however, that where the administrator is not bound to pay within a certain time after the commencement of administration no demand need be made until after such time.[35]

9. **Epidemic or Disease.** The prevalence of a malignant disease or epidemic excuses demand or notice until a reasonable time after the termination of the same,[36] although notice given during such time is effective.[37]

10. **Illness or Death of Holder.** While death or a sudden and severe misfortune of the holder or his collecting agent will excuse a delay in presenting a bill or forwarding a notice,[38] his illness or disability should be shown to have been sudden and so severe as to have prevented him from taking the proper steps,[39]

(N. Y.) 587; Jacks *v.* Darrin, 3 E. D. Smith (N. Y.) 557. See also Bradley Fertilizer Co. *v.* Lathrop, 2 N. Y. City Ct. 289.

South Carolina.— Lilley *v.* Miller, 2 Nott & M. (S. C.) 257 note.

United States.— Armstrong *v.* Brolaski, 46 Fed. 903; Neederer *v.* Barber, 17 Fed. Cas. No. 10,079.

England.— Hill *v.* Heap, D. & P. N. P. 57, 25 Rev. Rep. 791, 16 E. C. L. 435; Prideaux *v.* Collier, 2 Stark. 57, 3 E. C. L. 315.

See 7 Cent. Dig. tit. "Bills and Notes," § 1034.

29. Emery *v.* Hobson, 63 Me. 33; Lilley *v.* Miller, 2 Nott & M. (S. C.) 257 note; Kinyon *v.* Stanton, 44 Wis. 479, 28 Am. Rep. 601.

The reason is that "when the funds, destined to the payment of the bill, come, no matter how, into the hands of the drawer, he has sustained no loss, and no damages can be due him. Otherwise he would enrich himself at the expense of the holder. . . . The neglect of the holder may discharge the drawer from his then existing obligations; but it confers on him no right, nor any immunity from the consequences of his posterior act." Keith *v.* Mackey, 5 Rob. (La.) 277, 280.

30. Sutcliffe *v.* McDowell, 2 Nott & M. (S. C.) 251. See also Lilley *v.* Miller, 2 Nott & M. (S. C.) 257 note.

31. Adams *v.* Darby, 28 Mo. 162, 75 Am. Dec. 115; Edwards *v.* Moses, 2 Nott & M. (S. C.) 433, 10 Am. Dec. 615.

32. Valk *v.* Simmons, 4 Mason (U. S.) 113, 28 Fed. Cas. No. 16,815. See also Spangler *v.* McDaniel, 3 Ind. 275.

33. Gower *v.* Moore, 25 Me. 16, 43 Am. Dec. 247; Juniata Bank *v.* Hale, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558; Johnson *v.* Harth, 1 Bailey (S. C.) 482.

Upon whom demand made on death of maker see *supra*, X, E, 4.

34. Picklar *v.* Harlan, 75 Mo. 678; Davis *v.* Francisco, 11 Mo. 572, 49 Am. Dec. 98 (where, although it did not specifically appear that the indorser knew of the maker's death, such inference was almost inevitable from the testimony adduced).

35. Landry *v.* Stansbury, 10 La. 484; Hale *v.* Burr, 12 Mass. 86; Burrill *v.* Smith, 7 Pick. (Mass.) 291. *Contra*, Frayzer *v.* Dameron, 6 Mo. App. 153. See also Gower *v.* Moore, 25 Me. 16, 43 Am. Dec. 247, where the court, in referring to the rule of the Massachusetts court, said that doubts have been expressed whether this rule is supported by reason.

36. Tunno *v.* Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141; Hanauer *v.* Anderson, 16 Lea (Tenn.) 340. *Contra*, Roosevelt *v.* Woodhull, Anth. N. P. (N. Y.) 50.

37. Hanauer *v.* Anderson, 16 Lea (Tenn.) 340, holding this is true both at common law and under a statute which requires the giving of the notice within a specified time after the epidemic has been declared at an end by the health authorities. The effect of such statute is simply to fix by a definite event the period of the termination of the epidemic which at common law was a matter of proof and a fruitful source of contention and also to definitely determine what would constitute a reasonable time after the epidemic had ended.

38. *Massachusetts.*—White *v.* Stoddard, 11 Gray (Mass.) 258, 71 Am. Dec. 711, holding that where the holder died and his will was proved before the maturity of the paper, but the executor renounced the trust after requesting the indorser to waive demand, a presentment by an administrator a short time after his appointment, which occurred a month after the renunciation by the executor, was sufficient.

Pennsylvania.— Newbold *v.* Boraef, 155 Pa. St. 227, 26 Atl. 305.

South Carolina.— Duggan *v.* King, Rice (S. C.) 239, 33 Am. Dec. 107.

Wisconsin.— Wilson *v.* Senier, 14 Wis. 380.

England.— Smith *v.* Mullett, 2 Campb. 208, 11 Rev. Rep. 694.

39. Wilson *v.* Senier, 14 Wis. 380.

If the note may be sent by mail it has

and it has been held that notice of dishonor must be given as soon as the disability is removed.[40]

11. Loss or Destruction of Paper. That a bill is lost or mislaid is an excuse for reasonable delay in presenting the same,[41] and where the bill is destroyed without the fault of the holder no presentment need be made at all,[42] although the party primarily liable should be given notice.[43]

12. Protest For, and Notice of, Non-Acceptance. The protesting of a bill upon its non-acceptance and a due forwarding of notice of the same to the parties secondarily liable fixes the rights and liabilities of the parties and excuses a subsequent presentment and demand for payment,[44] but mere presentment for acceptance without subsequent protest and notice of non-acceptance will not.[45]

13. Want of Injury — a. To Principal Debtor. Where the action is against a party who sustains the relation of a principal or independent debtor or a guarantor, a showing that no injury was occasioned by the delay in presentment is as a rule a good excuse for such delay,[46] and where the delay has operated to his

been held that personal disability would not excuse the holder for failing to make demand at the proper time. Purcell *v.* Allemong, 22 Gratt. (Va.) 739.

The dangerous illness of an indorser's wife, because of which he left unopened a notice received by him, will not excuse his delay in forwarding notice promptly to his indorser. Turner *v.* Leach, Chitty Bills 1108.

40. Wilson *v.* Senier, 14 Wis. 380.

41. Aborn *v.* Bosworth, 1 R. I. 401; Sebag *v.* Abitbol, 4 M. & S. 462, 1 Stark. 79, 2 E. C. L. 39.

42. Scott *v.* Meeker, 20 Hun (N. Y.) 161.

43. Thackray *v.* Blackett, 3 Campb. 164, 13 Rev. Rep. 783.

44. *Arkansas.*— Turner *v.* Greenwood, 9 Ark. 44.

Louisiana.— Pecquet *v.* Mager, 14 La. 74; Williams *v.* Robinson, 13 La. 419; Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306; Morgan *v.* Towles, 8 Mart. (La.) 730, 13 Am. Dec. 300.

Massachusetts.— Lenox *v.* Cook, 8 Mass. 460.

Missouri.— Lucas *v.* Ladew, 28 Mo. 342.

New Hampshire.— Exeter Bank *v.* Gordon, 8 N. H. 66.

New York.— Plato *v.* Reynolds, 27 N. Y. 586 (where a bill was presented for acceptance on the day it became due and it was held that a non-acceptance was in effect a refusal to pay, and the formality of a demand of payment was dispensed with); Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; Weldon *v.* Buck, 4 Johns. (N. Y.) 144; Mason *v.* Franklin, 3 Johns. (N. Y.) 202; Hoffman *v.* Smith, 1 Cai. (N. Y.) 157.

Texas.— Carson *v.* Russell, 26 Tex. 452.

United States.—Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238; Wallace *v.* Agry, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17,096; Wild *v.* Passamaquoddy Bank, 3 Mason (U. S.) 505, 29 Fed. Cas. No. 17,646; Allen *v.* King, 4 McLean (U. S.) 128, 1 Fed. Cas. No. 226.

England.— Forster *v.* Jurdison, 16 East 105; Whitehead *v.* Walker, 11 L. J. Exch. 168, 9 M. & W. 506; Hickling *v.* Hardey, 1 Moore C. P. 61, 7 Taunt. 312, 2 E. C. L. 378; De la Torre *v.* Barclay, 1 Stark. 7, 2 E. C. L. 13.

See 7 Cent. Dig. tit. "Bills and Notes," § 1032.

Where certification of a check is refused further presentment for payment is unnecessary. Bradford *v.* Fox, 39 Barb. (N. Y.) 203.

45. Knickerbocker L. Ins. Co. *v.* Pendleton, 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866.

46. *Connecticut.*— Hoyt *v.* Seeley, 18 Conn. 353.

Georgia.— Patten *v.* Newell, 30 Ga. 271.

Illinois.— Stevens *v.* Park, 73 Ill. 387; Heaton *v.* Hulbert, 4 Ill. 489 (guarantor); Allen *v.* Kramer, 2 Ill. App. 205.

Indiana.— Offutt *v.* Rucker, 2 Ind. App. 350, 27 N. E. 589.

Kansas.— Gregg *v.* George, 16 Kan. 546.

Maine.— Emery *v.* Hobson, 63 Me. 33.

Maryland.— Wheeling Exch. Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

Michigan.— Compton *v.* Blair, 46 Mich. 1, 8 N. W. 533.

Missouri.— Morrison *v.* McCartney, 30 Mo. 183.

New Hampshire.— Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43.

New York.— Cowing *v.* Altman, 79 N. Y. 167; Carroll *v.* Sweet, 57 N. Y. Super. Ct. 100, 5 N. Y. Suppl. 572, 25 N. Y. St. 356; Reiners *v.* Davis, 2 N. Y. City Ct. 215; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156.

North Carolina.— See Stowe *v.* Cape Fear Bank, 14 N. C. 408.

Pennsylvania.— Piece *v.* Daniel, 16 Wkly. Notes Cas. (Pa.) 35; Flemming *v.* Denny, 2 Phila. (Pa.) 111, 13 Leg. Int. (Pa.) 140.

Compare Minehart *v.* Handlin, 37 Ark. 276; Williams *v.* Brashear, 19 La. 370; Ford *v.* McClung, 5 W. Va. 156 (holding that the law will presume that the drawer of a check suffered injury where its presentment had been delayed, and that plaintiff must rebut such presumption); Dennis *v.* Morrice, 3 Esp. 158.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1035, 1108.

prejudice he is discharged only to the amount of injury actually sustained;[47] but if during such delay the drawee fails[48] or the fund on which the check is drawn becomes depreciated[49] the holder must suffer the loss.

b. To Indorser. With regard to the indorser, however, the rule is different, and the absence of injury upon his part cannot be shown as an excuse for delay in giving him notice;[50] although in some instances the courts, while recognizing that injury to the indorser is to be presumed in such cases, seem to hold that if it is actually shown that no injury was in fact occasioned the delay will be excused.[51]

14. War or Interdiction of Commerce. The existence of a state of war which renders intercourse between the holder and indorser impossible or unlawful and interrupts or obstructs the ordinary regulations of trade, being a circumstance beyond the control of either party, is a good excuse for failure or delay in presenting a bill and giving notice.[52] But where it is neither illegal, impossible, nor eminently dangerous[53] to make demand or notice, the existence of a state of war will not excuse the exercise of diligence in endeavoring to make the same where, notwithstanding the war, it is probable that such demand or notice could have been made.[54] The excuse for failure or delay exists only so long as the hos-

47. Pack *v.* Thomas, 13 Sm. & M. (Miss.) 11, 51 Am. Dec. 135.

48. East River Bank *v.* Gedney, 4 E. D. Smith (N. Y.) 582.

49. Smith *v.* Jones, 2 Bush (Ky.) 103.

50. *Kentucky.*— Slack *v.* Longshaw, 8 Ky. L. Rep. 166.

Louisiana.— Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372.

Michigan.— Smith *v.* Long, 40 Mich. 555, 29 Am. Rep. 558; Whitten *v.* Wright, 34 Mich. 92.

Nebraska.— Wymore First Nat. Bank *v.* Miller, 37 Nebr. 500, 55 N. W. 1064, 40 Am. St. Rep. 499.

New York.— Gough *v.* Staats, 13 Wend. (N. Y.) 549.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1035, 1108.

51. Smith *v.* Miller, 52 N. Y. 545; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94.

Time when made.—Where, however, plaintiff's right of recovery is rested on an alleged subsequent promise to pay, the rule and the reason on which it rests are different, for reasons which will suggest themselves. A promise to pay, made after suit brought, will not support the action, unless there is something included in the promise which is equivalent to an admission that the liability incurred by the hill is still subsisting. Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658.

52. *Arkansas.*— Peters *v.* Hobbs, 25 Ark. 67, 91 Am. Dec. 526.

Kentucky.— Berry *v.* Southern Bank, 2 Duv. (Ky.) 379; Bell *v.* Hall, 2 Duv. (Ky.) 288; Graves *v.* Tilford, 2 Duv. (Ky.) 108, 87 Am. Dec. 483.

Louisiana.— Gayarre *v.* Sabatier, 24 La. Ann. 358; Union Bank *v.* Robertson, 19 La. Ann. 72; Jex *v.* Tureaud, 19 La. Ann. 64; Harp *v.* Kenner, 19 La. Ann. 63.

Maryland.— Norris *v.* Despard, 38 Md. 487.

Mississippi.— Durden *v.* Smith, 44 Miss. 548; Dunbar *v.* Tyler, 44 Miss. 1.

New York.— Harden *v.* Boyce, 59 Barb. (N. Y.) 425.

Pennsylvania.— House *v.* Adams, 48 Pa. St. 261, 86 Am. Dec. 588.

Tennessee.— Bynum *v.* Apperson, 9 Heisk. (Tenn.) 632; Polk *v.* Spinks, 5 Coldw. (Tenn.) 431, 98 Am. Dec. 426.

Virginia.— Farmers' Bank *v.* Gunnell, 26 Gratt. (Va.) 131 [*followed* in McVeigh *v.* Allen, 29 Gratt. (Va.) 588].

United States.— Ray *v.* Smith, 17 Wall. (U. S.) 411, 21 L. ed. 666; Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1043, 1109, 1192.

53. Apperson *v.* Union Bank, 4 Coldw. (Tenn.) 445.

54. *Kentucky.*— Union Nat. Bank *v.* Marr, 6 Bush (Ky.) 614.

Louisiana.—Jex *v.* Tureaud, 19 La. Ann. 64.

Tennessee.— Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419; Apperson *v.* Union Bank, 4 Coldw. (Tenn.) 445.

Virginia.— Purcell *v.* Allemong, 22 Gratt. (Va.) 739.

West Virginia.— Ford *v.* McClung, 5 W. Va. 156.

United States.— U. S. *v.* Barker, 24 Fed. Cas. No. 14,519, 1 U. S. L. J. 1.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1144, 1192.

"Obstacles of the kind which will excuse, need not be of the degree or extent which make travel, intercourse, presentment, impossible. It is enough if they be of the degree and character which deter men of ordinary prudence, energy and courage, from encountering them in the prosecution of business, in respect of which they owe an active and earnest duty, and feel an active and earnest interest. Dangers, difficulties, obstructions of a slight character, are not enough to excuse. The duty which the holder owes to the indorser, requires of the holder to give willing, earnest, active and real energy and effort to make presentment to the payor, at the proper

tilities last, and upon their termination, in the absence of statute or ordinance to the contrary,[55] it is the duty of the holder to make demand or give notice with reasonable diligence,[56] and the time for making the demand or giving notice begins to run from the time the restrictions upon commercial intercourse are removed and not from the time the war is officially declared to be ended.[57]

I. Waiver of Demand or Notice — 1. Right to Waive. The right of any party to a demand or notice, being a condition for his benefit, may be waived by him.[58]

2. Who May Waive. A waiver must be made by one having the capacity to incur obligations,[59] but inasmuch as notice left with a clerk or party in charge of an indorser's place of business is sufficient,[60] it follows that a waiver by a person

time prescribed by law. . . . The 'impossibility' mentioned in some of the text-books, in respect to questions of this kind, is not understood to mean hindrances, or obstructions of a degree or character, greater than as defined herein above." Polk *v.* Spinks, 5 Coldw. (Tenn.) 431, 433, 98 Am. Dec. 426.

55. Duerson *v.* Alsop, 27 Gratt. (Va.) 229.

56. *Alabama.*— Turner *v.* Patton, 49 Ala. 406, holding that failure to give notice until nearly two years after military operations have ceased and over two months after the reopening of the regular mail service between the parties is a failure to use proper diligence.

Arkansas.— Peters *v.* Hobbs, 25 Ark. 67, 91 Am. Dec. 526.

Kentucky.— Morgan *v.* Louisville Bank, 4 Bush (Ky.) 82, holding that notice sent six months after the opening of mail communications between due points was too late.

Louisiana.— James *v.* Wade, 21 La. Ann. 548; Labadiole *v.* Landry, 20 La. Ann. 149; Shaw *v.* Neal, 19 La. Ann. 156; Union Bank *v.* Robertson, 19 La. Ann. 72; Jex *v.* Tureaud, 19 La. Ann. 64; Harp *v.* Kenner, 19 La. Ann. 63 (holding that where an indorser returned in October, 1865, and notice of non-payment was not given him until early in 1866, there was a failure to use proper diligence); Bridgeford *v.* Simonds, 18 La. Ann. 121.

Maryland.— Norris *v.* Despard, 38 Md. 487.

Mississippi.— Durden *v.* Smith, 44 Miss. 548 (holding that a demand made in New Orleans five months after intercourse between that city and New York had been restored was too late); Dunbar *v.* Tyler, 44 Miss. 1.

New York.— Harden *v.* Boyce, 59 Barb. (N. Y.) 425.

Pennsylvania.— House *v.* Adams, 48 Pa. St. 261, 86 Am. Dec. 588; Steinmetz *v.* Currey, 1 Dall. (Pa.) 234, 1 L. ed. 115.

Tennessee.— Gilroy *v.* Brinkley, 12 Heisk. (Tenn.) 392; Bynum *v.* Apperson, 9 Heisk. (Tenn.) 632.

Virginia.— Old Dominion Bank *v.* McVeigh, 29 Gratt. (Va.) 546 (holding that a delay in giving notice of two months after the cessation of war and the opening of communication was too great); McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785; Tardy *v.* Boyd, 26 Gratt. (Va.) 631; Farmers' Bank *v.* Gunnell, 26 Gratt. (Va.) 131.

United States.— Bond *v.* Moore, 93 U. S. 593, 23 L. ed. 983; Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1044, 1192.

57. Bond *v.* Moore, 93 U. S. 593, 23 L. ed. 983.

58. *California.*— Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

Delaware.— Farmers' Bank *v.* Waples, 4 Harr. (Del.) 429.

Florida.— Robinson *v.* Barnett, 19 Fla. 670, 45 Am. Rep. 24.

Indiana.— Pollard *v.* Bowen, 57 Ind. 232.

Kentucky.— Murphy *v.* Citizens' Sav. Bank, 22 Ky. L. Rep. 1872, 62 S. W. 1028.

Massachusetts.— Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; Jones *v.* Fales, 4 Mass. 245.

Missouri.— Keller *v.* Home L. Ins. Co., 95 Mo. App. 627, 69 S. W. 612; Kaiser *v.* Nial, 9 Mo. App. 590.

Pennsylvania.— Barclay *v.* Weaver, 19 Pa. St. 396, 57 Am. Dec. 661.

Wisconsin.— Worden *v.* Mitchell, 7 Wis. 161.

See 7 Cent. Dig. tit. "Bills and Notes," § 1196.

59. A bankrupt may waive notice before the appointment of a receiver. *Ex p.* Tremont Nat. Bank, 2 Lowell (U. S.) 409, 24 Fed. Cas. No. 14,169, 16 Nat. Bankr. Reg. 397, 25 Pittsb. Leg. J. 84.

A curator to an insolvent has the right to waive protest on a note upon which the latter was indorser. *In re* Boutin, 12 Quebec Super. Ct. 186.

A waiver by a habitual drunkard after an imposition and finding, but before the appointment of a committee, is of no effect. Wadsworth *v.* Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; Wadsworth *v.* Sherman, 14 Barb. (N. Y.) 169.

A woman married after her indorsement, in those jurisdictions where the common-law disabilities of married women prevail, cannot waive notice without her husband's consent. Marshall *v.* Overbay, 10 La. 161.

If made by one of several executors it must at least be shown to have been made with the approbation of all. Cayuga County Bank *v.* Bennett, 5 Hill (N. Y.) 236, which case does not, however, expressly affirm that a waiver may be made by executors in any event.

60. See *supra*, XIII, E, 1, b, (I), (C).

so in charge is effective.[61] So too a waiver may be made by a joint drawer or indorser,[62] by a partner,[63] or by an agent,[64] but in the latter instance his power should clearly appear.[65]

3. TIME OF WAIVER. The time at which a waiver is made is immaterial. It may be made at the time the note is executed,[66] at the time of indorsement,[67] before[68] or after maturity,[69] or even after commencement of a suit thereon[70] or after judgment and pending motion for a new trial.[71]

4. NECESSITY FOR NEW CONSIDERATION. Inasmuch as a waiver of demand or notice is not considered a waiver of absolute and strict conditions precedent in contracts as construed at common law,[72] it is clear that no new consideration is necessary where such waiver is made before or at the maturity of the instrument;[73] and by the weight of authority none is necessary to support a waiver after maturity.[74]

61. Johnson *v.* Zeckendorf, (Ariz. 1886) 12 Pac. 65.

62. Seaford First Nat. Bank *v.* Connoway, 4 Houst. (Del.) 206; Dickerson *v.* Turner, 12 Ind. 223; Willis *v.* Green, 5 Hill (N. Y.) 232, 40 Am. Dec. 351; Sherer *v.* Easton Bank, 33 Pa. St. 134.

63. Farmers', etc., Bank *v.* Lonergan, 21 Mo. 46; Baer *v.* Leppert, 12 Hun (N. Y.) 516. See, generally, PARTNERSHIP.

64. Whitney *v.* South Paris Mfg. Co., 39 Me. 316.

An attorney in charge of a case or his managing clerk may waive. Standage *v.* Creighton, 5 C. & P. 406, 24 E. C. L. 628.

65. Kræutler *v.* U. S. Bank, 11 Rob. (La.) 213; Grosvenor *v.* Stone, 8 Pick. (Mass.) 79; McGhie *v.* Gilbert, 6 N. Brunsw. 235.

66. Sieger *v.* Allentown Second Nat. Bank, 132 Pa. St. 307, 19 Atl. 217; Wilkie *v.* Chandon, 1 Wash. 355, 25 Pac. 464.

67. Keyes *v.* Winter, 54 Me. 399.

68. *Alabama.*— Cockrill *v.* Hobson, 16 Ala. 391.

Delaware.— Farmers' Bank *v.* Waples, 4 Harr. (Del.) 429.

Georgia.— Hoadley *v.* Bliss, 9 Ga. 303.

Louisiana.— Union Nat. Bank *v.* Lee, 33 La. Ann. 301; Wall *v.* Bry, 1 La. Ann. 312.

Maryland.— Duvall *v.* Farmers' Bank, 7 Gill & J. (Md.) 44.

Pennsylvania.—Annville Nat. Bank *v.* Kettering, 106 Pa. St. 531, 51 Am. Rep. 536.

Wisconsin.— Worden *v.* Mitchell, 7 Wis. 161.

United States.— Sigerson *v.* Mathews, 20 How. (U. S.) 496, 15 L. ed. 989.

69. Rindge *v.* Kimball, 124 Mass. 209; Lockwood *v.* Bock, 50 Minn. 142, 52 N. W. 391. Although, accurately speaking, there can only be a waiver of demand and notice by the indorser before the note is due, yet after it is due he can waive proof of them; or what is more to the purpose he can so act toward the holder of the note as to render the fact that demand was not made or notice given wholly immaterial. Hoadley *v.* Bliss, 9 Ga. 303; Yeager *v.* Farwell, 13 Wall. (U. S.) 6, 20 L. ed. 476.

70. Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658; Oglesby *v.* The D. S. Stacy, 10 La. Ann. 117.

71. Hart *v.* Long, 1 Rob. (La.) 83.

72. Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

73. *Florida.*— Robinson *v.* Barnett, 19 Fla. 670, 45 Am. Rep. 24.

Indiana.— Neal *v.* Wood, 23 Ind. 523; Free *v.* Kierstead, 16 Ind. 91.

Louisiana.— Wall *v.* Bry, 1 La. Ann. 312; McMahan *v.* Grant, 16 La. 479.

New York.— Coddington *v.* Davis, 3 Den. (N. Y.) 16 [*affirmed* in 1 N. Y. 186].

Ohio.—McIlvaine *v.* Bradley, 1 Disn. (Ohio) 194, 12 Ohio Dec. (Reprint) 570.

Oregon.— Delsman *v.* Friedlander, 40 Oreg. 33, 66 Pac. 297.

Pennsylvania.— See Uhler *v.* Farmers Nat. Bank, 64 Pa. St. 406.

England.— Foster *v.* Dawber, 6 Exch. 839, 20 L. J. Exch. 385.

See 7 Cent. Dig. tit. "Bills and Notes," § 1205.

74. *Iowa.*— Creshire *v.* Taylor, 29 Iowa 492; Hughes *v.* Bowen, 15 Iowa 446.

Louisiana.— Hart *v.* Long, 1 Rob. (La.) 83.

Massachusetts.— Rindge *v.* Kimball, 124 Mass. 209.

Michigan.— Porter *v.* Hodenpuyl, 9 Mich. 11.

Minnesota.— Lockwood *v.* Bock, 50 Minn. 142, 52 N. W. 391.

South Carolina.— Fell *v.* Dial, 14 S. C. 247. But see Cathcart *v.* Gibson, 1 Rich. (S. C.) 10.

United States.— Yeager *v.* Farwell, 13 Wall. (U. S.) 6, 20 L. ed. 476.

Contra, Huntington *v.* Harvey, 4 Conn. 124; Sebree Deposit Bank *v.* Moreland, 96 Ky. 150, 158, 16 Ky. L. Rep. 404, 28 S. W. 153, 29 L. R. A. 305 (where the court said: "To recognize a doctrine that in effect dispenses with the performance of conditions by the holder upon which the indorser agrees to become bound, and hold him liable upon a subsequent promise to pay, although released, destroys the virtue of commercial paper, and places the indorser at the mercy of those who, in great commercial transactions, are seeking to hold those liable who have been once released, upon the plea that the laches of the holder redounds at last to his benefit, if he can establish a promise on the part of the indorser, although released from the payment of the dishonored paper"); Landrum *v.* Trow-

5. Necessity For Writing. A waiver of demand and notice made by an indorser, not being a new contract but only a waiver absolutely or in part of a condition precedent to his liability, need not, in the absence of statute,[75] be in writing.[76]

6. What Constitutes Waiver — a. In General. A waiver may result from implication and usage or from any words and acts which by fair and reasonable construction are of such a character as will satisfy the mind that a waiver was intended, or which will justify the holder in assuming that the indorser intended to dispense with notice, or to induce him to forego the usual steps necessary to fix the liability of the indorsers.[77] Such waivers, however, being in derogation

bridge, 2 Metc. (Ky.) 281; Ralston *v.* Bullitts, 3 Bibb (Ky.) 261; Lawrence *v.* Ralston, 3 Bibb (Ky.) 102; Brown *v.* Teague, 52 N. C. 573; Walters *v.* Swallow, 6 Whart. (Pa.) 446.

Aliter as to a guarantor who has been discharged by laches. Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547.

75. In Maine the statute expressly requires a written waiver signed by the indorser (Skowhegan First Nat. Bank *v.* Maxfield, 83 Me. 576, 22 Atl. 479, holding, however, that the necessity of such writing might be obviated by conduct of the indorser amounting to an estoppel); but this statute was expressly prospective and did not in any way affect the rights of parties under agreements already made (Thomas *v.* Mayo, 56 Me. 40). Before the passage of this statute no writing was required. Keyes *v.* Winter, 54 Me. 399; Lane *v.* Stewart, 20 Me. 98; Fuller *v.* McDonald, 8 Me. 213, 23 Am. Dec. 499.

76. *Arkansas.*—Andrews *v.* Simms, 33 Ark. 771; Lary *v.* Young, 13 Ark. 401, 58 Am. Dec. 332.

Kansas.— Markland *v.* McDaniel, 51 Kan. 350, 32 Pac. 1114, 20 L. R. A. 96.

Kentucky.— Maples *v.* Traders' Deposit Bank, 15 Ky. L. Rep. 879.

Massachusetts.— Field *v.* Nickerson, 13 Mass. 131.

Missouri.— Kaiser *v.* Nial, 9 Mo. App. 590.

New Hampshire.— Edwards *v.* Tandy, 36 N. H. 540; Hibbard *v.* Russell, 16 N. H. 410, 41 Am. Dec. 733.

New York.— Porter *v.* Kemball, 53 Barb. (N. Y.) 467.

Ohio.— Dye *v.* Scott, 35 Ohio St. 194, 35 Am. Rep. 604.

Pennsylvania.— Annville Nat. Bank *v.* Kettering, 106 Pa. St. 531, 51 Am. Rep. 536; Barclay *v.* Weaver, 19 Pa. St. 396, 57 Am. Dec. 661.

Texas.— Stone *v.* Smith, 30 Tex. 138, 94 Am. Dec. 299.

Wisconsin.— Worden *v.* Mitchell, 7 Wis. 161.

England.— Foster *v.* Dawber, 6 Exch. 839, 20 L. J. Exch. 385.

See 7 Cent. Dig. tit. "Bills and Notes," § 1199.

77. *Arkansas.*— Lary *v.* Young, 13 Ark. 401, 58 Am. Dec. 332.

California.— Bryant *v.* Wilcox, 49 Cal. 47 (a request by the indorser before the maturity of the note that the holder should give himself no uneasiness about it, and a statement that it would be paid at maturity and that the indorser was collecting money for the maker and would see that the note was paid); Leonard *v.* Hastings, 9 Cal. 236 (the giving of a new note by the drawer to the payee for the amount).

Connecticut.— Hayes *v.* Werner, 45 Conn. 246.

Delaware.— Seaford First Nat. Bank *v.* Connoway, 4 Houst. (Del.) 206.

Georgia.—Anthony *v.* Pittman, 66 Ga. 701.

Illinois.— Smith *v.* Curlee, 59 Ill. 221; Curtiss *v.* Martin, 20 Ill. 557. See also Wood *v.* Price, 46 Ill. 435.

Indiana.— Havens *v.* Talbott, 11 Ind. 323.

Kansas.— Markland *v.* McDaniel, 51 Kan. 350, 32 Pac. 1114, 20 L. R. A. 96; Glaze *v.* Ferguson, 48 Kan. 157, 29 Pac. 396.

Louisiana.— Zacharie *v.* Kirk, 14 La. Ann. 433 (a promise to pay if the costs were thrown out); Oglesby *v.* The D. S. Stacy, 10 La. Ann. 117 (an admission made after the institution of the suit upon the note of the justice of the claim); Blaffer *v.* Herman, 7 La. Ann. 659; Thomas *v.* Marsh, 2 La. Ann. 353 (a declaration of an indorser that he had received notice of the protest and that it would be necessary to make arrangements to pay the note, if unaccompanied with any complaint as to irregularity in the receipt of the notice); Benoist *v.* His Creditors, 18 La. 522.

Maine.— Keyes *v.* Winter, 54 Me. 399; Robbins *v.* Vose, 53 Me. 36; Fullerton *v.* Rundlett, 27 Me. 31; Ticonic Bank *v.* Johnson, 21 Me. 426; Lane *v.* Steward, 20 Me. 98; Fuller *v.* McDonald, 8 Me. 213, 23 Am. Dec. 499. See also Marshall *v.* Mitchell, 35 Me. 221, 58 Am. Dec. 697.

Maryland.— Schley *v.* Merritt, 37 Md. 352; Staylor *v.* Ball, 24 Md. 183. See also Geiser *v.* Kershner, 4 Gill & J. (Md.) 305, 23 Am. Dec. 566.

Massachusetts.—Corner *v.* Pratt, 138 Mass. 446; Armstrong *v.* Chadwick, 127 Mass. 156 (where the holder of a note secured by a mortgage informed the indorser that the note and mortgage were worthless and he should look to him, and the indorser assented, saying he "would take the mortgaged property, sell it, and take care of the note"); Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Gove *v.* Vining, 7 Metc. (Mass.) 212, 39 Am. Dec. 770; Barker *v.* Parker, 6 Pick. (Mass.) 80; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436 (a promise by an indorser to attend to

of the admitted rights of an indorser, are rather strictly construed, are not to be extended beyond the fair import of the terms used, and will not be inferred from

the renewal of a note and to take care of the same, and a direction that notice to the maker should be sent to his care); Boyd *v.* Cleveland, 4 Pick. (Mass.) 525 (a reply by an indorser to the indorsee that he would be in New York when the note fell due and would pay it if the maker or his indorser did not, the indorsee having stated to the indorser that he neither knew nor had confidence in the other parties to the note and would look wholly to him for payment).

Michigan.— Parsons *v.* Dickinson, 23 Mich. 56, a statement by an indorser who knew that he had been discharged by the holder's laches, that he expected to have to pay, and a request that he try to collect of the maker.

Mississippi.—Carson *v.* Alexander, 34 Miss. 528 (an inclusion by a payee of the amount of an unpaid draft in an account sent to the drawer, to which no objection was made); Robbins *v.* Pinckard, 5 Sm. & M. (Miss.) 51 (a promise to let judgment go by default after learning of the holder's laches); Offit *v.* Vick, Walk. (Miss.) 99.

Missouri.— Tailer *v.* M. J. Murphy Furnishing Goods Co., 24 Mo. App. 420.

Montana.— Quaintance *v.* Goodrow, 16 Mont. 376, 41 Pac. 76.

New Hampshire.— Libbey *v.* Pierce, 47 N. H. 309 (a request by an indorser to a party that he protest the note); Hibbard *v.* Russell, 16 N. H. 410, 41 Am. Dec. 733 (a statement by the indorser to the holder after dishonor of a note that he must go to the maker and that if the maker could not pay he would have to pay, or was "good for it"); Whitney *v.* Abbot, 5 N. H. 378.

New York.— Ross *v.* Hurd, 71 N. Y. 14, 27 Am. Rep. 1; National Hudson River Bank *v.* Reynolds, 57 Hun (N. Y.) 307, 10 N. Y. Suppl. 669, 32 N. Y. St. 124; Porter *v.* Kemball, 53 Barb. (N. Y.) 467; Russell *v.* Cronkhite, 32 Barb. (N. Y.) 282 (a reply by an indorser to the holder that the note was perfectly good and that he need put himself to no trouble about notifying him); Glendening *v.* Canary, 5 Daly (N. Y.) 489 (a request by the indorser to an agent of the holder that he hold the note a few days, and that he, the indorser, would make it all right); Savage *v.* Bevier, 12 How. Pr. (N. Y.) 166; Leffingwell *v.* White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97. See also Sheldon *v.* Chapman, 31 N. Y. 644; Taylor *v.* French, 4 E. D. Smith (N. Y.) 458.

Ohio.— McMonigal *v.* Brown, 45 Ohio St. 499, 15 N. E. 860; Boyd *v.* Toledo Bank, 32 Ohio St. 526, 30 Am. Rep. 624; Kyle *v.* Green, 14 Ohio 490.

Pennsylvania.— Jenkins *v.* White, 147 Pa. St. 303, 23 Atl. 556 (an offer by the indorser prior to the maturity of the note of a new note in renewal); Sieger *v.* Allentown Second Nat. Bank, 132 Pa. St. 307, 19 Atl. 217; Moyer's Appeal, 87 Pa. St. 129; Braine *v.* Spalding, 52 Pa. St. 247; Scott *v.* Greer, 10 Pa. St. 103 (a request by the indorser that the note be not protested); Stahl *v.* Wolfe, 6 Wkly. Notes Cas. (Pa.) 143.

Rhode Island.— Whittier *v.* Collins, 15 R. I. 44, 23 Atl. 39, holding that while an indorser of a note waived notice of demand and non-payment by inducing the payee to delay the demand of payment, a request to refrain from pressing the maker after the instrument had matured would not constitute such waiver.

South Carolina.— Schmidt *v.* Radcliffe, 4 Strobh. (S. C.) 296, 53 Am. Dec. 678 (the statement of an indorser that he would try to get the money out of the maker and that if he could not he would have to pay it himself as he was the indorser); Moon *v.* Haynie, 1 Hill (S. C.) 411 (an agreement with the maker "to become paymaster" to the holder and sending the holder a message to that effect).

Texas.— Runnel *v.* Swan, 20 Tex. 822.

Virginia.— Cardwell *v.* Allan, 33 Gratt. (Va.) 160.

West Virginia.— Compton *v.* Gilman, 19 W. Va. 312, 42 Am. Rep. 776.

Wisconsin.— Hale *v.* Danforth, 46 Wis. 554, 1 N. W. 284, a promise by the indorser before maturity that if the note was suffered to run he would "pay it whenever payment is called for."

United States.— Sigerson *v.* Mathews, 20 How. (U. S.) 496, 15 L. ed. 989; Perry *v.* Rhodes, 2 Cranch C. C. (U. S.) 37, 19 Fed. Cas. No. 11,011.

England.— Anson *v.* Bailey, Bull. N. P. 276 (where an indorser in answer to the holder's letter after laches in giving notice wrote that "when he comes to Town he will set that Matter to rights"); Phipson *v.* Kneiler, 4 Campb. 285, 1 Stark. 116, 2 E. C. L. 53; Caunt *v.* Thompson, 7 C. B. 400, 6 D. & L. 621, 13 Jur. 495, 18 L. J. C. P. 125, 62 E. C. L. 400; Wood *v.* Brown, 1 Stark. 217, 2 E. C. L. 88 (a letter saying that he is "an accommodation drawer, and that the bill will be paid"); Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605 (an admission from a drawer on being pressed, that he had no funds or effects with the drawee and that the bill must be paid).

Canada.— Beckett *v.* Cornish, 4 U. C. Q. B. 138. See also Masters *v.* Stubbs, 9 N. Brunsw. 453.

See 7 Cent. Dig. tit. "Bills and Notes," § 1203.

A promise to give a new note for the amount claimed would be an admission and waiver on the part of an indorser, although he afterward refused to execute such note. Fell *v.* Dial, 14 S. C. 247.

Inducing purchase of note.— Where the indorsers of a note are active in procuring a party to buy it after its maturity and do not disclose to him the fact that they were discharged for want of notice, their silence

doubtful acts or language.[78] So too it is clear that the language or conduct relied

is equivalent to an affirmation of their continued liability and they will be estopped to set up a want of such notice. Libbey *v.* Pierce, 47 N. H. 309.

Sale without erasure of indorsement.— Where the indorsers sell a note which has been protested for non-payment without erasing their indorsement they will be estopped by such act from controverting their liability. St. John *v.* Roberts, 31 N. Y. 441, 88 Am. Dec. 287 [*reversing* 6 Bosw. (N. Y.) 593].

Whether a holder was misled to his injury is material in determining whether an indorser has waived notice, where the evidence is conflicting. Thus where an indorser wrote the words "protest waived" over his indorsement and the evidence was conflicting as to whether he notified the holder that the indorsement was forged, it was held that if the holder was misled to his injury the indorser was bound. Robinson *v.* Barnett, 19 Fla. 670, 45 Am. Rep. 24.

78. *Alabama.*— Sherrod *v.* Rhodes, 5 Ala. 683.

California.— Wright *v.* Liesenfeld, 93 Cal. 90, 28 Pac. 849.

Iowa.— Freeman *v.* O'Brien, 38 Iowa 406.

Louisiana.— Vance *v.* Depass, 2 La. Ann. 16; Kræutler *v.* U. S. Bank, 11 Rob. (La.) 213; Laporte *v.* Landry, 5 Mart. N. S. (La.) 359.

Maryland.— Moore *v.* Hardcastle, 11 Md. 486.

Massachusetts.— Pratt *v.* Chase, 122 Mass. 262; Hussey *v.* Freeman, 10 Mass. 84.

Missouri.— January *v.* Todd, 1 Mo. 567.

New Jersey.— U. S. Bank *v.* Southard, 17 N. J. L. 473, 35 Am. Dec. 521.

New York.— Ross *v.* Hurd, 71 N. Y. 14, 27 Am. Rep. 1; Martin *v.* Perqua, 65 Hun (N. Y.) 225, 20 N. Y. Suppl. 285, 47 N. Y. St. 518; Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Oswego Bank *v.* Knower, Lalor (N. Y.) 122; Cayuga County Bank *v.* Dill, 5 Hill (N. Y.) 403.

Pennsylvania.— Lancaster First Nat. Bank *v.* Shreiner, 110 Pa. St. 188, 20 Atl. 718.

South Carolina.— Houston *v.* Frazier, Harp. (S. C.) 10.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Ford *v.* Dallam, 3 Coldw. (Tenn.) 67.

Vermont.— Landon *v.* Bryant, 69 Vt. 203, 37 Atl. 297.

Virginia.— Tardy *v.* Boyd, 26 Gratt. (Va.) 631.

United States.— Sigerson *v.* Mathews, 20 How. (U. S.) 496, 15 L. ed. 989.

England.— Pickin *v.* Graham, 1 Cr. & M. 725, 2 L. J. Exch. 253, 3 Tyrw. 923.

Canada.— Britton *v.* Milsom, 19 Ont. App. 96; Montreal Bank *v.* Scott, 24 U. C. Q. B. 115.

See 7 Cent. Dig. tit. "Bills and Notes," § 1203.

There was held to be no waiver in the following cases:

Arkansas.— Dutton *v.* Bratt, (Ark. 1889) 11 S. W. 821 (a request by the payee and indorser of notes that the indorsee should not sue during the absence of the payee from home in case the note was not paid); Andrews *v.* Simms, 33 Ark. 771 (a statement by the indorser that "My name on them makes them good").

California.— Keyes *v.* Fenstermaker, 24 Cal. 329, a remark by an indorser that he would rather pay the note than be sued.

Iowa.— Isham *v.* McClure, 58 Iowa 515, 12 N. W. 558 (the fact that the indorser aided in collecting interest from the maker by inducing the holder to foreclose the mortgage securing the note, the evidence not showing that plaintiff relied in any way upon these acts to his prejudice); Decorah First Nat. Bank *v.* Day, 52 Iowa 680, 3 N. W. 728 (a statement by the drawer that he had taken steps to enforce a mechanic's lien held by him to secure the debt).

Louisiana.— Vance *v.* Depass, 2 La. Ann. 16; McMahan *v.* Grant, 16 La. 479 (pending negotiations with an indorser before maturity which might if continued have culminated in an agreement); Miranda *v.* New Orleans City Bank, 6 La. 740, 26 Am. Dec. 493 (an attendance by an indorser before the maturity of the note of a meeting of the makers' creditors whereby he assumed the quality of a creditor on the note).

Massachusetts.— Glidden *v.* Chamberlain, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 477 (a statement that he could not raise the money but "would do what he could"); Kent *v.* Warner, 12 Allen (Mass.) 561 (a statement by the indorser to the indorsee that he would see the maker before the note became due, and that the maker would probably give a new note, as that was the way he usually paid his notes).

Minnesota.— Hart *v.* Eastman, 7 Minn. 74.

Missouri.— Klostermann *v.* Kage, 39 Mo. App. 60, mere advice by the indorser to the holder to sue the maker, with a promise to pay the costs of such suit.

Montana.— Grant *v.* Spencer, 1 Mont. 136, the presence of one of the indorsers when the holder presents the note for payment.

New Hampshire.— Carter *v.* Burley, 9 N. H. 558, an agreement by an indorser, when he had learned of the dishonor of a note, to give collateral security for his responsibility.

New York.— Baer *v.* Leppert, 12 Hun (N. Y.) 516 (a statement "You need not sue me, . . . we are perfectly good," and "my partner is now in New York trying to raise the money to pay"); Griffin *v.* Goff, 12 Johns. (N. Y.) 423 (a statement that "he knew of no defence").

Pennsylvania.— Lititz Nat. Bank *v.* Siple, 145 Pa. St. 49, 22 Atl. 208.

Virginia.— Watkins *v.* Crouch, 5 Leigh (Va.) 522 (consenting to the negotiation of the note at a bank other than that where it was made payable); Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707.

England.— Lecaan *v.* Kirkman, 6 Jur. N. S.

on as a waiver must proceed from the indorser or be made or given by his consent, and not from the maker, holder, or a third party.[79]

b. Acceptance of Indemnity or Collateral Security — (i) *In General.* By the weight of authority notice of dishonor is waived when the indorser, before maturity,[80] has taken collateral security sufficient to cover his contingent liability or has taken an assignment of all the estate of the maker for the purpose of meeting his responsibilities.[81] The taking of insufficient security, however, is not a waiver of notice,[82] and in some cases it has been held that an indorser is entitled

17, 7 Wkly. Rep. 499 (a statement that "had circumstances been different, . . . no application would have been necessary"); Prideaux *v.* Collier, 2 Stark. 57, 3 E. C. L. 315 (a statement at maturity that he would endeavor to provide effects and would see the holder again).

79. Applegarth *v.* Abbott, 64 Cal. 459, 2 Pac. 43; Pierce *v.* Whitney, 29 Me. 188; Davis *v.* Gowen, 19 Me. 447; Sice *v.* Cunningham, 1 Cow. (N. Y.) 397; Good *v.* Arrowsmith, Anth. N. P. (N. Y.) 289 (where the holder said to the indorser, "I look to you for payment"); May *v.* Boisseau, 8 Leigh (Va.) 164.

80. If taken after maturity it will not constitute a waiver.

Alabama.— Lowry *v.* Western Bank, 7 Ala. 120.

Connecticut.— Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Louisiana.— Peets *v.* Wilson, 19 La. 478.

Maryland.— Walters *v.* Munroe, 17 Md. 154, 77 Am. Dec. 328.

Massachusetts.— Tower *v.* Durell, 9 Mass. 332.

New York.— Otsego County Bank *v.* Warren, 18 Barb. (N. Y.) 290.

See 7 Cent. Dig. tit. "Bills and Notes," § 1204.

81. *Alabama.*—Holman *v.* Whiting, 19 Ala. 703; Carlisle *v.* Hill, 16 Ala. 398; Cockrill *v.* Hobson, 16 Ala. 391; Posey *v.* Decatur Bank, 12 Ala. 802; Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281.

Arkansas.— Walker *v.* Walker, 7 Ark. 542.

Connecticut.— Prentiss *v.* Danielson, 5 Conn. 175, 13 Am. Dec. 52.

Louisiana.— Hoover *v.* Glasscock, 16 La. 242.

Maine.— Mead *v.* Small, 2 Me. 207, 11 Am. Dec. 62.

Maryland.— Brandt *v.* Mickle, 28 Md. 436; Walters *v.* Munroe, 17 Md. 154, 77 Am. Dec. 328; Duvall *v.* Farmers' Bank, 9 Gill & J. (Md.) 31.

Massachusetts.— Bond *v.* Farnham, 5 Mass. 170, 4 Am. Dec. 47. *Compare* Andrews *v.* Boyd, 3 Metc. (Mass.) 434.

Mississippi.— Watt *v.* Mitchell, 6 How. (Miss.) 131.

New Jersey.— Perry *v.* Green, 19 N. J. L. 61, 38 Am. Dec. 536.

New York.— Clift *v.* Rodger, 25 Hun (N. Y.) 39; Spencer *v.* Harvey, 17 Wend. (N. Y.) 489; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Mechanics' Bank *v.* Griswold, 7 Wend. (N. Y.) 165.

Ohio.— Beard *v.* Westerman, 32 Ohio St. 29; Develing *v.* Ferris, 18 Ohio 170; Kyle *v.* Green, 14 Ohio 495.

Oregon.— Smith *v.* Lownsdale, 6 Oreg. 78.

South Carolina.— Charleston Bank *v.* Barrett, 2 McMull. (S. C.) 191; State Bank *v.* Myers, 1 Bailey (S. C.) 412.

Tennessee.—Swan *v.* Hodges, 3 Head (Tenn.) 251; Durham *v.* Price, 5 Yerg. (Tenn.) 300, 26 Am. Dec. 267.

England.— Brown *v.* Maffey, 15 East 216; Corney *v.* Da Costa, 1 Esp. 302.

Compare Watkins *v.* Cronch, 5 Leigh (Va.) 522, holding that an assignment of all the maker's property as security for part payment will not excuse notice.

See 7 Cent. Dig. tit. "Bills and Notes," § 1204.

Reason of rule.— In Brandt *v.* Mickle, 28 Md. 436, 448 [*citing* Bond *v.* Farnham, 5 Mass. 170, 4 Am. Dec. 47; Barton *v.* Baker, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620], the court said: "The general doctrine of waiver growing out of the transfer of all the maker's property to the endorser, is based upon the following reasons: First, that having secured all the maker's property, for the express purpose of meeting his endorsements, he must be considered as having waived the condition of his liability, and engage with the maker on receiving all of the property, to take up the note. Secondly, that having thus stripped the maker of all his property, and received all the security he could give, the endorser must know that a demand upon the maker would be fruitless."

An assignment to a third person of all the maker's property for the purpose of indemnifying the indorser will not excuse demand and notice. Moore *v.* Alexander, 63 N. Y. App. Div. 100, 71 N. Y. Suppl. 420 [*affirming* 33 Misc. (N. Y.) 613, 68 N. Y. Suppl. 888].

82. *Alabama.*— Marston *v.* Mobile Bank, 10 Ala. 284.

California.—Olendorf *v.* Swartz, 5 Cal. 480, 63 Am. Dec. 141.

Connecticut.— Holland *v.* Turner, 10 Conn. 308 [*approved* in Hayes *v.* Werner, 45 Conn. 246, where it was held, however, that the taking of such security at the time of the indorsement, while not of itself a waiver, is evidence thereof and fortifies the presumption arising from other facts and circumstances].

to notice regardless of the collateral taken, so long as the maker of the note remains primarily liable.[83]

(II) *For Payment of Particular Obligation.* Where, by the contract or agreement by which the indorser receives the assigned property he is expressly authorized or agrees to use it for the payment of the obligation notice is unnecessary,[84] and this is true if in consideration of funds or security he has made himself primarily responsible.[85]

c. Allowing Judgment to Be Entered. Where the indorser has suffered judgment to be entered against him *nil dicit* or by default, he cannot afterward take advantage of want of demand and notice;[86] but it has been held that the confes-

Louisiana.— Dufour *v.* Morse, 9 La. 333 [*approved* in Peets *v.* Wilson, 19 La. 478].

Maine.— Marshall *v.* Mitchell, 34 Me. 227; Maine Bank *v.* Smith, 18 Me. 99 (holding that this was especially true where he had received no benefit from such security).

Maryland.— Lewis *v.* Kramer, 3 Md. 265.

Massachusetts.—Creamer *v.* Perry, 17 Pick. (Mass.) 332, 28 Am. Dec. 297.

New York.— Seacord *v.* Miller, 13 N. Y. 55; Bruce *v.* Lytle, 13 Barb. (N. Y.) 163; Oswego Bank *v.* Knower, Lalor (N. Y.) 122; Spencer *v.* Harvey, 17 Wend. (N. Y.) 489; Ireland *v.* Kip, Anth. N. P. (N. Y.) 195.

Ohio.— Cleveland Second Nat. Bank *v.* McGuire, 33 Ohio St. 295, 31 Am. Rep. 539.

Rhode Island.—Whittier *v.* Collins, 15 R. I. 44, 23 Atl. 39.

Texas.— See Cruger *v.* Lindheim, (Tex. App. 1890) 16 S. W. 420.

United States.— Woodbury *v.* Crum, 1 Biss. (U. S.) 284, 30 Fed. Cas. No. 17,969, 1 West. L. Month. 522; Burrows *v.* Hannegan, 1 McLean (U. S.) 309, 4 Fed. Cas. No. 2,205.

See 7 Cent. Dig. tit. "Bills and Notes," § 1204.

83. Moses *v.* Ela, 43 N. H. 557, 82 Am. Dec. 175; Woodman *v.* Eastman, 10 N. H. 359; Denny *v.* Palmer, 27 N. C. 610; Kramer *v.* Sandford, 4 Watts & S. (Pa.) 328, 39 Am. Dec. 92 [but see Barton *v.* Baker, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620, where notice was held to have been waived, the indorser having accepted from the maker a general assignment]; Wilson *v.* Senier, 14 Wis. 380.

"The true criterion seems to be the obligation to take up the note. When that remains with the maker, it continues to be the duty of the endorsee to apprise the endorser of the maker's default; where it has devolved on the endorser himself, he needs no notice." Kramer *v.* Sandford, 4 Watts & S. (Pa.) 328, 331, 39 Am. Dec. 92 [*approved* in Selby *v.* Brinkley, (Tenn. 1875) 17 S. W. 479; Wilson *v.* Senier, 14 Wis. 380].

The contingent liability of the indorsers must, by the acceptance of the security, be converted into an absolute liability, and if the circumstances of the case show that the collateral was taken as protection and indemnity against the liability as an indorser, and not as consideration for their assumption of an absolute liability, notice must be given. Selby *v.* Brinkley, (Tenn. 1875) 17 S. W. 479.

84. *Alabama.*— Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281.

California.— Van Norden *v.* Buckley, 5 Cal. 283, holding, however, that a transfer by the maker to be relied on must be directly and specifically for the note and not as security for transactions in the aggregate.

Illinois.— Curtiss *v.* Martin, 20 Ill. 557.

Maine.— Wright *v.* Andrews, 70 Me. 86, 91, 35 Am. Rep. 308, where it is said: "By such appropriation there is a trust reposed in the indorser, and by his acceptance of it an implied promise on his part that such trust shall be faithfully performed. In a certain sense the indorser becomes original promisor and assumes the place of the maker of the note. He therefore suffers no injury from the fact that he is not notified of the omission of an act which fidelity to the principal, as well as to the payee, required him to perform."

New Hampshire.— Moses *v.* Ela, 43 N. H. 557, 82 Am. Dec. 175.

New York.— Clift *v.* Rodger, 25 Hun (N. Y.) 39; Taylor *v.* French, 4 E. D. Smith (N. Y.) 458; Coddington *v.* Davis, 3 Den. (N. Y.) 16 [*affirmed* in 1 N. Y. 186]; Mechanics' Bank *v.* Griswold, 7 Wend. (N. Y.) 165.

Pennsylvania.— Barton *v.* Baker, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620.

England.— Carter *v.* Flower, 4 D. & L. 529, 11 Jur. 313, 16 L. J. Exch. 199, 16 M. & W. 743; Corney *v.* Da Costa, 1 Esp. 302.

Contra, Woodbury *v.* Crum, 1 Biss. (U. S.) 284, 30 Fed. Cas. No. 17,969, 1 West. L. Month. 522, unless the property thus assigned is insufficient to satisfy the note.

See 7 Cent. Dig. tit. "Bills and Notes," § 1204.

Application of rule.— This rule does not apply as a matter of law when the indorser merely receives the funds from the profits of a business in which he is a partner of the maker, and is merely authorized, and not expressly instructed, to apply the funds to the payment of the notes at their maturity. Ray *v.* Smith, 17 Wall. (U. S.) 411, 21 L. ed. 666.

85. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653; Whitridge *v.* Rider, 22 Md. 548; Armstrong *v.* Chadwick, 127 Mass. 156.

86. Grigsby *v.* Ford, 3 How. (Miss.) 184; Winn *v.* Levy, 2 How. (Miss.) 902.

A cognovit containing a release of all errors which might intervene in the entering up of a judgment against the maker of a note is a waiver of demand of such note. Hall *v.* Jones, 32 Ill. 38.

sion of judgment by an indorser was only *prima facie* evidence that he had had notice of non-payment.[87]

d. Anticipation of Dishonor. The anticipation by the drawer of a bill that it will be dishonored and a statement by him that he believes it will not be paid is not a waiver;[88] but an indorser will waive demand and notice by informing the holder that the maker will not be able to pay at maturity and authorizing such holder to draw on him.[89]

e. Extension of Time. An agreement before maturity by an indorser or drawer that an extension of time shall be given is a sufficient circumstance or fact to authorize an inference of waiver;[90] and while it has been held that notice should be given at the expiration of such time,[91] it has also been held that the contingent character of the liability is by the waiver converted into one of absolute character and that further demand or notice is unnecessary.[92]

f. Fraudulent Transfer of Instrument. If the transfer is made under such circumstances that the transaction is fraudulent on the part of the indorser no notice to him is necessary.[93]

g. Indorsement or Writing in Separate Instrument — (i) *Indorsement* — (A) *In General* — (1) Specially. The necessity of a protest and notice may be waived by using words to this effect in the indorsement itself;[94] but it should

Judgment by default by a partner of the party pleading does not operate as an admission of notice as against the defendant pleading. Pengnet *v.* McKenzie, 6 U. C. C. P. 308.

87. Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

88. Los Angeles Nat. Bank *v.* Wallace, 101 Cal. 478, 36 Pac. 197; Bird *v.* Legge, 7 Dowl. P. C. 814, 8 L. J. Exch. 258, 5 M. & W. 418; Brett *v.* Levett, 13 East 213, 1 Rose 102. See also *Ex p.* Bignold, 1 Deac. 712, 6 L. J. Bankr. 17, 2 Mont. & A. 633, 38 E. C. L. 819.

Where the drawer of a bill becomes bankrupt before its maturity and notifies the holder that it will not be paid he does not thereby waive demand or notice of dishonor. Esdaile *v.* Sowerby, 11 East 114, 10 Rev. Rep. 440.

89. Seldner *v.* Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190.

A declaration by the indorser to a third person that he would pay the note without suit is no waiver of demand and notice. Allwood *v.* Haseldon, 2 Bailey (S. C.) 457.

90. *Connecticut.*—Norton *v.* Lewis, 2 Conn. 478.

Kansas.— Glaze *v.* Ferguson, 48 Kan. 157, 29 Pac. 396.

Louisiana.— Walker *v.* Graham, 21 La. Ann. 209.

Missouri.— Clayton *v.* Phipps, 14 Mo. 399; Glasgow *v.* Pratte, 8 Mo. 336, 40 Am. Dec. 142.

New Hampshire.— Amoskeag Bank *v.* Moore, 37 N. H. 539, 75 Am. Dec. 156.

New York.— Cady *v.* Bradshaw, 116 N. Y. 188, 22 N. E. 371, 26 N. Y. St. 518, 5 L. R. A. 557; Sheldon *v.* Horton, 43 N. Y. 93, 3 Am. Rep. 669 [*affirming* 53 Barb. (N. Y.) 23]; Hunter *v.* Hook, 64 Barb. (N. Y.) 468; Spencer *v.* Harvey, 17 Wend. (N. Y.) 489.

Ohio.— McMonigal *v.* Brown, 45 Ohio St. 499, 15 N. E. 860; Hudson *v.* Wolcott, 39 Ohio St. 618; Heman *v.* French, 2 Cinc. Super. Ct. 561.

Pennsylvania.— Barclay *v.* Weaver, 19 Pa. St. 396, 57 Am. Dec. 661; Ridgway *v.* Day, 13 Pa. St. 208.

South Carolina.— Long *v.* Moore, 2 Brev. (S. C.) 172.

Vermont.— Farmers', etc., Bank *v.* Catlin, 13 Vt. 39.

United States.— U. S. Bank *v.* Lyman, 2 Fed. Cas. No. 924, 20 Vt. 666.

England.— Houlditch *v.* Cauty, 1 Arn. 162, 4 Bing. N. Cas. 411, 7 L. J. C. P. 217, 6 Scott 209, 33 E. C. L. 779.

Compare Isham *v.* McClure, 58 Iowa 515, 12 N. W. 558; Freeman *v.* O'Brian, 38 Iowa 406 (holding that an agreement between the indorser and indorsee that the maker should not be sued until he had time to pay, or until the indorser should notify the indorsee to proceed against the maker, could not be considered as a waiver of demand and notice upon the part of the indorser); Iowa City First Nat. Bank *v.* Ryerson, 23 Iowa 508; Michaud *v.* Lagarde, 4 Minn. 43; Reiff *v.* McMiller, 45 Leg. Int. (Pa.) 26.

See 7 Cent. Dig. tit. "Bills and Notes," § 1203.

A request for more time, after a suit was begun in which due presentment was averred, is sufficient evidence of waiver to go to the jury. Hopley *v.* Dufresne, 15 East 275, 13 Rev. Rep. 463.

91. Worden *v.* Mitchell, 7 Wis. 161.

92. Amoskeag Bank *v.* Moore, 37 N. H. 539, 75 Am. Dec. 156; Sheldon *v.* Horton, 43 N. Y. 93, 3 Am. Rep. 669; Ridgway *v.* Day, 13 Pa. St. 208.

93. Alexander *v.* Dennis, 9 Port. (Ala.) 174, 33 Am. Dec. 309; Gee *v.* Williamson, 1 Port. (Ala.) 313, 27 Am. Dec. 628; Devoe *v.* Moffat, Anth. N. P. (N. Y.) 221; Bissell *v.* Bozman, 17 N. C. 154; Hellings *v.* Hamilton, 4 Watts & S. (Pa.) 462; Williams *v.* Brobst, 10 Watts (Pa.) 111.

94. *Alabama.*— Fisher *v.* Price, 37 Ala. 407.

appear that such special indorsement was written by the indorser or by his authority,[95] and a reference therein to an accepter in case of need will not be a waiver of notice as to the original drawer or accepter.[96]

(2) Beneath Waiver. Where language constituting a waiver is printed upon the back of a note or placed thereon by an indorser, it has been held that those who merely append their naked signature beneath such waiver must be assumed to have adopted the same and will be bound thereby,[97] although such waiver is not apparently connected with his indorsement.[98]

(3) Of Instrument Containing Waiver. A stipulation of waiver of protest, demand, and notice, expressed in the body of the bill or note, constitutes an element of the contract itself and operates as a waiver as to the signers thereto, whether they be indorsers, makers, or payees.[99]

(B) *Of Void Instrument.* Where an indorser indorses a note or bill on which the principal party thereto is not legally bound,[1] as where the instrument is void for want of a stamp,[2] the maker is a married woman,[3] the note is signed

Connecticut.— Cooke *v.* Pomeroy, 65 Conn. 466, 32 Atl. 935; City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601.

District of Columbia.— Portsmouth Sav. Bank *v.* Wilson, 5 App. Cas. (D. C.) 8.

Georgia.— National Exch. Bank *v.* Kimball, 66 Ga. 753.

Louisiana.— Carmena *v.* Mix, 15 La. 165.

Maine.— Farmer *v.* Sewall, 16 Me. 456.

Maryland.— Halley *v.* Jackson, 48 Md. 254.

Massachusetts.— Woodman *v.* Thurston, 8 Cush. (Mass.) 157.

Minnesota.— Lockwood *v.* Bock, 50 Minn. 142, 52 N. W. 391; Wolford *v.* Andrews, 29 Minn. 250, 13 N. W. 167, 43 Am. Rep. 201.

Missouri.— Hammett *v.* Trueworthy, 51 Mo. App. 281.

New York.— Buckley *v.* Bentley, 42 Barb. (N. Y.) 646.

Pennsylvania.— Brittain *v.* Doylestown Bank, 5 Watts & S. (Pa.) 87, 39 Am. Dec. 110.

Tennessee.— Johnston *v.* Searcy, 4 Yerg. (Tenn.) 182.

See 7 Cent. Dig. tit. "Bills and Notes," § 1200.

95. Fowler *v.* Fleming, 1 McMull. (S. C.) 282.

A waiver written over the signature of an indorser is prima facie evidence that it was done with his privity and assent. Farmer *v.* Rand, 14 Me. 225.

96. *In re* Leeds Banking Co., L. R. 1 Eq. 1, 11 Jur. N. S. 920, 35 L. J. Ch. 311, 13 L. T. Rep. N. S. 314, 14 Wkly. Rep. 43.

97. Parshley *v.* Heath, 69 Me. 90, 31 Am. Rep. 246; Loveday *v.* Anderson, 18 Wash. 322, 51 Pac. 463. *Contra,* Central Bank *v.* Davis, 19 Pick. (Mass.) 373.

98. Farmers' Bank *v.* Ewing, 78 Ky. 264, 39 Am. Rep. 231.

99. *Georgia.*— Woodward *v.* Lowry, 74 Ga. 148.

Illinois.— Dunnigan *v.* Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496. See also Deering *v.* Wiley, 56 Ill. App. 309.

Indiana.— Sohn *v.* Morton, 92 Ind. 170; Rooker *v.* Morris, 61 Ind. 286; Lowry *v.* Steele, 27 Ind. 168; Neal *v.* Wood, 23 Ind. 523; Gordon *v.* Montgomery, 19 Ind. 110.

Iowa.— Iowa Valley State Bank *v.* Sigstad, 96 Iowa 491, 65 N. W. 407; Phillips *v.* Dippo, 93 Iowa 35, 61 N. W. 216, 57 Am. St. Rep. 254.

Kentucky.— Bryant *v.* Merchants' Bank, 8 Bush (Ky.) 43, holding that the fact that the indorser did not notice such provision in the instrument could not avail him.

Minnesota.— Bryant *v.* Lord, 19 Minn. 396.

Pennsylvania.— Chambersburg Nat. Bank *v.* Schall, 10 Pa. Co. Ct. 394.

Texas.— Leeds *v.* Hamilton Paint, etc., Co., (Tex. Civ. App. 1896) 35 S. W. 77; Smith *v.* Pickham, 8 Tex. Civ. App. 326, 28 S. W. 565.

Washington.— Furth *v.* Baxter, 24 Wash. 608, 64 Pac. 798.

Wisconsin.— Hoover *v.* McCormick, 84 Wis. 215, 54 N. W. 505, holding that on such a note the mere fact that defendant thought that he was signing as an indorser and not as a guarantor was immaterial, inasmuch as an indorsement on such a note constituted an absolute agreement the same as a guaranty.

See 7 Cent. Dig. tit. "Bills and Notes," § 1201.

1. Voidable because of usury.— In Copp *v.* McDugall, 9 Mass. 1, the court seem to place their decision partially upon the fact that the evidence of the case shows that the maker was not liable thereon because the note was usurious, and that therefore the indorser would be liable without notice. The language of the court is not, however, clear as to this point, and the case might well wholly be decided upon the ground that the indorser was liable because of a subsequent promise to pay the note.

2. Cundy *v.* Marriott, 1 B. & Ad. 696, 9 L. J. K. B. O. S. 70, 20 E. C. L. 654; Wilson *v.* Vysar, 4 Taunt. 288.

3. Butler *v.* Slocum, 33 La. Ann. 170, 178, 39 Am. Rep. 265, where the court said: "When he endorses such note the endorser warrants by the very act that the drawer is legally liable to pay it, and practices a deception for which he is responsible, knowing, as he necessarily must, that such is not the

by an agent after his principal's death,[4] or the maker is known by the holder to be a fictitious person,[5] no demand and notice is necessary, although the opposite view has been taken where the maker was an infant.[6] So too no notice is necessary where the signatures of the prior parties to the note are forged.[7]

(II) *Separate Instrument.* A waiver may also be made by letter, telegram, or other separate instrument sufficiently evincing an intent upon the part of the indorser to dispense with demand and notice;[8] but the letter or instrument must be addressed to the owner or holder of the note at the time,[9] and the reference to a particular obligation must be clear and unambiguous.[10]

h. Partial Payment. A partial payment by an indorser or drawer upon or after maturity constitutes a waiver of demand and notice or of any laches on the part of the holder if made with full knowledge of the facts and circumstances,[11] but this rule is applicable only where payment by the indorser is made with knowledge of the facts and laches [12] and under circumstances recognizing his liability as an indorser.[13] Acceptance of an offer of part payment is essential to its

case. The holder, in the belief of its truth, might look only to the maker, and fail to take the necessary steps to charge the endorser, and if, when he becomes aware that the maker was not legally bound for it, he could not recover against the endorser — the latter would be protected by his own fraud, and the holder suffer by the confidence placed in him."

4. Burrill *v.* Smith, 7 Pick. (Mass.) 291.

5. Bundy *v.* Jackson, 24 Fed. 628. *Aliter* if the indorser does not know the fictitious character of the drawer. Leach *v.* Hewitt, 4 Taunt. 731, 14 Rev. Rep. 652.

6. Wyman *v.* Adams, 12 Cush. (Mass.) 210, which is decided on the theory that the note after its inception being voidable only, the power to repudiate it being the personal privilege of the minor, this disability would not vary the rule.

7. Turnbull *v.* Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Perkins *v.* White, 36 Ohio St. 530; Harrison *v.* Smith, 2 Tex. App. Civ. Cas. § 396.

8. *Iowa.*— See Bankers' Iowa State Bank *v.* Mason Hand Lathe Co., (Iowa 1902) 90 N. W. 612.

Louisiana.— Hoover *v.* Glasscock, 16 La. 242, where the waiver was contained in a collateral mortgage securing the note.

Maryland.— Seldner *v.* Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190 (by telegram); Duvall *v.* Farmers' Bank, 7 Gill & J. (Md.) 44.

Massachusetts.— Corner *v.* Pratt, 138 Mass. 446, telegram.

New York.— Coddington *v.* Davis, 1 N. Y. 186 [*affirming* 3 Den. (N. Y.) 16]; Fenly *v.* Bogert, 2 Edm. Sel. Cas. (N. Y.) 442.

Rhode Island.— Riker *v.* A. & W. Sprague Mfg. Co., 14 R. I. 402, 51 Am. Rep. 413, where the written waiver was filed with the trustee of a mortgage given to secure the note.

Texas.— Hastings First Nat. Bank *v.* Bonner, (Tex. Civ. App. 1894) 27 S. W. 698.

Canada.— See McLellan *v.* McLellan, 17 U. C. C. P. 109.

See 7 Cent. Dig. tit. "Bills and Notes," § 1202.

9. Poultney Nat. Bank *v.* Lewis, 50 Vt. 622, 28 Am. Rep. 514.

10. Martin *v.* Perqua, 65 Hun (N. Y.) 225, 20 N. Y. Suppl. 285, 47 N. Y. St. 518.

11. *Florida.*— Whitaker *v.* Morrison, 1 Fla. 25, 44 Am. Dec. 627.

Illinois.— Curtiss *v.* Martin, 20 Ill. 557.

Iowa.— Hughes *v.* Bowen, 15 Iowa 446.

Louisiana.— Frost *v.* Harrison, 8 La. Ann. 123.

Maine.— Lane *v.* Steward, 20 Me. 98.

Massachusetts.— Sigourney *v.* Wetherell, 6 Metc. (Mass.) 553.

New Hampshire.— Johnson *v.* Crane, 16 N. H. 68.

New York.— Linthicum *v.* Caswell, 19 N. Y. App. Div. 541, 46 N. Y. Suppl. 610 [*affirmed* in 160 N. Y. 702, 57 N. E. 1115]; Brown *v.* Mechanics', etc., Bank, 16 N. Y. App. Div. 207, 44 N. Y. Suppl. 645.

North Carolina.— Shaw *v.* McNeill, 95 N. C. 535.

Pennsylvania.— Sherer *v.* Easton Bank, 33 Pa. St. 134; Levy *v.* Peters, 9 Serg. & R. (Pa.) 125, 11 Am. Dec. 679.

South Carolina.—See Fell *v.* Dial, 14 S. C. 247.

Wisconsin.— Knapp *v.* Runals, 37 Wis. 135.

United States.— Perry *v.* Rhodes, 2 Cranch C. C. (U. S.) 37, 19 Fed. Cas. No. 11,011.

England.— Dixon *v.* Elliott, 5 C. & P. 437, 24 E. C. L. 644; Vaughan *v.* Fuller, 2 Str. 1246; Horford *v.* Wilson, 1 Taunt. 12.

Canada.— Rice *v.* Bowker, 3 L. C. Rep. 305, 4 R. J. R. Q. 23; Wood *v.* Stephenson, 16 U. C. Q. B. 419.

See 7 Cent. Dig. tit. "Bills and Notes," § 1217.

12. Porter *v.* Thom, 30 N. Y. App. Div. 363, 51 N. Y. Suppl. 974 [*affirmed* in 167 N. Y. 584, 60 N. E. 1119]; Buckley *v.* Bentley, 42 Barb. (N. Y.) 646; Sice *v.* Cunningham, 1 Cow. (N. Y.) 397; Carnegie Steel Co. *v.* Chattanooga Constr. Co., (Tenn. Ch. 1896) 38 S. W. 102; Vaughan *v.* Fuller, 2 Str. 1246.

13. Whitaker *v.* Morrison, 1 Fla. 25, 44 Am. Dec. 627 (where the payment was made with the money of the maker, and by his request, the indorser acting as his mere agent); Reinke *v.* Wright, 93 Wis. 368, 67 N. W. 737

validity as a waiver;[14] and an offer which if accepted would operate as a compromise by way rather of set-off or accord and satisfaction than of payment is insufficient.[15]

i. Promise of Payment. An absolute and unconditional[16] promise to pay,[17] made by one entitled to demand and notice to one entitled to demand payment,[18] will be deemed a waiver of demand and notice[19] or an acknowledgment that

(where the payee of a note, after default, sold the property under a mortgage given to him to secure the indorsers, and with their consent applied the proceeds on the note). In both of these cases it was held that the facts did not show a waiver.

14. *Alabama.*—Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335.

Missouri.— Long *v.* Dismer, 71 Mo. 452.

New Jersey.— Barkalow *v.* Johnson, 16 N. J. L. 397.

New York.— Sice *v.* Cunningham, 1 Cow. (N. Y.) 397; Agan *v.* McManus, 11 Johns. (N. Y.) 180; Crain *v.* Colwell, 8 Johns. (N. Y.) 384.

England.— *Ex p.* Bignold, 1 Deac. 712, 6 L. J. Bankr. 17, 2 Mont. & A. 633, 38 E. C. L. 819.

Canada.—New Brunswick Bank *v.* Knowles, 4 N. Brunsw. 219.

15. Newberry *v.* Trowbridge, 13 Mich. 263; Long *v.* Dismer, 71 Mo. 452; Tardy *v.* Boyd, 26 Gratt. (Va.) 631; Cuming *v.* French, 2 Camph. 106 note. See also Barkalow *v.* Johnson, 16 N. J. L. 397; Standage *v.* Creighton, 5 C. & P. 406, 24 E. C. L. 628.

16. If the promise is conditional the rule is otherwise (Campbell *v.* Varney, 12 Iowa 43; Cuyler *v.* Merrifield, 5 Hun (N. Y.) 559; Nicholson *v.* Gouthit, 2 H. Bl. 609), it must be accepted on the condition stipulated (Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335; Keith *v.* Mackey, 5 Rob. (La.) 277; Pickin *v.* Graham, 1 Cr. & M. 725, 2 L. J. Exch. 253, 3 Tyrw. 923), and will constitute a waiver only to the extent stipulated (Cardwell *v.* Allan, 33 Gratt. (Va.) 160).

What constitutes conditional promise.— It is not a waiver for a foreign drawer to say: "I am not acquainted with your laws; if I am bound to pay it, I will" (Dennis *v.* Morrice, 3 Esp. 158), for an indorser to say that if the bill is presented him duly protested, he will have to pay it (Penn *v.* Poumeirat, 2 Mart. N. S. (La.) 541), or to say that if the accepter does not pay, he must, but for the holder to exhaust all his influence with the accepter first (Hicks *v.* Beaufort, 1 Arn. 55, 4 Bing. N. Cas. 229, 2 Jur. 255, 7 L. J. C. P. 131, 5 Scott 598, 33 E. C. L. 684).

17. A promise to pay is essential, and the bare waiver of protest and notice after the dishonor of a paper would not, it would seem, be of itself sufficient to bind the indorser. White *v.* Keith, 97 Ala. 668, 12 So. 611 [*citing* Yeager *v.* Farwell, 13 Wall. (U. S.) 6, 20 L. ed. 476]; Wyckoff *v.* Andrews, 50 N. Y. Super. Ct. 196, 198 (where the court said: "If waived before maturity, the principle of estoppel *in pais*, binds the indorser. But otherwise, how are rights that have become fixed, affected? If there be a promise to pay after maturity, the law is well settled. But does a mere waiver, and no more, create an implied promise which would be of value equivalent to an express promise. Or do the waiver, and the circumstances under which it was made, make a question for the jury as to whether the parties understood that the indorser did promise to pay with a knowledge of the laches. If there be a waiver of the kind pleaded, and it proves, in any way, as matter of law or of fact, through a jury that the defendant promised to pay, is the plaintiff to show that the defendant had knowledge of laches, or the defendant to show that he had not").

Promise of part payment.— While a party may, by his promise, clearly show that he intends to pay only a part of his obligation (Fletcher *v.* Froggatt, 2 C. & P. 569, 12 E. C. L. 738), a promise to pay a part, unless specially restricted, will operate as a waiver as to the whole amount (Harvey *v.* Troupe, 23 Miss. 538. See also Gunson *v.* Metz, 1 B. & C. 193, 2 D. & R. 334, 1 L. J. K. B. O. S. 75, 8 E. C. L. 83); but it is not necessary that a formal acknowledgment of liability should be superadded to a promise to pay (Bogart *v.* McClung, 11 Heisk. (Tenn.) 105, 27 Am. Rep. 737).

18. If made to an entire stranger to the paper it will be unavailing. Olendorf *v.* Swartz, 5 Cal. 480, 63 Am. Dec. 141; Allwood *v.* Haseldon, 2 Bailey (S. C.) 457; Jervey *v.* Wilbur, 1 Bailey (S. C.) 453; Poultney Nat. Bank *v.* Lewis, 50 Vt. 622, 28 Am. Rep. 514. See also Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372; Myers *v.* Coleman, Anth. N. P. (N. Y.) 205; Gassaway *v.* Jones, 2 Cranch C. C. (U. S.) 334, 10 Fed. Cas. No. 5,263.

19. *Connecticut.*—Norton *v.* Lewis, 2 Conn. 478.

Maryland.— Turnbull *v.* Maddux, 68 Md. 579, 13 Atl. 334; Patton *v.* Wilmot, 1 Harr. & J. (Md.) 477.

Mississippi.— Moore *v.* Ayres, 5 Sm. & M. (Miss.) 310.

Missouri.— St. Louis State Bank *v.* Bartle, 114 Mo. 276, 21 S. W. 816.

New Hampshire.— Caldwell *v.* Porter, 17 N. H. 27; Whitney *v.* Abbot, 5 N. H. 378.

New York.— Fitch *v.* Redding, 4 Sandf. (N. Y.) 130; Leonard *v.* Gary, 10 Wend. (N. Y.) 504.

South Carolina.— Mathews *v.* Fogg, 1 Rich. (S. C.) 369, 44 Am. Dec. 257.

Tennessee.— Williams *v.* Union Bank, 9 Heisk. (Tenn.) 441.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Devendorf

notice was given,[20] if made with full knowledge of the laches of the holder.[21] While it is strictly essential that all the facts material to the full understanding of

v. West Virginia Oil, etc., Co., 17 W. Va. 135.

United States.— Union Bank *v.* Hyde, 6 Wheat. (U. S.) 572, 5 L. ed. 333.

England.— Murray *v.* King, 5 B. & Ald. 165, 7 E. C. L. 98; Woods *v.* Dean, 3 B. & S. 101, 32 L. J. Q. B. 1, 7 L. T. Rep. N. S. 561, 11 Wkly. Rep. 22, 113 E. C. L. 101; Greenway *v.* Hindley, 4 Campb. 52; Hodge *v.* Fillis, 3 Campb. 463; Gibbon *v.* Coggon, 2 Campb. 188, 11 Rev. Rep. 622; Killby *v.* Rochussen, 18 C. B. N. S. 357, 114 E. C. L. 357; Cordery *v.* Colvin, 14 C. B. N. S. 374, 9 Jur. N. S. 1200, 32 L. J. C. P. 210, 8 L. T. Rep. N. S. 245, 108 E. C. L. 374; Chapman *v.* Annett, 1 C. & K. 552, 47 E. C. L. 552; Lundie *v.* Robertson, 7 East 231; Haddock *v.* Bury [*cited* in Lundie *v.* Robertson, 7 East 231, 236, note *a*]; Hopes *v.* Alder [*cited* in Darbishire *v.* Parker, 6 East 3, 16, note *a*]; Patterson *v.* Becher, 6 Moore C. P. 319, 17 E. C. L. 484; Wilkes *v.* Jacks, Peake 202.

Canada.— Johnson *v.* Geoffrion, 7 L. C. Jur. 125, 13 L. C. Rep. 161; City Bank *v.* Hunter, 2 Rev. Lég. 171; Ross *v.* Wilson, 2 Rev. Lég. 28; McCarthy *v.* Phelps, 30 U. C. Q. B. 57; Shaw *v.* Salmon, 19 U. C. Q. B. 512; Bank of British North America *v.* Ross, 1 U. C. Q. B. 199; Upper Canada Bank *v.* Cooley, 4 U. C. Q. B. O. S. 17; Gillespie *v.* Marsh, 1 U. C. C. P. 453; Brown *v.* Marsh, 1 U. C. C. P. 438. See also Waterous Engine Co. *v.* Christie, 18 Nova Scotia 109, 6 Can L. T. 441; McLaurin *v.* Seguin, 12 Quebec Super. Ct. 63; Burke *v.* Elliott, 15 U. C. Q. B. 610; McCuniffe *v.* Allen, 6 U. C. Q. B. 377.

20. Potter *v.* Rayworth, 13 East 417.

It will serve either as presumptive evidence of due demand and notice or as a waiver of laches, according to the circumstances of the case. Dorsey *v.* Watson, 14 Mo. 59; Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379; Hall *v.* Freeman, 2 Nott & M. (S. C.) 479, 10 Am. Dec. 621; Cordery *v.* Colvin, 14 C. B. N. S. 374, 9 Jur. N. S. 1200, 32 L. J. C. P. 210, 8 L. T. Rep. N. S. 245, 108 E. C. L. 374.

21. *Alabama.*— Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658; Kennon *v.* McRea, 7 Port. (Ala.) 175.

Arkansas.— Hazard *v.* White, 26 Ark. 155; Walker *v.* Walker, 7 Ark. 542.

California.— Curtis *v.* Sprague, 51 Cal. 239.

Delaware.— Bailey *v.* Seal, 1 Harr. (Del.) 232.

Illinois.— Givens *v.* Merchants' Nat. Bank, 85 Ill. 442; Walker *v.* Rogers, 40 Ill. 278, 89 Am. Dec. 348; Morgan *v.* Peet, 32 Ill. 281; Tobey *v.* Berly, 26 Ill. 426.

Indiana.—Dickerson *v.* Turner, 12 Ind. 223.

Iowa.— Davis *v.* Miller, 88 Iowa 114, 55 N. W. 89; Freeman *v.* O'Brien, 38 Iowa 406; Allen *v.* Harrah, 30 Iowa 363; Hughes *v.* Bowen, 15 Iowa 446; Campbell *v.* Varney, 12 Iowa 43; Ballin *v.* Betcke, 11 Iowa 204.

Kentucky.— U. S. Bank *v.* Leathers, 10 B. Mon. (Ky.) 64.

Louisiana.— Louisiana Mut. Ins. Co. *v.* Walters, 25 La. Ann. 560; James *v.* Wade, 21 La. Ann. 548; Mitchell *v.* Young, 21 La. Ann. 279; Blum *v.* Bidwell, 20 La. Ann. 43; Vanwickle *v.* Downing, 19 La. Ann. 83; Butler *v.* Murison, 18 La. Ann. 363; Robinson *v.* Day, 7 La. Ann. 201; New Orleans, etc., R. Co. *v.* Mills, 2 La. Ann. 824; New Orleans Sav. Bank *v.* Harper, 12 Rob. (La.) 231, 43 Am. Dec. 226; Commercial Bank *v.* Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168; State Bank *v.* Holmes, 10 Rob. (La.) 40; Union Bank *v.* Hyde, 7 Rob. (La.) 418, 41 Am. Dec. 290; Heath *v.* Commercial Bank, 7 Rob. (La.) 334; Tomes *v.* Montanye, 2 Rob. (La.) 158; Glenn *v.* Thistle, 1 Rob. (La.) 572; Hart *v.* Long, 1 Rob. (La.) 83; Debuys *v.* Mollere, 3 Mart. N. S. (La.) 318, 15 Am. Dec. 159; Hennen *v.* Desbois, 8 Mart. (La.) 147; Lambeth *v.* Petrovic, 16 La. 315; Williams *v.* Robinson, 13 La. 419; U. S. Bank *v.* Ellis, 13 La. 368; Harris *v.* Allnutt, 12 La. 465; Tickner *v.* Roberts, 11 La. 14, 30 Am. Dec. 706; Ives *v.* Eastin, 6 La. 13.

Maine.— Thomas *v.* Mayo, 56 Me. 40; Byram *v.* Hunter, 36 Me. 217; McPhetres *v.* Halley, 32 Me. 72; Hunt *v.* Wedleigh, 26 Me. 271, 45 Am. Dec. 108; Davis *v.* Gowen, 17 Me. 387; Cram *v.* Sherburne, 14 Me. 48; Groton *v.* Dallheim, 6 Me. 476.

Maryland.— Turnbull *v.* Maddux, 68 Md. 579, 13 Atl. 334; Beck *v.* Thompson, 4 Harr. & J. (Md.) 531; Patton *v.* Wilmot, 1 Harr. & J. (Md.) 477.

Massachusetts.— Parks *v.* Smith, 155 Mass. 26, 28 N. E. 1044; Hobbs *v.* Straine, 149 Mass. 212, 21 N. E. 365; Fernald *v.* Bush, 131 Mass. 591; Boston Third Nat. Bank *v.* Ashworth, 105 Mass. 503; Harrison *v.* Bailey, 99 Mass. 620, 97 Am. Dec. 63; Arnold *v.* Dresser, 8 Allen (Mass.) 435; Matthews *v.* Allen, 16 Gray (Mass.) 594, 77 Am. Dec. 430; Kelley *v.* Brown, 5 Gray (Mass.) 108; Low *v.* Howard, 11 Cush. (Mass.) 268; Franklin Bank *v.* Freeman, 16 Pick. (Mass.) 535; Martin *v.* Ingersoll, 8 Pick. (Mass.) 1; Hopkins *v.* Liswell, 12 Mass. 52; Freeman *v.* Boynton, 7 Mass. 483; Warder *v.* Tucker, 7 Mass. 449, 5 Am. Dec. 62; May *v.* Coffin, 4 Mass. 341.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263.

Minnesota.— Lockwood *v.* Bock, 50 Minn. 142, 52 N. W. 391.

Mississippi.— Baskerville *v.* Harris, 41 Miss. 535; Harvey *v.* Troupe, 23 Miss. 538; Robbins *v.* Pinckard, 5 Sm. & M. (Miss.) 51; Offit *v.* Vick, Walk. (Miss.) 99.

Missouri.— St. Louis State Bank *v.* Bartle, 114 Mo. 276, 21 S. W. 816; Faulkner *v.* Faulkner, 73 Mo. 327; Harness *v.* Davies County Sav. Assoc., 46 Mo. 357; Salisbury *v.* Renick, 44 Mo. 554; Dorsey *v.* Watson, 14 Mo. 59; Wilson *v.* Huston, 13 Mo. 146, 53 Am. Dec. 138; Workingmen's Banking Co. *v.* Beell, 57 Mo. App. 410. See also Griggs *v.* Deal, 30 Mo. App. 152.

the liability of the indorser must be known to him at the time of the promise,[22] it is not, by the weight of authority, necessary that he should know the extent of his legal liability at the time of making the promise.[23]

New Hampshire.—Norris *v.* Ward, 59 N. H. 487; Edwards *v.* Tandy, 36 N. H. 540; Rogers *v.* Hackett, 21 N. H. 100; Caldwell *v.* Porter, 17 N. H. 27; Merrimack County Bank *v.* Brown, 12 N. H. 320; Woodman *v.* Eastman, 10 N. H. 359; Farrington *v.* Brown, 7 N. H. 271; Otis *v.* Hussey, 3 N. H. 346; Ladd *v.* Kenney, 2 N. H. 340, 9 Am. Dec. 77.

New Jersey.—Glassford *v.* Davis, 36 N. J. L. 348; Sussex Bank *v.* Baldwin, 17 N. J. L. 487; U. S. Bank *v.* Southard, 17 N. J. L. 473, 35 Am. Dec. 521; Barkalow *v.* Johnson, 16 N. J. L. 397.

New York.—Meyer *v.* Hibsher, 47 N. Y. 265; Kobbe *v.* Clark, Seld. Notes (N. Y.) 165; O'Rourke *v.* Hanchett, 89 Hun (N. Y.) 611, 35 N. Y. Suppl. 328, 69 N. Y. St. 717; Scott *v.* Meeker, 20 Hun (N. Y.) 161; Baer *v.* Leppert, 5 Hun (N. Y.) 453; Hunter *v.* Hook, 64 Barb. (N. Y.) 468; Gawtry *v.* Doane, 42 Barb. (N. Y.) 148; Buckley *v.* Bentley, 42 Barb. (N. Y.) 646; Bruce *v.* Lytle, 13 Barb. (N. Y.) 163; Groton First Nat. Bank *v.* Crittenden, 2 Thomps. & C. (N. Y.) 118; Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54; Hazelton *v.* Colburn, 1 Rob. (N. Y.) 345, 2 Abb. Pr. N. S. (N. Y.) 199; De Wolf *v.* Murray, 2 Sandf. (N. Y.) 166; Richard *v.* Boller, 6 Daly (N. Y.) 460, 51 How. Pr. (N. Y.) 371; Murphy *v.* Levy, 23 Misc. (N. Y.) 147, 50 N. Y. Suppl. 682; Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379; Keeler *v.* Bartine, 12 Wend. (N. Y.) 110; Leonard *v.* Gary, 10 Wend. (N. Y.) 504; Jones *v.* Savage, 6 Wend. (N. Y.) 658; Trimble *v.* Thorne, 16 Johns. (N. Y.) 152, 8 Am. Dec. 302; Crain *v.* Colwell, 8 Johns. (N. Y.) 384; Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372; Duryee *v.* Dennison, 5 Johns. (N. Y.) 248; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. (N. Y.) 1; Whiting *v.* Burt, 3 N. Y. Leg. Obs. 33; Myers *v.* Coleman, Anth. N. P. (N. Y.) 205; Arnold *v.* Kinlock, 2 Alb. L. J. 358.

North Carolina.—Lilly *v.* Petteway, 73 N. C. 358; Moore *v.* Tucker, 25 N. C. 347; Moore *v.* Coffield, 12 N. C. 247; Gardiner *v.* Jones, 6 N. C. 429.

Ohio.—Dayton City Nat. Bank *v.* Clinton County Nat. Bank, 49 Ohio St. 351, 30 N. E. 958; Graflin *v.* Gibson, 3 Ohio Dec. (Reprint) 236, 5 Wkly. L. Gaz. 41.

Oregon.—Smith *v.* Lownsdale, 6 Oreg. 78; Johnson *v.* Arrigoni, 5 Oreg. 485.

Pennsylvania.—Wagner *v.* Crook, 167 Pa. St. 259, 31 Atl. 576, 46 Am. St. Rep. 672; Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255; Loose *v.* Loose, 36 Pa. St. 538; Richter *v.* Selin, 8 Serg. & R. (Pa.) 425; Donaldson *v.* Means, 4 Dall. (Pa.) 109, 1 L. ed. 762; Jamison *v.* Wolverton, 22 Leg. Int. (Pa.) 293.

Rhode Island.—Glaser *v.* Rounds, 16 R. I. 235, 14 Atl. 863.

South Carolina.—Fell *v.* Dial, 14 S. C. 247; Schmidt *v.* Radcliffe, 4 Strobh. (S. C.) 296, 53 Am. Dec. 678; Allwood *v.* Haseldon, 2 Bailey (S. C.) 457; Fotheringham *v.* Price, 1 Bay (S. C.) 291, 1 Am. Dec. 618; Fleming *v.* McClure, 1 Brev. (S. C.) 428, 2 Am. Dec. 671; Oliver *v.* Brown, Rich. Eq. Cas. (S. C.) 62.

Tennessee.—People's Nat. Bank *v.* Dibrell, 91 Tenn. 301, 18 S. W. 626; Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66; Williams *v.* Union Bank, 9 Heisk. (Tenn.) 441; Ford *v.* Dallam, 3 Coldw. (Tenn.) 67; Swan *v.* Hodges, 3 Head (Tenn.) 251; Golladay *v.* Union Bank, 2 Head (Tenn.) 57, 12 L. R. A. 727; Spurlock *v.* Union Bank, 4 Humphr. (Tenn.) 336; Durham *v.* Price, 5 Yerg. (Tenn.) 300, 26 Am. Dec. 267; Brown *v.* Lusk, 4 Yerg. (Tenn.) 210.

Texas.—Stone *v.* Smith, 30 Tex. 138, 94 Am. Dec. 299; Hastings First Nat. Bank *v.* Bonner, (Tex. Civ. App. 1894) 27 S. W. 698.

Vermont.—Blodgett *v.* Durgin, 32 Vt. 361.

Virginia.—Tardy *v.* Boyd, 26 Gratt. (Va.) 631; Pate *v.* McClure, 4 Rand. (Va.) 164.

United States.—Yeager *v.* Farwell, 13 Wall. (U. S.) 6, 20 L. ed. 476; Sigerson *v.* Mathews, 20 How. (U. S.) 496, 15 L. ed. 989; Thornton *v.* Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595; Good *v.* Sprigg, 2 Cranch C. C. (U. S.) 172, 10 Fed. Cas. No. 5,532; Thornton *v.* Stoddert, 1 Cranch C. C. (U. S.) 534, 23 Fed. Cas. No. 14,000; Morris *v.* Gardner, 1 Cranch C. C. (U. S.) 213, 17 Fed. Cas. No. 9,830; Martin *v.* Winslow, 2 Mason (U. S.) 241, 16 Fed. Cas. No. 9,172.

England.—Gunson *v.* Metz, 1 B. & C. 193, 2 D. & R. 334, 1 L. J. K. B. O. S. 75, 8 E. C. L. 83; Williams *v.* Bartholomew, 1 B. & P. 326, 4 Rev. Rep. 81; Blesard *v.* Hirst, 5 Burr. 2670; Stevens *v.* Lynch, 2 Campb. 332, 12 East 38; Goodall *v.* Dolley, 1 T. R. 712, 1 Rev. Rep. 372.

See 7 Cent. Dig. tit. "Bills and Notes," § 1213.

If the promise is made with an air of indifference on the subject a year after the giving of the note, with no reason to suppose that demand had been made upon the maker, such promise if not in itself a waiver is strong evidence of an intention at the time of indorsement to waive demand. Hayes *v.* Werner, 45 Conn. 246.

22. Arnold *v.* Dresser, 8 Allen (Mass.) 435; Low *v.* Howard, 10 Cush. (Mass.) 159; Hamilton *v.* Winona Salt, etc., Co., 95 Mich. 436, 54 N. W. 903.

23. *Alabama.*—Kennon *v.* McRea, 7 Port. (Ala.) 175.

Iowa.—Creshire *v.* Taylor, 29 Iowa 492; Hughes *v.* Bowen, 15 Iowa 446.

Massachusetts.—Glidden *v.* Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479; Boston Third Nat. Bank *v.* Ashworth, 105 Mass. 503; Matthews *v.* Allen, 16 Gray

j. Renewal of Instrument. The renewal of a bill or note, or the making of a clear and valid agreement for such renewal, is a waiver of demand and notice or of any irregularity in the giving of the same;[24] but it has been held that merely calling at the place of payment on the day of maturity and making inquiry if the note could not be renewed, upon the return of the maker, would not be a waiver, although the holder assented to the suggested renewal.[25]

7. Effect of Waiver — a. In General. While the effect of a waiver of demand and notice by an indorser is to render him immediately liable to an action upon the maturity of the note[26] and absolutely liable for its payment,[27] it does not affect his right of recovery against the maker if he is forced to pay the note;[28] but as the law of notice applies to negotiable instruments only, an intended waiver by a party to a non-negotiable instrument is nugatory and of no effect whatever.[29]

b. Construction of Words Employed. As the term "protest" when applied to promissory notes and inland bills has in its commercial sense come to mean those steps necessary to charge an indorser,[30] a waiver of protest by an indorser is usually held to dispense with both demand and notice,[31] and *a fortiori* waiver

(Mass.) 594, 77 Am. Dec. 430 (which overruled the earlier decisions so far as they stated the contrary doctrine); Hopkins *v.* Liswell, 12 Mass. 52. *Compare* Warder *v.* Tucker, 7 Mass. 449, 5 Am. Dec. 62.

New York.— Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379.

England.— Stevens *v.* Lynch, 2 Campb. 332, 12 East 38. See also Croxen *v.* Worthen, 2 H. & H. 12, 3 Jur. 290, 8 L. J. Exch. 158, 5 M. & W. 5.

Contra, Fleming *v.* McClure, 1 Brev. (S. C.) 428, 2 Am. Dec. 671; Spurlock *v.* Union Bank, 4 Humphr. (Tenn.) 336 [*approved* in Carnegie Steel Co. *v.* Chattanooga Const. Co., (Tenn. Ch. 1896) 38 S. W. 102]; Brien *v.* Buttorff, 3 Tenn. Ch. 285.

24. *Iowa.*— Iowa City First Nat. Bank *v.* Ryerson, 23 Iowa 508.

Kentucky.—Murphy *v.* Citizens' Sav. Bank, 22 Ky. L. Rep. 1672, 61 S. W. 25.

New York.— Friendship First Nat. Bank *v.* Weston, 25 N. Y. App. Div. 414, 49 N. Y. Suppl. 542; National Hudson River Bank *v.* Reynolds, 57 Hun (N. Y.) 307, 10 N. Y. Suppl. 669, 32 N. Y. St. 124; Oswego Bank *v.* Knower, Lalor (N. Y.) 122; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. (N. Y.) 1. See also Ethridge *v.* Bond, 3 Thomps. & C. (N. Y.) 262.

Ohio.— Boyd *v.* Toledo Bank, 32 Ohio St. 526, 30 Am. Rep. 624.

Pennsylvania.— Jenkins *v.* White, 147 Pa. St. 303, 23 Atl. 556.

The invalidity of the renewal on account of usury does not affect its efficiency as a waiver, although the indorser is cognizant of its unlawfulness. Leary *v.* Miller, 61 N. Y. 488.

25. Cayuga County Bank *v.* Dill, 5 Hill (N. Y.) 403.

26. Gibson *v.* Parlin, 13 Nebr. 292, 13 N. W. 405.

27. Union Nat. Bank *v.* Lee, 33 La. Ann. 301.

28. Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

29. Stix *v.* Matthews, 75 Mo. 96; Burke *v.* Ward, (Tex. Civ. App. 1895) 32 S. W. 1047.

30. See *supra,* XII, B, 1.

31. *Alabama.*—Fisher *v.* Price, 37 Ala. 407.

California.— San Diego First Nat. Bank *v.* Falkenhan, 94 Cal. 141, 29 Pac. 866.

Connecticut.— Cooke *v.* Pomeroy, 65 Conn. 466, 32 Atl. 935; City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601; Continental L. Ins. Co. *v.* Barber, 50 Conn. 567.

Georgia.— Williams *v.* Lewis, 69 Ga. 825.

Indiana.— Fitch *v.* Citizens' Nat. Bank, 97 Ind. 211.

Louisiana.— Harvey *v.* Nelson, 31 La. Ann. 434, 33 Am. Rep. 222. Under the earlier decisions of the Louisiana court the rule was the opposite (Wilkins *v.* Gillis, 20 La. Ann. 538, 96 Am. Dec. 425; Ball *v.* Greaud, 14 La. Ann. 305, 74 Am. Dec. 431; Cox *v.* McIntyre, 6 La. Ann. 470; Wall *v.* Bry, 1 La. Ann. 312); but even under these decisions, if such an indorsement was made upon the very day of maturity and the circumstances attending the acts were such that one might naturally and fairly infer that the waiver was made upon a personal agreement with the holder of the bill and that the indorser had knowledge that the drawee had failed to meet the same such an indorsement would constitute waiver of notice (Marsh *v.* Waterman, 21 La. Ann. 377; Carmena *v.* Mix, 15 La. 165).

Maryland.— Parr *v.* City Trust, etc., Co., 95 Md. 291, 52 Atl. 512.

Massachusetts.— Johnson *v.* Parsons, 140 Mass. 173, 4 N. E. 196.

Mississippi.— Carpenter *v.* Reynolds, 42 Miss. 807.

Missouri.— Jaccard *v.* Anderson, 37 Mo 91.

New York.— Coddington *v.* Davis, 1 N. Y. 186 [*affirming* 3 Den. (N. Y.) 16].

North Carolina.— Shaw *v.* McNeill, 95 N. C. 535.

Ohio.— McIlvaine *v.* Bradley, 1 Disn. (Ohio) 194, 12 Ohio Dec. (Reprint) 570. See also Seymour *v.* Francisco, 4 Ohio Dec. (Reprint) 12, 1 Clev. L. Rec. 9.

of protest and notice includes waiver of demand.[32] On the other hand it is held by the weight of authority that a mere waiver of notice of demand does not dispense with the demand itself,[33] but a waiver of demand of payment constitutes a waiver of notice of non-payment.[34] So too a general agreement of waiver by

Pennsylvania.— Lancaster First Nat. Bank *v.* Hartman, 110 Pa. St. 196, 1 Atl. 271; Annville Nat. Bank *v.* Kettering, 106 Pa. St. 531, 534, 51 Am. Dec. 536 (where the court said: "The very purpose of a waiver is to supersede the ordinary steps and avoid trouble and expense. To waive the mere act of the notary, and yet suffer the duty of making demand and giving notice of its result to remain, would scarcely be thought of hy business men"); Day *v.* Ridgway, 17 Pa. St. 303; Huckenstein *v.* Hermann, 34 Leg. Int. (Pa.) 232. *Compare* Savage *v.* Bell, 1 Woodw. (Pa.) 52.

Virginia.— Broun *v.* Hull, 33 Gratt. (Va.) 23.

Washington.— Wilkie *v.* Chandon, 1 Wash. 355, 25 Pac. 464, which case was governed by the express provisions of the Cal. Civ. Code, § 3160.

Compare Moffat *v.* Griswold, 1 Nebr. 415.

See 7 Cent. Dig. tit. "Bills and Notes," § 1207.

32. *Indiana.*— Gordon *v.* Montgomery, 19 Ind. 110.

Kansas.— Baker *v.* Scott, 29 Kan. 136, 44 Am. Rep. 628.

Louisiana.— O'Leary *v.* Martin, 21 La. Ann. 389; Guyther *v.* Bourg, 20 La. Ann. 157.

Minnesota.— Wolford *v.* Andrews, 29 Minn. 250, 13 N. W. 167, 43 Am. Rep. 201.

Texas.— Sydnor *v.* Gascoigne, 11 Tex. 449.

Utah.— Walker *v.* Popper, 2 Utah 96.

See 7 Cent. Dig. tit. "Bills and Notes," § 1207.

33. *Iowa.*— Whitely *v.* Allen, 56 Iowa 224, 9 N. W. 190, 41 Am. Rep. 99; Voorhies *v.* Atlee, 29 Iowa 49.

Maine.— Lane *v.* Stewart, 20 Me. 98; Burnham *v.* Webster, 17 Me. 50; Drinkwater *v.* Tebbetts, 17 Me. 16.

Maryland.— See Halley *v.* Jackson, 48 Md. 254.

Massachusetts.— Berkshire Bank *v.* Jones, 6 Mass. 524, 4 Am. Dec. 175.

Missouri.— Jaccard *v.* Anderson, 37 Mo. 91.

New York.— Backus *v.* Shipherd, 11 Wend. (N. Y.) 629.

Oregon.— Sprague *v.* Fletcher, 8 Oreg. 367, 34 Am. Rep. 587.

Vermont.— Buchanan *v.* Marshall, 22 Vt. 561.

Contra, Matthey *v.* Gally, 4 Cal. 62, 60 Am. Dec. 595.

See 7 Cent. Dig. tit. "Bills and Notes," § 1207.

Waiver of notice and protest for like reasons does not dispense with demand. Buckley *v.* Bentley, 42 Barb. (N. Y.) 646.

Ambiguous or uncertain indorsement.— Where the indorsement is so ambiguous that the meaning thereof is uncertain, or where the language used is such that its literal interpretation would render the indorsement meaningless and nugatory, the courts will construe it, if possible, so as to carry into effect the intention of the parties, at the same time keeping in mind the well-known principle of construction that ambiguous words should be construed unfavorably against their user. Thus it is held that an indorsement in the words, "I waive demand of protest," should be construed to mean a waiver of demand and notice (Porter *v.* Kemball, 53 Barb. (N. Y.) 467), or that an indorsement that "notice of demand and protest is waived," constitutes a waiver of all the steps necessary to fix the indorser's liability (Johnson County Sav. Bank *v.* Lowe, 47 Mo. App. 151). So the words "accountable" (Furber *v.* Caverly, 42 N. H. 74), "eventually accountable" (McDonald *v.* Bailey, 14 Me. 101), "accountable in eight months from the above date" (Bagley *v.* Buzzell, 19 Me. 88), "no protest" written across the end of a draft (Shaw *v.* McNeill, 95 N. C. 535), or the word "holden" (Blanchard *v.* Wood, 26 Me. 358; Bean *v.* Arnold, 16 Me. 251), used in connection with the indorsed signature will constitute a waiver. See also Airey *v.* Pearson, 37 Mo. 424; Backus *v.* Shipherd, 11 Wend. (N. Y.) 629; Scull *v.* Mason, 43 Pa. St. 99. On the other hand an indorsement by a married woman that "I hereby charge my separate estate with the payment of this note" is not sufficient to show an intent to waive notice. Jaffray *v.* Krauss, 79 Hun (N. Y.) 449, 29 N. Y. Suppl. 987, 61 N. Y. St. 254. Nor will an indorsement in the words: "For value received, I assign the within note . . . , on condition that the property of the maker and endorsers be exhausted before recourse on me" dispense with demand and notice, as such stipulation would have the effect, and could only he intended to have the effect, of compelling the holder to exhaust his remedies against the maker and indorsers in the first instance (Duffy *v.* O'Conner, 7 Baxt. (Tenn.) 498); an indorsement in the words, "I indorse the within note to J. R. unconditionally," as such indorsement only means that there should be no restriction, enlargement, or qualification of the indorser's liability beyond what was to be inferred from the mere fact of indorsement (Dowd *v.* Aaron, 2 Hill (S. C.) 531), the addition to the indorser's signature of the word "surety" (Bradford *v.* Corey, 5 Barb. (N. Y.) 461), or the addition of the word "backer" (Seabury *v.* Hungerford, 2 Hill (N. Y.) 80) are not sufficient to constitute a waiver.

34. Dye *v.* Scott, 35 Ohio St. 194, 35 Am. Rep. 604. See also National Exch. Bank *v.* Kimball, 66 Ga. 753.

one on all instruments indorsed by him will be considered in force until shown to have been revoked.[35]

c. To Whom Waiver Inures. A waiver inures to the benefit of subsequent parties to the note as well as those who were parties to the instrument when the waiver was made or who were interested parties to the concession,[36] but it has of course no binding effect upon the prior parties.[37]

35. Knight *v.* Fox, Morr. (Iowa) 305.

36. *Alabama.*— See also Kennon *v.* McRea, 7 Port. (Ala.) 175.

Maine.— Marshall *v.* Mitchell, 35 Me. 221, 58 Am. Dec. 697.

Massachusetts.— Little *v.* Blunt, 9 Pick. (Mass.) 488.

New Hampshire.— Caldwell *v.* Porter, 17 N. H. 27; Johnson *v.* Crane, 16 N. H. 68.

New York.—Clark *v.* Tryon, 4 Misc. (N. Y.) 63, 23 N. Y. Suppl. 780, 53 N. Y. St. 123. *Compare* Coghlan *v.* Dinsmore, 9 Bosw. (N. Y.) 453.

England.— Gunson *v.* Metz, 1 B. & C. 193, 2 D. & R. 334, 1 L. J. K. B. O. S. 75, 8 E. C. L. 83; Potter *v.* Rayworth, 13 East 417.

See 7 Cent. Dig. tit. "Bills and Notes," § 1222.

37. Turner *v.* Leech, 4 B. & Ald. 451, 23 Rev. Rep. 344, 6 E. C. L. 556; Roscow *v.* Hardy, 2 Campb. 458, 12 East 434; Marsh *v.* Maxwell, 2 Campb. 210 note, 11 Rev. Rep. 696 note.